OSLO DISTRICT COURT

JUDGMENT

Pronounced: 27 September 2016 at Oslo District Court,

Case no: 15-202315TVI-OTIR/05

Judge: District Court Judge Jon Østensvig

WorldVentures Marketing, LLC Counsel Halvor Manshaus

versus

The Norwegian State, represented
by the Ministry of Culture Counsel Arne Johan Dahl

JUDGMENT

The case concerns the validity of the Norwegian Gaming Board's administrative decision of 24 November 2014, which did not grant an appeal against the Norwegian Gaming and Foundation Authority's administrative decision to order cessation of parts of the plaintiff's activity in Norway. The case concerns in particular the question of whether the plaintiff's activity was in contravention of the prohibition on pyramid-like sales schemes laid down in Section 16 second paragraph of the Norwegian Lottery Act.

1 Background to the case

The plaintiff – WorldVentures Marketing, LLC (WorldVentures) – is a US-registered company in the WorldVentures Group, based near Dallas in the USA. WorldVentures currently conducts business in approximately 30 countries, with more than 700 employees and several hundred hired consultants. A key part of the business consists of selling memberships in DreamTrips, which on the company's website is referred to as a *'vacation club and lifestyle community*'. Members of DreamTrips have access to buying holiday trips from WorldVentures that are specially designed by that company, and they also have access to some other services and products. Members pay USD 199.99 on joining and a subsequent monthly fee of USD 49.98, in the following referred to as membership fees. The membership is not subject to any lock-in period or notice period. In Norway, general rules on cancellation periods are also applicable. Worldwide membership is stated to have been approximately 100,000 at the start of January 2013 and approximately 430,000 in May 2016.

Membership is not bought directly from WorldVentures. The company has linked up with a great many independent dealers and sellers who sell membership in DreamTrips directly to consumers, i.e. without using traditional sales channels. The sellers pay USD 99.99 on joining and a subsequent monthly fee of USD 10.99, in the following referred to as representative business system (RBS) fees. The sellers can recruit an underlying pyramid-structured sales organisation. The sellers get a commission from WorldVentures based on their own and their subordinates' sales of memberships, as regulated in more detail in a compensation plan. They do not get a commission based on the RBS fees paid by subordinate sellers. The business model for selling memberships is thus based on network sales or multi-level marketing (MLM). Many of the sellers have also bough membership in DreamTrips themselves.

WorldVentures has conducted business in the USA since 2005, and started its business in Norway in 2010. Based on queries concerning the company's activity in Norway, the Norwegian Gaming and Foundation Authority (the Gaming Authority) initiated a supervisory procedure in spring 2013. The Gaming Authority wanted to clarify whether the activity was in contravention of the prohibition laid down in Section 16 of the Lottery Act. The Gaming Authority prepared the case by obtaining information and documentation about the activity. A meeting was also held with WorldVentures, and correspondence took place with the

company's attorneys.
Based on a supervisory report dated 19 February 2014, the Gaming Authority gave WorldVentures advance notice of an administrative decision pursuant to Section 14a of the Lottery Act to order cessation the sale of memberships, RBS participation and related products, because the scheme was assumed to be in contravention of Section 16 second paragraph of the Lottery Act. WorldVentures contested that this was the case, but the Gaming Authority upheld its assessment and, on 30 April 2014, it adopted an administrative decision pursuant to Section 14a of the Lottery Act, with the following conclusion:

> *'All sales of memberships, RBS participation and DreamTrips products to participants in WorldVentures in Norway must cease, because they are in contravention of Section 16 second paragraph of the Lottery Act.'*

WorldVentures appealed the decision, and the Gaming Authority decided to defer implementation on certain conditions pending a decision in the appeal case. The Gaming Authority's administrative decision was upheld by the Gaming Board in a decision of 24 November 2014. According to the information provided, WorldVentures subsequently complied with the order.

WorldVentures submitted a petition for a preliminary injunction, but the Office of the Chief City Judge of Oslo did not grant this petition in its ruling of 2 January 2015. On 23 October 2015, WorldVentures sent a notice of its intention to bring legal action and a claim for reversal of the administrative decision to the Gaming Authority. It appears that this was forwarded to the Ministry of Culture with a copy to the Gaming Board, without the claim for reversal being expressly considered.

The District Court received WorldVentures' notice of proceedings against the State represented by the Ministry of Culture on 17 December 2015, in which it entered a claim for the decision of the Gaming Board to be declared invalid, alternatively that it be repealed in whole or in part. In its notice of intention to defend of 18 February 2016, the State entered a claim that judgment be pronounced in its favour.

The main hearing was hels in Oslo Courthouse during the six days from 15 to 22 August 2016. The parties attended with their respective counsel, and WorldVentures was also represented by a co-counsel. WorldVentures was represented by the head of the group's legal department, while the State was represented by two senior advisers from the Gaming Authority. Fifteen witnesses gave evidence, including the aforementioned representatives of the parties, and case documents and other evidence were presented as mentioned in the court records.

When asked by the judge, the parties confirmed that WorldVentures Marketing, LLC is the correct plaintiff; re the general reference to WorldVentures in the administrative decisions, and that the plaintiff was WorldVentures Holding, LLC in the case submitted to the Office of the

Chief Judge of Oslo.

2 WorldVentures Marketing, LLC's statement of claim and arguments

WorldVentures submitted the following statement of claim at the main hearing:

1. *Principal claim: that the Gaming Board's administrative decision of 14 November 2014 be declared invalid and without effect.*

2. *Alternatively, that the Gaming Board's administrative decision be repealed in whole or in part to the extent that it goes further than there are grounds for.*

3. *In any case, that the State be ordered to cover the full costs of the case for WorldVentures Marketing, LLC.*

In brief, WorldVentures argued as follows in support of its statement of claim:
The administrative decision was based on incorrect application of law, incorrect and incomplete facts and assessment of the wrong issues.

The Court shall review all aspects of the decision. There is no basis for reluctance on the part of the Court to review the Gaming Board's assessments. The facts of the case at the time when the decision was made are decisive; such, however, that factual evidence can be presented subsequently to clarify the situation that prevailed when the decision was made.

WorldVentures is engaged in the sale of membership products in the form of network sales /MLM, and is otherwise like any other business. The sellers get their commission from the sale of products, which in turn are the result of significant investments and labour. This is real and sustainable economic activity and not a camouflaged pyramid scheme that falls under the scope of the Act. The purpose and result of the scheme are to generate profits by selling real services for which there is a demand and not by getting new participants to invest at the bottom of a pyramid structure.

Section 16 second paragraph of the Lottery Act is based on the Unfair Commercial Practices Directive and what is known as the *'Blacklist'.* It is not permitted to set further conditions such as *'market utility'* or a requirement for actual utilisation. Services and rights are products within the meaning of the Directive. The prohibition must be given a restrictive interpretation, and any doubt shall be to the benefit of the company. The prohibition shall apply to the grossest cases only, and WorldVentures' activity is nowhere near falling into that category. The interests of consumers are protected by other and less invasive provisions of the consumer legislation. It is illustrative that Norway is the only country where WorldVentures' activity has been prohibited. The administrative decision is based on misunderstandings and prejudices relating to MLM activities.

One fundamental error in the decision is that the members and sellers – as well as the

membership fees and RBS fees – are considered together. This entails a complete absence of analysis – and a fundamentally incorrect assessment and misunderstanding – of the business model and revenue flows. This has resulted in a number of incorrect assessments in relation to the conditions laid down by law. A more detailed analysis shows that dealers and members have quite different roles, rights and obligations, even if many act in both roles. The distinction between the different groups and revenue flows is absolutely fundamental and it is actually and legally implemented in this case and fully transparent. That many people have both roles is of no consequence to the deliberations in the case and is, moreover, completely natural in a business model based on direct sales. Furthermore, in foreign markets that have been allowed to develop, a relatively high number will be members only. Any overall consideration of this must be based on the specific circumstances, which is not the case here; see Norwegian Supreme Court Report Rt-2009-661.

Another error is the failure to consider and rely on the activity being sustainable, and not in the nature of a pyramid scheme that is pre-destined to collapse when new persons are no longer recruited to pay contributions. The accounts show that there are sufficient revenue flows at all times to cover the dealers' commissions without members being recruited. When a member leaves, the commission stops, and there is also an agreed cap on the commission. Lack of sustainability is a fundamental condition for such a business even falling under the scope of the prohibition in the Act; see the ECJ's decision in *4finance* and Rt-2009-661.

The Gaming Board's assessment that a pyramid-like system exists is incorrect. The Board has incorrectly considered members and dealers and membership fees and RBS fees together, and not conducted specific assessments. As opposed to what was the case in Rt-2009-661, there are no grounds for considering these factors together in the present case. When considered correctly and separately, it is clear that the members are not part of the company's sales system, which is an MLM system and therefore has a pyramid structure when seen in isolation.

No consideration is paid for the status of participant – neither by the sellers nor by the members or the two together. Payments by members and RBS fees are incorrectly confused in the administrative decision, and this is also not discussed further. It is overlooked that the RBS fee as a whole is paid to and kept by WorldVentures, and thus does not constitute payment for participant status and, in any case, not an overprice. As regards payments by members, no overprice can be deemed to have been charged as payment for participant status.

The sellers have no possibility of earning an income from other people's payment for participant status. No consideration is paid for participant status; see above. Whichever way you look at it, the RBS fee accrues to WorldVentures, and the sellers do not get a commission for recruiting new sellers. A member never becomes a participant in the sales scheme, so that contributions paid by members are irrelevant in this context and cannot in any case be deemed to constitute contributions.

The business's revenues cannot in any case be ascribed to '*specific*' recruitment. Concerning membership fees, the consumers are willing to pay for such membership, and so it must be assumed that the payment corresponds to the market value of the membership. The Directive and the Act stress that the sale or consumption of a product, service or other provision is relevant. The Gaming Board's point of departure is misconceived when it states that the value consists purely of the possible return of the member's contribution in the form of discounts on trips bought. The Gaming Board states incorrectly that reward points, the price guarantees and concierge services have no value, and fails to consider the value of the online travel agency (OTA). The Gaming Board states incorrectly that WorldVentures has not documented the basis for its revenues. Without conducting an independent assessment, the Gaming Board supports the Gaming Authority's view that the sale of products represents no more than 5% of the turnover. It is an incorrect and much too narrow approach when decisive weight is given to the actual use of the membership benefits.

The State is unable to explain how *'less than 5%'* is calculated as revenues from the sale of products. Based on the figures relied on by the State itself, the sale of trips represents 5.6%. Furthermore, it is not reasonable to use total revenues – both payments by members and RBS fees – in this context. The fact that reward points may be used for 90% of the trips has also been disregarded.

The Court must decide the market value of the membership – something that requires a complex overall assessment. Decisive weight cannot be given to actual use or *'market utility'.* Use of the figures from 2012 is incorrect, because the figures would have been at the global level at the time when the administrative decision was made had it not been for the supervisory procedure. The time for assessing the value of the membership is the time of purchase, and the value that the product represents to the buyer at that time; ref. the witness Finpå. The price of the concierge service cannot be set to the procurement price for WorldVentures and it must be assumed to be of significant value for each individual member, regardless of the extent to which it is actually used. The OTA is used and represents a real value. Members can order reasonable trips, are offered a price guarantee and the possibility of simple online planning. The Gaming Board has also overlooked the real value of the membership, which enables members to enjoy curated high-quality travel experiences, socialising with others, professional facilitation arrangements and a number of other elements. They are also given a Dream Price Promise and a price guarantee. Family members are included in the membership and can enjoy membership rights, and there is also a cancellation period and no lock-in period. It must be assumed that a membership paid by an employer would be considered a taxable benefit.

An active member will quickly enjoy benefits that exceed the contribution paid. That passive members fail to avail themselves of these benefits does not reduce the value of their membership. The members get what they are promised in the marketing. A high membership turnover is common to all subscriber relationships and is not a manifestation of low value.

The overall assessment must be based on the cross-border nature of the business, and not on the situation in Norway alone.

The conclusion is that the administrative decision is invalid on grounds of incorrect facts and application of the law.

Procedural errors exist that may have had consequences for the administrative decision; see Section 41 of the Public Administration Act.

The case has not been sufficiently clarified; see Section 17 of the Public Administration Act. The duty under Section 16 third paragraph of the Lottery Act does not relieve the authorities of the duty to clarify the case. WorldVentures has responded to all requests, submitted considerable amounts of documentation and actively sought to clarify the case and all aspects of the scheme. The Gaming Authority incorrectly focused on the situation in Norway and the actual discounted purchases of trips only. Moreover, the duty set out in Section 16 third paragraph of the Lottery Act is limited to providing information to show that incoming revenues do not fall under the scope of the provision, and WorldVentures has done that. WorldVentures did not receive adequate guidance on how to meet the duty of documentation; see Section 11 of the Public Administration Act. The Gaming Board did not make its own assessments and has now acknowledged that several relevant factors were not understood or considered.

Sufficient grounds were not provided for the administrative decision; see Section 25 of the Public Administration Act. There are more stringent requirements for the application of the law in cases that have to do with EEA rules, and also because this decision is particularly invasive.

The Gaming Board is subject to the procedural requirements mentioned above and shall consider the case independently within the framework provided for in Section 34 of the Public Administration Act.

The decision to impose a prohibition pursuant to Section 14 of the Lottery Act is in any case highly invasive and disproportionate. Less invasive measures could have been chosen. The administrative decision is therefore unlawful pursuant to non-statutory rules on abuse of power. This also entails that the decision must be limited to what is necessary; see the alternative statement of claim.

It is also a procedural error that no consideration was given to reversing the administrative decision even though a petition for reversal was submitted.

3 The State's statement of claim and arguments

The State represented by the Ministry of Culture submitted the following statement of claim at the main hearing:

1. *That the Court find in favour of the State represented by the Ministry of Culture.*

2. *That the State represented by the Ministry of Culture be awarded the costs of the case*.

In brief, the State argued as follows:

There is no evidence of the administrative decision being based on errors that would render it invalid.
The courts may review all aspects of the decision with a view to determining whether the conditions in Section 16 second paragraph of the Lottery Act are met. The Courts should nevertheless exercise caution when reviewing the expert assessments. Concerning the choice of sanction pursuant to Section 14a of the Lottery Act, it is only the question of whether there has been abuse of power that can be examined. Reviews by the Courts are based on the facts that formed the legal basis for the decision at the time when it was made.

It is the plaintiff that carries the burden of proving the invalidity of the decision. WorldVentures has also had the possibility of clarifying the facts, and also has a duty to provide documentation; see Section 16 third paragraph, where this is further underlined.

Section 16 second paragraph of the Lottery Act constitutes a complete harmonisation of the prohibition on pyramid promotional schemes set out in in point 14 in Annex I to the Unfair Commercial Practices Directive (2005/29/EC). The prohibition under the Act entails more stringent rules in that it also applies to pyramid-like sales schemes with elements of effective economic activity.

It is the activity in Norway that is the subject of the assessment; see Sections 2 and 4 of the Lottery Act.

Annex I and the Act are rather generally worded in order to prevent circumvention. What is decisive is an overall assessment of the real content of the scheme, and the designations used are of no consequence. Subjective factors and motivation are of no consequence.

In this case, there is no basis for distinguishing between members and sellers or between the revenue flows derived from each of these. Nearly all [the participants] in Norway held both roles, and this is underlined in the marketing, in the incentive schemes, and in the way some of the trips were carried out in Norway. That there is no legal obligation to take on both roles is of no consequence as this is how it actually worked in Norway. All payments were made to the same company, and the activities of the sellers were not separated out as a separate activity. The entire sales scheme must be considered as a whole; it would otherwise be very easy to circumvent the prohibition.

Seen as a whole, the sales scheme has a pyramid-like structure.

The participants pay a direct consideration for their status as participants. The payment is in

any case largely an indirect payment for participant status because what the participants receive in return in their different roles is highly overpriced; see the condition concerning a link between revenues and recruitment.

The participants pay for the possibility of earning an income derived from payments by other participants. In his capacity as a seller, the participant gets a commission on his own recruitment of new members, but he also gets more indirect financial gains through recruiting the members to also become sellers, who in turn generate a commission to the participant.

More than half the commissions paid for recruitment in Norway were financed by revenues from the recruitment of new participants and not by revenues from the sale or consumption of goods or services.

Gross sales of trips in Norway in 2012 and 2013 represented a very small part of the total turnover, which largely consisted of contributed membership fees and RBS fees, which must be deemed to constitute revenues from recruitment. Concerning the argument relating to sustainability, a distinction must be made between revenues from *'real'* or *'effective economic activity'* and revenues from *'economic contributions of its participants*'.

What is decisive with a view to determining whether the participants paid an overprice that must be deemed to constitute payment for participant status, is what values the participants on average actually received from the scheme in return for their contributions.

The membership only offered limited direct access to services, but the possibility of buying trips at what was stated to be discounted prices. In Norway, only a very small proportion of the members actually ordered a trip, and there was also a significant membership turnover. Based on the figures provided by WorldVentures, the Gaming Board has estimated that the sale of trips represented approximately 5% of the company's revenues in Norway. This means that the real value received by an average member in return for his contribution, namely the discount on purchased trips, was less than this. The reward point scheme has not been demonstrated to be of particular value. There is nothing to support that access to the online travel agency was of value to the members, and the same applies to the concierge service. The membership cannot otherwise be assumed to have any '*immaterial value*'.

On the whole, the membership is highly overpriced, since the members got very little in return for their contributions. The membership fees were in actual fact almost entirely payment for participant status in the sales scheme.

The RBS fee is included in the overall assessment. There is no basis for claiming that the participants were given something in return in the form of brochures, training, access to web pages etc. This amount, too, was in actual fact payment for participant status in the sales scheme.

At the participant level, the contributions effectively entailed little more than a possibility of recruiting new members, and at the national level in Norway, there was not sufficient effective economic activity to generate revenues to cover commissions to the sellers. To an overwhelming degree, the business concerned reallocation of participant fees.

The decision was not made on inadequate grounds; see Section 25 of the Public Administration Act and case law relating to the requirements of that Act. The case has been sufficiently clarified; see Section 17 of the Public Administration Act. This must also be seen in light of WorldVentures' statutory duty to provide information set out in Section 16 third paragraph ff. of the Lottery Act. Since the Court is fully competent to review the case, possible procedural errors are in any case of no consequence. No errors were made, and it is in any case of no consequence that reversal [of the decision] was not considered.

It is contested that the exercise of discretion relating to Section 14a of the Lottery Act was arbitrary or highly unreasonable.

4 The District Court's assessment

4.1 The issues for assessment in the case and some legal points of departure

It followed from the Gaming Board's decision that WorldVentures' business in Norway must largely cease because it was considered to be in contravention of Section 16 second paragraph of the Lottery Act. The key issue in the case is whether the decision was invalid because it was based on incorrect or incomplete facts or on incorrect application of the law; see sections 4.3 to 4.7 below. In addition, it is argued that the decision suffers from procedural errors, and also that the use of the authority to intervene provided for in Section 14a of the Lottery Act qualifies as being unreasonable or arbitrary; see sections 4.8 and 4.9 below. The Court considers the legal action to have been rather widely angled, both in terms of facts and legal arguments. In its deliberations, the Court has given particular weight to those factors that, in the Court's opinion, have a bearing on the assessment of the lawfulness of WorldVentures' business in Norway at the time when the administrative decision was made.

In the present case, the Court may examine the application of law, the findings of facts and the conclusions of law as well as whether there are significant procedural errors – all within the framework of what is invoked by the parties. In some areas of law where the relevant administrative bodies possess special competence and experience, there may be grounds for being reluctant to review the expert assessments that have been made. In the present case, the Court does not consider the question of whether such reluctance is warranted, as this is not decisive for the outcome. When reviewing the Gaming Board's use of the chosen sanction pursuant to Section 14a of the Lottery Act, the Court's review is limited to examining whether it is highly unreasonable, arbitrary or based on other forms of abuse of power pursuant to the non-statutory rules on this point.

The Court's review is based on the facts as they appeared at the time when the administrative decision was made; see *inter alia* the statement in Rt-2012-1985 paragraph 79. This means that the Court may only examine the facts that formed the legal basis for the Gaming Board's decision; such, however, that it may rely on any new evidential facts that shed light on the facts that formed the basis for the decision at the time it was made.

The Court bases its decision on what appears to be the most probable facts according to the evidence presented. It is the party who claims that the decision is invalid who must demonstrate the probability that the facts support this claim. If there is lack of clarity relating to the evidence in a situation where one party had the opportunity or was encouraged to clarify and document a matter, this may have an impact on the assessment of evidence.

In the present case, this must also be seen in conjunction with Section 16 third paragraph of the Lottery Act, from which it follows that the private party to the administrative proceedings may be ordered to document certain facts, namely that

> *'...the person's income can be specifically ascribed to the sale or consumption of goods, services or other benefits, rather than the recruitment of others to the scheme*.'

If a person is ordered to fulfil such an obligation, it means that the authorities are not under any obligation to refute undocumented pleadings submitted by the private party in support of such facts. The opposite also applies in that the authorities must be able to rely on the private party's information about relevant facts without claiming further documentation. The general duty of examination / duty to provide guidance [*sic*] must also be seen in the light of the above.

4.2 The prohibition on pyramid-like sales schemes

The prohibition on pyramid-like sales schemes is evident from Section 16 second paragraph seen in conjunction with the first paragraph of the Lottery Act:

> *'It is prohibited to establish, operate, participate in or promote pyramid games or similar schemes. The prohibition is understood to cover any scheme where consideration is paid for the possibility of gaining an income that is only derived from the recruitment of others to the pyramid game etc.*
>
> *The prohibition in the first paragraph includes pyramid-like sales schemes where consideration is paid for the possibility of gaining an income specifically derived from the recruitment of others to the scheme and not from the sale or consumption of goods, services or other benefits*.'

Section 16 second paragraph of the Lottery Act formed part of the full harmonisation of Norwegian law with the Unfair Commercial Practices Directive (2005/29/EC) and the general prohibition in Article 5 of the Directive.Pursuant to Article 5(5), an annex (Annex 1) was adopted listing certain forms of activity that *in all circumstances* were to be considered unfair

and prohibited. Annex I point 14, which forms the basis for Section 16 second paragraph of the Lottery Act, is worded as follows in the English version:

> *'Establishing, operating or promoting a pyramidpromotional scheme, where a consumer gives consideration for the opportunity to receive compensation that is derivedprimarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products*.'

The parties agree that the Norwegian provision is in accordance with the Directive, and also that ECJ case law in the area is of relevance to the interpretation of the Norwegian provision. Referring to the Advocate General's opinion in the ECJ case *4finance*, WorldVentures has pointed out that the purpose of Annex I has been to *'single out the practises that were most clearly heinous',* and that the prohibition must therefore be given a restrictive interpretation. The Court agrees with this point of departure, but cannot see that this element of interpretation relating to the Directive and the wording of the Act should have any decisive bearing on the outcome of the present case.

Even though WorldVentures conducts its business in several countries, the Court agrees with the State's assessment that the administrative decision must be based on the business that is conducted in Norway and that applies to consumers domiciled in this country. It follows from Section 2 of the Lottery Act that the Act's geographical area of application is Norwegian territory, and the same applies to the supervisory authorities' powers to enforce the Act. In the Court's opinion, it also follows from this that what is decisive in the present case is whether the business in Norway was in contravention of the prohibition in the Act, and that it is of no consequence whether the business in other countries or globally, in an imagined assessment, would have fallen outside the scope of Section 16 second paragraph of the Lottery Act.

The prohibition in Section 16 and other parts of the Lottery Act can be administered by the Gaming Authority by ordering that the unlawful condition be rectified or that the activity cease or be closed down; see Section 14a of the Lottery Act.

The current version of Section 16 of the Lottery Act entered into force on 1 January 2006. The prohibition on out-and-out pyramid games and any camouflaged versions of out-and-out pyramid games, which is of long standing in Norway, was upheld in Section 16 first paragraph of the Lottery Act. It is stated in Proposition No 97 to the Odelsting (2004–2005) that the provision in Section 16 second paragraph of the Lottery Act aims to extend the area of application of the prohibition in this area. The prohibition on pyramid games turned out to be difficult to administer and easy to circumvent, particularly in that some undertakings had certain elements of effective economic activity, while the predominant part of their turnover was derived from the recruitment of new participants. It was assumed that the harmful effects for consumers of some such pyramid-like sales schemes could be of the same nature as in the case of out-and-out pyramid games, and that such schemes were therefore also not worthy of protection.

It is clear from the preparatory works to the Act that the relatively open and flexible wording of the prohibition was chosen intentionally so as not to facilitate the adaptation of sales schemes and contravention of the prohibition. For example, the chosen form of organisation/ incorporation and the designations chosen for the scheme in question or its various elements are of no consequence. An overall assessment shall be made of the real content of the activity, based on the criteria mentioned in the wording of the Act. The motives or objectives of those who are behind or participate in the activity are also of no consequence. As mentioned above, no detailed assessment is required of how gross or reprehensible these are deemed to be, given that the activity falls under the scope of the conditions laid down in the Act.

It is evident from the wording of the Act and the preparatory works to the Act that four cumulative conditions must be met for the activity to be considered an unlawful pyramid-like sales scheme:

- the sales scheme must have a pyramid-like structure, i.e. the participants must have the possibility of achieving financial gains from participants at a lower level;
- the participants pay a consideration in return for participating in the sales scheme;
- the participants have a possibility of deriving an income from the consideration paid by other participants to participate; and
- the disbursement of such income to the participants is primarily/predominantly financed by the revenues of the undertaking that are derived from the recruitment of new participants rather than the sale and consumption of products.

The Court's assessment of the above-mentioned conditions are discussed in sections 4.4 to 4.7 below.

4.3 The question of whether members and sellers should be considered together

In the present case, the Court finds it of paramount importance to the further assessment of the above-mentioned conditions whether, as far as WorldVentures' business in Norway is concerned, a distinction should be made between members and sellers, and between the revenue flows derived from each of these groups.

If the members and the agreement regulating membership in DreamTrips are considered in isolation, it would not be natural to say, for example, that they participate in a pyramid-like structure, and, in their capacity as members, they also do not have the possibility of recruiting participants or gaining an income from other participants' payments Those who pay for their membership may avail themselves of the membership benefits and do not otherwise participate in the sales scheme.

If the sellers, and the terms of the agreements and compensation plan regulating their activity, are considered in isolation, there is hardly a basis for saying that their activity falls under the scope of the prohibition. They are part of a pyramid-like structure in the same way as the sellers of any MLM undertaking, but their income is derived from the considerations paid by members who buy membership from the sellers or their underlying sales organisation, and it is not linked to income from the recruitment of new sellers who are to participate in the sales scheme.

The Court agrees with the State that there is no factual basis in the present case for claiming that the assessment must be based on there being a distinction between the members and the sellers, and between the revenue flows derived from the two groups. As mentioned above, the Court's point of departure is that an assessment must be made of the real content of the activity in Norway at the time when the administrative decision was made and of how this actually worked. How the scheme was organised and divided and the designations used for its different parts were of minor importance.

In a letter of 27 June 2013 to the Gaming Authority, WorldVentures stated the following:

> *'Concerning the number of persons to which these figures relate, these are stated to be (as of the end of May): The total number of sales representatives (comprises those who are sales representatives only as well as those who are both sales representatives and "customers") amounts to 3,539 persons. Of these, 73 are sales representatives only and 115 are "customers" only.'*

The Court understands this to mean that at least 95% of the persons [involved in the scheme] in Norway were both sellers and members. This in itself indicates that no distinction can be made between the two roles for the purpose of assessing the real content of the activity. Neither the membership agreement nor the sales representative's agreement entailed any legal obligation to also take on the other role. The Court finds this of little significance given the actual situation whereby the relevant persons in Norway were in practice both sellers and members. That it is apparently common in MLM activities for the sellers to also have bought the product themselves does not automatically mean that a distinction should be made between these roles when considering the real content of the activity.

Several other factors in the case support the view that, in the assessment, no distinction can be made between the roles or revenue flows. On the whole, the Court understands the invitation to participate included in the presented marketing material to concern both membership and the *'business opportunity'* associated with becoming a seller. It is true that information about the two roles tends to be presented in different sections of the video films and the written information, but, on the whole, the Court has no doubts that the intention is for people who are recruited to take on both roles simultaneously. The wording of the contract form used for sellers must also be understood to point in the same direction. The invitation to become both a

seller and a member is also illustrated by use of the slogan '*Make a living, living'* for marketing purposes.

The compensation plan for the sellers links the commission to the sellers' own sale of memberships but also to sales of memberships by recruited sellers. The Court understands this system to mean that there is a strong financial incentive, not only to sell memberships, but also to recruit people to become both members and sellers. This supports the view that no distinction can be made between the roles in an assessment of the real content.

The *'Refer 4 pay no more'* scheme points in the same direction. In brief, it means that a member who refers a person to buy membership from a seller earns reward points and does not have to pay the monthly membership fee. The fact that, in practice, the referring members are also the sellers to whom they refer also supports the view that there are no real grounds for distinguishing between the two roles.

Documentation of some DreamTrip stays for members in Norway in 2012 and 2013 also shows that training and similar of sellers have taken place on some of these trips, another factor that supports the view that, in practice, there was no distinction between the roles of seller and member in Norway.

The Court understands that both membership fees and RBS fees have been paid to the same company and into the same account. The Court considers it of minor significance that these have been entered as separate revenue items in the company's accounts.

In summary, the Court believes that the assessment of the conditions in Section 16 second paragraph of the Lottery Act shall be based on the real content of the activity at the time the administrative decision was made, and that no basis exists in that connection for distinguishing between the sellers and the members' activities or between the revenue flows derived from these two roles. In the following, the Court considers the sellers and the members together as participants in WorldVentures' activity in Norway.

4.4 Pyramid-like sales structure

It is not contested by WorldVentures that, seen in isolation, the sellers in Norway were organised in a pyramid structure. They were able to build a subordinate sales organisation and get commissions on their own sale of memberships and sales of memberships by recruited sellers. This is also clear from the company's own overviews of sellers at different levels and from the structure of the compensation plan. However, WorldVentures has contested that the members are organised in such a structure.

The Court concluded above that there are no grounds for making a distinction between the roles of member and seller when assessing the conditions in Section 16 second paragraph of

the Lottery Act. Based on how this functioned in Norway, the Court considers that the activity seen as a whole had a pyramid-like sales structure. The Court stresses that such a structure is not a problem in itself, provided that the participants' income or the undertaking's revenues are not predominantly derived from the recruitment of new participants.

4.5 Consideration in return for participant status

It is not disputed that, in their capacity as members, the participants paid a fee of USD 199.99 on joining, followed by a monthly fee of USD 49.98. In their capacity as sellers, the participants paid USD 99.99 on joining, followed by a monthly fee of USD 10.99.This means that almost all the participants paid a total of USD 970 in the course of the first year, followed by USD 731 in subsequent years.
The parties disagree as to whether the participants' payments should be deemed to constitute consideration in return for participant status in a sales scheme. WorldVentures takes the view that nobody paid for participant status in a sales scheme, but that the members paid for their membership in DreamTrips and associated benefits, and that the sellers paid for access to RBS, training, sales materials etc.

The Act's condition concerning participant payments does not require the consideration to be expressly classified as a participant fee; nor does it require the consideration to be of a certain scope. On this point, too, it is the actual circumstances that are decisive. Payment for participation can also be deemed to take place where the consideration paid does not correspond to the value of the goods, services or other benefits that the person who pays receives from the scheme – in other words, an overprice. It may then be concluded that indirect payment is made for the status of participant.

In the present case, the Court agrees with the State that the payments made by the participants must be deemed to constitute payment for participation in the sales scheme. In this connection, too, the roles of members and sellers and the consideration paid for these roles must be considered together. As will be concluded by the Court in section 4.7 on the relationship between revenues from recruitment and revenues from the sale of other benefits, the Court is of the opinion that the undertaking's revenues, largely consisting of the different types of consideration paid by the participants, did not correspond to the real value of the membership benefits or of access to RBS. With reference to this, the Court considers that it is quite clear that the participants' payment of membership fees and RBS fees must, at least indirectly and predominantly, be deemed to constitute payment in return for participant status in the sales scheme.

4.6 The possibility of deriving an income from recruiting others to the sales scheme

Furthermore, the Court finds that, through payment for participation, the participants were given

an opportunity to derive an income from the contributions paid by other participants. On this point, too, the Court's point of departure is that it is neither possible to distinguish between the roles of members and sellers nor between the revenue flows from these two roles; see section 4.3 above.

In their capacity as sellers, the participants were given an opportunity to earn a commission calculated on the basis of the membership fees paid by new participants. At the same time, they were given an opportunity to earn a commission on sales of memberships by the sellers they themselves had recruited. Since the sellers were in practice also members, and since new members were in practice also sellers, and since they all paid membership fees and RBS fees, the reality was that the participants had an opportunity to gain an income from the recruitment of others to the sales scheme.

That this was organised so that the commission was calculated on the basis of the membership fee fraction of the consideration paid by new participants is of no consequence in the assessment of the reality of this. The decisive point is that the participants were given an opportunity to derive an income from new participants who, in practice, were paying for their membership and for access to selling memberships and recruit new sellers in the sales scheme.

4.7 Relationship between revenues from the sale of products and revenues from recruitment

For the activity to be deemed to constitute an unlawful, pyramid-like sales scheme, it is a further condition that the income that the participants are able to earn is *'specifically derived'* from the recruitment of new members and not from *'the sale or consumption of goods, services or other benefits'.* In the preparatory works to the Act, this is understood to mean that it is a condition for deeming the sales scheme unlawful that more than 50% of the undertaking's revenues can be ascribed to the recruitment of new members.

Such a scheme means that the number of new members who pay participant fees to the sales scheme must continue to grow in order to finance the compensation paid to participants further up in the structure. It is a typical feature of out-and-out pyramid games and of many pyramid-like sales scheme that they are pre-destined to collapse, because it will not be possible in the long term to recruit a sufficient number of new participants and thus generate the revenues required to cover commitments to existing participants. When such a collapse occurs, the most recently recruited participants lose their contributions because these have been used to pay participants at a higher level.

For how long such a scheme can continue to work will depend on its detailed organisation, however. If some part of the revenues used to pay the participants is derived from the sale of products and services of real value, the scheme can survive for a long time. The same is true if the commitment to pay the participants is conditional on each individual participant being capable of actually generating revenue by recruiting new members. The prohibition in the Act does not, in the Court's opinion, provide for a condition whereby it must be substantiated that

the sales scheme will stop working and, if so, at what time.

On this point, WorldVentures has claimed that the scheme was sustainable and therefore falls outside the scope of the provision. It has been claimed that it was not necessary to recruit new members in order to meet the commitment to pay commissions to the sellers. The global accounting figures show that the amount contributed in membership fees in 2013, 2014 and 2015 was almost double the amount of the commissions paid to the sellers, and that the commissions paid represented approximately 30% of total revenues. Reference has also been made to there being an agreed cap on the sellers' commissions, and to the fact that, when members leave the scheme and stop paying membership fees, the seller's commission will be reduced proportionately.

According to the Court's understanding of the accounting figures that have been presented in evidence, the global undertaking was sustainable in the sense that the membership fees received clearly exceeded the commissions paid to the sellers. However, the Court cannot see that this is decisive for its assessment of the case. The key question is whether the undertaking's revenues in Norway, predominantly consisting of the participants' payment of membership fees and RBS fees, must be deemed to primarily constitute revenues from recruitment and not from the sale or consumption of products; see Section 16 second paragraph of the Lottery Act. The preparatory works to the Act and statements by the ECJ in *4finance* both show that it is the undertaking's revenues from the consumption and sale of products – *'effective economic activity'* – that is relevant when deciding whether an activity is sustainable. That the scheme can be sustainable by including direct monetary contributions from its participants – *'economic contribution of its participants'* – does not mean that the scheme can be deemed to be sustainable in this context. If such revenues were to be included in the calculations, it would mean that not even a scheme funded purely by recruitment would fall under the scope of the prohibition.

According to the Court's understanding of the parties, the actual dispute consists of whether and to what degree the revenues from membership fees and RBS fees must in fact be deemed to constitute revenues derived from recruitment and not from the sale or consumption of goods, services or other benefits. As far as the Court can see, it is clear in the present case that, if all or the major part of these revenues are regarded as revenues derived from recruitment and not from the sale or consumption of products, as assumed by the Gaming Board, then the scheme falls under the scope of the relevant condition in Section 16 second paragraph of the Lottery Act.

In other words, the Court is required to adopt a standpoint as to whether more than half of WorldVentures' revenues linked to Norway were derived from payments by participants at the time when the administrative decision was made. Concerning the part of the undertaking's revenues that consists of membership fees and RBS fees, the Court finds that, insofar as the participants have not received anything in return for the consideration paid, the overprice must

be deemed to constitute participant payment.

On this point, the Court agrees with the State that the important question when assessing the overprice [issue] is whether the participants in Norway actually received or consumed goods, services or other benefits in return. The right to avail oneself of a service can also be of value, but the Court agrees with the State that, in a more detailed assessment of the real value of such a right, the important factor must be the actual extent to which the service in question is used. The Court is of the opinion that the wording used to describe the condition in the Act and in Annex I, the opinions expressed in the preparatory works and in the criminal case Rt-2009-1601, all show that it is the benefits that the participants actually receive and avail themselves of in return that must be decisive for the assessment. Statements by the ECJ and the Advocate General in *4finance* point in the same direction. Moreover, the Court assumes that it would be almost impossible in practice to apply the condition contained in the prohibition provided for in the Act, unless the value of what the participants actually receive in return was normally considered to be decisive for the assessment.

On that basis, the Court has considered the factual information provided about the situation as regards WorldVentures' activity in Norway prior to the administrative decision.

Based on the presentation of evidence, the Court concurs with the assessment in the Gaming Board's decision, in which the Board agreed with the Gaming Authority's assessment in its decision and supervisory report. No evidence has been presented before the Court that would give grounds for any other assumption than that the undertaking's revenues in Norway – which in turn were used to pay commission to the participants – were very largely derived from contributions by participants and not from the consumption or sale of goods, services or other benefits.

As mentioned in section 4.4 above, almost all the members paid a total of USD 970 in the course of the first year, potentially followed by USD 731 in subsequent years, in membership fees and RBS fees. The Court has considered the extent to which benefits were provided in return for these contributions, or whether an overprice has been charged and, if so, must be deemed to constitute revenue derived from the participants' fees.

Concerning the value of the membership in DreamTrips, the Court takes as its starting point that this only to a limited extent conferred any immediate rights to services or other products. The membership permitted members to buy trips composed by WorldVentures. WorldVentures has stated, and the State has also relied on this, that the trips were sold at a 20–45% discount compared with corresponding trips offered by the market. The membership also entitled members to use a concierge service and online travel agency, whether in connection with trips or otherwise, and the members earned reward points that could be used as partial payment when buying trips.

The Court starts by assessing the value of the right to by discounted trips. The information provided

by WorldVentures showed a total turnover in Norway of approximately USD 3.5 million in 2012 and USD 3.2 million in 2013. Commissions to sellers amounted to USD 1.1 million in 2012 and 1,9 USD 1.9 million in 2013. Norwegians booked trips for a total of USD 209,000 in 2012 and USD 217,000 in 2013, amounts that represented 5–7% of the total turnover for these years, while the rest consisted mainly of contributions from the participants.

According to information provided by WorldVentures, the average number of members in Norway was about 2,900 in 2012 and 3,400 in 2013. These figures do not reflect the constant membership turnover, which meant that a significantly higher number of people actually participated as temporary members during these years. Hence, the average member booked trips for a very low amount compared with the membership fee he contributed. The Court takes the view that, what the members got in return for this element of their membership, namely the right to buy trips, lies in the value of the discount. Based on the information provided by WorldVentures concerning the size of the discount, it is clear to the Court that the value of this return service amounted to well under 5% of the consideration paid for being a member. It is somewhat unclear to the Court whether the Gaming Board and the Gaming Authority refer to the value of the discount or the value of the trips that were booked. Regardless of how we look at this, the Court finds that the Gaming Board was correct in its assessment that the return benefit of being entitled to buy trips was of very limited real value to the average member.

The Court also agrees with the State that little evidence has been provided regarding the value of the reward points. The Court understands that these were introduced as from the summer of 2014. This meant that reward points were earned on payment of membership fees, trips etc., which could subsequently be used as partial payment for trips. Based on the presentation of evidence, the Court understands that members in Norway made very limited use of such points. Use of this reward was also linked to the purchase of trips, which was done to a very limited extent compared with the total sales. The exact value of this return service is therefore difficult to determine, but it seems clear that this cannot in any case have been great enough to be decisive in the assessment of the case.

Concerning the value of the online travel agency, the Court is of the opinion that there are no factual grounds for claiming that this was a return benefit of any particular real value to the members. Information has been provided that the portal offered members the opportunity to buy trips etc. subject to a price guarantee, but the Court was presented with little evidence as to how much it was actually used and the value that such a guarantee might have generated for the members in Norway. The OTA is a website affiliated to WorldVentures and DreamTrips that offers members the possibility of simple and practical travel planning, rather than having to search for such additional services elsewhere. Members may also use the OTA in connection with trips other than DreamTrips. The Court finds it difficult to see that it has been documented that this represented a return benefit to members in Norway of such a value that it would have consequences for the Court's assessment in the case.

The Court finds that evidence has not been presented that the benefit to members of having access to the concierge service, whether in connection with trips or otherwise, is of any significant real value. Based on the presentation of evidence, the Court concludes that only limited use was made of this service, particularly outside the USA. The Court agrees with the State that no evidence has been presented to show that the actual use of or possibility of using this service has a value that can be given much weight in the assessment.

No other evidence has been presented in the case to substantiate that the quality or content of the membership itself should otherwise be assigned any real value in this connection.

Specifically relating to the part of the payment referred to as the RBS fee, the Court is of the opinion that it has not been documented that anything noteworthy has been received in return, so that this must also primarily be seen as income from the recruitment of sales participants. The Court agrees with the State that evidence has not been presented to show that what the participants received in the form of marketing material, training, access to web pages etc. so that they could operate as sellers, can be deemed to constitute return services corresponding to more than a very small part of the RBS fee paid.
Accordingly, the Court concludes that the condition of the Act that the undertaking's revenues must largely be derived from the recruitment of participants in the sales scheme and not from the consumption or sale of goods, services or other benefits, is clearly met in the present case.

Based on what was mentioned in sections 4.3 to 4.7, the Court concludes, on that basis, that WorldVentures' activities in Norway at the time of the administrative decision constituted a pyramid-like sales scheme in contravention of the prohibition in Section 16 second paragraph of the Lottery Act, as assumed by the Gaming Board. In that connection, the Court will add that sales of DreamTrips' trips also form an integral part of the sales scheme considered by the Court, so that this element also falls under the scope of the prohibition, as also assumed by the Gaming Board. The prohibition does not apply to the sale of any other products apart from this.

4.8 Procedural errors

WorldVentures has argued that the Gaming Board's decision, and its assessment that the activity came under the scope of the prohibition in Section 16 second paragraph of the Lottery Act, in any case suffers from procedural errors whereby it must be set aside as invalid; see Section 41 of the Public Administration Act. Reference is made to the authorities having failed to fulfil their duty to clarify a case before making an administrative decision and that sufficient grounds for the decision were not provided; see Sections 17 and 25 of the Public Administration Act.

These arguments cannot succeed. As mentioned above, the courts are competent to review all aspects of the administrative decision that have to do with the application of the prohibition in

Section 16 second paragraph of the Lottery Act. The Court has considered this question above, based on the evidence presented in court, and it has arrived at the same conclusion as the Gaming Board. Hence, there are no grounds for setting aside the administrative decision on the basis of the procedural errors invoked; see, for example, Rt-2013-258 and Rt-1969-1053.

The Court would nonetheless like to add that it cannot see that any such procedural errors were made. The Gaming Board has either expressly, or by concurring with the Gaming Authority' prior assessments, adopted a standpoint regarding the arguments submitted by WorldVentures in the course of the administrative procedure.
As far as the Court can see, the relevant conditions of the Act have been reviewed and discussed and the factual circumstances of relevance to the assessment and the conclusion have been described. Nor has the case been demonstrated to have been inadequately clarified by the authorities prior to making the administrative decision. Information about the activity in Norway was obtained from WorldVentures to the extent that this was necessary in order to consider the case. It also carries weight that the private party to the case is a large, professional player with a statutory duty to document the source of its revenues in Norway and that is also capable of understanding what was relevant to disclose and present in evidence.

WorldVentures also considers it a procedural error when the authorities failed to adopt a standpoint to the petition for reversal in connection with the submitted notice of legal action. The present case concerns the validity of the Gaming Board's administrative decision and not a subsequent decision not to consider a reversal [of that decision]. Any error in the processing of the petition for reversal will thus in any case be of no consequence for the claim in the present case.

4.9 Arbitrary or highly unreasonable decision

WorldVentures has argued that the administrative decision to order cessation of the activity pursuant to Section 14a of the Lottery Act must be repealed *'in whole or in part'* regardless of whether the activity is unlawful pursuant to Section 16 second paragraph of the Lottery Act. Reference is made to the fact that Section 14a of the Lottery Act is a 'may' provision and that the choice of sanctions by the authorities was very invasive in this case. Other sanctions such as an order to rectify [the unlawful condition] could have been attempted, or the condition could have been rectified by providing better guidance.

According to the Court's understanding, it is argued that the authorities' decision to order cessation (of the activity) must be deemed invalid because it must be deemed to be arbitrary or highly unreasonable and thus comes under the scope of the non-statutory rules on invalidity on grounds of abuse of powers.

This argument cannot succeed. Based on the presentation of evidence, it is not found to have been substantiated that the order to cease the activity that was deemed to be unlawful pursuant

to Section 14a of the Lottery Act was based on an arbitrary assessment or qualified as being unreasonable. The Court cannot review the detailed assessment by the authorities of whether it was expedient to first try less invasive measures such as to rectify [the unlawful condition]. The Court would like to point out, nonetheless, that rectification pursuant to Section 14a of the Lottery Act can appear to be a less relevant sanction where a whole sales scheme falls under the scope of Section 16 of the Lottery Act, compared with a situation where there is a more limited breach of the Act.

4.10 Conclusion

In the above, the Court has arrived at the conclusion that the Gaming Board's administrative decision cannot be set aside and declared invalid on any grounds, and it thus finds in favour of the State.

5 Costs of the case

The State represented by the Ministry of Culture has succeeded on all counts, and is, in principle, entitled to coverage of its legal costs by WorldVentures; see Section 20-2 (1) and (2) of the Dispute Act. The Court cannot see that there are any weighty grounds pursuant to subsection (3) for granting exemption from the main rule that the losing party shall cover the full costs of the case. The questions that have been decisive for the Court's assessment of the facts and application of the law and for the outcome in the case have not appeared particularly doubtful. That a prohibition on an activity that is in contravention of Section 16 second paragraph of the Lottery Act cannot be seen to have been heard by a court after the amendment of the Act, is also not a circumstance that is sufficient to exempt from the liability to cover the opposite party's costs of the case.

In its final statement of costs of 5 September 2016, the State has claimed coverage of NOK 327,370, consisting of the counsel's fees, witness expenses and some photocopying. The Court is of the opinion that what is claimed by the State can be assumed to be reasonable and necessary expenses in light of the nature and scope of the case and the duration of the main hearing; see Section 20-5 of the Dispute Act. WorldVentures is ordered to pay the above-mentioned amount to the State.

RENDITION OF JUDGMENT

1 The Court finds in favour of State represented by the Ministry of Culture.

2 WorldVentures Marketing, LLC shall pay the costs of the case in the amount of NOK 327,370 – three hundred and twenty seven thousand three hundred and seventy kroner – to the State represented by the Ministry of Culture within two weeks of service of judgment.

The Court rose.

Jon Østensvig (signature)
Jon Østensvig

Please find enclosed the guidelines on the right to appeal in civil cases.