



Medietilsynet  
NORWEGIAN MEDIA AUTHORITY

National Authority for Markets and Competition - CNMC  
Carrer de Bolívia 56  
08018 Barcelona  
SPAIN

Att:

Our ref.: 2015000109-  
41/1200

Your ref.:

Date: 25.09.2015

## **Formal request for cooperation under Article 4 (2) of the AVMS Directive**

The Norwegian Media Authority refers to the email from the Comisión Nacional de los Mercados y la Competencia (CNMC) on 18 June 2015 regarding the jurisdiction of two TV channels targeting Norway. We thank you for your cooperation and helpful information on this matter.

With reference to the Audiovisual Media Service Directive<sup>1</sup> (AVMS Directive) Article 4 (2), and reasons explained in this letter, the Norwegian Media Authority (NMA) hereby requests CNMC to request TV channels under Spanish jurisdiction to comply with Norwegian law concerning gambling advertisements. The AVMS Directive is implemented in Norway due to the EEA Agreement.

The NMA has sent similar requests to the national regulators in the UK and in the Netherlands, regarding gambling advertisements from the UK licensed broadcasters TV3, TV6, Viasat 4, FEM, MAX, VOX, TLC Norway and Discovery Channel (Norway), and the Dutch licensed broadcaster MTV Norway.

## **1. REQUEST ACCORDING TO THE AVMS DIRECTIVE ARTICLE 4 (2)**

In accordance with Article 4 (2) of the AVMS Directive the NMA requests that CNMC requests

- the TV channels National Geographic Channel Scandinavia (National Geographic) and FOX Norway (FOX), licensed in the Spanish Register of Operators under the editorial responsibility of FOX International Channels España

to comply with the following Norwegian rules of general public interest, as set out in the Act relating to Gaming Schemes etc.<sup>2</sup> (Gaming Act) Section 2, subsection 3:

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<sup>1</sup> Directive 2010/13/EU

<sup>2</sup> Act of 28 August 1992 No 103 relating to Gaming Schemes etc.

*It is unlawful 1) 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 organised in connection with sporting events and other competitions, about the sale of coupons and the like or about the cashing of prizes. Cf. Section 1*

and as set out in the Act relating to Lotteries etc.<sup>3</sup> (Lottery Act) Chapter III, Section 11

*With the exception of such lotteries as are mentioned in section 7, it is prohibited to engage in the marketing of or mediating lotteries for which no permit has been granted pursuant to section 6, second paragraph.*

## **2. JURISDICTION**

According to the AVMS Directive Article 2 no. 3 a) the broadcaster is deemed to be established in a Member State if the media service provider has its head office in that Member State and the editorial decisions concerning the audiovisual media service are taken in that Member State.

In order to determine which country's jurisdiction that is correct, the NMA asked, in a letter dated 9 June 2015, for the CNMC's opinion on the jurisdiction over National Geographic. The NMA also asked for information on whether National Geographic is established in Spain and if it holds a Spanish license.

However, the CNMC responded, in the email dated 18 June 2015, that both National Geographic and FOX Norway are inscribed in the Spanish Register of Operators under the editorial responsibility of FOX International Channels España.

Following from these facts, the NMA finds that National Geographic and FOX fall within Spanish jurisdiction.

## **3. CROSS-BORDER ELEMENT**

Both National Geographic and FOX, owned by FOX International Channels España are, as concluded, subject to Spanish jurisdiction. However, these TV channels are directed wholly or mostly towards Norway meeting the conditions in the AVMS Directive Article 4 (2) (b) and the Directive's preamble no 42. This assumption is based on the following aspects:

National Geographic broadcasts, amongst others, Norwegian programmes. Some of the Norwegian programmes are made in Norway, and they also include Norwegian participants/actors. The TV channel broadcasts advertisements for Norwegian products and services, and they have Norwegian narrators in programmes and Norwegian subtitles in programmes with a foreign language. The TV channel communicate to the public in Norwegian, through the website [natgeotv.no](http://natgeotv.no)<sup>4</sup>.

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<sup>3</sup> Act of 24 February 1995 No 11 Relating to Lotteries etc.

<sup>4</sup> This website reroutes to [natgeotv.com](http://natgeotv.com)'s Norwegian sub-webpage. Natgeotv.com is registered by National Geographic Society.

FOX's programmes are subtitled in Norwegian. The TV channel also broadcasts programmes produced in Norway, involving Norwegian celebrities. Furthermore, the commercial communications are specifically targeting the public in Norway, with Norwegian language and Norwegian products/companies. The TV channel communicates to the public, in Norwegian, through the website [www.foxtv.no](http://www.foxtv.no).

Prospective advertisers in both TV channels are given information about audience penetration, prices and rate cards on <http://www.foxtv.no/extra/annonser>. The information is in Norwegian and the sales personnel have Norwegian phone numbers.

The NMA considers both National Geographic and FOX to target the Norwegian audience.

## **4. REASONS FOR THE REQUEST**

### **4.1. Norwegian prohibition against marketing of gambling**

In Norway, only the state owned company Norsk Tipping, the state controlled foundation Norsk Rikstoto and certain organisations granted a permit, are allowed to market games of chance (further explained under section 5).

Other companies and individuals are prohibited from marketing gambling services in Norway.

Contrary to the Norwegian marketing ban, the NMA and the Norwegian Gaming and Foundation Authority (the Gaming Authority) have discovered substantial and increasing amounts of gambling advertisements from betting companies - with no permit - targeting the Norwegian public on Spanish licensed TV channels.

### **4.2. Supervision of gambling advertisements**

The NMA and the Gaming Authority have conducted a coordinated supervision of TV channels targeting the Norwegian audience with advertisements for lotteries and gambling. In total, the supervision included twelve different TV channels established in the UK, France, the Netherlands and Spain. CNMC licenses two of these channels. The channels were selected with the criteria that they are funded by commercial communication, and that they wholly or mostly are targeting Norway.

The NMA has recorded broadcasts for the selected TV channels from five different days within a randomized week in the months of March and April 2015. The recordings were then shipped to the Gaming Authority, which has viewed a total of 24 hours of broadcasts per channel. The Gaming Authority has documented the results from the supervision by making a register of all of the advertisements for lotteries and gambling in violation of Norwegian law within this period of time.

The results of this control documents that FOX broadcast 118 advertisements for lotteries and gambling within a 24 hour period. For National Geographic the number was 101 for a 24 hour period.

The advertisements were shown throughout the whole day, including daytime when children and young people normally are watching TV. For instance:

- FOX broadcast 24 advertisements for lotteries and gambling on Sunday 12 April from 4.00 pm until 8.00 pm.
- National Geographic broadcast 23 advertisements for gambling and lotteries on Saturday 11 April from midnight until 4.00 pm.

The gambling operators/brands presented in the gambling advertisements are among others Unibet, Betsson, 7red, Maria Casino, Casinofloor, Expect, Norgesautomaten and Spilleautomater.

The Gaming Authority has stated that none of the registered gambling companies advertising on the Spanish licensed TV channels are permitted to offer or market gambling services in Norway. Hence, each and every one of the registered advertisements and sponsorships constitute a breach of the Norwegian marketing ban, and are considered illegal pursuant to the Norwegian gaming legislation.

The NMA can provide further documentation upon request.

### **4.3 Study confirms extensive and increasing marketing of gambling on TV**

In the period from August 2014 through July 2015, the NMA has examined the market for gambling commercials (advertisements and sponsorships) in broadcasting available for Norwegian viewers. The examination is based on data from Nielsen Media Research (NMR)<sup>5</sup>. The NMA did the same examination in 2014, based on data from October 2013 through September 2014<sup>6</sup>.

The examination showed that the Norwegian market for broadcasting commercials was worth € 1.4 billion in total. Commercials for gambling services amounted to € 85 million of the total. Unlicensed gambling<sup>7</sup> services stands for € 65 million, or 77 percent, of all gambling commercials broadcasted in Norway. As of October 2014, this market was worth € 45 million, indicating that the market has increased 44 percent (€ 20 million), in just ten months.

Unlicensed gambling commercials broadcast from Spanish licensed broadcasters stand for approximately 8.4 percent, or € 5.4 million annually, of the market for unlicensed gambling commercials available for Norwegian viewers. This represents an increase of approx. € 1.3 million in ten months.

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<sup>5</sup> The advertising expenditure from NMR is based on the rate-card method. The price is based on the actual GRP (Gross rating point) for each TV spot from the TNS TV-meter panel, the Nielsen TV logs and the official price lists from each TV station. The values will reflect the gross prices and not the net advertising spend.

<sup>6</sup> The examinations are ten months apart. Please keep in mind that the comparisons made between the examinations contains an overlap of two months of data from August and September 2014.

<sup>7</sup> International gambling operators that do not have a Norwegian license or permit to offer or market gambling services in Norway.

In total 83 467 unlicensed gambling commercials were broadcast from Spanish licensed broadcasters from August 2014 through July 2015. This amounts to approx. 26 000 minutes of broadcasting.

Of the total amount, FOX broadcast 36 809 unlicensed gambling commercials and approx. 11 000 minutes of broadcasting. The value of these commercials amount to approx. € 2.5 million. The value of unlicensed gambling commercials from FOX, has increased with approx. € 600 000 in ten months.

Of the total amount, National Geographic broadcast 46 658 unlicensed gambling commercials and approx. 15 000 minutes of broadcasting. The value of these commercials amount to approx. € 2.9 million. The value of unlicensed gambling commercials from National Geographic, has increased with approx. € 700 000 in ten months.

The study confirms that the amount of gambling advertisements targeted at Norwegians from Spanish licenced operators are substantial and increasing.

The NMA submits that substantial amounts of gambling advertisements – targeted at Norwegians - from Spanish licensed broadcasters undermines the effectiveness of the Norwegian marketing ban and consequently, Norway's efforts to safeguard the public interest objectives justifying the Norwegian gambling legislation. The NMA is especially concerned about the effects of gambling advertisements on younger and vulnerable groups.

## **5. The AVMS Directive Article 4**

According to the AVMS Directive Article 4 (1), Member States are free to adopt more detailed or stricter rules in the fields covered by the Directive.

Norway has opted for a particularly high level of consumer protection and stricter rules in the field of games of chance and lotteries. Only the state controlled companies Norsk Tipping and Norsk Rikstoto, and certain organisations with a beneficial purpose, are allowed to offer and market games of chance in Norway.

According to our knowledge, the Spanish rules are less strict and allow private gambling companies to advertise gambling and lotteries on TV.

The Norwegian gaming legislation, the marketing ban, public interest objectives, and compliance with union law, as prescribed in the AVMS Directive, will be further explained below.

### **5.1.Stricter rules of general public interest**

The fundamental principle in Norwegian legislation has for several centuries been that cash games and lotteries are prohibited. The authorities have nonetheless wished to permit lotteries and cash gaming under certain conditions. This has been enacted through the following statutes:

- Act of 1 July 1927 no. 3 relating to betting using a totalisator system (Totalisator Act)

- Act of 28 August 1992 no. 103 relating to Gaming Schemes etc. (Gaming Act)
- Act of 24 February 1995 no. 11 relating to Lotteries etc. (Lottery Act)

The Totalisator Act provides that licences to arrange horse race betting may only be granted to entities whose aims include supporting horse breeding. The Norsk Rikstoto Foundation is currently the only licence holder.

The Gaming Act applies exclusively to Norsk Tipping AS, a fully State owned public company supervised by the Ministry of Culture (hereinafter “the Ministry”). It gives Norsk Tipping sole rights to operate gaming activities related to sports competitions and other competitions not regulated in the Lottery Act, the game Lotto, and other games as decided by the Government. Norsk Tipping also have the sole right to offer and market online gambling in Norway.

The Lottery Act covers all gaming activities involving money which are neither regulated by the Totalisator Act nor the Gaming Act. Under the Lottery Act, a lottery may only be held for the benefit of humanitarian or socially beneficial causes.

The Gaming Authority oversees Norsk Tipping's and Norsk Rikstoto's gambling propositions and is empowered to exercise administrative control and follow-up of gambling offerings that are mediated and marketed in breach of the Gaming Act. The Ministry of Agriculture and Food has granted the Gaming Authority the authority to react by stopping illegal totalisator gambling and marketing of such gambling through the regulations of 24 August 2007 concerning totalisator gambling.

## **5.2.Prohibition against marketing of gambling without a permit**

According to the referred provisions in the Gaming Act, the Lottery Act and the Totalisator Regulations, gambling operators without a permit are prohibited from marketing gambling services in Norway. With the exception of those games legally offered by Norsk Tipping and Norsk Rikstoto, and organisations granted permit, it is therefore illegal to market gambling services in Norway.

The marketing ban encompasses essentially all activities undertaken to promote turnover in unlicensed gaming. This includes both statements and actions aimed at encouraging or stimulating purchases of the online gaming providers' services.

The marketing prohibition applies to anyone who markets gambling services without a licence. This will clearly include the gaming operator, but the prohibition also applies to other agents such as newspapers, radio, television broadcasters, social media and advertising agencies if, in their activities, they engage in marketing of unlicensed gambling.

As concerns the scope of gambling legislation, the marketing prohibition clearly encompasses all marketing of remote gambling that is unlicensed in Norway. Examples of this include advertisements in Norwegian media (Norwegian newspapers, Norwegian TV and radio stations, Norwegian websites) and banners in public spaces.

The marketing ban also applies to marketing of gambling from abroad, both online and through television broadcasting, if the marketing is targeted at the Norwegian public and intended to have effect in Norway.

### **5.3. Public interest justifying the Norwegian legislation**

The aim of the Norwegian lottery and gaming legislation is essentially to ensure that cash gaming is provided by satisfactory mechanisms under State supervision, with a view to preventing the negative consequences of cash gaming, while simultaneously allowing for the proceeds from the gaming activities to go to socially beneficial causes. The aim is set out explicitly in:

- Section 1 a of the Lottery Act
- Section 1 para 3 of the Gaming Act
- Section 2 of the Totalisator gambling regulations

According to preparatory work to the gambling legislation and statements for the Norwegian Ministry of Culture, the objectives behind the Norwegian gaming legislation and the lottery policy in general, are essentially to:

- prevent and protect the citizens against compulsive problem gambling
- keep the volume of gaming in society at a moderate and socially defensible level
- channel gaming desire into responsible outlets and ensure consumer protection
- protect public order and prevent crime and irregularities
- direct the revenues from gaming to humanitarian and socially beneficial causes, and
- prevent the operation of gaming from being a source of private profit.

It is for the national court to identify the aims that the legislation at issue is actually intended to pursue.

### **5.4. Union law in the area of gambling<sup>8</sup>**

There is no harmonised EU or EEA legislation in the area of gambling. According to settled case-law from the European Court of Justice (ECJ), in the absence of harmonisation on the games of chance, national authorities have “*a sufficient margin of discretion [...] to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the protection of society*”.<sup>9</sup> The Member States are therefore “*in principle free to set the objectives of their policy on gaming of chance and, where appropriate, to define in detail the level of protection sought*”.<sup>10</sup>

The Court has also held that, in the context of legislation which is compatible with the Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling falls within the margin of discretion enjoyed by national authorities.<sup>11</sup>

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<sup>8</sup> EU-COMMISSION STAFF WORKING DOCUMENT *Online gambling in the Internal Market*, SWD/2012/0345 final, section 5.

<sup>9</sup> C-347/09 Dickinger and Ömer, par. 45; C-316/07 Stoß and Others, par. 76, and case law cited.

<sup>10</sup> C- 42/07 Liga Portuguesa, par. 59; Case Dickinger and Ömer, par. 47.

<sup>11</sup> Stoß and Others, par. 92, and case-law cited.

Accordinging to case law from the ECJ, there is no duty of mutual recognition of authorisations/licenses/permits issued by the various EU/EEA States in the field of gambling.<sup>12</sup>

The ECJ stated early that gambling services constitutes an economic activity within the meaning of the treaties. Hence, they are subject to the freedoms in the treaty, in particular TFEU Article 49 freedom of establishment (EEA Agreement Article 31) and TFEU Article 56 freedom to provide services (EEA Agreement Article 36).

Member States may justify restrictions to the fundamental freedoms for reasons related to the general interest.<sup>13</sup> A restriction to the freedom to provide services or to the freedom of establishment may be:

- allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for by Articles 51 and 52 TFEU, which are applicable in the area of services by virtue of Article 62 TFEU,<sup>14</sup> or
- justified, in accordance with the case-law of the CJEU, by overriding reasons in the public interest.<sup>15</sup>

Restrictive measures imposed by the Member States must be applied without discrimination and must satisfy the conditions laid down in the case-law as regards their proportionality. Thus, they must be suitable for ensuring the attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective. In this connection, it is settled case-law that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.<sup>16</sup>

### **5.5.Compliance of Norwegian gaming legislation with Union law**

Both the EFTA Court and Norwegian national courts have delivered rulings stating that Norwegian gaming legislation complies with EU/EEA law.

The EFTA Court has in two separate cases considered whether Norwegian gaming legislation complied with the EEA Agreement Article 31 freedom of establishment (TFEU Article 49) and Article 36 freedom to provide services (TFEU Article 56).

*The Gaming Machines case (E-1/06)* concerned an application for a declaration that Norway, by adopting Act No 90 of 29 August 2003 Relating to Amendments to the Gaming and Lottery Legislation, which introduced a monopoly for the State-owned undertaking Norsk Tipping AS to operate gaming machines in Norway, has infringed Articles 31 and 36 of the EEA Agreement.

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<sup>12</sup> C-258/08 Ladbrokes, par. 84-86, Stoß and Others, par. 112; Dickinger and Ömer par. 96; C-203/08 Sporting Exchange, par. 33-35.

<sup>13</sup> Consistent case law, see most recently case C-470/11 Case Garkalns, par. 35, and the case-law cited.

<sup>14</sup> The reasons referred to in Articles 51 and 52 TFEU may justify national measures which are either discriminatory vis-à-vis foreign operators or which apply without discrimination to national and foreign operators. See, to that effect, Case Dickinger and Ömer, par. 79; Case Placanica, par. 49.

<sup>15</sup> Restrictions justified by overriding reasons in the public interest must be applied without discrimination.

<sup>16</sup> Case Garkalns, par. 37, and the case law cited.

After considering that the amended legislation pursued legitimate aims and that the restrictive measure were suitable, the Court concluded that:

*“...the Defendant [Norway] has sufficiently demonstrated that the exclusive right system opted for in the contested legislation is likely to be more effective in order to achieve the objectives of the legislation, considered as a whole, than the other means proposed by the Applicant.”<sup>17</sup>*

The EFTA Court, consequently, dismissed the application for declaration on infringement of the EEA Agreement Articles 31 and 36 from the EFTA Surveillance Authority.

*The Norwegian Supreme Court* subsequently handled the civil lawsuit, which had led up to the EFTA Court case. The Supreme Court concluded that the Norwegian state monopoly (as a restriction) to operate gaming machines satisfied the conditions set out in case law from the ECJ and the EFTA Court. Consequently, the Norwegian gambling legislation in question were found to comply with the EU/EEA law<sup>18</sup>.

*The Ladbrokes case (E-3/06)* concerned a preliminary request from a Norwegian district Court (Oslo) concerning the interpretation of the rules on the right of establishment and the freedom to provide services in the EEA. Among the questions raised was whether a state monopoly system, such as the one established under the Gaming Act, is compatible with Articles 31 and 36 of the EEA Agreement.

Regarding the considerations of the legitimacy of the aims pursued, the EFTA Court noted that:

*“The Courts have recognized that the aim of fighting gambling addiction, as well as crime and malpractice, and more generally of consumer protection and the maintenance of order in society, are amongst those which may serve to justify restrictions on the right of establishment and the freedom to provide services (see Gaming Machines, at paragraph 34 and Placanica, at paragraph 46).”<sup>19</sup>*

The EFTA Court was also requested to answer whether EEA Agreement Article 36 (TFEU Article 56) precludes a national rule, which forbids the providing, and *marketing of gaming* from gambling operators which does not have permission to operate in Norway, but which is approved under national law in another EEA State.

The EFTA Court held that:

*“...to the extent the national court concludes that the exclusive rights systems established under the Gaming Act and the Totalisator Act constitute lawful restrictions, the host State has the right to prohibit the provision and marketing of games of chance from abroad, no matter whether or not these are lawful in their State of origin. Further, to the extent the national court concludes that the exclusion of commercial operators under the Lottery Act constitutes a lawful restriction on the free movement of services,*

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<sup>17</sup> Gaming Machines (E-1/06), paragraph 52

<sup>18</sup> Rt. 2007 s. 1003

<sup>19</sup> Ladbrokes-case (E-3/06), paragraph 44

*national authorities may correspondingly prevent commercial operators from providing and marketing games of chance from abroad”<sup>20</sup>*

Subsequent to the preliminary ruling from the EFTA Court, the Norwegian district court (Oslo) considered whether State monopoly system such as the one established under the Gaming Act is compatible with Articles 31 and 36 of the EEA Agreement. The district court concluded that:

*“The restriction [the state monopoly] is justified by legitimate public interest, suitable and necessary, and is therefore deemed compatible with the EEA Agreement, Articles 31 and 36.*

*When laws are compatible with the EEA Agreement, Articles 31 and 36, the state has the right to ban the provision and marketing of gaming, cfr. Ladbrokes paragraph 83”<sup>21</sup>*

Both the Gaming machines case (E-1/06) and the Ladbrokes case (E-3/06) show that the aim of fighting gambling addiction, as well as crime and malpractice, and more generally of consumer protection and the maintenance of order in society, are legitimate public interests that may justify the restrictive Norwegian gaming legislation. Furthermore, the Ladbrokes-case shows that the Norwegian prohibition on marketing of games of chance from abroad, fully complies with the conditions set out in case law from the ECJ. The marketing prohibition applies irrespective of whether the gambling operator holds a license from another EU/EEA state.

Based on the cited case law from the ECJ and the EFTA Court, as well as from Norwegian courts, the NMA maintain that the Norwegian gambling legislation is in compliance with Union law, as prescribed in the AVMS Directive Article 4 (1).

## **6. CONCLUDING REMARKS**

According to the AVMS Directive Article 4 (1), Member States are free to adopt more detailed or stricter rules in the fields covered by the Directive.

Norway has opted for a particularly high level of consumer protection and stricter rules in the field of games of chance and lotteries. Only the state-controlled companies Norsk Tipping and Norsk Rikstoto, and certain organisations with a beneficial purpose, are allowed to offer and market games of chance in Norway. Other companies and individuals are prohibited from marketing games of chance.

According to our knowledge, the Spanish rules regarding broadcasting of gambling advertisements are less strict than the Norwegian regulation as regards marketing of games of chance.

There is no harmonised EU or EEA legislation in the area of gambling. According to consistent case law from the European Court of Justice, Member States are free to set the objectives of their policy on games of chance. Member States also have a margin of discretion to determine its level of protection and the methods for organising and controlling the operation of games of chance.

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<sup>20</sup> Paragraph 83

<sup>21</sup> TOSLO-2004-91873 p. 20

The Norwegian gaming legislation is considered to comply with Union law in the area of gambling.

The NMA and the Gaming Authority have shown significant and increasing amounts of gambling advertisements targeted at Norwegians from Spanish licensed operators in breach of the Norwegian marketing ban.

The NMA submits that the gambling advertisements broadcasted from Spanish licensed operators and targeted at Norwegians undermines the effectiveness of the Norwegian marketing ban and consequently, Norway's efforts to safeguard the public interest objectives justifying the Norwegian gambling legislation.

Based on the reasons described in this letter, the NMA kindly requests CNMC's cooperation according to the AVMS Directive Article 4 (2).

Please do not hesitate to contact us if you need further information or documentation. We are looking forward to your reply.

Your sincerely

Tom Thoresen  
Director

Linda M. Andersen  
Senior Legal Adviser

[This document is electronically verified, and does not need a signature.](#)

- Enclosures:
  - Act of 28 August 1992 No 103 relating to Gaming Schemes etc. (unofficial translation)
  - Act of 24 February 1995 No 11 Relating to Lotteries etc. (unofficial translation)
- Copies:
  - The Norwegian Ministry of Culture
  - The Gaming and Foundation Authority