THE ATTORNEY GENERAL (CIVIL AFFAIRS)

To the EFTA Court   Oslo, 18 May 2006

STATEMENT OF DEFENCE

BY

THE GOVERNMENT OF THE KINGDOM OF NORWAY

represented Mr Fredrik Sejersted, Advocate, the Attorney General for Civil Affairs, acting as agent, and Ms Hanne Ørpen, Adviser, the Ministry of Foreign Affairs, acting as agent, in

Case E-1/06,

The EFTA Surveillance Authority

v

The Government of the Kingdom of Norway

in which the EFTA Surveillance Authority has submitted an application pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, the Government of the Kingdom of Norway hereby submits a defence pursuant to Article 35 of the Rules of Procedure of the EFTA Court.

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1. INTRODUCTION

1. By an application lodged with the EFTA Court (hereinafter "the Court") on 13 March 2006, the EFTA Surveillance Authority ("the Authority") is seeking a declaration from the Court that the Kingdom of Norway, by amending the Norwegian gaming and lottery legislation, in such a way as to transfer the operation of slot machines from a market based concession regime to the public monopoly already regulating other major forms of gaming, has infringed Articles 31 and 36 of the Agreement.

2. The Norwegian Government respectfully requests the Court to declare the application as unfounded based on the following main submissions:

- The statutory reform constitutes a restriction within the meaning of EEA Articles 31 and 36, but this restriction is non-discriminatory and based on legitimate and mandatory legislative requirements. It forms an integrated and coherent part of national gaming policy, and it is proportional as well as necessary in order to obtain the level of protection against problem gambling and gambling problems sought by the Norwegian legislator.

- The reform does not introduce a "new" kind of public monopoly, but simply transfers slot machines from the Lottery Act to the Gaming Act, i.e. to the existing system under which major forms of gaming such as Lotto and football betting have been successfully and responsibly regulated ever since they were first allowed. The Authority's application is essentially an attack on the system of publicly controlled gaming as such, which has always been a foundation of national gambling policy in Norway, as in most other European countries.

- The main legislative aim of the reform is to fight problem gambling, which in recent years for the first time in history has become a huge problem in Norway, for a large number of individuals as well as to society as such. This problem is almost entirely caused by an exponential increase in the gambling on slot machines, which is the most addictive form of gambling legally operated in Norway today.

- The reform is estimated to reduce gambling on slot machines by approx 80 % as compared to present levels – with a targeted reduction in annual gross machine turnover from 26 billion NOK in 2004 to some 6-7 billion under a public monopoly, corresponding to a fall in net turnover (gamblers' loss) from approx 5 billion to 1½ billion NOK. The Norwegian Government knows of no other legislative reform in any country in recent years which to the same extent aims at bringing about a genuine diminution of gambling opportunities.

- The sharply diminished revenue generated under the publicly controlled monopoly system in the future will in its entirety go to the same charitable and humanitarian organisations which today hold the licenses for slot machines, only now channelled through Norsk Tipping. No one else will profit from the reform, and no revenue will go into the state coffers. The Government acknowledges that the desire to limit the reductions in revenue to charitable and humanitarian organisations, and to maintain a

certain minimum level (well below the present), was part of the legislative considerations behind the reform. But the Government disagrees with the Authority that this is an illegitimate "financial consideration". Furthermore, this was not the decisive reason for the reform as such, but merely an accessory (incidental) consequence within the meaning of ECJ case law (the Zenatti formula).

- Under the traditional Norwegian regulation of lotteries and gaming, the major forms of gaming have always been subject to publicly controlled monopoly regimes, under the Gaming Act and the Totalisator Act. Only the smaller and more harmless games have been regulated by the Lottery Act, which allows for concessions to be given to charitable organisations and for these organisations to employ commercial operators to run their games. Slot machines were until the mid-1990s a small and harmless sector, but have since developed into by far the largest and most problematic form of gambling in Norway – creating deep misery and huge private profits.

- In recent years the outdated regulation on slot machines has been a deeply incoherent part of national gaming legislation, with the growth and character of a tumour. The transferral of slot machines from the Lottery Act to the Gaming Act means restoring the fundamental consistency and coherency of national gaming legislation. It is also the cornerstone of a new and stricter national gaming policy in general, which was presented by the Government in the same March 2003 White Paper which introduced the reform, and which has been implemented since.

- Thus, the Norwegian Government not only disagrees with the Authority that the reform on slot machines is not consistent, but will in fact argue that it is the single *most* consistent and coherent measure taken by the national legislator in the field of gambling in recent years.

- This is not altered by the fact that Norsk Tipping and the Norsk Rikstoto Foundation have been allowed to develop and market their games, as argued by the Authority. First, this is without relevance to the present case, since there has never been any plan to allow for marketing of slot machines. Second, a certain development and marketing of the responsible game portfolio offered under the public monopoly is legitimate and necessary in order to sustain the system, and channel gambling desire to the least problematic and addictive games. Third, it is logically and legally untenable to argue that the legislator should be constrained from introducing new restrictions on one form of gambling because the marketing of other games is too liberal.

- If a national gambling restriction is founded on legitimate legislative considerations, and forms a coherent and systematic part of a national policy aimed at reducing gaming opportunities, then it follows from the case law of the European Court of Justice that the national legislator has a margin of appreciation not only as regards the level of social protection sought, but also as regards the means by which to achieve this. This is the content of the proportionality test laid down by the ECJ in the field of gambling, which respects moral, cultural and religious considerations, and recognizes the harmful consequences for the individual and society associated with gambling.

- The Norwegian slot machine reform of 2003 passes this ECJ test of proportionality and necessity in the gaming sector by a wide margin. But for that matter, it also passes the far stricter necessity test wrongfully applied by the Authority in its application. Transferring the machines from a market regime to the existing publicly controlled monopoly is the only way in which to obtain the level of social protection and responsibility necessary in order to address the current gambling problems. Any other, less interventionary measure within the present market-driven regime would only amount to patching up a system which is inherently deficient and inconsistent.

3. The key question in the present case is whether one acknowledges the *raison d'être* of having public monopolies in the field of lotteries and gaming, which is to curb gambling opportunities through the inherent limitations in such systems (as compared to market forces), to channel gaming desire to the least harmful outlets, and to gain a level of public control and responsibility which is not attainable under a private market regime.

4. If one acknowledges this, as the ECJ has done, inter alia in *Läärä*, then a monopoly on slot machines is easily defendable, this being one of the most problematic and addictive forms of gambling. And the Norwegian 2003 reform is particularly easy to defend, as it indisputably aims at bringing about a drastic diminution of gambling opportunities.

5. In contrast, the arguments used by the Authority in its application imply that it does not agree with the basic arguments and considerations on which most lotteries and other forms of gambling in Europe is founded. In fact it is probably not a single public gaming or lottery monopoly in Europe which would pass the tests applied by the Authority both as regards legal interpretation and factual assessment.

5. The position which is somewhat surprisingly taken by the Authority in effect invites the EFTA Court to leave behind current interpretation and application of EU and EEA law, and to apply judicial activism in order to establish a new regime which would call for the privatization and liberalization of gambling within the European Economic Area. This would not be in line with current legal and legislative debate and developments in the European Union, and it is not an exercise for which the EEA Agreement is suitable.

7. On this basis the Norwegian Government respectfully requests the Court to declare the application unfounded.

2. OVERVIEW OF THE CASE

8. The Norwegian lottery and gaming sector has historically always been strictly regulated. All forms of "games of chance" are prohibited under §§ 298 and 299 of the Norwegian Penal Code of 1902 except when authorised by law and operating under special license. In general, such permits may, under the 1995 Lottery Act only be granted to humanitarian and socially beneficial organisations or associations. For most major types of gaming further restrictions apply, in the form of exclusive rights. Under the Totalisator Act of 1927 the Norsk Rikstoto Foundation has in effect an exclusive licence to operate horse race betting. And under the 1992 Gaming Act, the State gaming company (Norsk Tipping AS) is granted exclusive rights to operate the number game Lotto and football betting.

9. This type of lottery and gaming legislation is common in most European countries, although in somewhat different forms, with certain differences in scope and details. Common to all, however, is that lottery and gaming is regarded as a distinct sector, subject to special political, cultural and moral considerations, in which ordinary market mechanisms are not desirable, and to which commercial operators have only very restricted access, if at all. It is also usual for segments of the gaming market to be reserved for public exclusive rights entities, and for profits to be channelled directly to charitable and socially benevolent causes.

10. Under Norwegian law, the gaming and lottery sector is in principle closed to private commercial actors, in the sense that they themselves can not obtain any kind of lottery or gaming license. The whole sector is in principle "non-profit" and exempted from ordinary market forces and competition. This has always been so. The only opening for private commercial profit has been at the periphery, from derived supporting services, for the betting agents of Norsk Tipping and Rikstoto, the owners of the premises on which certain games are operated, and for the commercial companies employed by charitable and benevolent organisations to operate their games for them. This derived private commercial element of the gaming sector has by tradition been modest.

11. The main argument for restricting "games of chance" (lotteries and gaming) under Norwegian law has always been, and still is, social policy considerations – to prevent, minimize and contain problem gambling (compulsive, habitual, pathological), and other gambling problems for society. The moral and cultural policy aspects have also historically been strong, and to some extent still are.

12. The reason why certain forms of lotteries and gaming are nonetheless permitted, in Norway as in other countries, is in acknowledgement of the fact that some degree of gambling will always prevail in society. It is then better to channel this demand into moderate and responsible formats, and the traditional public exclusive rights model is well suited for this task. It has also always been a basic principle to ensure that revenues generated by gambling should not go to private profit, but should be channelled directly to humanitarian and socially benevolent causes. The argument for this is both of a structural and a moral nature. The structural point is that the absence of private profit

will minimize market incentives and function as an inherent limitation on the volume of gambling. The twofold moral argument is that private commercial operators should not profit from the misfortune of others, and, perhaps more significantly, that a certain kind of moral balance in society is restored as long as the revenues from gambling are ploughed back into benevolent and humanitarian causes.

* * * * *

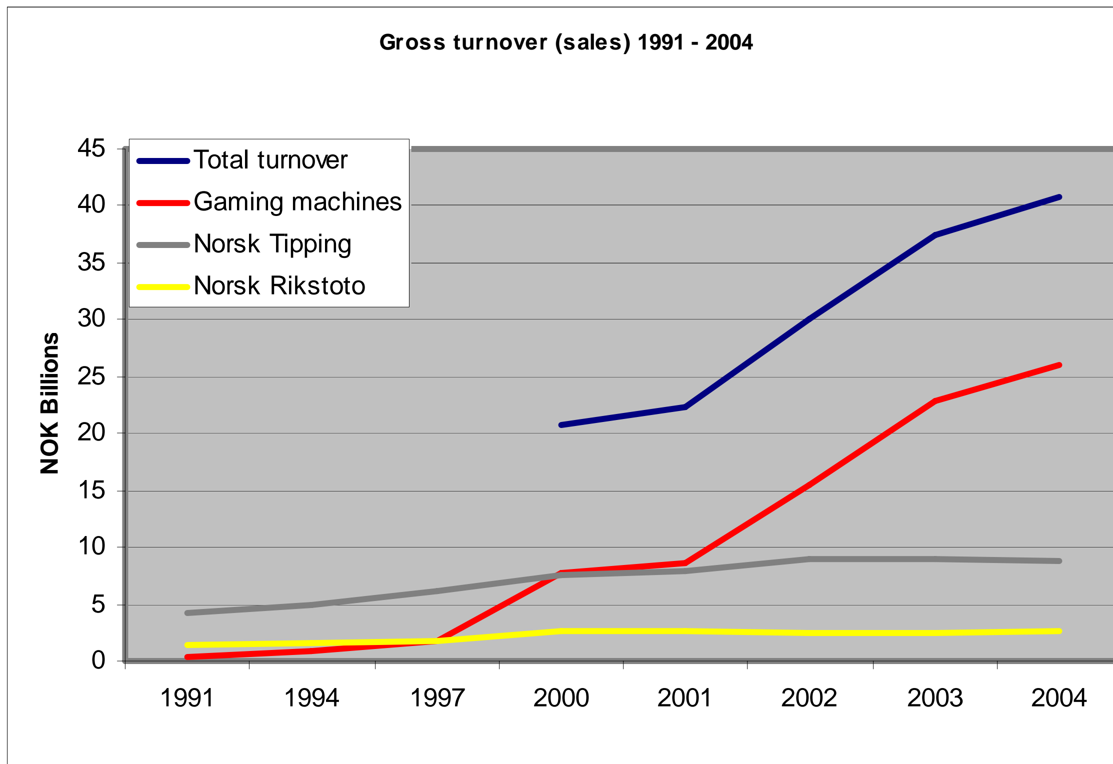
13. Until recently, the Norwegian system was consistent and effective. Over the decades there has been a relatively steady growth in gaming and lotteries, which have gradually reached substantial proportions. Norsk Tipping and the Norsk Rikstoto Foundation have developed and marketed their respective gaming portfolios, and charitable license-holders have done the same, although on a smaller scale, under the Lottery Act. Measured against the increase in national income, however, the growth in traditional gaming has been moderate. Moreover, the traditional gaming has been of a soft and responsible nature. The traditional system has been successful in confining and channelling gambling desire towards the least harmful outlets. Gambling addiction was until recently a marginal phenomenon in Norway.

14. In recent years, however, this picture is radically changed. Over the last few years, gambling has for the first time emerged as a serious problem in Norway – both for society as a whole and for a growing number of individuals. Since the late 1990s there has been a massive increase in the volume of gambling and in gambling problems.

15. This is not due to what by tradition have been the major operators in Norway (Norsk Tipping and Rikstoto), or traditional forms of gaming – such as the betting on football and horse races, the number games (Lotto, Ekstra), scratch cards or bingo. These forms of gaming have shown either moderate or stagnant growth, and they have never caused problems to society on any significant scale.

16. Instead, the exponential growth in Norwegian gambling in the last decade has been caused almost entirely by slot machines. In 1990 gross turnover from such machines was roughly NOK 200 million. By 2001 it had increased to NOK 9 billion, and by 2004 to NOK 26 billion, corresponding to a net turnover (gamblers' loss) of NOK 5 billion. In 1990 slot machines were a marginal part of the total gaming and lottery sector, while in 2004 the machines accounted for 64 % of gross turnover and 43 % of net turnover.

17. The development is illustrated in a table drawn by the Gaming Authority in 2004, showing gross turnover from gaming in Norway in 1991-2003:



18. There are several reasons for the rise of slot machine gambling in Norway in recent years, two of which can be seen as chief causes. First, the regulation of the machines has been outdated and inconsistent. The present legislation was prepared in the early 1990s (adopted in 1995), when the slot machine sector was modest and the machines themselves moderate. At that time, the machines were seen to belong naturally under the relatively liberal regime of the Lottery Act. With hindsight this was a miscalculation, which did not foresee the imminent technical development and market potential of the slot machines. When slot machines were regulated two years later in Sweden (in 1997) they were subjected to a public exclusive rights regime, and the result is that machine gambling is but a fraction of that in Norway. Had the Norwegian legislator done the same, there would not have been a major gambling problem in Norway today. As it turned out the legal framework of the Lottery Act was not strict enough to confine a form of gambling which is as potentially aggressive and addictive as the slot machines.

19. The second main reason for recent developments is that this regulatory weakness was exploited to the full by private interest. Since the mid-1990s the slot machine sector has functioned as an efficient commercial market, with extensive competition and vast opportunities for private profit. This ensues from the system set out in the Lottery Act, which grants licenses to charitable and benevolent organisations, but allows for private commercial enterprises to own and operate slot machines on behalf of the organisations, and to share directly in the "cash-box".

20. Under the present regime some 138 private commercial companies are operating approximately 15.000 slot machines on behalf of more than 3.500 humanitarian and socially beneficial license holders. The result is fierce competition – for contracts with license holders, for the most attractive premises, and for the most attractive (i.e.

aggressive) machines. The potential rewards are the enormous profits to be made in this sector. The market incentives under such a gaming system are tremendously strong.

21. The result to society of this explosion in slot machine gambling has been that Norway is for the first time in history facing a large problem of gambling addiction. This began to manifest itself in the late 1990s, and has since become ever more apparent. According to the most recent estimates as many as 71.000 persons (many of them minors) now have problems with compulsive gambling. This number is higher than that of people suffering from alcohol problems. The gambling addiction problem is now huge, both for the gamblers, for their families and for society at large. It is primarily a social problem, but it is also problematic from a socio-economic perspective, since slot machine gambling is a very socially imbalanced activity, which in effect works as a kind of regressive taxation. And it is problematic from a public order perspective as well, since the rise in gambling has led to related crime and malpractice.

22. By 2002 the authorities had become aware of the fact that gambling addiction was growing at an alarming speed, and that this was caused almost entirely by slot machines. It soon became clear that drastic action was needed in order to tackle the problems, but extensive preparations were still needed in order to find the right solution. By the autumn of 2002 the competent authorities had reached the conclusion that the obviously best solution would be to transfer the operation of slot machines from the relatively liberal regime of the Lottery Act to the more restrictive existing public exclusive rights arrangement of the Gaming Act, while at the same time limiting the number of machines, introducing stricter technical requirement, stricter rules on location and stricter procedures for public control and instruction.

23. This model was prepared and presented to Parliament by the centre-right Bondevik Government in March 2003, and was adopted by a broad parliamentary majority in June, following extensive committee recommendations. In parliamentary committee majority in particular stressed that a fundamental reform was necessary in order to fight the new problems of gambling addiction, and that the model chosen introduced a direct public responsibility for the gambling sector.

24. The legislative motives stated in the preparatory works to the reform were:

- To fight gambling addiction and other gambling problems.
- To reduce slot machine gambling to a socially defensible level.
- To strengthen and increase public control and responsibility in the gambling sector in general, and in the slot machine sector in particular.
- To protect public order, by preventing and reducing crime and malpractice and enforcing the 18 year age limit more effectively.
- To eliminate the market incentives which have caused the gambling explosion.
- To limit the necessary reductions in revenues for the former charitable and benevolent license-holders.

25. The main and overriding legislative aim was to fight and eliminate the social problems caused by slot machines. This is to be done (i) by sharply reducing the volume of slot machine gambling and (ii) by ensuring that remaining demand is met within a far more moderate system, with fewer and less aggressive machines, operated within the

traditional framework of the public exclusive rights system, under continuous control and public responsibility

26. From a technical legislative perspective the 2003 reform was very simple, and consisted of one short amendment to the Lottery Act (slot machines out), and another short amendment to the Gaming Act (slot machines in). What Parliament adopted was a structural reform, which transfers the operation of slot machines from the relatively liberal regime of the Lottery Act to the existing public exclusive rights regime of the Gaming Act, which is a model operated by Norsk Tipping for other major games for many decades. But the legislator also laid down a number of instructions on the contents of the reform, inter alia that the number of machines should be cut by half, and that the existing machines should be scrapped and replaced by a new set of less aggressive and addictive machines, which will also be far easier to control and correct. This was later implemented through new ministerial guidelines.

27. For the many charitable and benevolent organisations and associations holding slot machine licenses, the reform meant that they would loose these, for which many of them are economically dependent. Instead, the Gaming Act was amended in such a way as to give these organisations a part of the future surplus of Norsk Tipping, alongside the other socially beneficial causes (culture and sports) already receiving revenue from Norsk Tipping. The targeted reduction in gambling volume meant that the organisations would still loose considerably in economic terms from the reform. The major license-holders still welcomed and supported the reform. Behaving in a socially responsible manner these organisations understood that it was necessary with radical change in order to restore responsibility to the gaming sector, and they acknowledged the fact that the reform would be able to do this while still ensuring them of a certain future level of subsistence.

28. From the earliest preparations of the reform and up until it was adopted in June 2003, one of the basic premises was that the volume of slot machine gambling was to be drastically reduced. The originally targeted aim was to reduce turnover (gross and net) by approximately 40 % as compared to the 2001-level. This was the target for which the model was designed, and it was kept even after it became clear that actual turnover had risen sharply in 2002. By the time the reform was presented and debated in Parliament in the spring of 2003 it was clear to all parties involved that it would mean a very substantial cut not only on gambling turnover, but also in revenue for those charitable causes who would in the future be the only beneficiaries.

29. When the 2003 reform was presented it was welcomed by all the political parties except one, by most of the media, and most importantly also by the organizations for anonymous gamblers and for gamblers’ relatives, and by all those actually working with gambling addiction in the field. Some of them thought that the reform could have been even more restrictive, but all welcomed it as at least a step in the right direction.

30. The only parties to criticize and legally challenge the reform were the private commercial companies whose business is to offer their operating services to the humanitarian and benevolent license-holders for a 40 % stake in net turnover. These companies have formed the commercial operational level in the slot machine market, which has been the prime force in the gambling explosion, and which the reform is meant to eradicate.

31. While the charitable organisations holding the slot machine licenses accepted (and to a large degree supported) the reform, the commercial operators immediately took legal action against it in the autumn of 2003, both before the national courts and by simultaneously also lodging complaints with the Authority.[1] This is the reason why there have been two parallel processes in the case ever since – one before the national courts and another one in the form of an infringement procedure which has resulted in the present action before the EFTA Court. The legal and factual arguments presented against the reform, with reference to EEA law, has however been more or less the same in both processes, with the gambling companies and the Authority adopting more or less the same positions and presenting the same allegations and assertions.

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32. From the perspective of the Norwegian Government, the legal action taken before the national courts by the private gambling operators is understandable. These companies will in effect loose the existing basis for their business (even if they do not formally loose any licenses), and it is not surprising that they want to try this legally, even if the Government holds that the reform is clearly compatible with EEA law. They announced their intentions to take legal action well before the reform was finally adopted in the summer of 2003, and this was to be expected.

33. The position taken by the Authority in the case has however been more surprising to the Norwegian Government, both as regards the legal positions and the form and character of the infringement proceeding. In the EU the gambling sector is a very special sector, in which the Court of Justice has recognized that the Member States shall have special latitude, and in which the Community legislator has not tried to harmonize or liberalize national rules. The Commission has also been hesitant and careful.

34. In this perspective it is surprising that the Authority has chosen the gambling sector to launch what has been one of the most insistent and aggressive infringement proceedings against Norway so far, and by far the largest and most voluminous Application before the EFTA Court. And in the gambling sector it is even more surprising that the Authority has chosen to challenge the 2003 slot machine reform, which in the view of the Government is the most clearly legitimate gambling restriction of all, as it massively and manifestly aims directly at diminishing gambling opportunities and fighting serious gambling problems – two objectives which are clearly recognized as laudable. Furthermore, it does so by using a public exclusive rights system similar to the Finish arrangement for slot machines which was explicitly recognized by the ECJ as legitimate and suitable in the 1999 Läärä judgment.

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1 Cf. section 3.4 below for further details. The two parties before the national courts are (i) Norsk Lotteridrift AS, which is the single largest of the commercial operating companies, and (ii) NOAF, which is an association for companies in the slot machine business, to which some 50 of the 138 registered operating companies subscribe as members. NOAF was originally open only to commercial companies, but the statutes were altered in 2002 to allow for the non-profit license holding organisations to join, and a few of the minor organisations have since done so. None of the major license holders are members of NOAF, nor are they parties to the legal proceedings before the national courts. As far as the government is aware, none of them have lodged complaints with the Authority.

35. From a legal perspective the question is whether it is compatible with the requirements of EEA Articles 31 and 36 (on services and establishment) to apply the traditional Norwegian public exclusive rights system in the gambling sector to the operation of slot machines. It does not seem to be contested that the 2003 slot machine reform is a non-discriminatory measure, and indeed all the 138 private companies negatively affected by it are Norwegian, with the exception of one, which is owned by the Swiss bank UBS. There is in fact hardly any cross-border element to the case at all except potentially.

36. On the other hand it is not contested that the 2003 reform is a restriction. That is precisely the intention – to severely restrict, confine and limit slot machine gambling operations and opportunities.

37. On this basis, the question is whether the reform is compatible with the requirements of legitimate justification, suitability and proportionality of EEA law, as this is interpreted and applied by the ECJ and the EFTA court in general, and with particular regard to case law in the gambling sector. The EFTA Court has so far not had any gambling cases, but the ECJ has had several, five of which so far are the most important. These are C-275/92 Schindler, C-124/97 Läärä, C-67/98 Zenatti, C-6/01 Anomar and C-243/01 Gambelli.[2]

38. The basic legal disagreement between the Government and the Authority seems to be on the interpretation of the Gambelli judgement. Though it does not explicitly say so, the Authority in its Application applies Gambelli in a way which overturns the four previous judgments, and introduces far stricter tests of judicial review both on legitimacy, suitability and proportionality.

39. The short version of the Norwegian Government's legal position is that the Läärä judgment still applies. In Läärä the ECJ explicitly recognized that national exclusive rights arrangements for the operation of slot machines are compatible with Community law. Gambelli does not change this. And if that is so, then it is not possible to see how it can be incompatible with EEA law to apply the existing exclusive rights model of the Gaming Act to the operation of slot machines in Norway.

40. The longer version will be elaborated in the following, in section 7 on the general legal status of the gambling sector under Community and EEA law, in section 9 on the legitimate public objectives which national authorities may pursue in the gambling sector, in section 10 on how to interpret and assess suitability in these cases, and in section 11 on the judicial review of proportionality in the gambling sector, which the Government holds is limited.

41. There are varying degrees of legal disagreement between the parties on all these three major points. Whether this is important for the result is another matter. Before adopting the 2003 slot machine reform the Norwegian legislator made thorough evaluations both of its objectives, suitability and necessity. These evaluations still apply more than ever, and even if the Government sharply disagrees with the Authority on the degree and intensity to which they should be subject to judicial review, and on the exact criteria for such review, the slot machine reform is such as to satisfy all legal tests imaginable.

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[2] See section 7.2 below. There is also the 2003 Lindman case (C-42/02), which is of lesser interest, as it concerned an example of actual discrimination with regard to the national taxation of winnings from foreign gambling activities.

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42. On the factual side, the present action is voluminous. The Application lodged by the Authority is the largest so far in the history of the EFTA Court, and it is also extraordinary compared to the usual length and character of the Commission's applications before the ECJ. Also unusual is the fact that the Authority has enclosed several thousand pages of documents.

43. The Government has found it necessary to reply in the same line. Although it holds that the degree and intensity of judicial review prescribed under EEA law is less extensive and intense than asserted by the Authority, and the need for scrutiny of facts therefore less, the Government has nevertheless felt obliged to reply in full, both to be on the safe side and because many of the allegations of the Authority needs to be refuted.

44. Having said that, the Government respectfully submits that the EFTA Court should exercise a certain caution when it assesses and evaluates national law and fact. The mainly written procedure before the Court combined with geographical and linguistic distance makes it difficult to present the amount of fact potentially relevant in this case in a satisfactory manner. The Court may however find help in the earlier stages of the present case. During the proceedings before the Borgarting Court of Appeal in June 2005 three weeks of oral hearings were conducted, with a number of witnesses appearing, and with very substantial presentation of evidence. This is reflected in the August 2005 judgment of the Court of Appeal, which in enclosed in English translation as Annex 36 to the Application. The Government submits that the EFTA Court should take particular note of the factual assessments and evaluations of the Court of Appeal, and not overturn them unless sure that it has a better factual basis.

45. Needless to say, the Government also holds that the Court of Appeal was correct in its legal interpretation, and in its conclusion that the 2003 slot machine reform fulfills all requirements of legitimacy, suitability and proportionality of EEA law by a clear margin.

I. FACTS

3. THE NORWEGIAN GAMING AND LOTTERY SECTOR

3.1 The regulation of gaming and lotteries in Norway

46. The basic premise under Norwegian Law is that all forms of gaming are prohibited, except where permission to operate such activities is granted under the authority of a legal statute. According to §§ 298 and 299 of the Penal Code of 1902, it is a punishable offence to operate activities in the form of "games of chance" not sanctioned by special legislation. "Games of chance" include all types of betting and other types of gaming in which the element of winning is the key. This is a very old principle, and is based on a commitment to protect citizens from "the depravity induced by games of chance", as stated in early preparatory works.

47. There have long been statutory exceptions from the general prohibition. These are currently laid down in three legal acts, which on detailed terms allow certain operators to be granted permits. These are the 1927 Totalisator Act (horse race betting), the 1992 Gaming Act, and the 1995 Lottery Act. These three acts constitute a coherent and exhaustive regulation of all forms of lottery and gaming legally operated in Norway.[3]

48. Of the three, the Lottery Act of 1995 is in principle the general act, comprising all forms of lottery and gaming. This follows from the wide definition of "lotteries" given in § 1 (a) of the Act as all "activity in which participants may for a stake acquire a prize as a result of a draw, guesswork or other procedure which wholly or in part produces a random outcome". In practice, however, it is the two other statutes which have traditionally been by far the most important, regulating all major forms of gaming through exclusive rights arrangements. The system developed under the Totalisator Act in effect gives the Norsk Rikstoto Foundation an exclusive right to arrange horse-race betting, under the auspices of the Ministry of Agriculture. And the Gaming Act establishes the state gaming company, Norsk Tipping AS, granting it exclusive rights to other sports-based betting and certain number games (Lotto), under the ownership and control of the Ministry of Culture and Church Affairs.

49. The contested 2003 reform transferred slot machines from the Lottery Act to the Gaming Act, and these two statutes are therefore directly affected by the Authority's application. However, the Totalisator Act is also an integral part of the same system. A brief exposition of all three is therefore necessary.[4]

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[3] The three acts are enclosed, as **Annex 63** (the 1927 Totalisator Act), **Annex 64** (the 1992 Gaming Act), and **Annex 65** (the 1995 Lottery Act). The Gaming Act and the Lottery Act are enclosed in two versions, before and after the 2003 amendment, and with English translations. The 2003 Act of Amendment as such is enclosed as Annex 13 to the Authority's Application, but an English version is enclosed here as **Annex 61**. This annex is the actual subject of the case, in particular the changes to §§ 10 and 15 of the Lottery Act and of § 1 to the Gaming Act.

[4] Cf. the overview given in the Authority's application pp 6-7.

On the Lottery Act of 1995

50. The Lottery Act of 3 February 1995 replaces an earlier act of 1939, which in turn replaced the Lottery Act of 1895, which in turn replaced the Act on Lotteries and other Games of Chance of 14 June 1851. The fundamental principles behind the legislation have essentially been the same throughout this period.

51. Up until the late 1990s, the Lottery Act applied in practice only to a limited segment of the lottery and gaming market – mainly bingo, scratch cards, and the small and medium size lottery schemes allowed for charitable and socially beneficial purposes. It is only following the explosive and unpredicted increase in slot machine gambling in recent years that the Lottery Act has been applicable to gaming of any substantial volume.

52. The definition of a "lottery" under § 1 of the Act is broad, comprising all activity in which participants may for a stake acquire a prize as a result of a draw, guesswork or other procedure which wholly or in part produces a random outcome. This ensures that all possible forms of gambling fall within the regulatory framework. Following an amendment in 2003 a new § 1a now states that the object of the act is to ensure that lotteries are conducted in defensible formats under public supervision, and with a view to preventing negative social consequences of lotteries, while ensuring that lotteries may provide a good source of revenue for humanitarian and socially beneficial causes.

53. Under § 5 of the Lottery Act, lotteries may be held only for the benefit of humanitarian or socially beneficial causes. According to § 6 it is prohibited to hold a lottery without a permit, and such permits may be granted only to organisations and associations with a humanitarian or socially beneficial aim. Certain exceptions are provided for according to § 7, but they are very limited in scope.

54. In other words, the system embodied by the Lottery Act means that commercial operators cannot obtain a permit to operate lotteries or betting of any description. Such permits can be granted only to non-profit organisations or associations. However, as most such organisations are small, idealistic and of a non-professional nature, the Act permits them to employ private commercial companies to operate their games for them, against a price or a fixed percentage of revenues. Under § 4c of the Act such operators must be authorised by the Gaming and Foundation Authority. Many of these are the traditional small "bingo operators", which have in the time span of a decade evolved into a large and hugely profitable private gaming machine operation industry.

55. Under § 11 of the Act there is a general prohibition against engaging in the marketing of or promotion of lotteries for which no permit has been granted pursuant to § 6.

56. The principal administrative body pursuant to the Act is the Norwegian Gaming and Foundation Authority, created under the authority of § 4, which grants the necessary permits, and has a supervisory function. Pursuant to the Lottery Act, the Ministry has issued a comprehensive set of regulations.

57. The fundamental principles embodied by the Lottery Act are currently being challenged before the courts by Ladbrokes Inc, a large UK-based bookmaker and gambling company, who claims that the provision that permits may be granted solely to

humanitarian and socially beneficial organisations is in contravention of Articles 31 and 36 of the EEA Agreement, and that the marketing prohibition in § 11 is also in breach of EEA law. The case is commented on below in section 5.4.

58. The case brought by the Authority does not in the same way attack the fundamental principles of the Lottery Act. The issue in the present case is rather whether EEA law really requires that slot machines *remain* regulated by the Lottery Act, under what is in effect a regulated competitive market, partly run by commercial interest, even after the gambling on such machines have developed into a major social policy problem, which according to the responsible authorities, the Government and a broad majority in Parliament should be regulated under the stricter regime of the Gaming Act.

On the Gaming Act of 1992

59. The Gaming Act of 28 August 1992 replaces an earlier act of 1946 on football betting, which established Norsk Tipping, and the Act of 1985 on the Lotto number game.

60. Under § 1, the Gaming Act comprises all gaming in connection with sports fixture competitions and other competitions (except horse-race betting), the number game Lotto, and any other cash games which the King decides the Act shall apply to. The 2003 amendment to the Act also entailed that gaming machines were incorporated in the Act. The amendment is formally in force, but the Government has awaited the judicial proceedings, and now the proceedings before the EFTA Court, before it is implemented.

61. The Gaming Act serves as an exclusive-rights statute, which invests authority in the State gaming enterprise, Norsk Tipping AS, granting it the exclusive right to operate the gaming activities set out in § 1. This appears from § 2, which prohibits the promotion of number games and cash games in connection with competitions unless sanctioned by law. Further, according to the last paragraph of § 2, it is prohibited to promote or market foreign cash games of the type comprised by the Act.

62. The state-owned limited company (Norsk Tipping AS) is established by the Gaming Act, with its own corporate form, distinct from that of other state-owned companies, and adapted to the special requirements of the gaming sector. The rules are prescribed by the Gaming Act, and by regulations and instructions issued by the Ministry. This regulatory framework, in combination with the direct ownership, ensures that the Ministry is in a position to effectively monitor and control the company, both formally and to some extent informally, and to use it as a policy instrument in the field of gaming. Following the creation of the Norwegian Gaming Authority in 2000, the gaming operations of Norsk Tipping have also been subject to control by this body.

63. According to instructions and company statutes Norsk Tipping is required to act as a professional business company within the legal and policy framework established by the authorities, but at the same time with a special social responsibility, following from its particular status. The company is non-profit in the sense that the revenues generated by the gaming operations are channelled directly to socially beneficial causes, i.e. sports and culture, according to a fixed distribution scale ("tippenøkkelen"). Within this fixed scale, the revenues ear-marked for sports objectives are distributed by the Ministry,

while the revenues allocated to culture are distributed partly by the Ministry and partly by Parliament. The revenues are distributed to activities for which the authorities have not acknowledged economic responsibility, and although the arrangement has a certain public flavour, it is neither formally nor in reality a part of the state budgetary system.

64. Following a 2003 amendment, a certain percentage of the revenue generated by Norsk Tipping is set aside to research and combat problem gambling. When the slot machine reform comes into effect, the humanitarian and socially beneficial causes which today hold machine permits under the Lottery Act will instead be given a fixed share (18 %) of the distribution scale, as a "third cause" following sports and culture.

65. The way in which Norsk Tipping functions as a public exclusive rights enterprise will be described below (section 3.8).

66. The Gaming Act is currently being challenged outright before the courts by Ladbrokes Inc, who claims that the exclusive-rights system is in breach of EEA law, and demands to be given the right to operate the same games as do Norsk Tipping (see section 5.4). But in effect, the application of the Authority necessarily has to build on the same legal and factual premises. What the Authority really claims, is that the Gaming Act is too restrictive to be allowed to regulate gaming machines. Given that the machines are by far the most addictive and problematic form of gambling operated in Norway today, it is difficult to see how any other exclusive rights under the Act can then logically and legally be maintained.

67. Thus, the application of the Authority in effect rests on the premise that the Gaming Act in its entirety is in conflict with EEA law. The position of the Government is that the Act itself is well within the legal requirements set by Community and EEA law in the field of gambling, and that the inclusion of gaming machines under the Act is a particularly rational and coherent legislative measure.

On the Totalisator Act of 1927

68. The Totalisator Act is the oldest of the gaming acts presently in force, dating back to 1927, when the legislator for the first time allowed for horse race betting, although only under a system with floating odds (calculated by a "totalisator" machine). The aim of the legislator was to allow for a limited and restricted amount of horse race betting, within a socially responsible and controllable framework, to avoid crime and fraud, and at the same time to create an economic system for the equine sector, under which the revenues from the operation of gaming are ploughed directly back into horse breeding, rearing and races.

69. Under § 1 of the Act licences to arrange betting on horse races can only be given to organisations or companies whose objective is to support the breeding and rearing of horses ("å støtte hesteavlen"). This is interpreted as to mean that the licensee has to be a non-profit entity, which does not operate for private profit or commercial reasons, but solely for the development and maintenance of the equine sector. In principle several licences may be issued, and this was the earlier system, when each racetrack operated as a separate entity. In 1982, however, Det Norske Travselskap (Norwegian Trotting Association) and Norsk Jockeyklubb (Norwegian Jockey Club) established an

independent non-profit foundation called Norsk Rikstoto. This foundation gradually became more important, and in 1996 amendments were made to the Act which, among other things, entailed that it was given overall responsibility for totalisator betting. Since then only one license has been issued under the Act, to the Norsk Rikstoto Foundation.

70. The system of the Totalisator Act is similar to that of the Gaming Act in that it regulates what is in effect a restrictive exclusive-right system, operated by a non-commercial agent for idealistic purposes. One difference is that the revenues from Norsk Tipping are channelled to socially beneficial purposes with no direct link to gaming, while the revenue from horse race betting goes back into the equine sector itself.[5] Another difference is that Norsk Tipping is a state-owned company, while Norsk Rikstoto is an independent foundation, originally established by the trotting and jockey associations. The foundation is subject to instruction and control by the Ministry of Agriculture in several respects, and also (after 2000) to control by the Gaming Authority, but it is true to say that so far it has operated somewhat more independently than Norsk Tipping.

71. The Totalisator Act is currently being challenged in the lawsuit launc90hed by Ladbrokes Inc, who claims that the act is in breach of EEA law, and that it must be allowed to operate horse race betting for commercial purposes, even if it is not an organisation devoted to the breeding and rearing of horses. Once again, the main legal arguments are essentially the same as in the actions brought against the slot machine reform by the private operators and by the Authority.

3.2 Main principles and instruments in the Norwegian gaming and lottery sector

72. The fundamental principles of Norwegian gaming and lottery legislation and policy are very old. This is a domain unlike any other, subject to strict and particular restrictions, based on historical, social, moral, cultural and religious considerations. Gaming has historically been very restricted, and only allowed as a "tolerated evil". In modern times the restrictions have been eased somewhat and the main religious and moral arguments have to some extent been replaced more by social policy concerns – though the former elements are still important to many. The main concern today, however, is to keep gaming within a moderate and responsible framework, in order to protect the public against problem gambling and to protect society against the sort of gambling problems experienced in many other countries, including crime and other threats to public order.

73. Based on such considerations, the basic legal premise is still a general ban on all sorts of gaming and lottery – unless explicitly allowed and individually licensed under statutory law. Such licenses can never be granted, and have never been granted, to private commercial interests. Neither can gaming be conducted for state financial purposes. The only causes for which gaming and lotteries can be allowed are for charitable and socially beneficial purposes for which the authorities have not taken direct public economic responsibility. Thus, licenses can be given under the Lottery Act directly to charitable and socially beneficial organisations, associations and societies, and in the equine sector to those engaged in the breeding and rearing of horses. Or they

[5] There is a small state tax payable under the Act, amounting to some 3,5 % of revenue.

can be given under the Gaming Act to the state-owned company Norsk Tipping, which distributes its revenues directly to cultural and athletic activities.

74. In this way gaming and lottery has always been regarded and regulated as far as possible as a non-commercial sector. As earlier explained the argument against private profit is both structural and moral. Structurally the absence of private profit minimizes market incentives, and serves as an inherent limitation. Morally the system ensures that citizens may not profit from the misfortune of others, and also that the revenues are reserved for beneficial common causes, thus preserving a moral balance in society.

75. The fundamental premises on which the gaming legislation is based are so long-standing and self-evident that one has to go back very far in order to seek the original legislative intent behind the prohibitions and restrictions. One such source is a royal decree from 1753 in which the King of Denmark and Norway prohibited "all Kinds of so-called Games of Hazard". The royal reason given was that gambling had recently become a major problem in the realm, and that a prohibition was necessary "out of particular Concern for the Subjects, and in Order to remove from the Weak amongst them the Opportunity to waste what they have earned".[6] This decree was kept in force after the Norwegian independence of 1814, and not revoked until the Lottery Act of 1851, which reiterated the general prohibition with only a few exemptions.

76. The strict 1851 Act remained unchanged for almost 100 years with the exception of a tightening of the legislation which was carried out on in 1895 with the aim of preventing foreign lotteries from operating in the country. In 1879 the Storting (parliament) unanimously passed a motion that the government should prepare a bill concerning the establishment of a state lottery. In 1889 parliament rejected a proposal to allow private companies to establish and operate a Norwegian money lottery.

77. As certain restricted forms of lottery were gradually introduced during the early 20th century this was always confined, and the revenues exclusively channelled to idealistic causes, such as the protection of orphans and the fight against tuberculosis.

78. The same basic principles were applied when Totalisator Act was passed in 1927 in order to introduce a strict and responsible legislative framework for horse race betting, when a new Lottery Act was adopted in 1939, and when the Sports Betting Act was passed in 1946 to achieve the same for other kinds of sports betting (mainly football), through the company Norsk Tipping.

79. With increased prosperity after the second world war, gaming and lotteries have gradually developed, but always within a legislative framework which guaranteed social responsibility and prudence, as for example when the national lottery (Pengelotteriet) in 1985 was modernized into the number game Lotto, which became a harmless national pastime, with a large number of players, but without any socially harmful consequences. Up until the 1990s Norway had no experience neither with problem gambling of any significance, or with any other kind of large-scale gambling problems, like crime. The preventive effect of the legislation worked well, and for this reason the authorities had no cause to change the system or express the basics on which it was founded.

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[6] Cf. **Annex 66**.

80. Thus, the first occasion in modern times upon which these principles were actually formulated by the authorities were in 1991, when the Brundtland government presented a consolidated review of the lottery and gaming sector to the Storting, in the Revised National Budget for 1991, stating the following objectives:

> Right from the Act concerning lotteries and other games of chance of 14 June 1851, and subsequent acts on gaming, including the Lottery Act of 12 May 1939, moral considerations have been a guiding principle in the legislation of gambling and lotteries. There has been broad political consensus that access to gambling be positively regulated, i.e. that that which is not expressly permitted is prohibited. At the same time, political authorities down the years have recognised that a certain interest in gambling prevails in society. Channelling that interest through a public corporation has been regarded as the most appropriate means of organising gambling, because this is done using satisfactory mechanisms, under full State supervision and with transparent operating conditions within adopted legislation.

81. Norway's ratification of the EEA Agreement in the spring of 1992 (effective in 1994) prompted no changes to Norwegian gaming legislation and policy. During the EEA negotiations this was not regarded by any of the parties as an issue, and it was taken for granted that the system was in compliance with the basic four freedoms of EC/EEA law.

82. Neither the new Lottery Act of 1995 nor other minor amendments to the regulations in the 1990s were regarded as meriting any new overall revision of the gaming sector as a whole, and not until the unintended boom in slot machine gambling did the need for a new, consolidated review become apparent. However, when the time came, this was done thoroughly, and in March 2003 in the Bill to the Odelsting no. 44 (2002-2003), the Ministry of Culture and Church Affairs presented not only the new slot machine reform, but also gave a full account of the fundamental principles, system and challenges in the lottery and gaming sector.

83. The basic premises are described in section 3.1 of the Bill, which states, inter alia, that:

> Games for money are prohibited under Norwegian law. This prohibition against gambling has been a principle of Norwegian legislation for several hundred years, and is based on the desire to protect its citizens from "the depravity of games of chance". However, limited licensing has been allowed, partly based on the reasoning that it is impossible to prevent gambling, and partly to raise money for socially beneficial causes.[7]

84. In section 3.1.2 the Ministry goes on to explain the "Applicable main principles in gaming and lottery policy". This includes citations of previous statements from 1991 and their endorsement, and goes on to state that:

> The lottery and money game field in Norway is a market with limited competition. As far back as the establishment of the state Lottery in 1912, state-controlled money games have been the authorities' most important tool in shaping its lottery and money game policy. The positive demarcation of licensed money games comes from the desire for a defensible money

[7] Cf. **Annex 9** to the Authority's Application, where Ot.prp. 44 (2002-2002) is presented in full, with an English translation enclosed. The Government holds that this is the single most important documentary evidence in the case, which has to be read in its entirety in order not only to understand the slot machine reform (chapter 4), but also in order to gain an understanding of the coherency and consistency of the Norwegian gaming and lottery legislation as a whole. Chapter 3 on "Combined review of money games and lotteries in Norway" is especially important in this regard.

> game policy, and creates a market with highly stipulated competition.[8] This particular consideration is also reflected in the reason for money games being exempt from the principles of free competition within the EU/EEA area.
>
> Even though the private lotteries are generally regulated through legislation and regulations, in recent years the emergence of commercial enterprises and the increased competition between the various organisations' lotteries has made it more difficult to operate direct political control of market development. The tug-of-war concerning the shaping and interpretation of the terms for lotteries that has been held with regard to prize machines illustrates that Acts and regulations do not always ensure political control of the development of money games. Together with the increased availability of electronic money games across national boundaries this entails that national and political control of the development of available money games must be seen as weakened despite an increased control focus from the Norwegian Gaming Board.
>
> Against this background it will be a huge political challenge to ensure the maintenance of a defensible and controlled development of Norwegian money games in response to the aggressive development of an increasingly market and technology based control of the availability of money games.

85. In order to get a full understanding of the main principles and objectives of Norwegian gaming and lottery legislation and policy, it is necessary to analyse the historical background, the tradition, the actual policy, and the preparatory works to previous as well as current legislation. Based on such an analysis, the Government holds that these objectives can be summarized as follows:

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

86. These are the *general* objectives of Norwegian gaming and lottery legislation and policy, which have always applied, but which were also reiterated and reemphasized in the 2003 Bill, meeting with broad parliamentary approval, and which have since then been applied consistently by the competent authorities on a general level, as compared to their somewhat less coherent application during a period in the 1990s. Furthermore these are also by and large the same legislative objectives upon which the 2003 slot machine reform is *specifically* based, as will be elaborated below.

87. Based on these objectives the Norwegian legislator has sought to achieve a high national level of protection against the problems and challenges connected to gambling. On the whole, Norwegian gaming and lottery legislation (discounting the present regulation of slot machines) is among the most restrictive in Europe. It is in many respects most similar to that of the other Nordic countries, and to some extent one may talk of a "Nordic model", though there are differences – one of these being that Norway and Iceland are the only two Nordic countries not to allow casinos. And at the same time, the Nordic approach is not really that unique, but rather shares important characteristics with similar legislation and policy in most of continental Europe.

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[8] This is cited from the Authority's translation in **Annex 9**, in which the expression "highly stipulated competition" is inaccurate. The original Norwegian wording is "… et marked med sterkt betinget konkurranse". The correct translation would be "a market with highly *restricted* (or "conditional") competition".

88. One such similarity is the use of publicly controlled exclusive rights arrangements, which are common in the whole of the European gaming and lottery sector, and which forms the single most important instrument for maintaining a moderate and responsible Norwegian policy in this field. As described in previous sections all the traditionally largest and most important gaming activities are subject to the exclusive rights systems operated either by Norsk Tipping or the Norsk Rikstoto Foundation. Only smaller and less important forms of gaming and lottery are regulated by the Lottery Act, under which licenses are given to humanitarian and socially beneficial non-profit organisations. The only exception is the slot machines. And when these machines were first regulated, in 1995, they still constituted a small and moderate form of gaming. It is only with the unforeseen explosion in slot machine gambling since the mid 1990s that a major (and very problematic) form of gaming for some years were allowed to be operated under the less strict regime of the Lottery Act. The aim of the parliamentary 2003 reform is to reverse and repair this inconsistency in the overall legislation and policy.

89. The strength of the exclusive rights model rests on several factors. First, it is by far the most appropriate way to ensure a restrictive and publicly responsible framework for the operation of gaming. Such a system provides the competent authorities with the means to conduct close and continuous control with gaming activities which are simply not attainable in a market with a large number of license holders and operators. Second, an exclusive rights system in itself inherently serves to limit the volume of gaming, as compared to a market based competitive system. Third, such a system, especially if publicly owned, is the only way in which to avoid the market incentives created by private profit, to ensure that the operation of gambling does not become a source of private wealth, and to ensure that the revenues are channelled to charitable and socially beneficial causes. Thus, this is not only by the most efficient way in which to achieve the legitimate legislative objectives, but in some respects the only way and also clearly the morally most consistent.

90. The inherent limitations of an exclusive rights system can be explained using basic economic monopoly theory, according to which a monopoly will always tend to produce less turnover than a competitive market. First, the monopoly holder will have less of an incentive to develop and market new and more attractive products and services. Second, the monopolist will be able to demand higher prices, and thereby obtain greater profit from less turnover. Translated into gaming policy this means that Norsk Tipping can operate with less attractive (and addictive) games, and a lower payout rate in winnings than what is possible for a private operator within a market based regime. This inherently serves to limit both the volume of gaming and the addictiveness of the games offered.

91. In normal sectors of the economy monopolies are ill-regarded and preferably avoided because of these characteristics. In the gaming and lottery sector, where the aim is to control and restrict gambling, it is precisely the same inherent characteristics which make monopolies *the most appropriate* policy instrument. This was well put in a recent newspaper article by a leading professor of socio-economics, Steinar Strøm:

> As an economist I hold increased competition in high esteem. Limited competition may lead to too limited production of certain goods and services and at a higher price than what would

otherwise have been possible. But competition may become a fixed idea, so called competition mania. Competition is not necessarily the best solution in all markets. The gambling market is an example.[9]

92. This section has been devoted to describing the main principles and objectives of the Norwegian gaming and policy legislation, and the legal instruments used to achieve these objectives. The theory has so far been that the traditional exclusive rights system will result in moderate and responsible gaming, while a competitive market system with numerous license holders and operators may, under certain circumstances, easily lead to excessive and irresponsible gambling. As will be demonstrated, this is exactly what has characterized the Norwegian gaming sector in recent years.

3.3 The Norwegian gaming market[10]

Market figures for 2004 and 2005 – gross and net turnover

93. The Norwegian gaming market had a total gross turnover in 2004 of 40,8 billion NOK (4,9 billion Euro), of which 26 billion NOK (64 %) came from slot machines. Norsk Tipping had a gross turnover of 8,8 billion (22 %), while Norsk Rikstoto's turnover was 2,6 billion (6 %). The remaining 8 % of the gross market derived from other games offered under the Lottery Act.[11] The key figures (in NOK and EUR) are:

Key figures on the gaming market in Norway

	Million	
Year 2004	NOK	EUR[48]
Gross turnover (total wagered)[49]	40,827	4,877
Prizes	29,316	3,502
Net turnover (expenditure/loss)	11,511	1,375

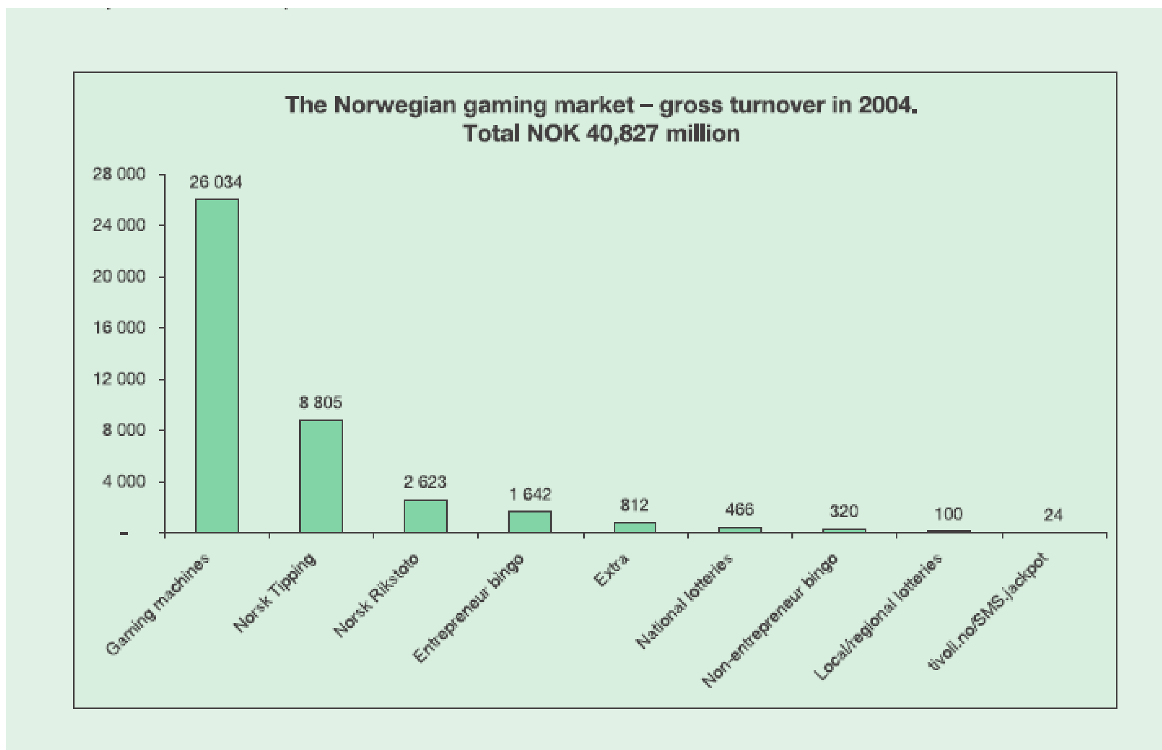
	Amount wagered		Expenditure	
Year 2004	NOK	EUR	NOK	EUR
Per capita[50]	8,891	1,062	2,507	299
Per capita, 15 years and older	11,088	1,325	3,126	373
Per household[51]	20,449	2,443	5,766	689
Percentage of disposable income[52]	4.98%		1.40%	

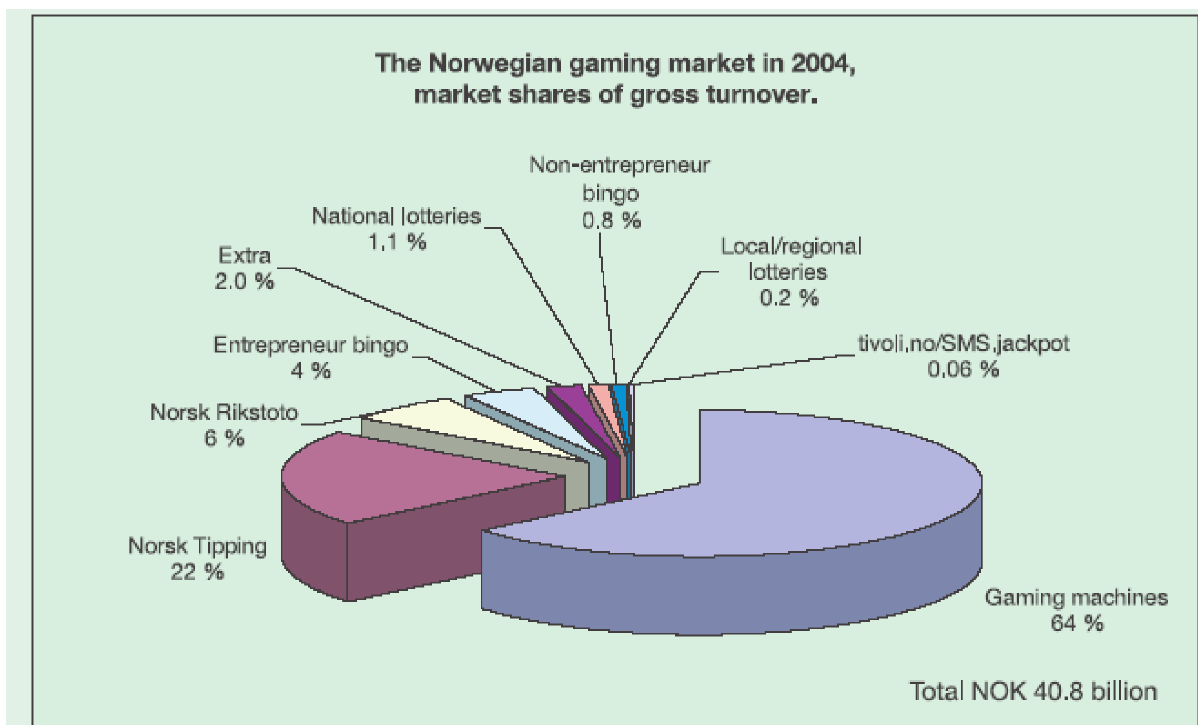
94. This breaks down on the different forms of gaming and lotteries as follows:

[9] Our translation. The original text is enclosed as **Annex 74**.

[10] The Gaming Authority produces statistics of the lottery and gaming market, which are published in annual reports. These are enclosed as annexes to the application of the Authority – cf. **Annex 37**.

[11] These are the figures published by the Gaming Board. They do not include gambling by Norwegians on Internet from abroad, which in 2004 was estimated by the Gaming Board to have a gross turnover in 2004 of 2,4 billion NOK.





95. The "gross turnover" is the total amount wagered, before prize money is deducted. The "net turnover" is the amount generated after prizes are paid out (the players' loss). The net turnover of the Norwegian gaming market in 2004 was 11,5 billion NOK, of which 4,9 billion (43 %) came from slot machines.[12] Norsk Tipping had a net turnover of 4,2

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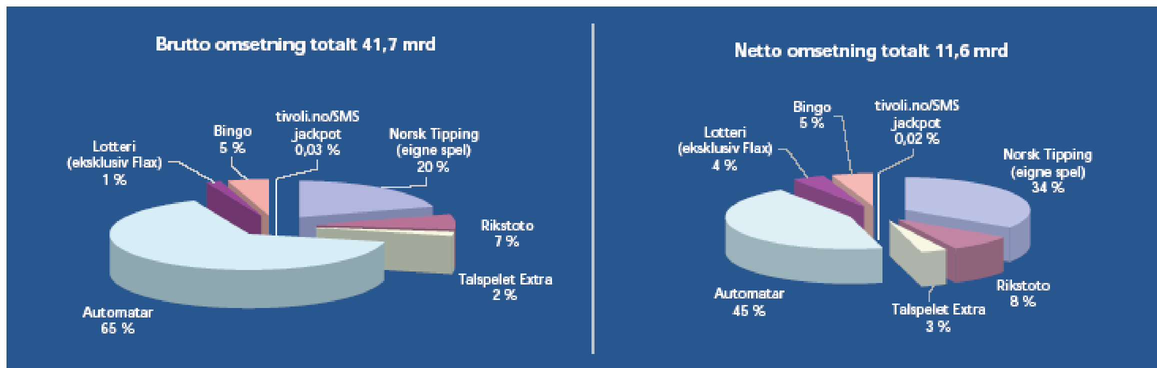
[12] The difference between the gross and net percentage is due to the fact that the various gaming activities have different payout rates. The payout rate on slot machines is set at a minimum of 78 %, while Norsk Tipping has a rate of 52 % and Norsk Rikstoto 66 %.

billion (36 %) and Norsk Rikstoto a net turnover of 0,9 billion (8 %). The remaining 13 % of the net turnover derived from other games offered under the Lottery Act.

96. Early statistics for 2005 show that the market increased slightly last year, with a total gross turnover of 41,7 billion NOK (up 2 %), and a total net turnover of 11,6 % (up 1 %). The increase is due to a rise in turnover on slot machines of 3-5 % and Rikstoto of 6 %. Other gaming activities suffered a decline – in the case of Norsk Tipping down net 5 %. The following table is based on the 2005 figures, gross and net:



97. The most recent changes from 2004 to 2005 are as shown:

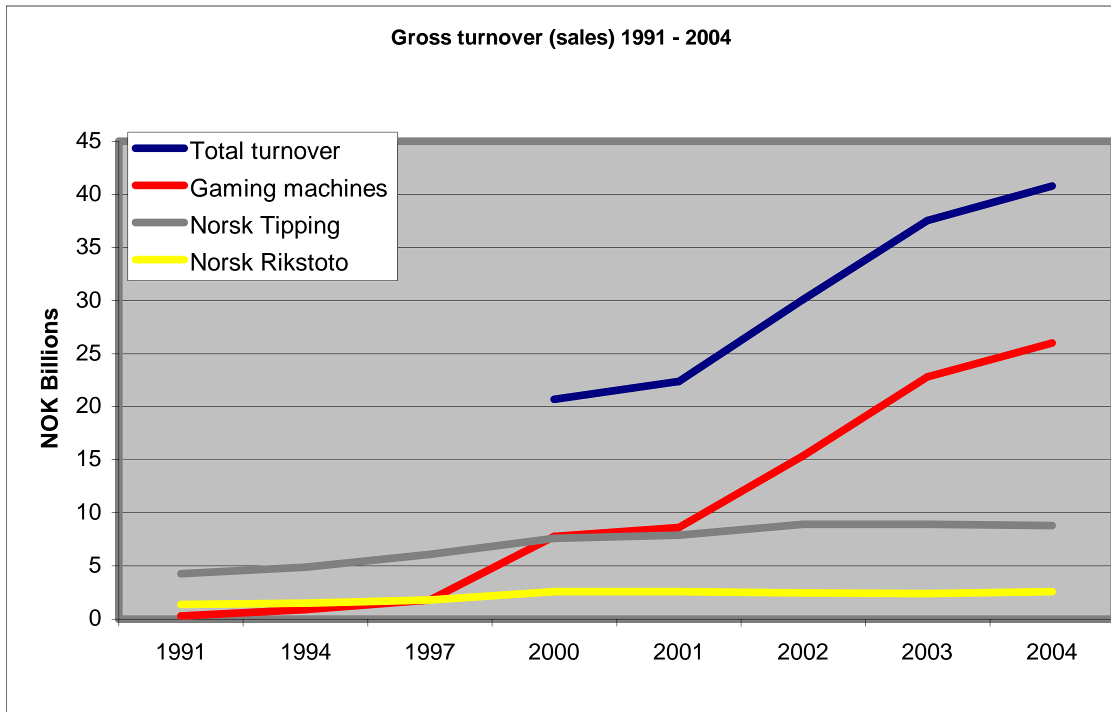
	2004		2005		Endring	
	Brutto oms.	Netto oms.	Brutto oms.	Netto oms.	Brutto oms.	Netto oms.
Norsk Tipping (eigne spel)	8 805	4 200	8 433	3 989	- 4 %	- 5 %
Rikstoto	2 623	902	2 781	959	6 %	6 %
Talspelet Extra	812	406	771	385	- 5 %	- 5 %
Automatar *	26 034	4 961	27 100	5 200	3-5 %	3-5 %
tivoli.no/SMS jackpot	24	4	14	2	- 44 %	- 52 %
Lotteri (eksklusiv Flax) *	566	481	600	500	stabilt / liten auke	
Bingo *	1 962	558	2 000	600	stabilt	
Totalt *	40 827	11 511	41 700	11 600	2 %	1 %

98. The figures show that the market for gaming legally offered under Norwegian law was leveling out in 2005, with a slight increase for gaming machines and Rikstoto, and a certain decrease for Norsk Tipping.[13] This is in contrast to the intense growth of the market in recent years.

Market developments in recent years

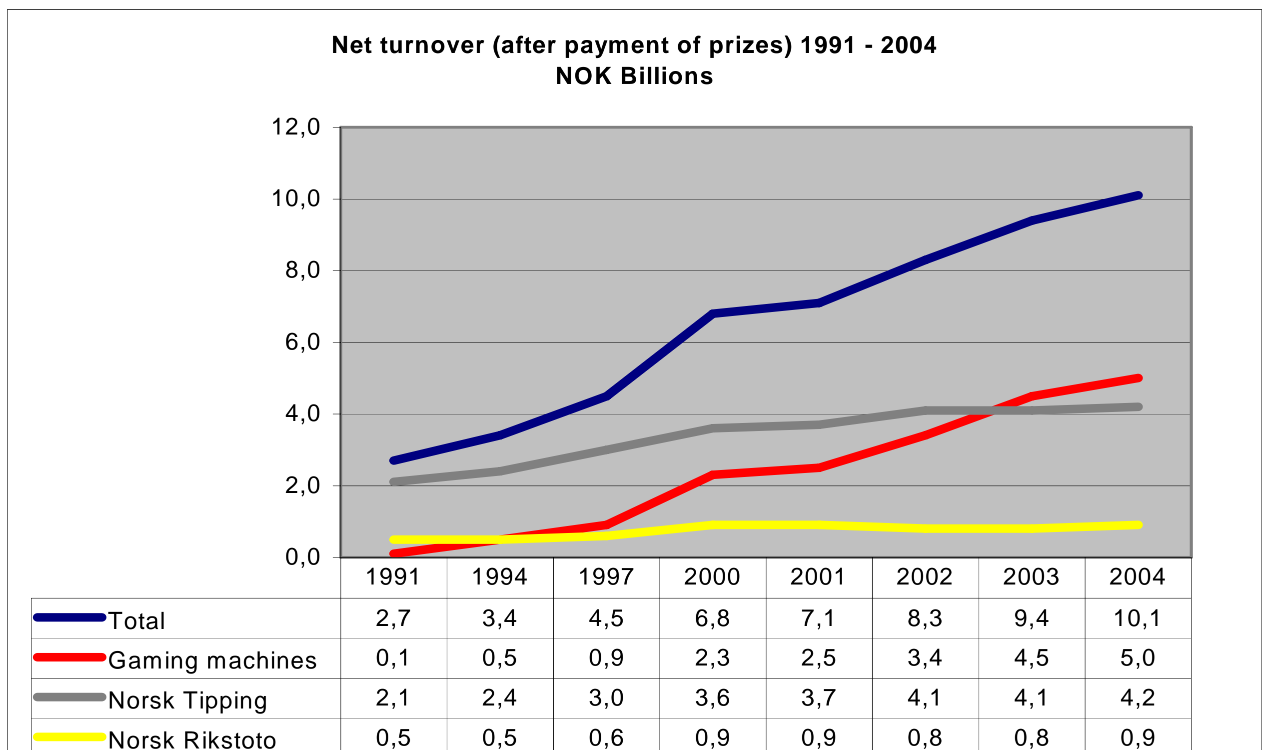
99. The trends in the gaming market from the early 1990s to year-end 2003 are illustrated in the following table from the Gaming Authority (2004), which shows the turnover of Norsk Tipping, the Norsk Rikstoto Foundation, slot machines, as well as the total market:

13 Growth in 2005 was however dramatic on Internet gambling from abroad, which is estimated by the Gaming Board to have doubled from 2,4 billion NOK in 2004 to 4,7 billion in 2005. Other estimates indicate an even higher turnover.



100. This table is interesting not only because of the figures it illustrates, the developments in the market, and the proportions between the different forms of gambling and lotteries. It is also of interest as a time-line when describing the processes which led up to the 2003 Slot Machine Reform (section 4.2 and 4.3). Indeed, it is a key to the understanding of the whole case. The rise of the red line (slot machines) also corresponds roughly to the rise of gambling addictiveness as a social problem in Norway (section 3.4).

101. The previous table showed gross turnover, which is the way the Gaming Authority usually present the market. The Ministry has asked the Gaming Authority to produce a similar table for net turnover (gamblers' loss). The time line at the bottom of this table is somewhat shortened, but otherwise similar:



	1991	1994	1997	2000	2001	2002	2003	2004
Total	2,7	3,4	4,5	6,8	7,1	8,3	9,4	10,1
Gaming machines	0,1	0,5	0,9	2,3	2,5	3,4	4,5	5,0
Norsk Tipping	2,1	2,4	3,0	3,6	3,7	4,1	4,1	4,2
Norsk Rikstoto	0,5	0,5	0,6	0,9	0,9	0,8	0,8	0,9

102. The figures for the period 2000-2005 are as follows, in billion NOK:

The total market

	2000	2001	2002	2003	2004	2005
Gross	20,7	22,4	30,1	37,5	40,8	41,7
Net	8,1	8,5	9,6	10,9	11,5	11,6

Norsk Tipping[14]

	2000	2001	2002	2003	2004	2005
Gross	7,6	7,8	8,9	8,9	8,8	8,4
Net	3,6	3,7	4,0	4,1	4,2	4,0

Norsk Rikstoto

	2000	2001	2002	2003	2004	2005
Gross	2,6	2,6	2,5	2,4	2,6	2,8
Net	0,9	0,9	0,8	0,8	0,9	1,0

Slot machines

	2000	2001	2002	2003	2004	2005
Gross	7,8	8,6	15,4	22,8	26,0	27,1
Net	2,3	2,5	3,4	4,5	5,0	5,2

103. Going back further in time, comparing 1990 to 2005, gives the following figures:

Gross annual turnover	**1990**	**2005**
Norsk Tipping	5,2 billion	8,4 billion
Norsk Rikstoto	1,4 billion	2,8 billion
Slot machines	0,2 billion	27,1 billion
Total	8,4 billion	41,7 billion

The total market

104. The figures and tables show that there has been a tremendous growth in the Norwegian gaming market in recent years. This growth, however, is mainly attributable to one form of gaming activity – the slot machines. Since the early 1990s the machines have gone from being an insignificant form of gaming to become by far the largest single game, with a 65 % share of the total gross market (net 45 %).

105. For the traditional market, excluding the slot machines, developments have been rather different. This part of the market has had an average annual growth in turnover since 1990 of roughly 5 % a year. Compared to the growth in national income this is

[14] These are the figures for Norsk Tipping's own games (Lotto, football betting, scratch cards). In addition, the company operates the number game Extra on behalf of a charitable health organization. The gross turnover from Extra (in NOK millions) was 715 in 2000, 746 in 2001, 794 in 2002, 822 in 2003, 812 in 2004, and 771 in 2005.

moderate, especially considering that gaming for most people is a surplus activity, which may be expected to increase more than proportionately as prosperity rises.

106. Comparing changes in the purchasing power of the population in 2001-2003 with the increase in gross turnover for Norsk Tipping (including Extra) and the gaming machines produces the following table:

	2001	**2002**	**2003**	**Growth**
Norsk Tipping	8.6 billion	9.7 billion	9.7 billion	13 %
Gaming machines	8.5 billion	15 billion	22 billion	260 %
Purchasing power	667 billion	726 billion	780 billion	17 %

107. This period (2001-2003) is of particular interest to the case, since these are the years in which the slot machine reform was conceived, prepared and decided (see section 4).

108. The figures for the total market do not include gambling by Norwegians on Internet games offered on foreign websites, outside of the national jurisdiction. This has increased rapidly in the last few years, with an estimated rise in gross turnover from NOK 2,4 billion in 2004 to 4,7 billion in 2005.

The traditional main operators – Norsk Tipping and Norsk Rikstoto

109. The traditional main operators in the Norwegian gaming and lottery market are Norsk Tipping and (to a lesser extent) the Norsk Rikstoto Foundation. Both of them have had a certain increase in turnover in recent years, but this has been moderate compared to the growth in national income, and negligible as compared to the exponential growth in slot machine gambling (and recently Internet gambling).

110. Market developments for Norsk Tipping and Norsk Rikstoto since 1990 do not show a steady increase. Both operators had a period of growth in the late 1990s. Since then, Norsk Rikstoto's turnover has been rather stable, with a small decrease in 2002-2003, and a small increase in 2004-2005. Norsk Tipping reached a peak in 2002, with zero growth in 2003 and negative growth in 2004 and 2005.

111. In terms of market shares, both Norsk Rikstoto and Norsk Tipping have lost hugely in recent years, as a consequence of the increase in slot machine gambling. The slot machines overtook Norsk Rikstoto in turnover (gross and net) in 1995-96, and Norsk Tipping in 2000 (gross) and 2003 (net). Today Norsk Tipping only holds about 20 % of the gross market, corresponding to 33 % of the net market. One consequence is that it is much more difficult than before for the competent authorities (the Ministry) to use the company as a policy instrument to steer and adjust developments the gaming and lottery sector. The result is that political and administrative influence and responsibility in this sector has declined.

112. The Norwegian government will argue that the figures for the traditional gaming and lottery sector (excluding slot machines) in Norway in the last decade demonstrate:

- That a public monopoly system in itself inherently serves to limit and moderate the volume of gambling in society, as compared to a market regime, however regulated.

- That the public monopoly actually operated by the Norwegian government, i.e. Norsk Tipping, has served as a pillar of responsibility during a period in which private commercial gambling operators (at home and abroad) have run wild, causing great and grave damage to society.

- That the gaming and lotteries operated under public exclusive right systems in Norway over time always have had moderate growth, and that in recent years their turnover has declined when compared to economic growth in the same period, and for Norsk Tipping even in nominal terms.

- The ability of the competent national authorities to pursue a gaming policy under an exclusive rights system aimed at moderation and genuine diminution of gambling opportunities.

- That the development and marketing of games by Norsk Tipping and Norsk Rikstoto in recent years have not led to any substantial increase in turnover, but rather barely been sufficient to allow these operators to maintain a certain level – while large market shares have gone to private gambling operators offering far more aggressive and addictive games.

3.4 The slot machine market

On the economics of the slot machine market

113. Developments in the market-driven slot machine sector in the last decade stand in stark contrast to the moderation shown by the traditional exclusive operators.

114. The figures given above show the exponential increase in slot machine gambling in recent years, from an estimated gross turnover of NOK 200 million in 1990 to a gross turnover of NOK 27,100 million in 2005. Growth was particularly strong in 1997-1999, and then again in 2001-2003, with annual increases of 14 % in 2001, 72 % in 2002, and 48 % in 2003. The increase in 2004 was 14 % and even the “frozen” market of 2005 saw a further growth of some 3-5 %.

115. The economic rules and incentives of the slot machine market differ from other markets in a number of ways, both for the players, the operators and the license holders.

116. For the player a slot machine is a guaranteed way of loosing money. The machines allowed in Norway are based on pure chance, without any element of skill, and the payback ratio is set at a certain percentage, which under the current Norwegian system is regulated to at least 78 %. This means, roughly speaking, that for every 100 kroner put into the machine, 78 kroner will statistically be paid back in winnings, and 22 kroner will be lost to the machine – as the “net turnover”, or “cash box” (in professional jargon). Most compulsive gamblers have the tendency to then stake the 78 kroner “winnings”, and then stake again what is left, and so on – until the whole 100 is gone. It

is impossible to "beat" a slot machine over time, and all frequent players will inevitably loose.

117. The amount lost by Norwegian players – the "net turnover" – was 2,3 billion kroner in 2000, growing to 5,2 billion last year (2005). Recent estimates indicate that as much as 90 % of the amount is spent by compulsive or high-risk problem gamblers, many of whom are minors and/or unemployed.[15] Behind these figures lies tens of thousands of personal tragedies and a huge social problem, which has been increasing steadily as the volume of slot machine gambling has grown (see below section 3.5).

118. Conversely, this annual amount of NOK 5 billion constitutes the revenues generated, to be split amongst the three economic participants under the present regime – (i) the license holder, which has to be a non-profit charitable or socially beneficial organisation or association (often referred to as the "cause"), (ii) the private commercial operator, and (iii) the owner of the premises where the machines stand (the proprietors). These three divide the net turnover according to a regulated scale (the size of their actual profits will then depend on their costs). The distribution scale formerly used to give 35 % to the license holder (the "cause"), 45 % to the commercial operator, and 20 % to the proprietor. The regulation was altered in March 2003 to a 40-40-20 scale, thus increasing the share of the beneficial "causes" by an extra 5 percentage points.

119. Turnover in recent years breaks down as follows:

	2000	2001	2002	2003	2004
Gross turnover	7,836	8,958	15,426	22,789	26,034
Payouts	5,529	6,412	12,038	18,279	21,073
Net turnover	2,307	2,546	3,388	4,510	4,961
to operators	1,494 in total	1,138	1,489	1,929	1,965
to proprietors		491	675	891	988
to causes	813	933	1,224	1,691	2,008

120. The figures for 2001 are of particular interest to the case, since they were used as a point of reference for the estimated economic effects of the slot machine reform when it was prepared and decided in 2002-2003, as well as the planned guarantee to the causes of a 2001-level of revenue (i.e. 933 million) during the first year of the reform. Furthermore, these estimates still stand as the legislative targeted aim of the reform. This means that the reform is expected to reduce the volume of slot machine gambling substantially even as compared to the 2001-level (not to mention later levels) – from a gross turnover of approx 9 billion to a gross turnover of some 6-7 billion. The economic effects of the reform are discussed in further detail below in section 4.7.

The charitable and beneficial license holders (the "causes")

121. Under § 10 cf. § 6 of the 1995 Lottery Act gaming machine licenses may only be given to charitable and socially beneficial organisations and associations. This has been

[15] Cf. the 2005 MMI report, **Annex 40**.

interpreted to cover most non-profit organisations dedicated to some kind of idealistic or benevolent civil society cause, including not only purely charitable work but also for example sports and culture – i.e. the whole of what is often referred to as "Voluntary Norway" (Frivillighets-Norge), covering a vast range of different organisations, associations and societies, some of them large, others very small – as for example the local football club or musical society.

122. There are numerous such organisations, associations and societies in Norway and a large proportion of them have since 1995 applied for and received slot machine licenses. The only big exception is the many religiously based organisations and societies, which have taken a clear position against slot machine money. There are also some secular organisations and associations which for moral or ethical reasons have decided not to participate. But apart from this, most of "Voluntary Norway" has in the course of the last decade become involved in the slot machine market, with many of the organisations relying heavily on this as a major source of income.

123. Thus, in 2005 there were a total of 5.926 organisations and associations authorized by the Norwegian Gaming Board to offer slot machine gaming. Of these, approximately 3.500 were active in the market, holding between them a total number of 17.017 slot machine licenses. Most of them are very small, holding only one or two licenses. The largest are the following:

Organisation	**Active licenses June 2005**
Røde Kors	3870
Redningsselskapet	2230
Kreftforeningen	1170
Norges Handikapforbund	705
Landforeningen for hjerte- og lungesyke	451
Redd Barna	255
Norges Skiforbund	404
Norges Blindeforbund	310
Others	7622

124. These are the "causes" which have participated in the slot machine bonanza of the last decade, sharing in the sharply increasing revenues, from very small sums in the early 1990s to NOK 813 million in 2000, 933 million in 2001, 1224 million in 2002, 1691 million in 2003, 2008 million in 2004 and approximately the same in 2005. The two largest participants, Røde Kors (the Norwegian Red Cross) and Redningsselskapet (a sea rescue society), also operate their own machines, receiving percentages both as "cause" and operator. All the other license holders employ commercial operators.

125. To some extent, the slot machine money has replaced earlier sources of income for the organizations, as for example small-scale lotteries, bazaars, private contributions, etcetera. But for most of them the increase in total income have been large, and for many tremendously so. Some of them have gradually adjusted their activities, becoming more or less dependent on the increased levels, while others have managed to set aside funds – especially so after the 2002 announcement of the planned reform.[16]

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[16] Most of the major participants have had a sharp increase in registered equity capital in recent years because of the slot machine income. Thus, the equity of Røde Kors rose from NOK 769 million in 2000 to 1.6 billion kroner in 2004.

126. Under the contested 2003 reform the organizations will loose their slot machine licenses, and thus all their direct income from this activity. Instead they will share between them a fixed share (18 %) of the revenues generated by Norsk Tipping, from the company's total gaming portfolio. If the reform had entered into force as planned in January 2005, the state would have guaranteed the "causes" an income equivalent to the 2001-level of NOK 933 million.[17] After that their gaming income will depend on the overall revenues of Norsk Tipping.

127. When the slot machine reform was prepared in the autumn of 2002 it was clear that it would mean a decline in revenue for all the "causes", and this was even more evident when parliament debated the Bill in the spring of 2003. Still, the reform had the clear and expressed backing of most of the major license holders, including Røde Kors and Redningsselskapet, as well as the more ambivalent consent of the others.

128. None of the major license-holders have protested formally against the 2003 reform, nor tried to take legal action against it, nor (as far as the government knows) complained about it to the Authority. The same applies to the numerous smaller license-holders, with a few minor exceptions.[18]

129. As slot machine gambling continued to increase in 2003 and 2004 the gap between the new levels of revenue and the estimated level after the reform increased accordingly. Measured against the NOK 2 billion received by the "causes" in 2004, the reform will mean an estimated decrease for them of more than 1 billion annually. In this perspective, they stand to "loose" much more from the reform today than in 2002-2003, and this has caused some of them to become less supportive, or, in the case of Redningsselskapet, even downright hostile to it. From a legal perspective this simply demonstrates that the reform will not only radically diminish slot machine gambling, but also sharply diminish the revenue generated to humanitarian and socially beneficial causes. This is an important point in the case, to which we will return.

The commercial operators

130. While all charitable and socially beneficial organisations may apply for gaming licenses under the 1995 Lottery Act, most of them are neither large nor professional enough to actually run and operate such gaming themselves – be it slot machines, bingo, scratch cards or other medium-sized forms of lottery. The Act therefore allows for commercial companies to operate gaming and lottery on behalf of the non-profit license-holders, giving the authorities the competence to decide on the distribution of revenue. Such operators must be authorized under § 4c of the Act, but the criteria are not very strict.

Redningsselskapet had an increase in equity from 186 million in 2001 to 618 million in 2004, Norges Skiforbund from 25 million in 2000 to 115 million in 2004, and Norges Blindeforbund from 3 million in 2000 to 23 million in 2004.

[17] This guarantee is now revoked, since the delayed entry into force of the reform meant that the "causes" received a unforeseen full income of more than NOK 2 billion in 2005, with similar large "extra" revenues continuing into 2006 and possibly 2007. The economic implications of the 2003 reform are explained in greater detail below in section …

[18] The exception being that some 100 of the 5926 organizations have joined the NOAF association, which is a party in the proceedings before the national courts, and probably also a complainant before the ESA. NOAF was until the summer of 2002 open only to the commercial companies involved in slot machine and other gaming business, but the statutes were then changed to open up for non-profit organizations to be members. None of the major slot machine license holders have joined.

131. These private operators are, together with the premise-owners, the only commercial element tolerated in the gaming and lottery sector under Norwegian law. Traditionally their role and importance was marginal, and mainly confined to the operation of bingo halls. The explosion in slot machine gambling in the last decade has however transformed the old bingo operators, as well as adding a number of new companies, creating a large and extremely lucrative new branch of business.

132. In this way, gambling has for the first time in Norwegian history become a source of huge private profit, generated in a competitive commercial market.

133. In 2004 there were 138 authorized companies actively operating slot machines in Norway, according to the Gaming Authority. One of these, Norsk Lotteridrift, is a fairly large company, while the 137 others are small and medium-sized. Of these, 50 were members of the association NOAF. Norsk Lotteridrift and NOAF are the two parties in the proceedings before the national courts, and both have also been very active launching complaints and submitting arguments to the EFTA Surveillance Authority.

134. The company Norsk Lotteridrift AS (NLD) was established in 1996 when several smaller operators merged. It was originally owned by Norwegian stockholders, but it was sold to the Swiss bank UBS in 2000 for approximately NOK 1 billion.[19] In 2004 NLD operated approximately 4.200 slot machines on behalf of 1.222 license holders, generating a gross turnover of NOK 7 billion and a net turnover of NOK 854 million – of which the company's share was between 40 and 45 % (depending on the date of each license).

135. On a smaller scale, operating slot machines has been a very lucrative business for the other 137 companies as well. One of them, Bergen Coin, was established in 1999 and had revenues rising from NOK 3,7 million in 2000 to 63,6 million in 2003, topping a survey of Norwegian "gazelle" (fastest growing) enterprises for two years in a row.[20] Another company, Karasjok Biljardservice, was started in 1994 as a billiard hall by a former reindeer owner, who after turning to slot machines in the late 1990s today is one of the richest men in the northern county of Finnmark.[21] These are only two of numerous such stories, which illustrate the private profits and market incentives generated from slot machine gambling in recent years.

Competition and market incentives under the present slot machine regime

136. Not surprisingly, the growth of the private slot machine market has led to increased competition and professionalization. While the original operators were for the most part small personal companies, a number of them former bingo or billiard hall operators, many have now developed into much more professional and efficient enterprises. The entry into the Norwegian slot machine market of UBS in 2000, following advice from the investment analysts of the Swedish company Enskilda Securities, marked the first ever example of large international capital investment in the Norwegian gambling

[19] See below section 4.2. Answering a question during his testimony before the Court of Appeal, the present chairman of the company, Mr Göran Diedrichs of UBS Capital, confirmed that the investment of NOK 1 billion made by UBS in 2000 was fully recovered by June 2005.

[20] Cf. **Annex 75,** "Pengemaskiner på oppsigelse" [*Money machines served with notice*], *Dagens Næringsliv* 30.11.2004.

[21] Cf. **Annex 76,** "Solid spillegevinst" [*Solid gambling winnings*], *Nordlys* 13.12.2004.

sector. In any other sector of the economy involvement by a professional investor of this kind would have been highly welcome, but for those who want to restrain and diminish gambling opportunities it is highly troubling.

137. The competition in the slot machine market takes place on several levels. First, the operators compete to offer their services to the charitable and beneficial license holders, without whom they cannot operate. Second, they compete for the most lucrative premises, which mean offering their machines to the proprietors of such places, who gets 20 % of net turnover. Third, they compete to offer the most attractive (i.e. aggressive) machines, thereby generating the largest income.

138. The characteristics of this market is well formulated on the website of Redningsselskapet (the Lifeboat Association), one of the two beneficial organisations to operate their own machines, but still subject to fierce competition as regards the most lucrative machines and premises. In its invitation to prospective premise-owners Redningsselskapet describes its strategy as follows:

> Competition in the gaming market is high. In order to gain a high turnover we have to have the best games. We in the Redningsselskapet keep a continuous update on the new games and gaming machines developed. Old and unprofitable machines are regularly replaced by new and more profitable models. We strive for an optimization of the machine park by offering the best and most profitable solution for both parties.[22]

139. Seen from the perspective of the competent national authorities, tasked with maintaining a responsible and moderate gaming and lottery sector, the sudden emergence of an aggressive and resourceful private gambling sector has been both alarming and very difficult to handle. This was especially true as long as the private operators and the charitable organizations had full common interest – combining the political leverage of the latter with the resources and private professional force of the former.[23] This is the actual reason why any substantial moderation of the slot machine sector was impossible to achieve until the responsible authorities came up with the solution of the 2003 reform, offering the organizations a (downsized) compensation from the revenues of Norsk Tipping in exchange for loosing their slot machine licenses.

140. Unlike the charitable and beneficial organizations that will loose their machine licenses, the private commercial operators are not formally hit by the contested 2003 reform. They will still hold their authorizations under § 4c of the Lottery Act, and they will still be able to offer their services as operators of the gaming and lottery activities still regulated under the Act (bingo, scratch cards, lotteries). The difference is that there will no longer be a clientele of machine license holders to serve. In real terms, of course, the private slot machine operators are hit hard by the reform, since it removes their market.[24]

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[22] Cf. **Annex 77**, "Redningsselskapets spilleautomater – lønnsom automatpark" from www.redningsselskapet.no, (the Government's translation).

[23] See below section 4.2 on the intense and effective lobbying campaign waged by the operators and the organizations against the Government's 1999 proposals to moderate and reduce the slot machine market.

[24] In terms of investments already made, the private operators are however not disproportionably hit by the reform, since the "graze period" between the June 2003 parliamentary amendment and the planned January 2005 entry into force of the reform was more than sufficient for them to recoup their investments and gain comfortable last profits. These profits have since continued with the unforeseen further postponement of the reform, caused first by the national judicial process and later on by the Application of the Authority. Even if (when) the operators should finally loose the delays caused by their

141. This is the reason for the seemingly paradoxical situation under which the parliamentary slot machine reform has not been legally challenged by those who will actually loose their licenses, but only by a group of commercial sub-service providers. It is only these operators which have lodged the lawsuit with the national courts and (as far as the government knows) the complaints with the EFTA Surveillance Authority.

142. The reform will have little or no actual impact on the freedom to provide cross-border services within the EEA. All the present commercial operators are companies established and registered in Norway under Norwegian law. With the exception of Norsk Lotteridrift all the remaining 137 operators are also Norwegian-owned, although a few claim to have foreign minority owners. As regards Norsk Lotteridrift, this company is owned by a Swiss bank (i.e. outside the EEA), and although the ownership is formally registered with a Dutch subsidiary (UBS Capital BV) no activity related to the running of NLD takes place in any other EEA state.

143. The only possible impact of the reform on the intra-EEA trade in services and establishment is thus of a potential and rather limited nature, in case a machine operator from another EEA state should some time in the future wish to offer its services on the Norwegian market to charitable organizations holding national machine licenses. So far there have been no such initiatives.

3.5 Problem gambling in Norway in recent years

144. The need to protect the public against compulsive gambling (ludomania) has always been a main principle of Norwegian gaming policy, but until recently this had the character of preventive policy – due to the fact that it actually worked. Compulsive gambling, as known from other countries, was not seen or reported as any sort of large-scale problem in Norwegian society. In spite of a gradual increase in gaming activities and propositions, gaming was regulated, practised and channelled in such a way that it did not in effect create any major dependency problems.

145. Things are very different today. In the course of the last decade, compulsive gambling has grown to become a considerable social problem, with an estimated 71,000 persons now seriously affected – mainly because of gambling on slot machines.

146. In this context the term "compulsive gambling" covers not only problem gambling, characterised by the fact that the gambler is unable to adjust his gambling to his own finances, but also pathological gambling, which since 1992 is qualified as a diagnosis under the WHO-system. As a medical diagnosis, pathological gambling involves a state of frequent recurrent episodes of gambling that dominate a person's life at the expense of social, occupational and family values and commitments, and which therefore affect far more individuals than the gambler him/herself.

147. Up until recently, there was, for obvious reasons, very little research done on problem gambling in Norway. There are therefore no comparable figures to the situation before the explosion in slot machine gambling in the last decade.

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lawsuits and complaints to the Authority will have generated extra private profits for them running into several billion NOK.

148. Seen from the perspective of the competent authorities, it is however clear that problem gambling as a major occurrence first started in the mid-1990s, corresponding roughly to the increase in slot machine gambling. Now, for the first time, this became a growing issue in the media, with a number of articles reporting on the new problems. Furthermore, the authorities started to receive letters from citizens, and from psychiatrists and other professional health personnel, working with other kinds of addictions (drugs, alcohol), reporting that they were receiving a growing number of clients with gambling problems caused by machines.

149. In 1997 Gamblers Anonymous was established for the first time in Norway, by slot machine addicts, and the association has since grown rapidly. In 2000 Norsk forening for pengespillproblematikk (The Norwegian Association for Problem Gambling) was established. In 2001 Pårørendeforening til Spilleavhengige (an association for family members of compulsive gamblers) was established. This association has focused on the serious problems compulsive gambling poses, not only for the gambler, but also for his or her family. In 2002 Dr. Hans Olav Fekjær, a leading psychiatrist working formerly with drug and alcohol addicts, but now increasingly with compulsive gamblers published a book, "Spillegalskap" – vår nye landeplage" (Ludomania – our new national scourge), which contributed to increased awareness of the new problems.[25] Dr. Fekjær has since publicly endorsed the slot machine reform, although with some qualifications, as he does not think it restrictive enough.

150. As awareness grew, the Ministry in 2000 instructed the newly established Gaming Authority (Lotteritilsynet) to initiate research on problem gambling, and to prepare proposals for remedies. This led, inter alia, to a research project which involved the Norwegian Institute for Alcohol and Drug Research (SIRUS) and NOVA, the social research institute, and resulting in two reports published in 2003.[26]

151. Although not all the relevant research was finished by the time the Government presented its bill of reform to Parliament in March 2003, enough was known for the competent authorities to identify slot machines as the main source of gambling addiction problems. This is described in chapter 3.2.4 of the Bill.[27]

152. In 2003 a telephone helpline project for problem gamblers was set up. Findings from the project were reported in January 2005, and concluded, inter alia, that 90 % of those calling in for the first time reported slot machines to be the main source of their

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[25] Three pages from this book have been presented by the Authority as **Annex 44**. This rather selective extract describes the gaming activity of Norsk Tipping, of which Dr. Fekjær is also critical. His analysis of the "new scourge" and source of ludomania, namely the slot machines, is however not presented by the Authority. This is therefore enclosed as **Annex 78** (in Norwegian). As early as in 2000, Dr.Fekjær identified slot machines as "the real villain" in a paper presented at the 4th Conference of the European Association for the Study of Gambling, cf. **Annex 79**. Dr.Fekjær's main arguments, as well as his endorsement of the 2003 reform is expressed, inter alia, in a feature article he wrote in Aftenposten in 2004, cf. **Annex 80**, "Pengespill er på nytt blitt en sosial ulykke i Norge" [*Gambling strikes again as a social disaster in Norway*], *Aftenposten* 6.11.2004, with English translation enclosed.

[26] Cf. SIRUS report no. 2/2003 "Pengespill og pengespillproblemer i Norge" [*Gambling and gambling problems in Norway*] by Lund and Nordlund, and NOVA report no. 1/2003 "Underholdning med bismak – Ungdom og pengespill" [*Entertainment with an aftertaste - Young people and gambling*] by Rossow and Hansen.

[27] Cf. Ot.prp. nr 44 (2002-2003) chapter 3.2.4 "Specific information regarding gambling addiction", presented by the Authority as **Annex 9,** with an English translation enclosed.

problems.[28] A table from the report shows the most problematic games (several games could be listed):

7.15 De mest problemfylte spillene (2004)
Her er det anledning til å oppgi flere typer spill

	Alle samtaler		Blant 1.gangs innringere	
Spill som er nevnt som problematiske	Tall	Prosent	Tall	Prosent
Gevinstautomater	1 844	81,0 %	1 401	90,3 %
Odds	176	7,7 %	142	9,1 %
Hest	154	6,8 %	126	8,1 %
Tipping	141	6,2 %	123	7,9 %
Lotto / Extra	86	3,8 %	75	4,8 %
Bingo	56	2,5 %	45	2,9 %
Andre pengespill	48	2,1 %	38	2,4 %
Skrapelodd	38	1,7 %	33	2,1 %
Poker	34	1,5 %	31	2,0 %
Spill uten penger	27	1,2 %	25	1,6 %
Kasino	24	1,1 %	19	1,2 %
Andre kortspill	6	0,3 %	5	0,3 %
Usikker / vil ikke si	12	0,5 %	8	0,5 %
Ikke tema	271	11,9 %	22	1,4 %
N (antall)	2 276		1 552	

I 81 % av alle samtaler er gevinstautomater nevnt som årsak til spilleproblem[8]. Om vi avgrenser utvalget til 1. gangs innringere er andelen 90 %.

153. In 2003 the Ministry initiated the drafting of an action plan aimed at preventing problem gambling. The project was assigned to the Gaming Authority, which established a working group and a reference group, and in December 2004 submitted a report. The report is comprehensive, and includes not only the proposal for an action plan, but also a description of the gaming sector in Norway, an extensive summary of findings from recent research on problem gambling abroad and at home, and a description of current problems and challenges in Norway. On the basis of an earlier survey (SIRUS 2003) the report estimated that some 50.000 Norwegians were either pathological gamblers or problem gamblers. In the summary, the source of the problem is described as follows:

> In Norway, the availability of gaming has increased gradually. Today's gaming market consist of traditional lotteries, various number games, sports games, scratch cards, bingo games and betting games over the Internet. Nevertheless, electronic gaming machines are the most dominant individual type of game on the Norwegian gaming market. And these are also the gaming machines that constitute the main problem for people suffering from gambling problems.

154. This report from December 2004 is still the most comprehensive survey of problem gambling in Norway.[29] Particularly relevant parts include the summary on p. 6, the description of the social policy considerations behind the national gaming legislation on pp. 11-13, the exposition of "risk factors" in gaming on pp. 25-32 (showing that slot machines are the most problematic form of gambling), the table of problem gambling in

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[28] Cf. **Annex 81,** "Sluttrapport. Hjelpelinjen for spilleavhengige" [*Concluding report: the helpline for problem gamblers*], Innlandet Hospital Trust 31.01.2005. (excerpts)

[29] Large parts of the report were read out in the proceedings before the Court of Appeal, and it is included as **Annex 21** to the Authority's Application in full English translation. The references to particular pages are to the English translation (in the Norwegian original the page-numbers are slightly different).

known studies on pp. 34-35, the chapter on prevention of gambling problems by regulatory instruments on pp. 41-48, and the proposals in this respect on pp. 58-61.

155. The report states that although lotteries are the main form of popular gaming in many countries, it is the slot machines which are the main source of problem gambling, internationally as well as in Norway. This view is supported by an overview of findings from a selection of gambling surveys conducted from 1997 to 2003 from the above mentioned survey SIRUS 2003, included in the Gaming Authority's report on pp. 34-35.

156. The report was presented to the Ministry in December 2004, which in April 2005 announced the "Governmental Plan to prevent Problem Gambling", which is described below in section 5.3.[30]

157. Following a 2003 initiative from the Ministry, a certain percentage of revenues from gaming are now set aside for research, prevention and treatment of compulsive gambling, and several projects are currently running, contributing to increased knowledge in the field.

158. In September 2005, the report "Undersøkelse av pengespill", from the MMI institute (in cooperation with Østnorsk kompetansesenter, Sykehuset Innlandet HF, and Mr Thomas Nilsson, Spelinstitutet, Sweden) was published.[31] This is the most recent report on the prevalence of compulsive gambling in Norway. The findings in the report are for the most part in line with earlier findings and estimates, with the notable exception that the number of persons estimated to suffer from gambling problems is increased to some 71,000, which is up from the earlier estimate of 50,000. In addition, some 133,000 persons are classified to be in a "moderate-risk" group. This is summed up on p. 3:

> Gambling problems
> Based on the classification system CPGI, our estimates show that a share of 1.9 percent of the population (approximately 71,000 persons) has problems with gambling (use gambling at a level which entails negative consequences). Further, we find that 3.6 percent may be classified as gamblers of a moderate risk (approximately 133,000 persons). This means that they use gambling at a level which has or most likely will entail negative consequences. Almost 1 out of 10 are comprised by the category low-risk gamblers, while 4 out of 5 are completely without gambling problems. [From the Authority's translation, annex 40]

159. The MMI report also identifies slot machines as the preferred game for problem gamblers:

> The gambling habits of the risk and problem gamblers
>
> The gambling machines are in a special position among the risk and problem gamblers. A considerable larger share of this group than in the population at large play the gambling machines. They also separate themselves from the rest of the population, by a definite larger share playing Internet games, Oddsen and Tipping.
>
> The expenditure of money by the risk and problem gamblers
> The risk and problem gamblers spend considerably more money on gambling than the other

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30 Cf. **Annex 22** to the Application with an English translation.
31 Cf. **Annex 40** to the Application with an English translation.

> gamblers. They use most of their money on Internet games and gambling machines. Of Norsk Tipping's games, Oddsen is the one that the risk and problem gamblers spend the most money on during the course of a year.
>
> The risk and problem gamblers are responsible for a very large share of the annual turnovers from the gambling machines (estimated to 90 percent) and Internet games (estimated to 60 percent). As regards Oddsen, their activity represents approximately 44 percent of the annual turnover, while their corresponding relation to the turnover for Lotto is approximately 8 percent.

160. The Government would also like to draw the Court's attention to the MMI report section 4.1 on gambling habits, section 5.3 on the degree of gambling problems in the population, and section 5.5 on the habits of problem gamblers. The findings here show that slot machines have a young age profile, with most of the gamblers below the age of 25, that many of them have very low gross income (below 100,000 NOK), and that many of them are unemployed.

161. The estimate that as many as 71.000 Norwegians suffer from serious gambling problems is interesting when compared to other forms of addiction. Comparison is of course difficult, both because the estimates themselves are uncertain, and because the tests and criteria are different for different forms of addiction. But the rough overall picture is nevertheless startling. While there are 71.000 suffering from serious gambling problems, the estimated number of drug addicts is between 11.000 and 15.000, and the number of persons classified as "heavy consumers" of alcohol (which is not to say that they are all alcoholics) is estimated at 66.000.[32]

162. This is, in brief, the current status of research done on problem gambling in Norway in recent years, which confirms the evaluations of the competent authorities in 2002 and 2003, when the gaming machine reform was prepared and adopted.

163. Research surveys and reports may appear overly theoretical and abstract, and illustrating what compulsive gambling is really all about is harder in a written procedure before the EFTA Court than it was during the three-week oral hearings before the Court of Appeal, where, inter alia, the state brought a witness, Mr Eiksund, who has personally had a major problem with slot machine gambling, as well as vast experience with these problems through his work in Gamblers Anonymous and as a counsellor for the Rus-Nett drug and alcohol dependency foundation, a work which also brings him into close contact with gambling dependency, since these forms of addiction are sometimes heavily intertwined. His testimony confirmed that the slot machines are by far the most addictive form of gambling in Norway.

164. Another challenge in a procedure such as the present is that the Bench is removed from everyday life and public debate at the national level. For anyone living in urban areas in Norway, seeing slot machine addicts has unfortunately become an everyday occurrence, at least if one is aware of the problem. In Oslo, the gambling on slot machines is especially noticeable in the city centre and the east-side neighbourhoods. But the machines are all over the city: in shops, shopping centres, kiosks, petrol stations and so forth, and a closer look at those who are actually playing them brings the problem home in real terms.

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[32] The figures on drug and alcohol may be found on www.sirius.no

165. Another factor which brings the problem home is the continuous press coverage given to problem gambling, both at the national and local level – which until last year was almost exclusively devoted to slot machine problems (Internet gambling now shares the position). The Ministry's clippings archive contains pile upon pile of clippings from up and down the country, all of which testify to the problems in recent years. Two small but representative selections of these clippings are appended, one covering the period from 1999 to early 2005, and the other late 2005 to May 2006.[33] The stories are of personal tragedies, bankruptcies, broken marriages and even suicides – all caused or enlarged by slot machine gambling. The most recent one is dated today (18 May 2006), and it is a full front-page article in the country's largest newspaper (VG), of a husband telling the story of how his wife after five years of compulsive gambling on slot machines succeeded in her third suicide attempt at suicide. In the same article Dr Fekjær informs that one out four persons who seek treatment against gambling addiction at his institution has considered suicide.

166. Another illustrating fact is that slot machine gambling always peaks on the 21st of every month. The explanation is that this is the day on which social security is paid out.[34]

167. In recent years, the Ministry, as well as the Minister personally, has received a number of enquiries and letters from people with a gambling problem, or from their next of kin. One such letter is attached, in anonymous form.[35] It is not untypical of the stories told by those who work in the field of compulsive gambling.

168. As regards the root cause of the explosion in problem gambling in Norway in recent years, research reports, evaluations, press clippings and all correspondence received are unanimous. It is caused first and foremost by the slot machines.

169. In the last couple of years, there has also been a significant rise in problem gambling due to the Internet, arising from interactive gambling offered from abroad, by private companies operating outside of Norwegian jurisdiction. These problems have not replaced the slot machine problems, but have come in addition, although as yet not anywhere near the same scale.

170. By comparison, the problems with compulsive gambling are *not* attributable to the gaming operated within the traditional regime, under the exclusive rights arrangements of Norsk Tipping and Norsk Rikstoto. The moderate growth of these companies' gaming propositions are in the main channelled towards less aggressive forms of gaming, and have thus not given rise to social policy problems on any significant scale.

171. In its Application the Authority has included a section on "Research on problem gambling" (pp. 47-50). Reading this, one is reminded of the arguments of the private commercial operators before the national courts, who consistently tried to minimize the extent of problem gambling in Norway as well as the particular addictiveness of slot

[33] Cf. **Annex 82 and 83**. The clippings are not translated. See also a recent in-depth article in the magazine Memo, from March 2006, enclosed as **Annex 84**.

[34] Cf. **Annex 86**, "Automatene sluker trygd" [Slot Machines Devour Social Security], Oslopuls 21 April 2006.

[35] Cf. **Annex 89,** Letter of 10.12.2004 from X to the Minister of Culture and Church Affairs, concerning the gambling problem of her son.

machines.[36] This was perhaps to be expected from the operators, but it is more surprising to see the same line of argument presented by the Authority.

172. In order to get a qualified second opinion on the assertions of the Authority, the Government asked Dr Fekjær, the leading expert in the field on problem gambling in Norway, for his opinion. Dr Fekjærs assessment is as follows:[37]

> In EFTA Surveillance Authority's application against Norway on the law introducing slot machine monopoly, chapter VI – Research on Problem Gambling (page 47-50), gives a highly selective overview of the field, leading to conclusions not shared by gambling researchers and other experts in Norway.
>
> Several paragraphs seem to indicate that slot machine gambling is not an especially addictive or harmful type of gambling in Norway. The basis for this assertion is quotations from population surveys on gambling and gambling problems. This line of arguing is very surprising, as none of these population studies have actually asked the respondents which types of gambling have created problems.
>
> Only statistics from treatment centres and the national help line can give us data on this issue. These statistics consistently show that for 85-90 % of the help-seeking pathological gamblers in Norway, slot machines is their main problem. All other types of gambling creates problems among less than 10 % of the pathological gamblers. Comparing these numbers with the proportion of the total turnover of, or money spent on, different types of gambling, there is no doubt that slot machines in Norway are by far the most addictive type. This applies to all age groups and both sexes.
>
> This view is supported by data from the MMI study from 2005. The study found that of the money spent on slot machines, 90 % came from persons who had experienced some degree of gambling problems (not all of them pathological gamblers). Second on this list came Internet gambling with 62 %.
>
> When ESA's application argues that slot machines are not especially addictive, the argument (paragraphs 174-179) is based on data on the frequency of the pathological gamblers' participation in different types of gambling. It is a well known fact that pathological gamblers

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[36] NLD and NOAF received some help in this regard from two international scientists, Rachel Volberg and Max Abbot, who were presented as expert witnesses, and which gave testimony to the effect, inter alia, that compulsive gambling seems to be low in Norway as compared to many other countries, in particular in the Anglo-American sphere. Whether this comparison is true or not is of lesser interest to the competent authorities responsible for the gambling sector, which has for years seen how the problems have grown and manifested themselves, something which has recently been confirmed in the MMI report of September 2005 (annex 40). Volberg and Abbott also had views on public exclusive rights models for gambling, which had a distinct Anglo-American liberalist flavour. Their testimony is commented upon by the Court of Appeal on p. 37 of the judgment (original version): "The research that has been presented to the Court of Appeal by the opposing parties is first and foremost related to international circumstances and says little about the Norwegian situation. Neither does the research have particular focus on a monopoly arrangement. The Court of Appeal refers here to the expert witness from the USA, Volberg, who in her testimony said that there are few investigations concerning monopolies as a means against compulsive/habitual gambling. It is correct that Volberg had for her part little faith in that a state monopoly could reduce compulsive/habitual gambling on pay-out machines, but her viewpoints must, in the opinion of the Court of Appeal, be viewed against that she gave her opinion under the premise of a commercial state owner. This not the situation in Norway.", cf. **Annex 36**. After the proceedings before the Court of Appeal were concluded in late June 2005, NLD commissioned a "report" from Volberg and Abbott, which was later presented during the preparations before the Supreme Court as their written deposition. NLD must have given this to the Authority, which has enclosed it as **Annex 41** to the Application, and cited it on p. 49 (para 180) as a "report", without mentioning that it is a written deposition commissioned by the private gambling company NLD. It appears that NLD has also commissioned Volberg and Abbott to write a "review" of the MMI Report, which is dated 28 February 2006 and enclosed by the Authority as **Annex 42**.

[37] Dr Fekjær wrote "A Note on Research on Problem Gambling in Norway", dated 9 May 2006, which is enclosed as **Annex 90.** His assessment is however cited in full, as it directly addresses the presentation of the Authority.

often gamble in several ways, especially in the lotteries, which by far are the most popular type of gambling in Norway. Still, addiction to lotteries is practically non-existent. Persons addicted to lotteries constitute less than 1 % of the help-seeking pathological gamblers. As long as the respondents have not been asked to identify which types of gambling makes problems, the data on gambling frequency cannot be used to answer the question which has, in fact, not been asked in any of the surveys.

In addiction, paragraph 180 seems to leave a misleading impression on the development of pathological gambling in Norway. The researchers Volberg and Abbot are quoted, stating that "it cannot be concluded on the basis of the survey data per se, whether or not problem gambling prevalence has changed from 1997 or 2002 to 2005". As the studies have used different methodologies, the quotation is correct per se. However, other data strongly indicate that the problems have increased considerably. The turnover on slot machine gambling nearly doubled from 2002 to 2005. Both the MMI study in Norway and several studies in other countries show that a large proportion of the slot machine's turnover comes from problem gamblers. Thus, it is hard to imagine that the dramatic increase in turnover has not been accompanied by a considerable increase in problems.

173. These are assessments which are in line with the view of the competent authorities in the Ministry of Culture, and to which the Government agrees.

3.6 Different forms of gambling – "hard" and "soft"

174. The fact that by far most of the problem gambling in Norway is attributable to gaming machines is in line with international research, which shows that such machines tend to entail a particularly high risk of addictiveness and be a "hard" form of gambling.

175. The Government agrees with the Authority that it is difficult to draw an exact line between "hard" and "soft" forms of gambling. It is more a question of a relative scale, and the same form of gaming may appear in "harder" and "softer" versions, depending on how it is construed and presented. That said, the Government disagrees with the Authority that the distinction is without merit. On the contrary, it is a fact that different forms of gaming are in general more or less likely to induce delusions or dependency, and the terms "hard" and "soft" are a useful way to distinguish between high-risk and low-risk forms of gaming.

176. Using these terms, it is clear that slot machines in general carry a higher potential risk of compulsive gambling, and therefore are a "hard" form of gambling, in the sense that they are more liable than most other games to promote problem gambling and addictiveness. This is documented in a number of studies.[38] It was also explained in detail before the Court of Appeal by professor Mark Griffiths, who holds a chair in gambling studies. In his written testimony before the Supreme Court, professor Griffiths answered questions on the subject as follows:

"5. Are slot machines to be considered a "hard" form of gambling?

Given the definition above, I believe slot machine gambling is a 'hard' form of gambling.

[38] Cf. the studies quoted or referred to on pp. 25-32 of the Desember 2004 report by the Gaming Board (**Annex 21**), where the "risk factors" of different kinds of gaming are discussed. Cf. also **Annex 91** Mark Griffiths "Gambling Technologies: Prospects for Problem Gambling" (1999).

> Games which offer a fast, arousing span of play, frequent wins and the opportunity for rapid replay are associated with problem gambling. This observation has been made in relation to slot machines by researchers all over the world (e.g. Australia, US, UK, Canada, Spain, Holland, Germany) (Griffiths, 1999).
>
> 6. How problematic are slot machines as compared to other kinds of gambling?
>
> There is now consistent evidence from all around the world demonstrating the potential addictiveness of slot machines. In fact, I would argue that slot machines are the single most potentially addictive form of gambling. In the past ten years, slot machines have been the predominant form of gambling by pathological gamblers treated in self-help groups and professional treatment centres in Spain, Germany and Holland (Griffiths, 1999). In the US, Volberg and Steadman (1992) found that 72% of their high income and 77% of their low income pathological gamblers, drawn from five states, played slot machines. Studies in Spain (Becona, 1994), Germany (Meyer, 1993) and Holland (Geller, 1994) report that at least a half of pathological slot machine players are in the younger age group - 18 to 30 years.
>
> There is no doubt that frequency of opportunities to gamble (i.e., event frequency) is one of the major contributory factors in the development of gambling problems (Griffiths, 1997; 1999; Griffiths & Wood, 2001). As will be argued in subsequent questions below, slot machines have an event frequency of every few seconds whereas the football pools and weekly lottery draws have event frequencies of once a week. The general rule is that the higher the event frequency, the more likely it is that the activity will potentially cause gambling problems. Addictions are essentially about rewards and the speed of rewards. Therefore, the more potential rewards there are, the more potentially addictive an activity is likely to be (Griffiths, 2005a)." [39]

177. These observations by professor Griffiths are in conformity with the experiences of the competent Norwegian authorities, and with what is known about the actual causes of problem gambling in Norway. Slot machines must in general be regarded as a relatively "hard" form of gaming, though this depends to some extent on how they work. The old "coin-drop" slot machines, which were the only machines allowed in Norway until the early 1990s, were not as potentially addictive. But the types of machine that have been developed and introduced since then have to a great extent been hard and aggressive machines, designed to hold on to the gambler for longer, with a strong potential for inducing gambling dependency. The hardware of these machines is of a kind which is difficult to modify in a satisfactory manner of means, and the only way to make significant change is to replace the whole machine park with a totally different kind of machines – which is one integral element of the 2003 reform.[40]

178. Irrespectively of whether one uses the terminology of "hard" and "soft", it is clear that different types of gambling have different addiction potential, and that slot machines are usually the most problematic type. This was recently pointed out by the German Constitutional Court in its 28 March 2006 judgment in the "sportwetten" case:[41]

> Nevertheless, different types of games of chance have different addiction potential. According to current knowledge, by far the most players with problematic or pathological

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[39] Cf. **Annex 72** (original emphasis). The reasons why slot machines are especially problematic are further described by professor Griffiths in his answer to question 9, on pp 6-8. See section 12 on the nature of this deposition.

[40] Cf. section 4.6 on the new "Multix" terminals developed by Norsk Tipping to replace the present slot machines.

[41] Cf. the decision of the German Bundesverfassungsgericht of 28 March 2006 in case 1 BvR 1054/01, enclosed in English translation as **Annex 147**. See below section 7.6 for further comments on this case.

gambling behaviour play on machines, which are legal under the Industrial Code. Statistics show casino games in second place. All other types of games of chance currently contribute significantly less to problematic and pathological gambling behaviour […]. (100)

179. In contrast to the slot machines, what have traditionally been permitted in Norway are first and foremost the more moderate ("softer") forms of gaming. Examples are Lotto, Extra, scratch cards and traditional football betting. There is for example no known dependency problem arising from the game of Lotto, which until recently was the main form of gaming in terms of turnover. Problem gambling from football betting (a national pastime) and scratch cards is also marginal.[42] Horse race betting, as offered by the Norsk Rikstoto Foundation, has traditionally been somewhat more problematic, but the problems have been narrowly confined, and these games have never led to any large scale gambling addiction.

180. The form of gaming offered by Norsk Tipping with high potential risk of dependency is the so-called "Oddsen". This has been gradually developed over the last ten years as a more moderate version of the sports betting odds game that international bookmakers have increasingly offered over the Internet. The idea was to offer a more moderate alternative, with more responsibility and consumer protection. The launch of the game was however so successful that it started to attract a number of professional gamblers, the kind of which Norsk Tipping does not want to associate itself with. As it is further not in line with Norwegian gaming policy to cater to this kind of gamblers, restrictions were imposed on Oddsen in 2003 that reduced the scope for placing large bets. From 1 January 2004 a minimum age limit of 18 was also introduced. As a result of the restrictions, the game turnover declined by almost 20 % in 2004.[43] These measures stands in sharp contrast to the market reactions of the private slot machine operators in the same year, and serves as an example of the moderating nature and responsible focus of the publicly controlled exclusive rights system.

181. It should also be noted that slot machines are the most potentially addictive form of gambling allowed to operate in Norway. Some of the forms of interactive gambling offered today over the Internet are highly potentially addictive, but these have no license in Norway and are in principle illegal to offer in Norway, even though jurisdictional problems makes this challenging to enforce. Furthermore, "hard" gambling, such as poker and other table games in addition to slot machines, is in many countries confined to casinos, but casinos are not allowed under Norwegian law.

182. With the modification that the terms are relative rather than absolute, the distinction between "hard" and "soft" gambling is useful both to explain the structure of Norwegian gaming and lottery legislation, the principles governing national policy in this area, including the concept of "channelling" the desire to gamble into moderate

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[42] The Authority refers to an article by professor Griffiths on p. 82 (para 310) of the Application, as an argument that scratch cards constitute another hard form of gambling (as part of its attempt to minimize the slot machine problem). In his testimony to the Supreme Court, however, professor Griffiths explained that even though scratch cards appear to carry similar risks as slot machines "the empirical evidence indicates that they are nowhere near as problematic as slot machines probably because they are played by a very small clientele", cf. **Annex 72** p. 5. This is in line with empirical evidence from the Norwegian gambling sector.

[43] This is further elaborated in the written deposition before the Supreme Court of the chairman of Norsk Tipping, Mr Thue, cf **Annex 71**. Cf. also the deposition of Mr Eivind Tesaker of the Ministry of Culture, **Annex 70.** See section 12 on the nature of these depositions.

gaming, and the practice followed by Norsk Tipping in the development and marketing of its games.

3.7 Crime and malpractice in the Norwegian gaming and lottery sector

183. Because of the tight regulatory regime there has traditionally been very little crime and malpractice in the Norwegian gaming and lottery sector. Organised crime related to gambling, as known from other countries, is almost non-existent. Traditional problems have mainly been related to money laundering and tax evasion through horse betting, but this is a confined area, of which the authorities have lately gained better control.

184. The rise in slot machine gambling in recent years has however led to a rise in other and more widespread forms of crime and malpractice.

185. First, the large number of slot machines standing around with a lot of cash in them has led to an alarming amount of machine burglaries. In later years there has been between 3000 and 4000 such burglaries annually, and they are often committed by adolescents, some of whom later go on to more serious crime.[44]

186. Second, there has been a growing problem with compulsive machine gamblers resorting to crime in order to finance their gambling, or to pay of gambling debts. Most of this is small-scale stealing and burglary, or fraud. But there have also been some very serious cases. In a particularly brutal murder case of two young Chinese students a few years ago, it was revealed that it was committed by the cousin of one of them in order to cover up debts he had incurred from playing the machines. Quite recently, in April 2006, an elderly woman was murdered in Oslo, and the police suspect that prize money from machine-gambling is directly involved as a motive.

187. Third, there are suspicions that slot machines are used to launder money. This has so far not yet been proven, but the authorities have reason to believe that it happens to some extent. The potential for such activity is certainly there, especially if done in collaboration with somebody who both operates machines and owns the premises on which they stand.[45] Another suspected problem is related to embezzlement of machine revenue.

188. Fourth, there have been problems with illegal selling of particularly lucrative installation sites. Under the present regulation there is a fixed limit to how much the owner of the premises may get from the machine revenue, but at the same time there is fierce competition between the operators for the most lucrative sites. This creates a situation in which illegal transactions may occur. In one case in 2002, an illegal agreement was uncovered under which Røde Kors was to pay 80 million NOK to the company Steen & Strøm for exclusive rights to install slot machines in 27 of its malls. In other cases there have been reports of regular bribing of the premise owners.[46] In one

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[44] Cf. **Annex 88** for a selection of news clippings reporting on the widespread problems with slot machine burglaries. The clippings are not translated. One of them, dated 11.7.2001, reports on a large-scale organised theft from machines in Bergen. Another, dated 30.7.2004, reports on a gang of 15-17 years old raiding a number of machines. Another problem is fraud through the use of foreign coins, in practice often by using a Syrian coin very like the Norwegian 20 Kroner coins.

[45] Cf. the written deposition of Mr Tesaker, **Annex 70**, question 84.

[46] Cf. for example two clippings from December 2002, enclosed as **Annex 92,** “Sydenturer i bytte mot automatavtaler”

case the Norwegian Association of the Visually Impaired was actually convicted for illegal pay-offs to proprietors in connection with slot machine operations.[47]

189. Fifth, clear examples of malpractice are the cases in which the technical requirements are violated by operators who want to offer more aggressive machines. This practice has been rather widespread. To some extent this has been admitted. In a consultation paper of August 2000 the ten largest gaming machine organisations and NLD indicated that the best-playing of the installed machines were paying out "prizes of up to NOK 6-8-10,000 sequentially" – which should be compared to the applicable regulations, prescribing that prizes should not be above NOK 200. In January 2002 the Norwegian Red Cross informed the VG newspaper that its "Crazy Reels" machine had greater game appeal and generated more winnings than any other machines on the marked, and that these machines could end up with a main prize in the region of NOK 10,000.[48] The Red Cross stated that the Ministry of Justice had originally devoted much effort to trying to get the machine taken out of operation, but that the Ministry had never succeeded in proving any irregularity so as to get the machine suspended.

190. In one of the more recent cases – that of illegal gaming machines from the manufacturer Errell – in the period 2001-2002 around 5,000 gaming machines were sold which in the Norwegian Gaming Board's opinion were to be regarded as illegal. The case is still pending before the courts.

191. A final and very widespread example of malpractice is the fact that many places there is little or no supervision and control of the 18 year minimum age limit for playing the machines. Under the present regime it is easy for minors to gain access to slot machines, and a large proportion of the compulsive slot machine gamblers are estimated to be under the formal age limit.

192. All in all, it is clear to the authorities that the surge in slot machine gambling has been accompanied by an increase in crime and malpractice. Much of this is related to the increased volume of machine gambling. But some of the types of crime and malpractice are more closely related to the way in which the slot machine market has been regulated, with a large number of license-holders, private operators and premise owners.

193. The slot machine reform will serve to reduce slot machine-related crime and malpractice partly because the volume of gambling will be dramatically diminished, and partly because some of the types of crime and malpractice will be impossible or much harder to perpetrate under a publicly controlled exclusive rights system (see below section 9.6). The reform will also have a preventive effect, and eliminate much of the potential for worse and more widespread criminal activity in the future.

3.8 The existing exclusive-rights system (Norsk Tipping)

194. The traditional Norwegian public exclusive-rights system for gaming and lotteries is primarily the one operated for more than 50 years by the state-owned enterprise Norsk

[*Foreign holidays in return for slots deals*], and "Svindlet frivillige for en halv million" [*Swindled half a million out of voluntary organisations*].

47 Cf. Borgarting Appellate Court's judgement and ruling of 20.12.1999 in cases 98-01813 A/01 and 98-01814 A/01.

48 Cf. **Annex 93** "Røde Kors-automater er ulovlige" [*Red Cross gaming machines are illegal*], *VG*, 22.01.2002

Tipping AS. This is of particular importance to the case, as it is this system under which the Norwegian parliament has decided that slot machines will be operated in the future.

195. Broad knowledge of the existing system is therefore necessary if one is to evaluate correctly whether the parliamentary slot machine reform complies with the requirements of EEA law, in particular whether the reform is suitable and whether it is part of a system which serves to confine and limit gambling opportunities in a consistent and systematic manner. Furthermore, it is necessary to know the system as a whole, and not only to focus on selective aspects, as done by the Authority in its Application.

196. During the national judicial proceedings, in particular before the Court of Appeal, comprehensive evidence was presented by all parties on the general character and activities of Norsk Tipping. There is nothing whatsoever in the court's judgment to indicate that it found any basic flaws in the public exclusive rights system, much less flaws which could influence the suitability and consistency of the reform.

197. It is not possible to examine this issue to the same extent under the mainly written and more distant procedure before the EFTA Court. The following is therefore a sketch only.

198. For a more thorough examination, the following annexed texts are of particular interest:

- The Gaming Act of 1992. The Act lays down the basic rules for Norsk Tipping and the exclusive right system. It is enclosed as annex 64

- The statutes and instructions for Norsk Tipping, as issued by the Ministry, and lately amended on 8 April 2005. These are enclosed as annex 115.

- The latest annual reports of Norsk Tipping. The reports for the years 2003 and 2004 have been translated by the Authority and they are enclosed as annex 15.

- The written deposition of the chairman of Norsk Tipping, Mr Sigmund Thue, before the Supreme Court, answering questions from both parties, covering the whole organization and activities of Norsk Tipping. This should be read in its entirety, and it is enclosed in English translation as annex 71.

- The relevant parts of the depositions before the Supreme Court of the Minister, Ms Svarstad Haugland, and of Mr Tesaker of the Ministry, where they describe the role and function of Norsk Tipping as seen from the perspective of the authorities. These are enclosed in English translation as annexes 69 and 70.

Basic principles and procedures

199. Norsk Tipping is a fully state-owned enterprise, which was first founded in 1946, and which is now regulated by the Gaming Act of 1992. The company has a corporate structure which is distinct from that of both private and other public companies. It is a non-profit enterprise in the sense that the revenues generated are channeled directly to

benevolent causes prescribed by law – with 50 % to sport activities and 50 % to cultural activities. The state does not receive any profit whatsoever from the company (unlike other public enterprises). The revenues are distributed directly to activities for which the authorities have not taken public economic responsibility, and the allocations are not part of the state budgetary system. Within the fixed statutory scale, the exact distributions are decided partly by the Ministry and partly by Parliament.

200. As a public enterprise, Norsk Tipping has a dual character. It is first and foremost required to operate as a professional business company within the legal and policy framework defined by the competent authorities, and it is primarily for the authorities to define and make clear the restrictions and limitations to which the company shall adhere. But the company also has a special social responsibility of its own, following from its particular public status. In later years, corresponding to the general increased awareness of problem issues caused by gambling, this element has been more pronounced and emphasized, both by the Ministry and the company itself.

201. The basic idea and objective behind the Norsk Tipping system is to administer and protect public and social interests in the gaming and lotteries sector, and to offer restricted, safe and moderate gaming to the large part of the population which seeks this kind of thrill. The system has been very successful in this respect. Over the decades Norsk Tipping has become an institution in Norwegian society, offering soft and stable gaming within a responsible and moderate framework, which has not led to problem gambling or gambling problems of any scale – even though approximately half the population frequently or infrequently are customers.

202. Seen from the perspective of the authorities, Norsk Tipping is a policy instrument in the gaming and lottery sector, both by its very nature and character, by the inherent limitations in a system of this kind, and by the fact that the company is subject to close and continuous public control and instruction in a way which is not possible to achieve within a market with competing private actors.

203. Responsibility for Norsk Tipping lies with the Ministry of Culture and Church. The Ministry instructs and controls the company partly through the procedures laid down in the Gaming Act and the company statutes and partly through its position as direct owner. Control is both formal and informal. This is described by the chairman of the company, Mr Sigmund Thue:

> The Ministry lays down the framework for the company’s activities and approves what games the company should be permitted to offer. Determines the game rules.
>
> The Board’s task is to organise the company under public control. We also have an obligation to work to counteract negative effects of gambling. We are required to ensure that the company is operated rationally in order thereby – within a socially responsible framework – to generate maximum profit for the causes.
>
> The Ministry exercises its ongoing supervision and control of the company through the annual general meeting. The Ministry appoints the Board of Norsk Tipping. The Ministry receives copies of the minutes from all Board meetings on an ongoing basis. Regular meetings are held between Norsk Tipping and the Ministry. There is a formal meeting with the Minister a couple of times a year. Consultation meetings/contact with civil servants occur relatively frequently. We operate under relatively strict rules, so that there is often a need for clarification.

> In the years that I have served as Chairman of the Board [since 1997] the Ministry's ongoing supervision and control have been expanded. This has taken place gradually, but more intensively in recent years. Today our experience is that in many areas the Ministry issues control signals that mean that the Board's and management's discretionary competence is also being limited in respect of purely commercial matters. [49]

204. The informal aspects of the continuous control exercised by the Ministry over Norsk Tipping are both closer and tighter than what is usual with regard to other public companies. This was commented upon in 2004 by the Office of the Auditor General, which criticized the Ministry for exercising its control in a too informal a manner. More formal procedures have since been introduced, without reducing the degree of control.

The Games Portfolio of Norsk Tipping

205. Norsk Tipping offers the following basic forms of gaming:

- Lotto/VikingLotto (number game)
- Joker (number game)
- Tipping (football betting)
- Oddsen (sports betting)
- Flax (scratch card)
- The Extra lottery

206. Lotto, Tipping and Oddsen are subject to exclusive rights under the Gaming Act, in the sense that these forms of gaming may not legally be offered by others. The Flax scratch card is subject to a special license under the Lottery Act, and operate in competition with other kinds of lotteries and scratch cards. The Extra lottery is owned by a charitable organisation under the Lottery Act, and is only operated by Norsk Tipping on its behalf.

207. For some of the games listed above there are several forms. Lotto includes traditional Lotto, Vikinglotto and Joker. Oddsen includes Langoddsen and Oddsbomben.

208. The figures for Norsk Tipping's turnover are given above in section 3.3. The total gross turnover in 2005 was NOK 8.4 billion, with a net turnover of NOK 4 billion. It may be noted that the accumulated gross turnover of all the games provided by Norsk Tipping within the public exclusive rights system amounts to only one third of the present gross turnover in the slot machine market.

209. The largest game provided by Norsk Tipping is by far the Lotto games, which amount to approximately 65 % of the total turnover of Norsk Tipping.[50] These Lotto games are a particularly "soft" and non-aggressive type of gaming which does not offer any significant problems of compulsive gambling.

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[49] Cf. **Annex 71**, answers to questions 7 and 8.

[50] Cf. the 2004 Annual Report, **annex 15**, p. 18-19, for a breakdown of turnover on the individual games. In 2004 the Lotto games (Lotto, Vikinglotto and Joker) had a combined gross turnover of 5,7 billion. Oddsen had 1,3 billion, Flax 1 billion and Tipping (football) 0,8 billion.

210. The activities of Norsk Tipping from 1946 until today have developed continuously, and turnover has traditionally increased steadily. This has however over time followed the general growth in national income and purchasing power, without any excesses.[51] Lately growth has stopped, with a level turnover in 2004 and a five percent decrease in 2005. This decrease is the result of restrictions introduced by the Ministry, such as the introduction of an 18 year age limit and caps on the stakes in Oddsen. The result is welcome to the extent that it represents a reduction in overall gambling, but not to the extent that it is a sign that turnover is transferred to more aggressive games and suppliers, in particular the slot machine market and also internet based bookmakers.

211. In the Application of the Authority, as well as in the petitions from the plaintiffs under the corresponding national court proceedings, there are numerous attempts at establishing the impression that the number of games from Norsk Tipping increases rapidly and continuously. This is not correct. The amount of games provided Norsk Tipping has at all times been modest compared to what is seen in most other countries. As seen from the list above, Norsk Tipping currently offers only five different types of games, six including the Extra Lottery operated on behalf of a charitable organization.

212. Furthermore, no new games have been introduced by Norsk Tipping since Joker in 2000, which replaced an earlier game ("the cash lottery"). Amongst the games introduced in the 1990s, several were either replacing existing games, or were simply taken over by Norsk Tipping from other administrators. The development of the games portfolio is described by Mr Thue in his written deposition:

> Norsk Tipping began its activities with football pools in 1946. This was followed in 1986 by the first numbers game, Lotto, Måltips in 1989, Vikinglotto in 1993, Oddsen in 1994 (replaced Måltips), Flax in 199**5** (this was a game that had existed in the market from 1988, and which Norsk Tipping won the licence to (formerly administered by Nordlandsbanken)), Extra in 1996 (the game belongs to the health and rehabilitation foundation Stiftelsen Helse and Rehabilitering, and Norsk Tipping is merely the operator). Joker came in 2000 to replace the cash lottery. The Ministry has not approved any more games for Norsk Tipping after 1993. What has happened since that time has merely been in the nature of adjustments and modernisations of the existing games portfolio.[52]

213. It is thus plain wrong to describe the history of Norsk Tipping as one of continuous and aggressive expansion. The correct perspective is that there has been moderate development and updating in accordance with general technical developments. This has been done in a manner compatible with the consistent general aim of preventing compulsive gambling and other gambling problems.

214. On this basis, the Government holds that exactly because of the exclusive right arrangement operated by Norsk Tipping, the volume of gaming and lotteries in Norway is substantially lower than it would (hypothetically) have been under any kind of more liberal and commercial system. And the character of the gaming offered is far, far less aggressive and addictive than they would otherwise all to easily have been, had they been developed and marketed by commercial actors.

215. Thus, the existing public exclusive right arrangement has in fact served Norwegian society very well as a provider and guarantee of moderate and non-addictive gaming

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[51] A table showing "Games revenue 1948-2004" is included on p. 42 of the 2004 Annual Report, annex 15.

[52] Cf. **Annex 71**, see question 11.

and lottery. And one of the reasons why it has been able to do this is precisely because it has been allowed to make certain adjustments and modernizations in its portfolio.

216. The only game provided by Norsk Tipping which is in principle has the potential of causing problem gambling is the Oddsen game, which was originally conceived and introduced as a more moderate version of the sports betting games which international bookmakers were increasingly starting to offer over the Internet. However, after some time Norsk Tipping started to get indications of problems attached to the game, and responded by reducing its attractiveness, introducing limits on the stakes (2003) as well as an 18 year limit (2004). The result was that turnover declined by almost 20 %. The main reason why Oddsen is still kept in the portfolio, is that despite its somewhat more problematic character, as compared with Norsk Tipping's other games – compared to the international odds-games it is still much less aggressive, as well as far safer from consumer protection and potential malpractice perspective. Thus, in its way, even Oddsen serves the main purpose of channeling gambling demand into as responsible and non-addictive variants as possible.

217. Some of the traditional games offered by Norsk Tipping are now offered on the Internet as well as through the traditional outlets. The same is true of Rikstoto. However, no new games have been developed specifically for this purpose. It is only the traditional games, which are not interactive, and the net is merely a new alternative distribution channel.

218. It is therefore misleading when the Authority tries to describe Norsk Tipping as establishing new interactive games on the Internet. If interactive games are defined as games where there is an immediate response to the individual customer about the result of the game after the customer has purchased a game, then Norsk Tipping offers no interactive games on the Internet (and neither does Rikstoto).

Marketing of Norsk Tipping's Games

219. It is true, as pointed out by the Authority, that Norsk Tipping conducts extensive marketing. The rest of the Authority's description of this is however selective, biased and misleading – both as regards the extent, the nature and the function of this marketing. It is also of dubious relevance to the case at hand, as there has never been any plan for Norsk Tipping to market its future machines.

220. As the marketing subject has been brought forward by the Authority as a main point in the case, as alleged before by the commercial operators before the national courts, it is therefore nevertheless necessary to address it, and to comment and correct the wrongful impression sought by the Authority.

221. The overall correct perspective of Norsk Tipping's marketing is that described by Mr Thus in his written deposition:

> Since the State has created the conditions for gaming in a responsible framework, it is important to be able to attract Norwegian players to these forms of gambling. Marketing is therefore necessary and desirable in order to be able to channel gaming into areas that are run by responsible and regulated enterprises. The chief strategy in our marketing is to promote responsible games and the

> fact that Norsk Tipping is a responsible enterprise. Furthermore, we want to draw attention through our marketing to the contributions that Norsk Tipping's profits make to society.
> Norsk Tipping is extremely restrained in using "hard-sell" advertising. It is an important part of the company's strategy to encourage people to bet on the low-risk games. We therefore make media purchases worth NOK 40 million annually for Lotto games, while we spend NOK 9 million a year on Oddsen. […]
> It would undoubtedly have paid to increase the marketing budget, if the object was to maximise profits. Experience has shown the consequences of cutting back promotions for the "jackpots". A NOK 10 million media investment yields NOK 100 million in turnover. With an earnings rate of 30% an investment of NOK 10 million will generate NOK 30 million in profits. From a purely commercial perspective, Norsk Tipping ought to spend more in the way of marketing resources if the sole object were to maximise profits. The fact that we don't do this, but on the contrary have reduced marketing expenditure in recent years is connected with the fact that we have been receptive to signals from the authorities that it is not desirable to increase the extent of gambling in Norway. This is in keeping with our principle of refraining from using instruments that seen in isolation are commercially profitable if they are not responsible in terms of social policy. [53]

222. Whilst Norsk Tipping's marketing is extensive, in style and content it is moderate and conservative. The main emphasis is on promoting the company and its gaming propositions to a wide segment of the population in the form of moderate entertainment. Marketing is not "hard-sell", nor is it targeted at potential heavy gamblers.

223. Secondly, it is primarily the soft variants of gambling that are marketed – in particular the number games Lotto and Extra, which are the softest games on the market and are not known to induce any form of problem gambling. The Lotto campaigns are probably Norway's best known marketing campaigns, but they promote the most harmless form of gaming, and they do so in a way which has great entertainment value for a lot of people, without causing any form of gambling problems.

224. Thirdly, Norsk Tipping's marketing is not extensive as compared to what it could have been – that is, compared to what would have been commercially sound or optimal. A private commercial operator would have spent mote on marketing, and the marketing would have been of a different and more aggressive nature.

225. The "hard evidence" that Norsk Tipping's marketing is not inconsistent or illegitimate is twofold. First, it is not producing problem gambling. Second, it is not even producing any great growth. While marketing has for many years been extensive, the turnover of Norsk Tipping has only been growing at a moderate pace, and has in recent years even stagnated and declined.

226. Norsk Tipping itself is very aware of the issues surrounding its marketing, and regularly consults experts in order to avoid marketing that might induce problem gambling.[54]

227. Even though Norsk Tipping's marketing has not been known to induce problems, it was a natural and consistent part of the general tightening of Norwegian gaming and lottery policy starting in 2002-2003 to subject it to critical assessment. Of some relevance was of course also the November 2003 Gambelli judgment paragraph 69, which in particular questions the consistency of marketing within restricted gambling systems. Another

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[53] Cf. **Annex 71**, see question 12.

[54] Cf. **Annex 94,** "Grunnlaget for Norsk Tippings markedsføring" [*The Basis for Norsk Tipping's Marketing*], memorandum from Norsk Tipping.

important factor is the growth of compulsive gambling in Norway, which – even though almost exclusively caused by (non-marketed) slot machines – still has contributed to a more general skepticism with gaming and lotteries – which also affect Norsk Tipping and its marketing campaigns.

228. For this reason, the Ministry has imposed on Norsk Tipping obligations to adhere to principles of moderation and responsibility in terms of the marketing. The result is that marketing has been substantially reduced, and that even more consideration is put into ensuring that it is non-aggressive in style and content. The reduction is described by Mr Thue in his deposition:[55]

> The marketing budget for the games has been reduced over the last two years from NOK 155 million in 2003 to NOK 129 million in 2004, while the budget for 2005 is NOK 124 million. All the figures include VAT. This has occurred in a period in which the total advertising market in Norway has grown. From 2003 to 2004 the increase was 12%, while from 2004 to 2005 it increased by 7%. This means that Norsk Tipping has become considerably less visible during the period. From being the second largest buyer of media coverage in Norway, Norsk Tipping has to date dropped to tenth place in 2005.

229. Furthermore, when the Gaming Authority conducted its thorough review of Norwegian gaming and lottery in order to prepare a proposal for a governmental action plan, marketing was one of the main issues. In the Authority's December 2004 report there were several suggestions in this regard, including that guidelines should be drawn up. This was promptly followed up by the Ministry in its April 2005 Governmental Action Plan to prevent Problem Gambling, and the new "Guidelines for the Marketing of State-Controlled Gaming and Gambling" were adopted by Royal Decree in early June 2005.[56] This is further described below in section 5.3.

230. On this basis, the Government holds that the marketing of Norsk Tipping, within the present legal and actual framework, is of a sensible and proportionate character, which balances conflicting interests, in one the one hand confining and limiting gambling opportunities, and on the other hand channeling gaming desire into the least harmful outlets, and preserving a system which ensures responsibility and moderation. The need for such marketing is in fact probably increasing, rather than the opposite, in the face of a rapidly growing and to some extent very aggressive and addictive new forms of gambling being offered very extensively over the Internet – much of it from jurisdictions under little or no legal and actual control.

231. While this is an important topic, the Government holds that it bears no direct relevance to the case at hand, since slot machines are not marketed in the usual sense of the concept, neither by the present operators nor will they be in the future by Norsk Tipping.

Norsk Tipping's Approach to Social Responsibility

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[55] Cf. **Annex71**, question 13.

[56] Cf. **Annex 95,** Guidelines for the Marketing of State-Controlled Gaming and Gambling, Royal Decree of 10 June 2005, with an English translation enclosed. The guidelines apply to Norsk Tipping and the Norsk Rikstoto Foundation.

232. The main contribution of Norsk Tipping to the social issues raised by gambling is that it does not offer games that are addictive, at least not beyond very limited levels. In this respect, it operates a policy which is different from that of most commercial companies engaged in the gaming market.

233. The wish to avoid gambling problems and to keep gaming within socially acceptable limits is why Norsk Tipping was established in the first place. This is also why the company is still used as the Government's primary tool for implementing gaming policy.

234. Norsk Tipping may easily and efficiently be instructed and controlled when doing so is necessary for social policy considerations. Contrary to what would be the case under a competitive and privatized license regime, there is no need for proving any previously established legal basis for imposing restrictions aiming to reduce problem gambling. Further, the system with Norsk Tipping as a gaming policy tool avoids the risk for debates and law suits in connection with new restrictions. Changes can be made within weeks, if not days, if the Government finds it expedient.

235. Although problem gambling has only to a very limited extent been due to games offered by Norsk Tipping, the company has nonetheless acknowledged the challenge, and introduced a number of measures. In this respect, Norsk Tipping has:

- Drawn up its own comprehensive programme for gaming responsibility
- Implemented the World Lottery's Code of Conduct
- Started its own training programme for employees and concession holders
- Introduced guidelines on market ethics
- Set up a surveillance system to detect abnormal gambling behaviour

236. These and other measures are described in Sigmund Thue's deposition as well as in the latest annual reports.[57] Starting in the 2004 Annual Report, there is now a "social report" drawn up each year, which reports on social responsibility initiatives and considerations.

237. The commercial consequences of the social responsibility exercised by Norsk Tipping are described by the chairman, Mr. Thue, as follows:

> In practice this means that at times we are obliged on the basis of these guidelines to make decisions that we know will reduce turnover and thereby the company's profit. Not infrequently we also refrain from making use of instruments that we know would have positive commercial effects, because we can see that they may have undesirable consequences and thus come into conflict with our responsibility to society

238. The greatest challenge for the social responsibility of Norsk Tipping will come when it assumes responsibility for the slot machines, which is a form of gambling potentially much more problematic than any of the forms presently offered by the company. This is

[57] Cf. Thues deposition, **annex 71**, in particular pp. 4-9, and the 2004 Annual report, **annex 15**, pp. 32-35. See also **Annex 96,** Norsk Tipping's programme for responsible gaming, **Annex ..97,** Ethical guidelines for Norsk Tipping, **Annex 98** "Ansvarlig spilleglede" [*Responsible gaming*], brochure from Norsk Tipping, 2004, **Annex 99** "Spørsmål og svar om spilleavhengighet" [*FAQ on compulsive gambling*], brochure from Norsk Tipping 2004, and **Annex 100** Excerpts from Norsk Tipping's website, under "Spilleavhengighet" (currently available in Norwegian only).

anticipated, and a number of measures have been taken to ensure that under the regime of Norsk Tipping the future machines will be very significantly different from the present, and that they will be operated in such a way as to effectively safeguard against any large scale problem gambling.

4. THE 2003 SLOT MACHINE REFORM

4.1 Introduction

239. The Storting (parliament) adopted the slot machine reform in June 2003 by a broad majority, following a year and a half of extensive preparations, first by the Ministry of Culture and then by the parliamentary Standing Committee on Cultural Affairs.

240. The question before the EFTA Court is whether this parliamentary reform complies with the requirements set by EEA law, as they must be interpreted according to the case-law of the ECJ. Under the criteria set by the ECJ it may be of interest not only to evaluate the contents of the reform, but also to know its history and preparatory works, in order to judge whether it is based on legitimate requirements, whether it is a consistent and systematic measure aimed at limiting gambling, and how the national legislator has assessed the necessity of such a measure.

241. In this case there are extensive preparatory works, reflecting the thorough legislative processes conducted in the administration and the parliamentary committee. The two main documents are:

- The Bill of Enactment of 14 March 2003 – Ot.prp. no. 44 (2002-2003)
- The Committee's Recommendation of 6 June 2003, Innst. S. no. 124 (2002-2003)

242. Both are annexed to the Authority's application, with English translations enclosed.[58] They are both broad policy papers, which not only describe and explain the slot machine reform in detail, but also give a comprehensive review of Norwegian gaming and lottery policy in general and discuss a number of current issues.

243. The Government holds that when judging the slot machine reform under EEA law, it is necessary to study these two documents in full, not only to look at selected quotes, and not only to look at the parts specifically describing the slot machine reform. Therefore, although the most important sections will be quoted in the following, the full documents will have to be studied by anyone who wants to make an evaluation of the legitimacy, consistency and necessity of the contested parliamentary amendment.

244. Furthermore, the Government holds that these two documents should in principle be sufficient to evaluate the legislative reasoning and the reform as such. They fully comply with all national criteria for the drafting of legislation, and they are more than thorough enough for any judicial test prescribed by EU/EEA law. Thus, it should in principle be enough to refer the Court's attention to these two documents, as sufficient material for a correct understanding and evaluation of the factual elements of the case.

245. The Authority obviously does not share this view. In stead, in its Application, it gives a lengthy and curiously one-sided account of parts of the pre-history of the reform. The underlying submission seems to be that the legislative reasons for the reform given in

[58] Cf. **Annex 9** and **Annex 11**.

the Bill of Enactment and the Committee Recommendations are not the "real" reasons, but only incomplete or vicarious motives.

246. The Government is fully aware of, and comfortable with, the fact that under EU/EEA law the competent courts shall evaluate not only the formal legislative reasons stated in national preparatory works, but also the real and actual reasons, in case there is a difference, and to the extent that the courts are in position to do so. This has often been stated by the ECJ, inter alia in Gambelli. However, the Government sharply disagrees with the Authority to the extent that it implies that the reasons given in the preparatory works are incomplete or vicarious.

247. In order for the Government to refute the allegations of the Authority, and to show that the preparatory works are substantive and complete, as well as to further explain the background to the reform, a description is therefore given of the whole process, from gambling on slot machines started to become a problem in the early 1990s until the parliamentary adoption of the act of amendment in June 2003.

248. The Government would also like to point out that the legislative process is described in detail in the written depositions prepared for the Supreme Court by the Minister, Ms Svarstad Haugland, the Director responsible, Mr Tesaker, and the chairman of Norsk Tipping, Mr Thue. These and other statements are enclosed, and may be read as a supplement to the description given below.[59]

4.2 Previous regulation of slot machines

249. Electronic slot machines of the current type (AWPs) are a relatively new thing, which were first developed and introduced on the Norwegian market in the early 1990s. The predecessor is the old-fashioned mechanical slot machine, the "one-armed bandit", which is more than a century old, and in most countries primarily confined to casinos.

250. Such machines were not allowed in Norway, although there was a certain illegal market for them in the 1970s. This was revealed and reported upon by an official committee in 1980, and stricter controls were emphasised (NOU 1980:9 "Slotmaskiner"). In 1985, the committee also produced a report on other types of gaming machines (NOU 1985:16, "Spilleautomater").

251. The only gaming machines which were allowed and widespread in Norway up until the late 1980s were simple mechanical "coin-flick" machines, on which 1 krone could be flicked manually at the time, with a maximum winning of 7 kroner. These machines were not legally classified as "lottery" devices, and were therefore not restricted. Most of them were owned and operated by Røde Kors and Redningsselskapet.

252. As a result of technological developments in the late 1980s and early 1990s the old coin-flick machines were gradually replaced by new electronic machines, which fell outside of the prohibition against "slot machines". They were formally in the same category as the coin-flick machines, and therefore not regarded as "lottery", and they

[59] Cf. **Annexes 69, 70 and 71**. See section 12 on the nature of these depositions.

were operated for a while both by humanitarian and socially beneficial organisations and by private commercial companies.

253. When a new Lottery Act was adopted in 1995 it was decided that the new kind of slot machines, or "gaming machines", should be categorized as "lottery", and therefore subject to the license requirement, under which only humanitarian and socially beneficial non-profit organisations and associations could get licenses. In this way, the organisations gained a share of the revenue from the machines. For the private commercial companies which were at the time engaged in this business, it meant that they could no longer operate in their own name, but would have to offer their services as "operators" to the non-profit license-holders against a percentage of revenue.

254. In order to understand this legislative reform of 1995 it must be noted that slot machines were at the time still a rather small and marginal part of the gaming sector. The preparatory works cite annual turnover figures from the early 1990s, which were only a few hundred million kroner. This is why the machines were naturally incorporated into the Lottery Act, together with the other small and medium-sized forms of gaming and lotteries, and not regulated as a major form of gaming (i.e. under the exclusive right).

255. The moderate 1995 reform was fiercely criticized by the (then) small private machine business, and 20 companies launched proceedings against the state before the national courts claiming that it was both unconstitutional and in breach of EEA law. This was the Kiddie Rides-case, which ran from 1995 to 2001, when the companies lost.[60]

256. With hindsight, it is clear that the 1995 reform did not go far enough, and that the Norwegian legislator should have done the same as the Swedish legislator did two years later, when in 1997 slot machines in Sweden were regulated under the existing exclusive rights regime of Svenska Spel. The result is that the Swedish slot machine sector has developed in a much more moderate and responsible manner so that today the average net turnover per citizen is only approx. ten percent of that in Norway (see section 6.5).

257. Had the Norwegian legislator been stricter in 1995 there would never have been a big private commercial gambling business in Norway, there would not have been anything like the present social problems, and there would not have be a case like the present.

258. As things were, the Norwegian slot machine market started to gather pace in the second half of the 1990s, with the development of increasingly aggressive machines, and a large number of new license-holders and commercial operators entering the market.

259. The result was the first surge in slot machine turnover, accompanied by the first surge in problem gambling, which were repeatedly reported in the media, and which started to attract the attention of those working with other kinds of addictions in the field.

260. By 1998 the competent authorities had become aware that compulsive gambling on slot machines had developed into a problem. The response of the Ministry of Justice was to

[60] The case involved a first round of dispute over the question of interim measures in 1995 which ended in the Supreme Court. The main case then went on for many years until the state won in the Oslo City Court in 2001.

issue new regulations on type approval of gaming machines (the 1998 Regulations),[61] which tightened the technical requirements for new machines (stake, prize, speed, design, sound and visual effects etc.), and called for the phasing-out by April 2001 of the old existing machines which did not comply with the new requirements. Had this been allowed to function, the whole machine-park would have had to be replaced by "softer" machines by 2001. Furthermore, the Ministry drew up plans to change the rules on where machines could be installed, banning places like shops, shopping centres, kiosks, petrol stations etcetera, and mainly confining the machines to especially reserved areas (arcades). These plans were presented to the Storting (parliament) by the Bondevik Government in the spring of 1999.[62]

261. This two-pronged Government initiative to restrict the new slot machine market met with vehement opposition from the commercial operators and the non-profit license-holders, and in the summer and autumn of 1999 they launched a large-scale lobbying campaign targeted at the parliamentary Standing Committee on Justice. The campaign combined the political influence of the humanitarian and socially beneficial organisations with the entrepreneurial drive of the commercial operators, and it was led by the then chairperson of Norsk Lotteridrift AS, a prominent business lawyer who was also a former minister of justice. The result was characterised in the press as "a lobbying campaign that humanitarian Norway had hardly seen the like of":

> "The gaming machine operator Norsk Lotteridrift (NLD) pushed humanitarian associations before it along the corridors of power to persuade the Standing Committee on Justice to stop the government's new lottery regulations. The decision has helped increase the value of NLD by over 80 per cent. Chairman of the board Else Bugge Fougner and the company's new chief executive Bjarne Borgersen are left with hefty options profits. […] On Friday 22nd October last year the leaders of six non-profit organisations put their names to the same piece of paper. The document was placed in an envelope and addressed to the Storting's Standing Committee on Justice. The letter was part of a lobbying campaign that humanitarian Norway had hardly seen the like of: the theme was gambling and the motive was profits in the millions." (Aftenposten 10 March 2003).[63]

262. The lobby campaign was successful enough to convince not only the opposition, but it also made the parliamentarians of the ruling parties go against the initiatives of their own (minority) government. The result was that the Standing Committee on Justice in December 1999 unanimously turned down both the strict new technical requirements of the 1998 Regulations and the plans for stricter installation rules. The Committee remarked that "no requirements must be made in the regulations that would require replacement of the gaming machines, or which reduce revenue for the organisations", and emphasised that it did not want new restrictions on where to place the gaming machines.[64]

263. Committee remarks of this kind are regarded as binding in Norway and the result was that the Ministry for the time being had to give up its attempt to restrict slot machine gambling. The plans for restrictive installation rules were abandoned, and the 1998 Regulations (which had not had time to make much effect) were amended, with new

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[61] Cf. Regulations of 28 August 1998 No 853, enclosed as **Annex 1** to the Authority's Application.
[62] Cf. Ot.prp. no. 84 (1988-89).
[63] Cf. **Annex 101,** Article in *Aftenposten* 10.03.2000, "Milliongevinst i det godes tjeneste", English translation enclosed. The article explains in detail how the lobby campaign was conducted, and what were the economic implications.
[64] Cf. Innst. O. no. 33 (1999-2000), enclosed as **Annex 2** to the Authority's Application.

and liberal technical requirements, which allowed for the existing machines to continue in operation and for new machines to be developed.[65]

264. Thus, the effect of the campaigns waged by the new slot machines business was that in stead of a tightening, as proposed by the competent authorities, what in fact took place in 2000 was a further liberalisation of the slot machine sector. This gave new impetus for even stronger growth, with large jumps in turnover in the following years.

265. Another consequence of the successful 1999-campaign was that the market value of the operator companies rose sharply. One result of this was that the largest of the companies, Norsk Lotteridrift (NLD) was sold in February 2000 to the Swiss bank UBS for NOK 956 million, at a huge profit for the Norwegian investors and lobbyists.[66]

266. Seen in retrospect, events in the late 1990s demonstrate the difficulties in regulating and restricting a profitable and powerful market sector, and illustrate the driving forces and mechanisms in a competitive market with strong and influential commercial players.

267. By way of contrast, it is safe to assume that if the slot machines at the time had been subjected to the ordinary exclusive-rights system of Norsk Tipping, the competent authorities would have had little difficulty in 1998-99 in rapidly restricting the character and volume of this gambling.

4.3. Preparing the reform 2002-2003

268. Following the failure to restrict slot machine gambling, problems continued to grow. By the autumn of 2001 the situation had become grave enough for the Stoltenberg government to report upon to parliament in the premises to the draft budget for 2002.[67] The problems were also addressed by a Private Members' Bill in the Storting, which was discussed by the Standing Committee on Culture in the spring of 2002. The committee commented that it was deeply concerned about the spread of compulsive gambling on slot machines, but that it would await an overall assessment of the gaming sector from the government, with concrete proposals for legislative change.

269. In January 2001 the administrative unit responsible for gaming and lottery policy had been transferred from the Ministry of Justice to the Ministry of Culture and Church, and in October 2001 there was a shift in government, following the general elections.

270. In the early winter of 2002 the Ministry started once again to address the issue of how to fight the new problems caused by the slot machines. There were several reasons for this initiative. First, parliament had commissioned a full presentation of national gaming and lottery policy, and it was clear that the expanding slot machine gambling would have to be a main issue. Second, the Ministry started to get reports and statistics from the newly-appointed Gaming Board (now the Gaming and Foundation Authority), which gave a more precise understanding of the challenges. Third, Dr Fekjær, a leading psychiatrist working in the field with gambling addicts published a book called

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65 Cf. the Ministry's proposals of June 2000, enclosed as **Annex 3** to the Authority's Application.

66 Cf. **Annex 102**, Article in *Aftenposten* 21.02.2000, "Kjapp gevinst for Borgersen".

67 Cf. Parliamentary Bill no. 1 (2001-2002), which is cited in Bill to the Odelsting no. 44 (**Annex 9**) in chapter 3.1.2.

"Spillegalskap" – vår nye landeplage" (Ludomania – our new national scourge), which sparked a general debate and greatly increased public as well as political awareness of the problems.

271. Fourth, two cases were uncovered which demonstrated the aggressiveness of the market forces at work, and the problems inherent in the existing regulation. One of the cases involved the illegal buying and selling of especially attractive machine premises. The other one involved a company importing machines (Errell) which had managed to exploit a loophole in the technical regulations in order to develop a particularly addictive super-game function on its machines, contrary to the intentions of the legislation.[68]

272. Finally, there was a strong political willingness to seriously address the new gambling issue, both for socio-political and moral reasons.

273. Based upon earlier experience, the Ministry started a comprehensive project in order to prepare new proposals, which from the start included parallel examination of different alternatives. The two main alternatives were either (i) to try again to regulate the slot machines in a more restrictive manner within the legislative framework of the Lottery Act, or (ii) to examine whether it would be feasible instead to regulate the slot machines under the exclusive-rights system of the Gaming Act.

274. The fact that these alternatives were examined and prepared in parallel during the spring of 2002 is essential to understand the nature of the process, and why the Ministry in the summer/autumn was in a position to present two consultation papers setting out different solutions.[69] It also shows the thoroughness of the process, and the fact that various options were assessed and kept open for a long time. The alternatives which were considered are described and discussed in the proposition to parliament which came a year later.

275. One of the early initiatives taken by the Ministry was to ask Norsk Tipping to give an internal report on whether the company would be able to enter the slot machine sector with the aim of contributing to a more moderate and responsible market. This task was assigned in meetings in February and March 2002 between representatives of the company and the authorities. The mandate was open, and it was not specified whether such involvement by Norsk Tipping should be under the existing exclusive rights system or some other system.

276. While Norsk Tipping started work on its assignment, the Ministry continued its own examinations. In these early stages, there was a feeling that the exclusive-right model was an ideal but rather radical solution, and that other alternatives also had to be examined and assessed.

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68 These cases are further commented upon in the written testimony of Director of Department Eivind Tesaker to the Supreme Court, see **Annex 70** in the answer to question 10. The efforts of the competent authorities to stop the highly problematic Errell-machines led to a lawsuit against the state which is still pending before the Court of Appeal. The judgement of the Oslo City Court of November 2005 (which the government won) is enclosed as **Annex 60** to the Authority's Application. The Errell-case, as the earlier Kiddie Rides-case, illustrates how difficult and time-consuming it has been to regulate and administer the slot machine sector in a responsible manner.

69 In contrast, the description of the process given by the Authority gives the impression that the second (exclusive-right) solution was something which the Ministry only came up with at a later stage, when the economic implications of the first alternative was pointed out. This is wrong.

277. This is the reason why the Ministry opted to start with sounding out the least intrusive measure, and on 21 June 2002 sent out a first "consultation paper". This paper contained a renewed proposal for changing the rules on where slot machines may be installed, taking them away from places like shops and shopping malls. The proposal was modest, and did not include changing the technical requirements for the machines themselves. The underlying idea was that a change in installation rules would in itself not be enough, and that this would only be the first of several stages, to be followed later be stricter technical requirements. The consultation paper however focused only on the first step, to sound out whether such a course would be at all feasible.

278. While the first consultation paper was being drawn up, the parallel examination of a second, bolder and more radical, alternative continued. In early June two representatives of the Ministry went together with representatives of Norsk Tipping to Quebec (Canada) to see how the state authorities there had managed to replace a former competitive slot machine market with an exclusive rights system. And in late June a delegation was sent to Denmark and Sweden to examine how slot machines were regulated in these two countries. The delegation was headed by a junior minister, Ms Gjerløw, and included a political advisor, three senior civil servants and representatives of Norsk Tipping. The clear impression of the delegation was that the Swedish model for regulating slot machines under the same restrictive exclusive rights system as other major forms of gaming and lottery was far superior to the existing Danish and Norwegian regimes in terms of limiting gambling opportunities and constraining problem gambling.[70]

279. On 2 July 2002 Norsk Tipping presented its internal report in a meeting with the Ministry. The company's main argument was that if it was to enter the slot machines sector in order to make it more moderate and responsible, this would have to be under the traditional exclusive rights model. Should the company go in as yet another operator under the existing regime, this would only lead to increased competition, and force it to operate in a way totally foreign to its tradition and objectives. The report then presented a detailed proposal on how Norsk Tipping could administer the slot machine sector under the legislative framework of the Gaming Act, and transform it into a restrictive and responsible sector, replacing the existing machines with a different concept, involving fewer and less aggressive machines, new rules for installment, new systems for surveillance and control, etcetera.

280. The report from Norsk Tipping focused for the first time on how a transferal of slot machines to the exclusive-rights system of the Gaming Act could actually be done. The report was examined by the administration in the summer of 2002, and a number of follow-up questions and requests for further analysis were put to Norsk Tipping. These were answered during a meeting in September, in which the company gave a more detailed presentation.

281. Alongside with the reading of the report from Norsk Tipping, the Ministry continued its own examinations in the summer of 2002, reevaluating arguments and positions both at the administrative and political level. The result was a growing sense that an exclusive

[70] This is described in the deposition of Director of Department Eivind Tesaker in answer to questions 17 and 19, cf. **Annex 70**.

rights model was actually feasible, and that this, done in the right way, would be by far the best way to diminish slot machine gambling and gambling addictiveness.

282. On 20 September 2002 the time-limit for giving response to the consultation paper expired. If the Ministry had been in any doubt as to whether the existing operators and license-holders would be willing to go along freely and constructively with a modest reform alternative, this vanished. In three separate consultation statements, the ten major humanitarian license-holders (the “10H”), the NOAF and the NLD all argued strongly against the proposal to restrict the premises on which slot machines could be placed, asserting, inter alia, that this would ruin their business, that the basis for the Ministry’s proposal was inadequate, and that extensive further research had to be carried out before any comprehensive reforms could be undertaken.[71]

283. At this point in time, the Ministry was already in great doubt as to whether it would be at all possible to remedy the new problems caused by slot machine gambling within the existing regulatory framework, and the reactions to the consultation paper confirmed and reinforced that doubt. Furthermore, in terms of timing, it was altogether untenable for the authorities to postpone the reform awaiting further research, as suggested by the operators, while the problems with compulsive gambling continued to mount up.

284. This was the situation faced by the Ministry in late September 2002. On the one hand unanimously negative response from both the non-profit license-holders and the commercial operators, combining forces, and signaling that they would strongly oppose even that proposal which the Ministry regarded as only a first step, and which it had grown increasingly doubtful as to the effects of. On the other hand the new inputs and assessments – from the talks in Sweden and Denmark, from internal evaluations, and from the presentations of Norsk Tipping, which had envisaged how the slot machines could be transferred to the regime of the Gaming Act, and how this model would be superior in terms of effectively and comprehensively fighting problem gambling.

285. At this stage political contact was established between the Ministry and the major humanitarian and charitable organisations and associations holding slot machine licenses, the “10H”, and in particular the two largest – Røde Kors (the Norwegian Red Cross) and Redningsselskapet (the Lifeboat Association). For the Ministry it was important to have the support of these organisations. First, this was essential in political terms, in order to get any substantial gaming reform introduced and implemented. Second, it was considered important also out of consideration for the fact that these organisations were the actual license-holders, and in recognition of the important work they are doing in society with the gaming revenue.

286. The aim of the Ministry was to put a stop to the problems on the slot machine market, and to that end the backing of the humanitarian and benevolent organisations was considered vital. At the same time it was also a consideration that any new restrictions on the slot machine sector should not reduce the revenue of the organisations more than necessary. One of the advantages of the model outlined by Norsk Tipping was that it

[71] The consultation statements, all dated 20 September 2002, were presented and in large parts documented during the proceedings before the Court of Appeal. They have not been enclosed by the Authority, and the Government for its part does not find this necessary.

would guarantee the organisations reduced but stable funding allocations in the future, even with a heavy reduction in slot machine turnover.

287. This was the basis for the contact taken, which was constructive. The Ministry succeeded in getting the major organisations to accept and support a model under which they were willing to hand in their slot machine licenses in exchange for a fixed percentage of the distribution scale (tippenøkkelen) of Norsk Tipping, i.e. a fixed percentage of the total revenue generated by Norsk Tipping after the entry into force of the reform, from all of the company's gaming and lottery activities.

288. The organisations were willing to go along with this model even though they knew well at the time that it would not lead to increased revenue, but quite the opposite – a reduction as compared to 2002-levels, and a substantial reduction as compared to what they could expect in the future under the existing rising market.

289. In this respect, the organisations traded a reduction in income against the stability of fixed annual transfers from the total turnover of Norsk Tipping. But for many of them, this was also a social and ethical issue. Many of them acknowledged that something radical had to be done about the slot machine problem, and that this would be impossible to achieve within the existing legislative framework.

290. Having secured the backing of the major license-holders, the Ministry was in a position to launch the ideal model, and this was done in a second consultation paper, issued on 25 October 2002.[72] In this paper the Ministry outlined how the slot machine sector could be transferred from under the Lottery Act to the existing exclusive-rights system of the Gaming Act, and how this would work out in practice.

291. Like any consultation paper, the October 2002 paper was a proposal, sent out to get response and reactions, and to sound out whether the model envisaged was actually feasible. In other words, this was only the start of the legislative preparations for what would later be the Bill and the parliamentary reform.

292. As it turned out, the consultation paper was well received by all those who gave official response, except for the commercial operators. Several of the major humanitarian and benevolent license-holders supported it wholeheartedly both in their responses and in the press, amongst them Røde Kors, Redningsselskapet and Norsk Idrettsforbund. Other license-holders were more ambivalent, but not opposed. The opposition, the media and the public were also on the whole hugely in favor of the model, with the exception of the Progress Party and parts of the "business-press".

293. Two quotes, one from the chairman of Røde Kors (the Norwegian Red Cross) Mr. Thorvald Stoltenberg, and one from the general secretary of Redningsselskapet (the Lifeboat Association) Anne Enger Lahnstein, sums up the attitude of the major license-holding organisations towards the reform:

> "The Norwegian Red Cross wholeheartedly supports the Government's latest proposal to transfer the operation of payout machines in Norway to Norsk Tipping. The proposal means that our organization will be looking at a loss of 150 millions annually. I repeat: a loss of 150

[72] Cf. **Annex 8** to the Authority's Application, with an English translation enclosed.

million kroner every year. Further to this, we will be forced to lose 130 man-years. Despite this, we support the proposal because it is in our opinion absolutely necessary to implement a radical clean up in the market."[73]

"For the Lifeboat Association the bill will represent a major disadvantage. We will have to wind down our payout machine department with its 37 hard-working workers. This is sad! Further, our income will be reduced to a considerably lower, but nonetheless predictable and stable level. Even through this will demand much of us, the Lifeboat Association gives its full support to the reform. Our reasoning for this is that we as a humanitarian organisation wish to show our social commitment by taking the ethical and human challenges seriously. Anything less would not be worthy."[74]

294. Not surprisingly, the Ministry's consultation paper of October 2002 met with vehement opposition from the private commercial companies selling operating services to the license holder, which would loose the basis for their business, should the proposal be enacted. Both NOAF and NLD delivered lengthy response papers in December,[75] and also engaged themselves actively on a number of other levels. Unlike the situation three years earlier, however, they did not this time have the support of the humanitarian and benevolent license-holders and their campaigns were therefore less effective.

295. After issuing the October 2002 consultation paper, the Ministry continued its process of fact-finding and preparation, consideration of the consultation responses, further fact-finding and evaluation, and by-and-large the writing of a proposition (Bill) to parliament. There was still a lot of work to be done examining both the principles and the details of the proposed model, and this was done partly by the Ministry itself and partly in dialogue with Norsk Tipping and the Gaming Board. Furthermore, the Ministry had to assess the compatibility of the proposal with EEA law, all the more since NOAF and NLD had already threatened legal action. This was done in cooperation with the Ministry of Justice, as later reflected in the Bill. Finally, the Ministry saw that a reform of the slot machines would have to be considered in the broader context of the gaming policy in general, which at this time had not been subjected to an overall review and parliamentary debate for more than a decade.

296. The process of examination, evaluation and legislative drafting undertaken by the Ministry in the late autumn of 2002 and the winter of 2003 was consequently broad and comprehensive, and resulted in the March 2003 Bill to parliament, which not only set out the slot machine reform, but also gave an overall review of national gaming policy in general, heralding a tighter and more conscientious approach in the future.

297. The key document for understanding and evaluating the Ministry's considerations and justification for the slot machine reform is therefore the March 2003 Bill, which must then be supplemented with the legislator's positions as they were expressed in the committee recommendation of June the same year.

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[73] Cf. Thorvald Stoltenberg, Verdens Gang 5 March 2003, enclosed as **annex 103**, with an English translation. It should be noted that the article is written in March 2003 – before the Ministry had presented its Bill, and well before the parliamentary debate and vote. Even at this stage Røde Kors knew that the reform would mean a large reduction in income.

[74] Cf. Anne Enger Lahnstein, Dagbladet 8 August 2003, enclosed as **annex 104**, with an English translation.

[75] NOAFs response paper of 17 December 2002 is fifty pages long, and contains numerous factual and legal arguments and allegations against the proposal in the consultation paper, including the threat of taking legal action based on EEA law. This paper was presented and partially read during the proceedings before the Court of Appeal.

4.4. The Ministry's White Paper of March 2003 – Ot.prp. nr 44 (2002-2003)

298. The Ministry's Bill of Enactment, Ot.prp. nr. 44 (2002-2003) of 14 March 2003 Concerning the Act relating to changes in the gaming and lottery legislation, is divided into seven main chapters. The proposed slot machine reform is discussed in Chapter 4. The rest of the Bill describes and discusses the gaming and lottery policy in general, as well as a number of other current challenges and initiatives.

299. The introduction in Chapter 1 on "Main contents of the proposition" starts by stating:

> It has always been deemed necessary to regulate games played for money to ensure safe conditions for people in a society. Regulations exist in all civilised countries to limit the spread of lotteries and money games. Games for money have been prohibited under Norwegian law for hundreds of years. However, a limited number of permits have been authorised for the purpose of raising funds for humanitarian purposes and for socially beneficial causes.
>
> In 2001, Norwegians gambled for some 22 billion Kroner. There has been strong growth in the use of prize machines in recent years, and in fact such use has multiplied in the last ten years. The profits from gaming provide important contributions to many good causes in society, yet at the same time many people develop unfortunate gambling habits. The growth in gambling activity has been particularly large for so-called prize machines. Approximately 19000 prize machines were deployed in 2001 across Norway. These machines combine sound, visual displays and prize payouts in a way that makes them extremely "attractive". Experience shows that it is difficult to enforce age restrictions for the use of prize machines. Many children and young people regularly use prize machines. A new element is the aggressive marketing of money games on the Internet which undermines national regulations. The international pressure on Internet gaming is increasing, and it is necessary to determine how this challenge is to be met.
>
> In this proposition the government puts forward several motions which tackle these questions. The main reasons for the government's proposal for a clean-up of the prize machine market is a desire to be able to fight gambling addiction and prevent crime in a more effective manner, achieve better control of the irregularities in the industry and be able to enforce the minimum age limit of 18 limit more strongly.
>
> Gambling addiction is not a new phenomenon, but is a growing problem for an increasing number of people. Stories about those with huge gambling debts, whose families have been split up because of gambling, and even those who have taken their own lives, shake us all. The large number of gaming machines that have been set up make it difficult for an increasing number of people to be out in public. Prize machines are a source of excitement for children and young people in particular - and also for many others - but unfortunately they can also result in huge losses. […]

300. The introduction is followed by a short Chapter 2 on the "Background for the Bill".

301. Chapter 3 (pp 10-26) is titled "Combined review of money games and lotteries in Norway", and consists of a compact and comprehensive review of the history, main principles and current challenges of Norwegian gaming and lottery policy in general.

302. Chapter 4 (pp 27-37) is devoted to the slot machine reform, and must be read in its entirety if one is to understand and review the legislative reasoning and contents of the reform. It starts with an introduction (4.1), referring to the experience of the last ten years, which shows "a steadily increasing problem" with minors playing the machines and with gambling addiction, and introduces the proposed reform.

303. Chapter 4.2 on "Rules in other countries" is short, and points out that the present Norwegian rules on slot machines are liberal compared to a number of other western countries. Then follows a brief description of slot machine legislation in Denmark, Sweden and Finland, pointing out that in Sweden and Finland all machines are operated by the state gaming companies under exclusive rights.

304. Chapter 4.3 on "The current situation" first describes the background for the current rules (4.3.1). Then follows an assessment of "The need for changes to the current rules" (4.3.2) which in its entirety is directly relevant to the case at hand. Particularly pertinent passages include:

> The Ministry of Culture and Church Affairs is of the opinion that the placement pattern and manner of operation of today's prize machines has increasingly resulted in unfortunate gambling behaviour.
> […]
> Treatment institutions for those suffering from substance addiction report an increasing demand for the treatment of gambling addiction and that in the majority of cases such addiction is connected with playing prize machines… […]
> The Norwegian Gaming Board has demonstrated that many of the machines that are developed on the basis of the new requirements contain a payout program that does not meet the requirement of the technical approval regulations for a random distribution of winnings. Experience drawn from the implementation of the new regulations shows that it is difficult to control and enforce the machines' genuine mode of operation with regard to the requirements laid down in the regulations. […]
> The range of suppliers of machines and software to games operators in Norway is dominated by large international companies with purely commercial interests that put pressure on the interpretation of regulations and technical specifications, and are less interested in the intention of the Act, i.e. to limit the damaging effects of gambling. It is clear that a latent desire exists to exploit the regulations as much as possible in order to thereby increase market share in sales of machines to Norway.
> It has also been seen to be difficult to implement stricter rules on the mode of operation of the machines, because such changes are met by massive resistance from the games operators who fear a decline in turnover from the machines.
> Furthermore, it is extremely expensive to establish complete control as the machines that are deployed do not contain a payout program that gives players the opportunity to predict when a machine will pay out winnings. Despite the fact that both turnover and profits per machine are increasing each year it does not appear that the financial motivation for deploying ever more aggressive machines is slowing down proportionally. The demand for new and ever more attractive machines thereby creates continuous pressure on the technical machine requirements that requires a corresponding improvement in control procedures.

305. Chapter 4.4 is titled "Alternatives to the monopoly proposition", and starts by describing how the Ministry has assessed different reform alternatives. The two main alternatives are then presented in 4.4.2 on "Adjustments to the current model" and 4.4.3 on "The concession system".

306. "The Ministry's assessment" is then presented in chapter 4.4.4. The line of reasoning has to be read as a whole, and is therefore quoted as such:

> **4.4.4 The Ministry's assessment**
>
> The gaming and lottery market in general, including the machine market, should not be an standard competitive market. Money games and lotteries are fundamentally prohibited in Norway. The basis for the regulation of gaming and lotteries has always been that it is necessary to protect citizens from developing unfortunate gambling behaviour. It is the

opinion of the Ministry that the unfortunate aspects of the machine market are significant causes of the fierce and increasing competition between the different operators, including finding the best machines and gaining access to the most lucrative deployment sites. The entrepreneurs compete to have the most attractive prize machines at the most exposed deployment sites, i.e. where many people gather; for example in shops, shopping centres etc. This entails the unfortunate exposure of minors and people with problematic gaming behaviour to money games. This description is supported by considerable direct feedback from individuals received by the Ministry

The Ministry is of the opinion that a change to the current rules or the introduction of a concession system with a reduced number of concession agents would not remove the element of competition from the prize machine market. As long as many private operators compete with each other the desire for ever more aggressive machines will exist, at the same time as the undesirable competition on the best deployment sites will be maintained. The task of monitoring and exposing illegal practice will be require huge resources. Experience shows that it is difficult for the lottery authorities to carry out the necessary regulatory measures with regards to deployment locations and the type of machines due to the industry's objections to reduced earnings potential. It can therefore also be assumed that Norsk Tipping, as an operator in the prize machine market competing with the existing or a small number of new operators would not be able to contribute to a reduction in the negative effects of competition in the market, because the company would have to react to and compete on the same terms with the other operators. This has been shown through experiences in Denmark where Dansk Tipstjeneste competes with private operators.

The Ministry is of the opinion that the introduction of different rules for the distribution of the profits from machines (for example the so-called "gaming pot") will not solve the inspection and control problems described above. Today's model or a new concession-based system would also require further regulation and controls to deal with the existing problems with regard to cross-ownership between the owner of the premises and the operator.

A concession system for the operation of machines would probably also have to be conditional on the fact that the concessions were for a limited period of time, cf. the regulations in the EEA agreement's rules on the free movement of services and establishment rights. Time-limited concessions would result in reduced predictability with regard to investments and future projects for the operation of prize machines. The operators would have to write off investments within the period of the time-limited concession. Such a system is unlikely to encourage prudence on the part of the operator in the positioning and operation of the machines.

Based on the above the Ministry has reached the conclusion that a single operating company should be established with the exclusive rights to the operation of machines. This evaluation is supported by the country's largest and most experienced machine company - Røde Kors (the Red Cross) - which in its consultation submission stated that

> "It is the opinion of the organisation that a model in which Norsk Tipping AS enters the market as one of many operators will not result in the removal of the undesirable consequences of today's competitive situation. The exclusive rights model is necessary to achieve the necessary rationalisation benefits in order to reduce the number of machines to 10000 and to introduce a new type of machine. Other models that are based on more operators that do not run their operations according to the non-profit principle, will perpetuate the current problems by the fact that some of the profits do not benefit the intended causes, it will obstruct the introduction of new types of machines, perpetuate the undesirable competition over the best deployment sites and will not make any significant contribution towards better controls."

> "It is the opinion of Røde Kors that the existing legislation is the cause of this development. As long as free competition over the operation of machines exists, private operators and the owners of the premises concerned will continue to try to maximise their profits. This results in a constantly growing, ever more competitive and

partly uncontrollable market that is no longer in step with that considered by public opinion to be defensible. It has always been a prerequisite of the Storting that the prize machine market should secure income for the humanitarian and socially beneficial organisations within an ethically defensible framework. The existing model for the operation of prize machines in Norway has been shown to be incapable of meeting both of these conditions."

The Ministry has also concluded that a model with a large private concession agent will not provide the required direct possibility for control and inspection. Based on the experience of recent years in the machine market both in Norway and other countries, direct control of available games is deemed an essential condition to avoid confusion regarding the terms of operation for the machines, both with regard to the technical mode of operation of the machines and with regard to other conditions for the deployment of machines. Even in an exclusive rights model with only one private concession agent, this will have its own interests in relation to the profits from the enterprise which would of course be in conflict with the aim of the prevention of socially damaging effects. Experience suggests that the fact that a controlled and defensible range of games is in the best interests of the public is often inadequate in such a conflict of interests.

There are also reasons to believe that such a conflict of interests will occur regardless of whether the concession is operated by commercial or philanthropic interests. In any case, the experiences in recent years have shown that philanthropic organisations have also found it necessary to implement retaliatory measures and actively influence the decision-making process when the organisation's earnings appear threatened by stricter lottery legislation.

It is the opinion of the Ministry that the situation stated above that neither adjustments within the framework of the current model nor a concession system with one or more operators will ensure a socially defensible organisation of the prize machine business in Norway. The Ministry has concluded that the only model that can give full control of the games offered by prize machines is a model involving a fully-owned public operator that is directly governed and controlled by the state.

The Ministry is of the opinion that a state-owned operator with exclusive rights is best organised in connection with Norsk Tipping, both on the basis of the company's general experience as a gaming operator and to ensure the most direct and clear governance of state money games. Such organisation will also lessen the work towards a unified distribution of the profits from the gaming business.

307. These are the Ministry’s legislative reasons for the reform, which were later endorsed and supplemented by a broad majority in parliament. The Government holds that they are not only wise and virtuous, but also clearly legitimate according to the requirements of Community and EEA law. This will be discussed in section 9.

308. After giving its assessment, the Ministry went on to describe the new reform in chapter 4.5, starting with 4.5.1 on “More details on the contents of the proposal”:

4.5.1 More details on the contents of the proposal

General conditions

The proposed monopoly for Norsk Tipping AS entails that the terms governing deployment, including those covering the mode of operation of the machines, are stipulated by the Ministry in accordance with the Gaming Act. It is a condition that all deployed machines are connected together in an electronic network. Such a connected network gives continuous access to information concerning cash flow and the mode of operation of the machine.

Furthermore, the payout of winnings will be in the form of a paper receipt that must be exchanged with the owner of the premises instead of direct cash payouts from the machine as is the case today. The proposal will create a significantly improved basis for a defensible political control of the development of regulations, a clear responsibility for machine operation and a more effective enforcement of the 18 year age limit. At the same time it is a condition that the number of deployed machines be reduced to approximately 10000. The positive effects of different types of machines, paper receipts and network connectivity can also be achieved by private operators. However, reference is made to the discussion under point 4.4.4.

The proposal is further conditional on the machines being deployed in controllable premises with an emphasis on large kiosks as well as establishments such as restaurants pubs and bars. In addition machines will be deployed in connection with bingo halls/race tracks, in gaming cafes and in a small number of larger gaming halls. Deployment in grocery stores and shopping centres as is the case today will therefore cease.

Today there is a significant crime problem related to games machines. This includes approximately 4000 forced entries into machines each year. In the proposed exclusive rights model much of this problem will be eliminated. Due to the fact that all the machines will be connected in a computer network, Norsk Tipping will have control over the cash flow of each machine at all times. It will thus be the responsibility of the individual owner of the premises to take care of the money. This is a division of responsibility that the games companies currently practice with regard to their commissionaires. In the same way as today's commissionaires the owner of the premises will be charged via his bank for the correct amount. This will almost prevent both fraud and theft of cash, as the owner of the premises will have a direct interest in taking care of the amount of cash in the machines in the most defensible manner possible.

A proposal for guidelines for deployment will be prepared through collaboration between the Norwegian Gaming Board and Norsk Tipping AS. An important aim of the guidelines will be the effective enforcement of the age limit of 18 for playing the machines. In any case, such enforcement will be significantly easier in the new model because the new machines will pay out winnings in the form of paper receipts which must be exchanged over the counter. The owner of the premises also has the opportunity of denying players access to the premises if they cannot prove that they are 18 or older.

Due to the fact that Norsk Tipping will be granted exclusive rights to the operation of prize machines, the profit from the machines will also constitute a part of the combined profits of Norsk Tipping. Socially beneficial and humanitarian organisations will receive an earmarked share of the gaming profits (18 %) and will be a third good cause to receive profits in addition to sporting and cultural causes. This model will strengthen the governance and control of the combined gaming market, including the gaming portfolio offered in the market (by the company). This gives the political authorities the opportunity to direct the total gaming portfolio away from games with a risk of undesirable social consequences. For example, if in time the authorities find that the number of prize machines should be further reduced (from 10 000) out of concern over undesirable gambling behaviour, this can de decided by the Ministry as the owner at the same time as Norsk Tipping is instead given permission to stimulate/establish low risk games as a replacement for prize machines so that the total profits to good cause need not be reduced after all. Experience points to the fact that allowance also needs to be made for the recipients of the profits in order in order to implement this type of proposal. Such combined regulation and control on the part of the authorities cannot be achieved if exclusive rights are granted to other operators than Norsk Tipping.

Calculations made by Norsk Tipping AS that build upon the experiences from Sweden show that an exclusive rights model based on a non-profit company will result in significantly lower operational costs than in today's market. According to Norsk Tipping a new operational system could produce an equally high turnover from the machines as today, even of the total machine turnover falls by up to 40 %.[76]

[76] The Authority's translation of this sentence is inaccurate, because it uses the word "turnover" in two different

309. It should be noted that this section not only describes the “contents” of the reform, but also sets out several main preconditions and requirements, such as increased control and responsibility, crime reduction, and effective enforcement of the age limit. The Ministry then stresses the flexibility of the new system, and the fact that if the preconditions are not met, or if there should continue to be “undesirable gambling behaviour” arising from the new machines, then the machine gambling can easily be further reduced, and gaming desire channeled over to low risk games within the portfolio of Norsk Tipping.

310. These are the main contents of the slot machine reform, which will be further described later in section 4.6, and discussed in the light of EU/EEA law in section 9.

311. The rest of chapter 4.5.1 on the details of the reform is a sketch of the “organisation and finances” of the machine operation as envisaged, followed by chapter 4.5.2 on the “Relationship to the Constitution” and 4.5.3 on “Relationship to the EEA Agreement”. The discussion on EEA law is quite comprehensive, but must be read bearing in mind that it was written before the November 2003 Gambelli judgment of the ECJ. There are however several references to the Läärä judgment, which in the opinion of the Government are still perfectly relevant and valid.

312. Chapter 4.6 is titled “Distribution of profits” and includes a discussion on how big a percentage of Norsk Tipping’s total distribution scale should in future be allocated to the former machine license holders (18 %), as well as an assessment of the “compensation” to be guaranteed by Norsk Tipping to the organisations during a transitional period of one year, i.e. the first year of operation of the reform. This amount was set to the 2001 level of revenue received by the license holders, which was 933 million kroner. Several of the organisations argued in vain that both the guaranteed “compensation” and the future percentage should follow the level of revenue in 2002 or (even better) in 2003, but the Ministry did not agree, as this would be contrary to the aim of reducing total machine turnover to well below the 2001-level.

313. In other words, it was crystal clear in March 2003 that the reform would not only lead to a significant diminution of machine gambling as compared to the present level, but also to a significant drop in revenue for the humanitarian and benevolent organisations.

314. The rest of the Bill of Enactment includes chapter 5 on other legislative amendments (beside the slot machine reform), and chapter 6 on “Other questions” of gaming and lottery policy (casinos, credit gambling, Internet gambling and pyramid games). This illustrate the fact that the slot machine reform was conceived, constructed and presented to parliament not as a single isolated measure, but as part of a more comprehensive review of the national gaming and lottery policy (see below section 5.2).

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meanings. The original text accurately differentiates between “overskudd” (surplus/revenue) and “omsetning” (turnover). The point is that under the reform the total turnover (gross/net), that is, the volume of gambling, can be diminished by up to 40 % without affecting the level of revenue (surplus) channelled to charitable and benevolent causes. This is (i) because one operator can operate cheaper than 130, and (ii) because under the reform there will be no private profit, as all revenues (after expenses) are to be directly channelled to worthy causes under the distribution scale of Norsk Tipping. When read in conjunction with chapter 4.6 it becomes clear that the estimate of a 40 % reduction is based on the <u>2001</u> turnover figures (even though the Bill was presented in March 2003). This is also in line with the underlying figures of Norsk Tipping.

315. Chapter 7 is a brief presentation of financial and administrative consequences of the legislative proposals, which is a standardized assessment. The actual proposals for legislative amendments are found in the last part of chapter 8.

4.5. The parliamentary process and vote

316. The recommended Bill of Enactment from the Ministry of Culture was approved by the King sitting in cabinet on 14 March 2003 and presented to the Storting (parliament) on the same day.

317. In parliament the Bill was assigned to the Standing Committee on Family, Culture and Administration ("the Committee"). For the remainder of the parliamentary spring term this was one of the major cases before the Committee. By the ordinary standards it was given a very thorough treatment, including contacts with many of the interested parties, written questions to the Ministry, an open parliamentary hearing, and broad political considerations, resulting in a comprehensive report to the plenary, presented as Recommendations to the Odelsting (Innst.O.) no. 124 (2002-2003) on 6 June 2003.[77]

318. During the Committee's examination it was approached by several of the private parties concerned with preserving the present slot machine regime, in particular by Norsk Lotteridrift (NLD). In May the company's lawyers sent a 43-page letter to the Committee arguing fiercely against the reform. This was passed on to the Ministry, which gave written remarks to the contents. The Ministry also answered other questions from the Committee.

319. On 5 May 2003 the Committee held a one-day open parliamentary hearing on the case. This is a procedure which is reserved for major cases, under which the Committee invites interested parties to give their oral opinions and answer questions. The hearing is open to the public. In this case the list of parties invited was long, and included all the major humanitarian and benevolent license-holding organisations, the association of private slot machine operators (NOAF), Norsk Lotteridrift, Norsk Tipping, the Blue Cross (an institution treating drug, alcohol and gambling addictiveness) and several others.[78]

320. Formal minutes are not taken from such open hearings, but an informal and internal set of minutes made by Norsk Tipping has been presented earlier in the case, and gives an impression of the character of the process, the parties involved and the arguments presented. This is enclosed in English translation,[79] and it illustrates the fact that the reform received broad support from a number of humanitarian and charitable organisations as well as from institutions and persons actually working with gambling addictiveness in the field. The main opponents to the reform were NOAF and NLD, which argued strongly along political, factual and legal lines.

321. While most of the major humanitarian and benevolent license-holders continued their support of the reform, they argued at the same time before the Committee, both in the

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[77] Cf. **Annex 11** to the Authority's Application, with a full English translation enclosed.

[78] A list of the organisations, associations and companies invited by the Committee to participate and give their opinions is enclosed as **Annex 105**.

[79] Cf. **Annex 106**, Norsk Tipping's informal minutes from the open Committee hearing of 5 May 2003.

hearing and through other channels, that the 2001-level was inappropriate as a point of reference, and that the reform should be adjusted to the (far) higher turnover levels of 2002 or 2003. This again demonstrates that all parties knew that the reform would entail not only a diminution of gambling, but also a reduction in humanitarian revenue.

322. The reason why the Government stresses the scope and character of the parliamentary process in the spring of 2003 is because it demonstrates that the reform received real and substantial examination and considerations by the democratically elected legislative body. This is of considerable relevance when assessing what was the legislative intent behind the reform, as discussed in relation to EEA law in section 9.

323. Like the Bill, the June 2003 Recommendations of the Committee contain both a discussion of gaming and lottery policy in general, an evaluation of the proposed slot machine reform, and an evaluation of other proposed legislative amendments and other questions of particular interest. Again, this should be read in its entirety in order to assess how the reform ties in as a systematically integrated part of general policy in this sector. The passages most directly relevant to the reform are the following:

> **General comments**
> […] The Committee is of the opinion that the strong increase in gaming turnover and the alarming signals that have been received concerning gambling addiction and children and young people's gambling habits, indicate that effective measures need to be taken. The Committee would also like to point out that the Norwegian gaming market has represented highly significant revenues for voluntary and humanitarian organisations for many years.
> The Committee believes that it is important that licenses for and the extent of games should be evaluated together with the negative effects that such activities create. In this regard it is important that there is continuous and qualified research in this area, and at the same time the offer of treatment should be available in all parts of the country.
> The Committee's majority, all members except those from the Progress Party, primarily support the government's proposed scheme to gain better control over the gaming market.
> It is the opinion of the majority that the government's proposal will be a good basis from which to create methods of operation for the gaming market that balance the opposing considerations that apply here. […]
> The majority agrees that that caution must be exercised in allowing new types of national money games. Regarding the allocation of new licenses the majority believes that particular measures must be taken to ensure that these do not contribute to the creation of negative social consequences.
> The majority is positive regarding the government's desire to clean up the prize machine market and thereby fight the problem of gambling addiction, prevent crime, gain better control of the irregularities in the industry and a more effective enforcement of the minimum age of 18 for money games. There are few countries in the world that have such a liberal gaming policy and such a high turnover per inhabitant as Norway. The majority refers to St.meld. no. 2 (1990-1991), which includes the following:
> "The growth of the combined gaming activities in society should be restricted regardless of whether they are operated by the State or private lotteries."
> The majority supported this goal and believes that it is clear that developments have been in the opposite direction. The desire was to limit the extent of money games, yet explosive growth has occurred. In this period the amount of money spent on gaming has doubled several times. The reason for this increase is primarily due to a machine policy that is far too liberal.
> The majority would like to point out that money games are fundamentally prohibited under Norwegian law. The fact that the practice still takes place is due to limited licensing based on adequate control and the premise that such gaming does not raise money for commercial

purposes.
The majority agrees with the government's proposal that the share of future gaming profits to sports that is equivalent to machine profits shall be given to activities for children and young people at a local level.
The majority supports the government's policy that the government will not allow a liberalisation of gaming for money that results in all kinds of money games becoming more commonplace.
The majority has noted that the government believes that the turnover from lottery and money games should not exceed the current level. The majority supports this and believes that the experience of the changes that are to be implemented now and further research must be used as a basis for further assessments of the scope and type of games, and if necessary result in further restrictions on turnover in the gaming market.
The majority believes that the proposition is a step in the right direction and sees the measures put forward as important contributions to cleaning up the gaming market. The proposition's proposals place the responsibility for the total development of the gaming market with Norsk Tipping AS, and thereby maintain a public responsibility for market development. The proposition also entails that the government and the Storting will be responsible for following up developments in this market. These members believe that when the responsibility for the prize machine market is now given to a public operator, Norsk Tipping AS, this will prepare, strengthen and clarify public responsibility. […]

324. The Committee then discusses the procedures for control and inspection (2.2), before turning to the gambling addiction caused by the slot machines:

2.3 Gambling addiction

The Committee majority, with the exception of the members from the Progress Party, have noted that lottery and money games in Norway have developed more rapidly than desired. The changes have been so rapid and so marked, particularly in the development of the number of games machines, that it is now important to regulate both the number of games machines and deployment locations.

The majority understand that games for money are forbidden through Norwegian law, but that money games are in fact permitted for the purposes of raising money for humanitarian and socially beneficial causes.

At the same time the majority also recognises that money games have their negative aspects as they create more and more gambling addicts. This development is also characterised by the fact that more and more young people are becoming addicted to gambling. Such addiction often leads to criminal acts to finance the need to gamble.

The majority have been made familiar with the experiences of both Renåvangen and Blå Kors. These institutions believe that 90% of those who come for treatment are players of machines.

Even though the Storting approved an age limit of 18 for playing machines, through the proposition the majority has found out that children and young people between 13 and 17 spend more than 170 million Kroner on prize machines each year.

The majority therefore believes that it is essential that some of the gaming profits go towards prevention, research and information on gambling addiction.

The majority is therefore positive to the amendments contained in the proposition and will support the government in the measures proposed to combat gambling addiction.

The majority believes that the removal of machines from grocery stores and shopping centres is a positive move. This will help to reduce the number of 'new recruits' to gambling and reduce the number of relapses for former gambling addicts. Furthermore the placement of machines in supervised areas will reduce gaming amongst young people under the age of 18. However it should be assessed whether it is advisable that a large proportion of the machines are due to be positioned in environments where young people and people with gambling problems pass by, for example transport waiting rooms, large kiosks etc. But it is positive that

winnings shall be paid out in the form of receipts instead of cash. These measures, together with a reduction in the number of machines are a good basis to combat the problems of gambling addiction.

The majority is mainly positive to the measures proposed and believes that these represent a step in the right direction in overcoming the problems caused by gambling. Yet the majority believe that this must be seen as a first step, and that further research and measures are necessary. […]

325. In chapter 2.4 the Committee then discusses the proposed slot machine reform:

2.4 Prize machines

2.4.1 Exclusive rights for Norsk Tipping AS

The Committee has noted that Norway has a long history of operating prize machines. As early as 1937 Norges Røde Kors had its first so-called "knipseautomat" (coin-flick machine). The Committee points out that these machines were not seen as lottery enterprises according to the Lottery Act of 1939 and could therefore be deployed by both philanthropic organisations and private businesses. Today prize machines can only be deployed to raise money for socially beneficial and humanitarian organisations.

The majority of the Committee, all except the members from the Progress Party, supports the government's proposal to give Norsk Tipping AS a monopoly for the operation of prize machines. Through such an arrangement the state will have full control over the gaming company's enterprise, and all income will be given to the prevailing applicable causes for games and lotteries. The majority also wishes to point out that this arrangement makes clear the responsibility the government has at all times with regard to gaming enterprises being operated within a defensible framework. […]

The majority also believes that prize machines are needed that are less aggressive and give a game receipt instead of money.

The majority believes that prize machines in Norway should be state-operated as is the case in Sweden.

The majority therefore believes that Norsk Tipping AS are the most capable company to organise this work. The majority believes that Norway has good experience over a long period of Norsk Tipping AS as a gaming operator, and that Norsk Tipping AS will be able to have clear control of prize machines.

The majority believes that the exclusive rights model is a prerequisite for the most socially defensible organisation of the gaming machine market in Norway. In this regard it is important that exclusive rights for Norsk Tipping AS should entail the best possible opportunities for inspection and that the machines' functionality can be changed rapidly, as knowledge of which factors increase the risk of gambling addiction grows. Through the benefits of rationalisation this model will also secure the government's goal of a reduction in the number of machines to 10,000 and ensure a significant reduction in total machine turnover, at the same time as the profits to the socially beneficial and humanitarian causes are maintained at the 2001 level.

326. Analyzing the parliamentary remarks, it is clear that a broad majority accepted and approved of the assessments presented by the Government in the Bill. It is really only at this stage that the preparatory works of the Ministry truly become part of the legislative (parliamentary) intent behind the amendment.

327. The committee majority then supplemented the assessments in the Bill by stressing those aspects which it found to be of particular importance.

. It should first be noted that when reading the Committee Recommendations there can be no doubt at all that the slot machine reform is motivated first and foremost by a strong

desire to fight the new problems of gambling addiction caused by the slot machines. This is the absolutely dominating motive.

328. Second, the committee majority highlights in a way stronger than before that a major advantage of the public exclusive right system is that "this arrangement makes clear the responsibility the government has at all times with regard to gaming enterprises being operated within a defensible framework". Thus, the majority stresses the aspect of political responsibility in the gambling sector. By transferring slot machines to a public enterprise which is wholly owned and controlled by the state, the reform thus increases ministerial accountability and responsibility for future developments in this sector.

329. Third, the committee majority makes an explicit necessity-test by stating that it regards the existing exclusive right model of Norsk Tipping to be "a prerequisite for the most socially defensible organisation of the gaming machine market in Norway". This is in part based on the good experiences which Norway has had with the way Norsk Tipping has operated its gaming and lotteries for many decades, in a moderate and responsible manner, without creating compulsive gambling.

330. Finally it should be noted that the committee majority explicitly points to the Swedish regulation on slot machines as a model for the Norwegian reform.

331. Following the Committee Recommendations of 6 June 2003, the case was discussed in plenary session in the Odelsting on 12 June. The debate was quite extensive by parliamentary standards, lasting one hour and fifteen minutes, reflecting the political importance of the case. The minutes from the debate have been presented by the Authority in its Application, but only in Norwegian. An English translation is therefore enclosed, which the Government holds is compulsive reading if one is to evaluate the actual legislative intent behind the reform.[80] Reading this, it is impossible to conclude otherwise than that the need to fight gambling addictiveness from slot machines was the one totally dominating requirement of the reform, and that the existing exclusive right regime was chosen as the clearly best model for achieving this.

332. The Government would like to emphasize that the reform was adopted by a broad parliamentary majority, which included all parties except for the Progress Party. It was first proposed by the minority centre-right Bondevik government, which was comprised of the Christian Democrats (KrF), the Conservatives (Høyre) and the Liberals (Venstre). These are political parties which are in general very sceptical of monopolies, and even more so of introducing "new" monopolies. Economic liberalisation and privatisation of former public enterprises was in general quite high on the political agenda of this government. But in this specific sector, for this specific problem, even these parties came to the conclusion that it was in fact *necessary* to transfer slot machine operations to the existing strict regulatory regime of the 1992 Gaming Act in order to reduce gambling opportunities and fight gambling addiction. This assessment received full and wholehearted support from the three opposition parties the Labour Party (Ap), the Socialist Party (SV) and the Centre Party (Sp).

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[80] Cf. **Annex 67**, Minutes from the Meeting of the Odelsting on Thursday 12 June 2006 in English translation. The original Norwegian text was enclosed by the Authority as **Annex 12**.

333. After the debate in the Odelsting, the amendment was passed on to the Lagting, and then to the King in State Council for approval, which it received on 29 August 2003, which is the date of the statute. From a formal point of view it is in force. It was however not intended to be implemented until 1 January 2005. This meant a transition period of a year and a half, which was the time needed for a responsible change of system, and for Norsk Tipping to develop its new concept, which required new machines of a totally different nature than the old ones. The transition period in effect also functioned as a graze period for the existing license-holders and commercial operators, giving them sufficient time to adjust and to recover investments.

334. As we shall see, the original transition period has had to be extended several times because of the legal actions taken by the commercial operators, and the result is that the reform has still not been implemented (see below section 4.8).

4.6. Main contents of the reform

335. When assessing the contents of the 2003 parliamentary slot machine reform it should first be noted that it is more a *change of system* than a fully-fledged and detailed definitive solution. The basic aspect is the removal of slot machine operations from the market regime of the 1995 Lottery Act, with a large number of charitable licence-holders and commercial operators, to the public exclusive rights regime of the 1992 Gaming Act, which is operated by the public entity Norsk Tipping for the direct benefit of socially beneficial causes.

336. The machines will thus in future be subject to the same rules and requirements as the other gaming activities run by Norsk Tipping (Lotto, football betting and others). The reform did not create a "new" monopoly arrangement. The new element is simply that slot machines are transferred into this regime. And even this is a slightly misleading description, as the future gaming machine arrangement of Norsk Tipping will be very different from the old one in almost all aspects.

337. What the reform really does is to shut down the existing slot machine business in Norway, while giving Norsk Tipping the task and responsibility – under ministerial supervision and Gaming Board control – of building up a new and much more moderate gaming machine operation, with diminished gambling opportunities and without aggressive and addictive features.

The legislative amendment

338. From a legal technical point of view the reform is brief and simple. In legislative terms it was achieved by just amending a few provisions – more precisely § 1 c of the Gaming Act and two paragraphs in the Lottery Act (§§ 10 and 15). This is the legal amendment which is the subject of the action taken by the Authority.[81]

Requirements set out in the preparatory works

[81] See section 8.1 below on "the scope of the action".

339. The formal statutory amendment is, however, of course not the whole reform. As earlier described and quoted, the preparatory works also included a number of specifications and requirements for the reform, especially in chapter 4.5.1 of the Bill of Enactment under the subheadings “General preconditions” (quoted above) and “Organisation and finance”.[82] Major points include:

- The number of machines should be reduced to approx. 10.000
- Major changes in location rules (no shopping centers or grocery shops)
- Pay out of winnings by paper receipt (not cash)
- Stricter technical requirements, eliminating the most aggressive features
- All machines integrated into one electronic network
- Strict supervision and instant dynamic adjustments
- A reduction in turnover of approx. 40 % as compared to the earlier 2001 level.

340. A basic premise of the reform was that the new arrangement should not be fixed, but that it should be as flexible as possible, giving the competent authorities the ability to exercise continual supervision and control, and to rapidly implementing further changes as dictated by developments.

341. The preconditions provide that the new Norsk Tipping machines are to be linked up in a joint electronic network, and are to be installed solely “in premises permitting supervision, with the main emphasis on large kiosks and in catering establishments such as restaurants, pubs and bars.” The last of these presented a difficult dilemma for the authorities in that the object of effective enforcement of the minimum age limit of 18 had to take precedence albeit with considerable doubts over the reservations about allowing gaming machines to be installed in establishments where alcohol is served.

342. A key precondition was also that installation in “supermarkets and shopping centres as in the current scheme would be prohibited.” Through this measure, the Ministry assumes that the basis for a large proportion of current gaming on machines will be eliminated. Further, prizes are to be paid out in the shape of a printed receipt as opposed to a hard cash pay-out, and new (and less aggressive) machines are to be introduced.

343. Another precondition in the Bill was that Norsk Tipping would be permitted to install no more than 10.000 gaming machines, which is down from the some 17.000 currently installed. It is also stated that it would be desirable to reduce this number further, as dictated by the need to protect citizens from “undesirable gambling habits”.

Ministerial instructions and guidelines

344. Gaming machines are in the future to be regulated according to the general provisions of the 1992 Gaming Act. This statute is brief and mainly concerned with the institutional aspects of Norsk Tipping. The Ministry has been given competence to give further regulations, and for each of the games and lotteries under the act there are

[82] In addition there is a description of the Norwegian Gaming and Foundation Authority’s supervisory functions on p. 31, and an account of the new profits distribution scale on pp. 31-35.

specific instructions and guidelines, setting out the more detailed regulatory framework. The same was done for the new gaming machine operation.

345. This new regulatory regime was elaborated by the Ministry in the spring of 2004 in the following documents:

- Terms applicable to the installation of gaming machines of 25.05.2004.[83]
- Gaming rules for gaming machines of 25.05.2004.[84]

346. These two documents are in formal terms instructions from the Ministry to Norsk Tipping, and were issued to the company under a covering letter dated 26 May 2004.

347. The new machines which were being procured by Norsk Tipping (Multix) were checked and assessed by the Gaming and Foundation Authority, which in a letter of 1 November 2004 pointed out need for certain modifications.[85]

348. As a result of what the Ministry perceives as a series of misapprehensions on the part of the District Court as regards the detailed preconditions for the reform, these were consolidated in writing in a letter to Norsk Tipping of 17 November 2004.[86] The letter furthermore instructed Norsk Tipping to carry out the modifications as indicated by the Norwegian Gaming and Foundation Authority.

349. These are the main features of the new model, as it was intended to enter into force as of 1 January 2005. It remains to be seen whether this is precisely how it will be structured if and when it enters into force. Developments on the slot machine market have continued apace after the last premises were laid in spring 2004, and the processes (including the proceedings before the national courts and the correspondence with the Authority) continuous to reveal new issues, necessitating ongoing assessment. If the Government wins the pending case, there may also be premises in the judgment which must be taken into account. On that basis it will be natural for the Ministry to undertake a fresh, general review, and make any adjustments needed prior to final commencement.

350. In addition to the ministerial instructions on the contents of the reform, the Authority has also placed emphasis on the proposals which Norsk Tipping submitted to the Ministry in the process. To the extent that these proposals have been followed up by the Ministry they are obviously relevant. But where such proposals were not followed up, they are *not* relevant and have no bearing on the structure of the new model. It is not in any way unnatural for Norsk Tipping during the process to have submitted requests and proposals to the Ministry that go beyond what the Ministry found appropriate to follow.

351. One example of this would be the statements made by Norsk Tipping on a number of occasions that the aim should be to increase the number of gamblers from the current approximately 500.000 to one million. The intention being that more would play, but for smaller amounts (like for example Lotto), and hence without the same attendant risk of developing a gambling problem. However, an increase in the number of gamblers on

[83] Cf. **Annex 107**.

[84] Cf. **Annex 108**.

[85] Cf. **Annex 109**, Letter from the Norwegian Gaming and Foundation Authority to the Ministry of Culture and Church Affairs, of 1.11.2004

[86] Cf. **Annex 110**, Letter from the Ministry of Culture and Church Affairs to Norsk Tipping, of 17.11.2004.

that scale is altogether at odds with the Ministry's objectives underlying the reform, and has never been an aim on the part of the Ministry. This has been made very clear by the Ministry on several occasions, latest by the instruction to Norsk Tipping of 17 November 2004, in which the Ministry holds that the number of players should not be increased above the current level, and that Norsk Tipping should act swiftly if the number increases. Still the Authority keeps repeating the issue, questioning whether "such a letter can have the desired effect of ensuring" that the new machines will not "attract large number of new players".[87] The answer to that is that this is a ministerial instruction, which Norsk Tipping is obliged to respect.

The preparations of Norsk Tipping – the "Multix-machines"

352. After the Storting had adopted the gaming machine reform, Norsk Tipping commenced the work of procuring new gaming machines, and subsequently signed a contract with a Swedish supplier to that end. These are the so-called Multix machines, and are detailed in documents produced in the case, and of which to date approximately 1.000 units have been manufactured (further manufacture is awaiting the legal proceedings).

353. Clearly, these are the gaming machines that will be installed if the reform comes into effect. However, this does not mean that the gaming features and actual functionality of the machines are 'set in stone'. On the contrary, the Multix machines are highly flexible computers, in which the functionality and gaming features can be reprogrammed in a few keystrokes. Since the gaming machines will be linked in a joint electronic network, such modifications can essentially be made from a central server, without any need to physically attend to each individual machine.

354. On that basis, the rather exhaustive discussion conducted before the national courts as to whether Multix machines are "harder" or "softer" than current machines is, in the opinion of the Government, of minor judicial relevance. The Government states that the Multix machine, as it was intended to function from roll-out, is a considerably "softer" gaming proposition than current machines. But if this should prove wholly or partially insufficient, then it is an express requirement that the machines' functionality shall be modified at once.

355. Experience gained from the brief pilot period project conducted by Norsk Tipping in autumn 2004 in which a limited number of Multix machines were installed in selected premises also confirms that these machines are less alluring and aggressive than the current machines. Norsk Tipping's finding was that turnover from the new machines fell heavily as compared with that generated by the old machines that until then had been installed in the same premises. An internal survey produced by Norsk Tipping as part of its evaluation of the pilot project is enclosed which gives examples of this.[88]

4.7. More on the economic consequences of the reform

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[87] Cf. the Application at paragraph 280.

[88] Cf. **Annex 111**, "Omsetningstall gevinstautomater" [*Turnover figures, gaming machines*], Norsk Tipping, February 2005.

356. From the earliest preparations of the reform starting in the winter of 2002 and throughout the process ending with the parliamentary adoption in June 2003 a basic premise was always that the volume of slot machine gambling had to be drastically *reduced*. This meant that turnover (gross and net) would have to be cut, in turn cutting revenues from the operations.

357. When estimating the more exact level of future turnover, the point of departure used by the Ministry were the 2001 figures, which were in the beginning the only figures available. These were also used by Norsk Tipping in the plans presented to the Ministry in the summer of 2002, in which the company stated that it would be possible under a future exclusive rights arrangement to produce a surplus for charitable and benevolent causes at the same level as in 2001, while still cutting turnover (gross and net) from the operation of the machines by approximately 40 %. The reason for this was partly that Norsk Tipping, being a single operator, could cut operating costs as compared to the present 138 operators. The other part of the calculation was that no revenue would in the future be "wasted" on private commercial operational profit. Being a "non-profit" entity, Norsk Tipping would transfer the whole surplus (after costs) to charitable and benevolent causes.

358. In 2001 the gross turnover from slot machines was approximately 9 billion kroner, corresponding to a net turnover of 2,5 billion, of which the charitable and benevolent "causes" received 933 million kroner. A reduction of this turnover by 40 % implied that the total gross turnover under the future exclusive right arrangement would be approximately 5,5 billion kroner.

359. A fundamental point in order to understand the economics of the reform is that the original figures, based on the 2001-level, has been kept as an approximate and targeted level throughout the process, even after it soon became clear that actual turnover in the slot machine sector was rising very rapidly in 2002 and 2003. Indeed the whole reform (number of new machines, technical requirements, places of location, etcetera) was designed to achieve the original target of a substantial reduction as compared to the earlier 2001-level. Thus, the internal budgets drawn up by Norsk Tipping in late 2002 estimated the new level of gross turnover after the planned implementation of the reform in 2005 to be 1,7 billion for the first transitional year of 2005, and then rising to 5 billion in 2006 and 6,4 billion in 2007.[89]

360. This is still the estimated and targeted approximate level of machine gambling after the reform, even if actual slot machine turnover in recent years have gone on rising rapidly, as described earlier in section 3.3. The reason for this is partly that this is seen as a socially defendable level of machine gambling, which therefore remains the target to which the future model should be tailored. And it is partly for the rather more realistic reason that Norsk Tipping is very unsure of whether the completely new and far less aggressive Multix machines, at a reduced number and with new rules on location, as well as strict supervision and control against compulsive gambling, will be able to generate more than this level of turnover.

361. What the exact level of turnover will be if and when the reform is implemented remains to be seen. It might not be exactly 60 % of the 2001 level, and it is possible that it might

89 Cf. **Annex 112**, Norsk Tipping's internal budget plan for the new reform dated 12 December 2002.

rise somewhat above this. The chairman of Norsk Tipping, Mr Thue, indicated in his written submissions to the Supreme Court that the figures might be closer to a gross turnover of 8 billion in 2007, rising to 9 billion in 2008, though these are not figures which have been approved by the Ministry.[90]

362. This means that compared to the present level of slot machine gambling, which in 2004 was at a gross turnover of 26 billion, the estimated economic effect of the reform will be a very substantial reduction indeed, of perhaps as much as 20 billion kroner. The corresponding figures for net turnover is a fall from 5 billion to less than 1 ½ billion.

363. In its Application the Authority grudgingly and partially acknowledges this on p. 59 (para 220), where it states that that with "the benefit of hindsight" it is easy to agree "that an implementation of the monopoly model today would reduce revenues". It then tries to convey the impression that this is something which is first known "now", and that it was not known that the reform would mean a substantial reduction in turnover and revenue at the time when the decision was taken.

364. This is very wrong. Hindsight has nothing to do with it, as all the interested parties knew perfectly well even as early as in the autumn of 2002 that the exclusive rights reform under preparation would mean a substantial reduction not only in the volume of slot machine gambling but also in the revenues generated after the reform to the former charitable and benevolent license-holders, as compared to what they were getting in 2002. And this was even clearer at the time when the proposal was presented in the March 2003 Bill and when the reform was adopted in June 2003.[91]

365. The fact is that all interested parties knew by the autumn of 2002 that the volume of slot machine gambling was rising rapidly, and that the application of the 2001-level would mean a reduction in revenue for the charitable organisations. This was used by several of the organisations in late 2002 and early 2003 to argue before the Ministry that the basic level for the estimated reform should be changed to the 2002 figures. The same argument was presented even more strongly before the parliamentary Committee in the spring of 2003, inter alia during the open hearing in May. But both the Ministry and Parliament were firm, and insisted upon the 2001-level, meaning insisting that the organisations would have to accept substantial reductions as compared to the 2002 level.

366. One example which illustrates that this was known is the article published in a newspaper by the chairman of the Norwegian Red Cross, Mr Thorvald Stoltenberg on 5 March 2003 in which he states that "The proposal means that our organization will be

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[90] Cf. the written deposition of Mr Thue to the Supreme Court, enclosed as **Annex 71**, at question 39.

[91] There are other misleading passages in the Authority's remarks in paras 220-221 as well. One is that the Authority holds that an implementation "today" would reduce charitable revenue. The fact is that an implementation of the reform will reduce revenues not only as compared to "today" (2006), but also as compared to the actual levels of income received in 2005, 2004, 2003 and 2002. Another curiosity is when the Authority holds that "decisions taken after the decision to introduce the monopoly cannot be taken as proof of what the legislator wished to achieve with the monopoly", and then refers to the Ministry's consultation paper of October 2002. First, the Ministry knew very well in October 2002 that machine turnover was rising far higher that year than the previous, even if formal statistics had not yet been presented. Second, the consultation paper was not "the decision", nor was the Ministry in this case the "legislator". The *decision* in this case was taken in *June 2003* by *Parliament*. At that time, it was long since perfectly clear both to Parliament (as legislator) and to the organisations that the reform would mean a substantial reduction in charitable revenue.

looking at a loss of 150 millions annually. I repeat: a loss of 150 million kroner every year".[92]

367. As slot machine revenues have continued to rise in 2003, 2004 and 2005, the gap between the actual revenues for the charitable organisations and what they can expect under the future reform has increased dramatically. In 2004 the organisations received revenues of 2 billion kroner (out of a total net turnover of 5 billion). Had the reform been implemented in 2005, according to plan, this would have meant a reduction in annual charitable income as compared to the 2004-level of more than 1 billion kroner.

368. The increasing gap between present income and expected income after the reform (or the perceived "loss" which will be caused by the reform) has led some of the charitable and benevolent organisations to become more ambivalent towards the reform. Only one of them has however openly broken the line. This is Redningsselskapet (the Lifeboat Association) which was a strong supporter of the reform in 2002-2003, but which after a change of leadership and an economic reevaluation has turned around and started criticizing the reform. The Government holds that this is obviously for financial reasons, and that it simply shows how much even the charitable and benevolent organisations (which in the future will receive the *whole* surplus from the new machine operations) stand to loose in economic terms from the reform.

369. According to recent estimates the Norwegian Red Cross is now looking at an estimated reduction in income of close to 90 %, as compared to present levels, when the reform is implemented.[93] Facing these figures even this once strong supporter of the reform is now sounding a little ambivalent.

370. The economic consequences which the reform will actually have demonstrate the sheer absurdity of the Authority's claim that it was mainly motivated by illegitimate "financial considerations".

371. The way in which the concept of illegitimate "financial considerations" is usually invoked in Community and EEA is in regard to national restrictions on the four freedoms which serve to increase or preserve national state revenue or national jobs.

372. The facts of the present case is first that the 2003 reform will not affect state finances at all, as future revenues will be channeled directly out again by Norsk Tipping. Secondly, the revenue generated in the future will go to the *same* charitable and benevolent organisations and associations which today hold the machine licenses. No one else will benefit. And thirdly the reform will mean that these beneficiaries will receive substantially *smaller* revenues than they did when the Act was adopted in 2003, and radically smaller revenues than what they have been getting in 2004 and 2005.

373. The Government will return to this when responding to the Authority's allegations of illegitimate financial objectives in section 9.

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92 Cf. article in Verdens Gang 5 March 2003, enclosed as **annex 103.**

93 On the other hand, the organisations have profited greatly from the delays in implementation caused first by the national judicial process, and later on by the action taken by the Authority. The two organisations Røde Kors and Redningsselskapet together had extra earnings of 800 million kroner in 2005 because of the postponement of the reform. It is estimated that 700 of these came from compulsive gamblers. Cf. **Annex 85**, "Tjente 700 mill. på spillegale", article, Verdens Gang 30 March 2006.

4.8. The fate of the reform so far

Positive reactions to the reform

374. As earlier described, the initiative of the centre-right minority Bondevik Government to introduce the slot machine reform was warmly welcomed in parliament, and adopted by a broad majority. The further implementation of the reform, and the legal challenges, were high on the agenda of the Government in the following years. After the change of Government in the autumn of 2005 this has continued without interruption. The position of the current political leadership is stated by the Minister of Culture Mr. Trond Giske in his written deposition before the Supreme Court:

> The parties forming the present government supported the gaming machine bill in the Storting in 2003. The government supports the previous government's follow-up of the Storting's decision on this matter. […]
> In my opinion, the exclusive-rights model will provide the most effective control of future operation of gaming machines. 50 years of state control through Norsk Tipping of the major cash games has shown that direct owner control of this type is an effective model for ensuring public control of the major games and for avoiding problem gambling as a national health problem on the scale it has now reached.[94]

375. As described above in Section 4.3 several of the major humanitarian and benevolent license-holders originally supported the reform wholeheartedly both in their responses and in the press, amongst them Røde Kors, Redningsselskapet and Norsk Idrettsforbund. Other license-holders were more ambivalent, but not opposed. None of the major license-holders have tried to take legal action against the reform.

376. The reform was also warmly supported by problem gamblers and their organizations. Their main concern was rather that the reform should have been even more radical – i.e. a ban on gaming machines. The psychiatrist Hans Olav Fekjær held:

> Through a bill adopted by Parliament in 2003, the political establishment took action to reduce the problems associated with the retention of a high proportion of the profits. The bill bans the installation of payout machines in shops and places the operation of such machines under the control of Norsk Tipping, which with its economies of scale in purchasing and operation can generate large profits for distribution to the organisations despite operating far fewer machines and less seductive games.
>
> Norsk Tipping has constructed payout machines in which many of the more damaging characteristics have been eliminated or reduced. The most important is however that Norsk Tipping's standardised machines can be modified overnight if one should find that one or more of the games are particularly harmful. This is possible because all the machines are of the same type and are online to Norsk Tipping, so that the software can be updated or replaced quickly and efficiently. This level of flexibility cannot be achieved in a "free" market for payout machines.
>
> Both the addictive/compulsive gamblers and those of us who meet these tragedies face to face would like to see the machines removed from the arena. Nonetheless, the bill represents an historic turning point: For the first time Parliament has adopted a resolution that primarily aims to tackle the problems associated with gambling and gaming, even though this may

94 Cf. **Annex 68**, written deposition of Mr Trond Giske, Minister of Culture, before the Supreme Court.

result in a reduction of funds available to the social and charitable objectives. One aims to reduce turnover from payout machines to the 2001 level, i.e. 1/3 of turnover generated in 2003. Further the bill aims for a fairer distribution of the profits.[95]

Attitudes to current slot machines among the general public

377. In June and December 2004, Norsk Tipping commissioned the Omnibus company to survey public opinion on current slot machines. The question asked was: "What kinds of consequences for society do you believe current slot machines are having?". The survey revealed a strongly critical attitude to the machines.[96]

Later evaluations by the Gaming and Foundation Authority

378. The Gaming and Foundation Authority (Lotteritilsynet) supports the reform. During the winter of 2005 the main content of the reform was assessed, and an evaluation report issued 27 April 2005. After pointing out the dramatic problems with the present slot machine market, the Gaming and Foundation Authority held that:

> It has been alleged that the problems outlined above can be resolved within the framework of the current arrangements with the introduction of stricter regulations. The central problem is whether or not it is possible to implement the objectives and aims that and gaming/gambling legislation is designed to promote and protect in connection with the operation of payout machines in a market where free competition rules or in a market with a sole private operator. As long as private operators are allowed to operate in the market, the profit motive will always govern/affect operations and this objective is not compatible with the said aims and objectives of the legislation and the need to limit the number of compulsive/addictive gamblers and turnover of the machines.
>
> It is true that some changes can be implemented with a less intrusive solution than the introduction of a monopoly, for example the introduction of games with a central jackpot where profits to the organizations are distributed by the authorities and not the individual entrepreneur. The challenge in the current framework around the operation of payout machines is however of such a complex and compacted nature that radical change is required to reverse the undesirable developments in the market.
>
> That the State is the sole operator of all machines is the model that will provide the best possible degree of certainty that the aims and objectives of lottery, gaming/gambling legislation will be enforced.
>
> **The monopoly achieves better regulation and control of the payout machine market regardless of whether the operator is private or state-controlled. The advantage of a state monopoly, through state ownership, is that the governing strategic objectives of the regulation of the gaming and gambling market will be the dominant factors, and not the profit motive. Further, ownership provides the ability to directly administer and manage the market, hereunder to introduce and enforce the changes that may be deemed to be necessary at any one time.**
>
> **A regime with one or more private entrepreneurs will require extensive and complicated detail legislation for the whole of the licence period, with limited possibilities to introduce the changes that may prove necessary underway.**
>
> A state owned operating company will ensure equal terms for the siting of machines through standard contracts, the problems associated with cross-ownership will be negated and agreements on illegal payments/in kind deals will no longer be possible. Problems and speculation concerning the

[95] Cf. **Annex 80**, Fekjær "Gambling has again become a social disaster in Norway", Aftenposten 6 November 2004.
[96] Cf. **Annex 113,** Survey from Omnibus on public attitudes to current gaming machines, June and December 2004.

limitations of the type approval regulations will disappear. Further, a state-owned entrepreneurship enables a better and healthier installation policy in that the State can seek to have the machines sited at locations that represent a reduced risk for compulsive/habitual gamblers and criminal elements. Limited access to payout machines will reduce the problems associated with gambling addiction, reduce criminal acts in connection with the machines, and contribute to that the 18-year age limit is enforced. A state-owned monopoly will also be able to better focus on the role of the organisations in the payout machine market, while at the same the positions of power currently held by the owners of facilities and sites and the current entrepreneurs will be greatly reduced or no longer exist.[97]

Negative reactions to the reform – from the commercial operators

379. Looking at the reactions which the 2003 slot machine reform has received in Norwegian society, it is striking that the only criticism of any magnitude has come from parts of the "pink" (business) press, and of course from the present private commercial slot machine operators, which will have to go out of business when the reform is implemented. Their reactions have however, and perhaps not surprisingly, been strong, and they have fought the reform on most levels possible, formal and otherwise.

380. Informally, the operators have taken their case to the press, the politicians and most other actors and institutions willing to listen. On the Norwegian arena, they have issued so-called "information packs" to local authorities, organisations and the press, and in Brussels they have been rather active in employing lobbyists to influence processes.

381. Formally, the commercial operators chose two parallel actions, with NOAF taking legal action before the national courts and NLD lodging a complaint with the Authority. NLD later joined in with NOAF in the national judicial proceedings, and NOAF seems to have joined in with NLD as a complainant before the Authority. In this way both of them are parties/complainants in both of the two parallel actions.

The administrative procedure

382. In section III of the Application (pp. 30-42) the Authority gives a detailed description of "the administrative procedure", that is, the earlier infringement procedure, from the first letters in early 2003 to the Government's reply to the reasoned opinion in November 2004. The Government holds that the details of this process are of minor interest at the present stage. What is relevant for the EFTA Court are the arguments and evidence presented before it during the judicial proceedings.

383. In this respect it should be noted that even if the main scope and subject of the case remains the same, the case has nevertheless developed and evolved very substantially over the years, both because of the correspondence between the Government and the Authority, but even more so because of the extensive national judicial processes.

384. On the part of the Government, this means that its early letters responding to the letter of formal notice and the reasoned opinion should today be seen as early variants of what has later become an even broader and more extended argumentation.

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[97] Cf. **Annex 114**, Memorandum – evaluation of the monopoly model, The Norwegian Gaming and Foundation Authority 27 April 2005, with English translation enclosed (emphasis in the original).

385. The same applies to the Application of the Authority, in which the argumentation has evolved considerably since the earlier correspondence. It is obvious that the Authority has taken note of developments in the argumentation during the national judicial proceedings. Comparing the Application with the letter of formal notice and in particular the reasoned opinion, the Government also welcomes the fact that much of the surprisingly aggressive and ironic tone of the earlier texts is gone, though traces still linger. As regards the contents of the Application, however, the Government must be allowed to remark that this is still unusually biased and one-sided as compared to other cases, and more resembles the arguments of the private commercial gambling companies before the national courts than the objective and sober evaluation to be expected by a neutral surveillance authority.

The proceedings before the national courts

386. The Authority gives a short description of the proceedings before the national courts in section IV. It is correct that the Government throughout the court proceedings has argued against a reference for an Advisory Opinion to the EFTA Court. The reason is primarily that the Government was (and is) of the opinion that the case law of the ECJ on national gambling restrictions is really rather developed and clear. What remains is primarily the factual assessment and evaluation of the reform, according to the criteria already stated by the ECJ, and this was not something on which the national courts could or should ask the advisory opinion of the EFTA Court. This argument was accepted by both the Borgarting Court of Appeal and the Appeals Selection Committee of the Supreme Court.

387. The Government would furthermore point to the fact that the president of the Supreme Court had decided to bring the case in before the plenary, which is very rare, that the case had been given priority, and was to start on 24 January 2006, and that two weeks were reserved for the hearings, which is a very long time in the Supreme Court. What this in effect meant, was that the Supreme Court had decided to treat this case as the largest case before it in several decades. On this background, the 17 November 2005 announcement of the Authority that it would take legal action before the EFTA Court was both surprising and irrational. The Authority had by then already waited a year, and it could easily have waited a few more months, until after the judgment of the Supreme Court. Had the Court rules against the state, there would have been no need for infringement proceedings. Had the Court ruled in favour of the state, the Authority could have assessed the judgment before deciding upon whether it agreed or not, and in the latter case taken action.

388. In this perspective the November 2005 announcement of the Authority is impossible to understand as anything else than a declaration of mistrust in the judgment of the plenary of the Supreme Court of Norway. It is also a blatant derogation from the principle that factually large and complex cases involving EEA law should preferably by adjudged by the national courts, which are in a better position to assess national law and fact.

389. In the Government's view the approach of the Authority was regrettable. The present case is factually very large and complex, and therefore with respect better suited to the procedures of the national court system than those of the EFTA Court. Furthermore, the

decision of the Authority meant that the already delayed implementation of the reform had to be postponed by an additional period of at least a year.

390. It should be noted that the action before the Supreme Court have formally not been lifted, but merely postponed, pending the outcome of the case before the EFTA Court. It is however not very likely that there will be further substantial proceedings before the Supreme Court after the judgment of the EFTA Court.

The postponement of the reform – temporary measures

391. When the reform was adopted by Parliament in the summer of 2003, the social problems caused by the present slot machine regime were already pressing, but due to the size and character of the reform an implementation period was still necessary, and the entry into force of the amendment was therefore set to 1 January 2005. Because of the national judicial process, this has had to be postponed by several turns, and the present action of the Authority means a further delay of some 12-18 months. Altogether this means an implementation period of 4-5 years before the reform can enter into force.

392. In the meantime the present slot machine continues to be a major cause of gambling addictiveness and social problems. The Government has therefore repeatedly considered introducing temporary measures, aimed at reducing slot machine problems within the present framework of a competitive gambling market with a large number of commercial operators and charitable license holders. The problem, however, is twofold. First, the whole idea behind the parliamentary reform is that the main problem lies with the present market structure as such. Minor temporary adjustments within this framework would probably have little effect. And even major temporary adjustments, such as dramatically reducing the numbers of operators, license holders and machines, would not be as effective as the reform already decided – while at the same time most likely starting new and parallel legal disputes before the courts. Secondly, all such adjustments raise a number of technical and legal issues. Technically, most of the temporary adjustments possible would require changes in the hardware of the present machines, which is costly and time-consuming. Legally, most of them would be new restrictions, requiring notification under EEA law as well as changes in national regulations or statutory law.

393. This is the reason why the Government so far has not introduced temporary measures, and instead has been compelled on several occasions to postpone the entry into force of the reform. The latest of these decisions was made reluctantly in November 2005, in recognition of the fact that the Supreme Court would give a final national verdict by late March 2006. Under the present situation, the Government has had to consider a number of alternative temporary options, none of which are adequate. Following advice from The Norwegian Association for Gambling Problems, the Government decided in January as a short-time temporary solution to propose a ban on using bank notes in slot machines. This is a fairly simple measure to implement, which will be implemented as of 1 July 2006, and which will hopefully have some instant effect. Other temporary measures will also be considered. But the Government would emphasize that it regards all such measures and adjustments, within the existing framework of a market-driven gambling regime, to be highly inadequate in order to solve the actual and structural

gambling problems in Norway, as compared to the far easier, more consistent and more effective reform already adopted by Parliament.

5. THE REFORM AS PART OF NATIONAL GAMBLING POLICY

5.1 New challenges for national gambling policy

394. The regulation of gambling in most of the European countries is today at a turning point as a result of several new challenges. States with traditionally restrictive gambling regulations are now experiencing an increase in gambling and negative social consequences, which are raising questions regarding the legitimacy of the national regulations. At the same time national regulations are challenged under Community and EEA law to a greater extent than before, partially because of the legal uncertainty that appears to exists after Gambelli. Private operators are working more actively to impose their interests. In addition to this, there are ongoing changes in the gambling market with Internet, mobile phones, interactive TV, etcetera, providing cross border gambling.

395. In Norway, the growing problems related to gambling have resulted in an increased awareness and stronger support for a restrictive gambling policy. This development first started around 2000. The establishment of the Norwegian Gaming Authority in 2001 and the White Paper of 2003 are both results of this raised awareness.

396. The Governmental White Paper was later followed by several measures on different levels. The responsible authorities could perhaps have done even more, especially to meet the challenges of gambling on the Internet, but the time-consuming process with the changes in regulation on the slot machines has slowed down the progress to implement measures related to other forms of gambling.

397. When the reform of the slot machine sector was introduced in the March 2003 Bill of Enactment it was as part of a broader White Paper containing a review and assessment of Norwegian gaming and lottery policy as a whole.

398. At one level the proposals constituted a new reform. But equally, the Governments proposals can be seen as continuing and promoting the fundamental principles governing Norwegian gaming policy, which have been basically the same for a very long period of time. In effect the Parliament's decision was a correction designed to restore consistency and a systematic structure to national regulation and to eliminate the anomalous situation which developments in the slot machine sector had created.

399. The developments in the slot machine sector and the resulting explosion in compulsive gambling is the major challenge in current gaming policy. But there are also other challenges. The proliferation of services offered by foreign gaming operators over the Internet is another key challenge, which raises both issues regarding compulsive gambling and consumer protection and also issues regarding protection of the principle that gaming must be non-commercial and profits channelled towards public-interest and non-profit causes.

400. At another level it is a challenge for the authorities that Norwegian gaming policy has come under legal attack, as the action brought by the gaming machine operators shows. There are also other actions and appeals pending, as shown below.

401. Naturally these challenges and trends impact on Norwegian gaming policy and have made it necessary for the competent authorities (in the first instance the Ministry of Culture) to rethink policy and adapt it to the new era. The March 2003 White Paper may be seen as the start of this process, which has since continued and is still in progress.

402. In relation to the fundamental principles of Norwegian gaming policy already inscribed in the legislation, the key features of this process are awareness-raising, clarification, follow-up and promotion of these principles. The need for the latter has become particularly apparent in the slot machine case, where both the ESA and Oslo City Court have misapprehended fundamental aspects of Norwegian gaming policy in general and the slot machine reform in particular.

403. Beside the need to clarify and promote the principles underlying the policy, the State also finds that in some areas there may, in addition to the slot machine reform, be a need for a certain further *reaffirmation* of gaming policy and its administration. At a time when the extent of gaming and ensuing gambling problems are on the increase, it is important for the authorities to examine how best to react to this as an element of a consistent and systematic gaming policy. To that end, consideration is being given to a number of measures that will be described below.

404. Historically a period of the kind that Norwegian gaming policy is presently going through is not unusual. On the contrary, a retrospective look at gaming reveals that periods of (relatively) liberal practice are as a rule followed by periods of restrictions introduced to counteract the problems that have emerged.

5.2 The 2003 White Paper (Ot.prp. 44) on gambling policy

405. The 2003 White Paper (Ot.prp. 44) was the first overall report on gaming and gambling in Norway in nearly a decade. It is essential that the White Paper is read in context, as a whole, and that the focus is not limited to the parts on slot machines. This is necessary to understand the background for the Bill and the reasons why the reform was chosen.

406. This context is described in detail in Bill no. 44, which is the most comprehensive presentation of Norwegian gaming legislation and policy formulated to date.

407. The main chapters of the Bill of Enactment are:
    1. Main contents of the proposition
    2. Background for the bill
    3. General review of gaming and lotteries in Norway
    4. Specific information regarding prize machines
    5. Other amendments to the legislation relating to gaming and lotteries
    6. Other issues
    7. Financial and administrative consequences
    8. Notes regarding the individual stipulations

    Proposal for changes to the money game and lottery acts

408. The presentation begins in Chapter 3 under the heading “General review of gaming and lotteries in Norway” with an account of the historical and current main principles, as described above in section 3.2. This is followed by a description of the gaming market’s organisation, its operators, turnover, recent technological development and the problems associated with compulsive gambling. The chapter ends with a brief comparative survey, chiefly focusing on a comparison with Denmark and Sweden.

409. Chapter 4 presents the proposal for the introduction of an exclusive-right to operate slot machines.

410. Chapter 5 deals with “Other amendments to the regulations on gaming and lotteries”. First, the proposal for a new objects clause in the Lottery Act that was subsequently adopted as the new § 1 a is presented. Chapter 5.2 goes on to discuss the principles underlying the question of who should have access to revenue from gaming and lotteries, including a delimitation of the concepts “humanitarian” and “public-interest” causes, and certain minor amendments to the rules on small-scale lotteries are proposed. Section 5.3 considers questions concerning lottery activities on Norwegian vessels sailing to foreign ports and the need for a harmonisation of the regulations off and on shore.

411. In Section 5.4 the Ministry describes the work being done to combat problem gambling, including the establishment of a 24-hour compulsive gambling helpline and the introduction of a minimum age limit of 18 for playing Oddsen, which is the “hardest” of the games offered by Norsk Tipping – a measure which was subsequently adopted.

412. Under the heading “Other issues”, Chapter 6 discusses the prohibition of casino activities (6.1), legislative technicalities (6.2), requirements regarding stakes and winnings (6.3), the prohibition on gambling on credit (6.4), the challenges posed by Internet gaming (6.5) and pyramid games (6.6).

413. Read in context, the general picture presented in Bill no. 44 is clear. It presents a consistent and systematic review of the fundamental principles on which Norwegian gaming policy rests and of the new challenges that it is facing. The Bill serves to raise awareness of, and promote the fundamental principles, presents a precise description of current rules, and a number of proposals for how these should be adjusted and reaffirmed. The slot machine reform constitutes a major element of this picture, but a number of other amendments to the rules and measures are also put forward.

414. Viewed retrospectively, Bill no. 44 was the start of a wide-ranging process that has subsequently been followed up in a number of domains, and which is still continuing. Some central elements in this process will be briefly mentioned below.

5.3 Recent public measures tightening gambling policy

The establishment and strengthening of the Gaming Authority

415. The first measure in a more modern and tighter national gambling policy was the establishment of the National Gaming Board in 2001. Since then, this institution has been gradually strengthened, with new tasks assigned and increased resources allocated. Today the Norwegian Gaming and Foundation Authority conducts reinforced and intensified surveillance and control over all aspects of the Norwegian gaming and lottery sector. This is described in the Gaming Authority's annual reports, of which the reports for 2003 and 2004 have been included as annexes by the ESA.[98]

The establishment of the Helpline (Hjelpelinjen)

416. The Helpline was established as a pilot project in 2003 as a public service phone for compulsive gamblers, their relatives and next of kin, to give them access to information about compulsive gambling and available treatment. The service was established in collaboration between the Norwegian Gaming Authority and the Hospital of Sannerud. The Helpline was evaluated after a two years period.[99] The conclusion was that the Helpline has been successful in reaching out to the target group. The statistics and data derived from the activity on the Helpline have given the authorities important information of the development of problems related to gambling. As a result of the evaluation, the Ministry of Culture decided to make the service permanent from 2005.

The Government's action plan against gambling addiction

417. Compulsive gambling has because of the increase in slot machine gambling in recent years for the first time become a major problem in Norway, as described above in section 3.4. Public awareness of this grew gradually, and it was not really until 2001-2002 that the competent authorities really started to take notice. After that, however, it has been a political priority to fight this growing social problem. The March 2003 White Paper includes a description of what was then known about compulsive gambling, and most of this document should be seen as an attempt to tackle it, by different means.

418. One of the measures signaled in the March 2003 White Paper was that the Ministry would take the initiative to have an action plan prepared, aimed at preventing problem gambling and reducing the negative effects resulting from excessive gambling in Norway. It was decided that the Norwegian Gaming Authority should be responsible for the preparation of the plan. An action plan proposal was submitted by the Norwegian Gaming Authority to the Ministry of Culture and Church Affairs in December 2004.

419. The report is enclosed as annex 21, and the parts of it describing the extent and nature of compulsive gambling in Norway is referred to earlier in section 3.5. The report also presented a number of proposals for a new policy plan to prevent problem gambling and to reduce the negative effects deriving form compulsive gambling.

[98] Cf. **Annexes 57 and 59**.
[99] Cf. **Annex 81**.

420. The December 2004 proposals of the Gaming Authority were quickly transferred into public policy, and in April 2005 the Government presented its "Governmental Action Plan to prevent Problem Gambling",[100] which met with broad public and political approval.

421. The Governmental Action Plan focuses on two main goals – (i) the prevention of problem gambling and (ii) the reduction of negative effects of problem gambling. Action plan annual funding can be up to 0.5 % of Norsk Tipping's revenues, and amounted to NOK 12 million for 2005 and a similar sum for 2006. These funds contribute to improving research, treatment, information and prevention of problem gambling. Funding is allocated as agreed between professional departments working in this area.

422. Among the measures that are a part of the Governmental Action Plan is a research programme which will strengthen competence regarding problem gambling, managed through the Research Council of Norway (Norges forskningsråd). I addition to this the Gaming Authority will continue, and expand, its work as regards continuous data collection from the gambling market and on the development of problem gambling in the population.

423. The Governmental Action Plan states that due to the risk associated with gambling and uncertainty of the effects of individual measures, gambling regulation should utilise a precautionary approach. In line with this, every change in the gambling regulation has to be evaluated with regards to potential social consequences by the Gaming Authority.

424. Delusions relating to gambling are an important factor which can result in vulnerable gamblers developing compulsive gambling. The Governmental Action Plan includes measures to increase awareness related to compulsive gambling and to prevent people from becoming addicted to gambling. The information campaign will be targeted at specific groups research shows are at a higher risk of developing an addiction than the population in general.

425. The main strategy for reducing the negative effects resulting from compulsive gambling is to contribute to a strengthening of competence related to compulsive gambling in the healthcare and social welfare system and make sure that compulsive gamblers get treatment close to where he or she lives. Measures to help improving competence within these sectors are listed under Main Goal No 3 in the Governmental Action Plan.

Formal guidelines for the marketing of gaming and lottery by Norsk Tipping and the Norsk Rikstoto Foundation

426. One of the measures proposed by the Norwegian Gaming Authority in its action plan from December 2004 was the introduction of formal guidelines for the marketing which Norsk Tipping and Norsk Rikstoto should be permitted to carry out. The guidelines are now in force, and are being controlled by the Gaming Authority.[101] The purpose of the

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[100] Cf. **Annex 22** (English version).
[101] Cf. **Annex 95**, Guidelines for the marketing of state-controlled gaming and gambling, Royal Decree of 10 June 2005,

guidelines is to secure that the marketing is in line with the restrictive objectives of the regulation. Direct marketing and marketing targeted at adolescence (under 18 years) is prohibited. Also, misleading and certain forms of aggressive marketing will not be tolerated under the new guidelines. The Gaming Authority will issue a report on Norsk Tipping's and Norsk Rikstoto's marketing for the past six months in August 2006.

Revised and tightened control of Norsk Tipping

427. The Ministry exercises its supervision and control of Norsk Tipping through the annual general meeting. The Ministry furthermore appoints the Board of Norsk Tipping, and receives copies of the minutes from all board meetings. Meetings are also held regularly between Norsk Tipping and the Ministry. There is a formal meeting with the Minister a couple of times a year. Consultation meetings and contact with civil servants occurs relatively frequently.

428. Norsk Tipping operates under relatively strict regulation, which often results in a need for specific clarification of both technical and regulatory aspects. The Ministry's ongoing supervision and control have been expanded over the last decade. This has taken place gradually, but more intensively in recent years. This has also been described in the written deposition to the Norwegian Supreme Court by Chairman of the Board of Norsk Tipping Mr Sigmund Thue.

429. In 2004 the Office of the Auditor General of Norway criticised the Ministry for certain aspects of its governance of Norsk Tipping. Against this background the Ministry has reviewed its control routines.

430. The Ministry responded to the remarks from the Office of Auditor General by proposing new statutes for the company along with changes in the board instructions to ensure that the roles and responsibilities were more clearly defined. The changes were approved by the Government in April 2005. The Ministry maintains a close contact and continuous dialog with the company on how the company fulfils it's obligations in a socially responsible manner in accordance with the regulation.

431. Whenever Norsk Tipping adjusts or extends its gaming propositions, this takes place after consultation with the Ministry, and all changes in game rules require the Ministry's approval. Before the Ministry can decide, the Gaming Authority has to evaluate the proposed changes and make an advisory statement to the Ministry with regards to control, consumer protection and social responsible perspectives.

432. One example of this is an application where Norsk Tipping made a request that it be permitted to make certain changes to the rules for the Extra game. On the basis of a broad assessment of conditions in the gaming sector, the Ministry found itself compelled to deny permission.[102]

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enclosed in English translation.

[102] Cf. **Annex 116,** Letter of 18.02.2005 from the Ministry of Culture and Church Affairs to Norsk Tipping, Change of game rules for Extra.

433. A more recent example is Norsk Tipping's request to make changes to the rules of the Lotto game. The proposition was evaluated as described above. In this case the Ministry decided to let the company make the requested changes based on the advisory statement from the Gaming Authority. In a letter of 3 March 2006 the Ministry of stated that:

> "The proposed changes in the Lotto regulation hardly seem to increase the risk of problem gaming in connection of the game. The top prize in Lotto has been unchanged for nine years. As underlined by the Gaming- and Foundation Authority, Lotto has few of the elements that according to research may lead to the development of problem gambling. Based on the data from the helpline few signs indicate that Lotto cause problem gambling in the population. As usual The Ministry ask Norsk Tipping to follow the development of Lotto gaming closely in order to catch any signs of problem gambling. The Ministry also expect Norsk Tipping to follow the general principle of precaution and the specific regulations that follows from the guidelines for marketing of governmental games, when it comes to marketing in relation to new prizes, the size of the prizes and the possibility to win."[103]

434. Norsk Tipping has itself made a great effort to, not only await instructions from the Ministry, but to also have an active approach towards responsible gaming. This can be illustrated by the above mentioned (section 3.8) changes made in the Oddsen game. The responsible approach is also implemented in the company's internal guidelines and a specific programme for social responsibility.

435. In comparison with other similar companies in Europe, the Government holds that Norsk Tipping is relatively moderate, both in its ambitions to expand and in the way their games are being promoted. The amount of marketing has been reduced over the past years. The development of Norsk Tipping's games during the last decade has been moderate and precautious, compared to most other countries. Signs of increased development in problem gambling, in connection with Norsk Tipping's games, have led to preventing adjustments in the regulations. This policy goes along with the Governments principle of not competing with the offensive gambling opportunities that has been available on the Internet in recent years. That is why the latest trend internationally with poker on Internet sites has not led to a parallel poker game from Norsk Tipping.

436. On this basis, the Government holds that the Authority's allegation on p. 63 (paragraph 236) that Norsk Tipping is substantially expanding the range of games and gaming opportunities is positively wrong. All the games available through Norsk Tipping's Internet site are traditional number games and lighter forms of sports betting. No interactive games with direct response between the operator and the player are allowed on the Internet. Norsk Tipping has had a few test games through digital TV for a short period of time, but this has been limited and non commercial approaches to gain experience with new techniques and new forms of games. Licenses for ordinary activity with such interactive games have never been given in Norway. This fact may be part of the reason why Norsk Tipping has experienced stagnating turnover the last few years. Still the Government has held that new gaming opportunities can not be offered before the major problems connected to the slot machines have been permanently solved.

The refusal to allow interactive internet gambling from Norway

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[103] Cf. **Annex 117**, Letter from the Ministry of Culture to Norsk Tipping of 3 March 2006.

437. A major question today is how to deal with the challenges from the thousands of gambling sites which has been established around the world, often located in liberal jurisdictions as Malta, Gibraltar and Antigua. Most countries face these challenges without a clear answer. Some countries (like the USA, Italy and the Netherlands) try to stop such cross border gaming through regulations. Other countries warn their citizens against problem gambling and fraud that more easily may occur in connection with such liberal and often lesser controlled gaming offers. Others again (until recently also the Commission) tries to harmonize the international cross border gaming regulation to integrate such services as an ordinary part of the continental or the global marketplace.

438. Norway has also dealt with this question, and did in 2005 decide not to allow for the interactive gaming site Tivoli.no to be established as a permanent gaming offer. After a complaint from the operator of the test-project, Norske Spill, the final decision was taken by the Government on 1 July 2005, partly because "the uncertainty of the future development and the consequences of such gaming offers. Such uncertainty is particularly inconvenient at a time when some of the national gaming offers increase their turnover strongly and the international availability of games is also increasing".[104]

Denial of bottle deposit lottery

439. The private part of the gaming marked in Norway has also applied for at licenses to new kinds of lotteries. Among these is a bottle deposit lottery, as known from some other countries. This kind of expanding of the private lottery market was also let down in the Ministry's letter 20 May 2005, with reference to that "it can not be given new licenses to such money games as a bottle deposit lottery, before the total situation on money gaming in Norway is diminished considerably."[105]

New regulation on network marketing companies

440. In later years some network marketing companies ("pyramidespill") have flourished throughout Europe. In some of these companies most of the turnover comes from high introduction fees for new partners who wants to be shareholders and take part in the marketing of the company. In Norway such networks are illegal if the major part of the total turnover comes from introductions fees and enlisting of new partners, and not from the sales of services and goods. Still hundreds of million kroner have been collected illegally through such networks in Norway the last couples of years. To make it more possible to identify such illegal pyramid networks the Article 16 in the Lotteries Act was amended by 1 January 2006 as a harmonization to the Directive 2005/29/EC on Unfair Commercial Practices. Now the police and civil controlling bodies can demand documentation showing that the turnover in such network companies actually comes from ordinary sales activity and not from introductions fees and other illegal collection of money.

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[104] Cf. **Annex 118**. When the Authority on p. 75 (para 281) claims that "….Norske Spill have substantially expanded gaming opportunities in Norway (…) in particular by utilizing new technology." this is outdated and misleading.

[105] Cf. **Annex 119**, Letter from the Ministry of Culture of 20 May 2005.

Continued prohibition against gambling on credit

441. According to Norwegian law since 1902 no debt from gambling may institute a contractual obligation to pay. On the basis of this regulation the Norwegian banking system has recently decided that it cannot transfer money to credit card companies on the behalf of a customer that has taken part in gambling and paid by the use of a credit card. The law was originally given to help people from losing land and property in card games another forms of hazard gambling. Today the regulation sees to it that all licensed gaming in Norway can only be held legal if the participators pay in advance.

Continued prohibition against casinos

442. Casino operations are permitted in a number of European countries, including the neighbouring Nordic states: Denmark (since 1990), Finland (since 1995), and Sweden (since 2001). In Norway they are not allowed. In terms of Norwegian legislation, the games offered in a casino constitute a "lottery" and are therefore subject to the general prohibition, unless a special permit has been granted.

443. The issue of permitting casino operations in Norway as well has been raised from time to time, and in 2001 an application to this effect was submitted to the authorities by the Norwegian Cancer Association, with the Olav Thon Group and Norsk Lotteridrift as proposed private operators. The application was rejected.[106]

444. In 2003, on request from a majority in the Standing Committee on Justice, the Ministry of Culture considered whether to allow for the establishment of casinos in Norway. On the basis of an overall assessment of national gambling policy, the Ministry concluded in its March 2003 White Paper that it is not desirable to permit this.[107]

Meeting the Challenges from Internet Gambling

445. The increase in gambling opportunities through the internet has reduced the national control with the gaming and gambling in countries all over the world. For 2004 the official estimates for gambling from Norway through sites without license in Norway was 1,8 billion kroner. Unofficial estimates for 2005 indicate a figure of more than 8 billion kroner. In Norway gambling through Internet is only licensed for Norsk Tipping and Norsk Rikstoto, and only for distributing of the companies current number and betting games. All forms of interactive gaming over the internet are forbidden. The test-project with interactive games from the operator Norske Spill was ended in 2005, as described above. This is the opposite of the situation in Sweden where a test- project on interactive poker on the internet was launched in autumn 2005 through Svenska Spel.

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[106] **Annex 120,** Application for pilot operation of a casino in Oslo, Letter of 27.06.2000 from the Norwegian Cancer Association to the Ministry of Justice, with a letter from Olav Thon and Norsk Lotteridrift enclosed; **Annex** 121 "Oslo kan få sitt Las Vegas" [*Oslo can have its Las Vegas*], *Aftenposten* 7.07.2000. **Annex** 122, Letter of 8.08.2000 from the Ministry of Justice to the Norwegian Cancer Association

[107] Cf. **Annex** 9, Ot.prp. nr. 44, chapter 6.1. Later initiatives to establish casinos have also been rejected, as for example in April 2005, cf. **Annex 123,** "Vil starte kasino i Bjørvika" Aftenposten Aften 08.04.2005.

446. One of the major challenges in the gaming sector at present is the explosion in the range of online gaming that has occurred in the last few years with a serious danger of problem gambling and malpractice. This is a challenge which Norwegian authorities share with national authorities in most other countries, and which is described in the March 2003 White Paper.

447. When speaking of the Internet, it is important to distinguish between, on the one hand, its use for approved national games and, on the other hand, the types of interactive game that have been specially developed for the Internet, and which are almost all operated from abroad.

448. The first category is relatively unproblematic, and here the authorities have given Norsk Tipping and Norsk Rikstoto permission to offer their ordinary range of games online. This is done in compliance with the rules otherwise in force and in principle constitutes nothing more than a new channel for the existing gaming propositions.

449. A different question is to what extent Norway should permit the growth of interactive games specially adapted for the Internet along the lines of the very comprehensive range of games offered from abroad that can be found online today. This is a far more problematic matter, and here the authorities have been more cautious. Norsk Tipping and Norsk Rikstoto have not been granted such permission.

450. These new interactive games are primarily a number of electronic variants of traditional casino games (poker, roulette, blackjack, etc.), along with betting on sports and all other kinds of events. Many of these are “hard” games, and, what is more, they are marketed aggressively over the Internet, are scarcely subject to state control and have few or no limits on how much money may be staked. Most European countries have restrictions on such activities, but these can easily be evaded on the Internet, and a large number of operators, among them many large international bookmaking companies, have established themselves in small island states in the Caribbean and in Malta and Gibraltar, where the legislation is liberal. The range on offer is very extensive. From Norway’s viewpoint, it is a matter of particular concern that at least two such companies, Ladbrokes and Betsson, have set up dedicated Norwegian websites, hired Norwegian representatives and offer betting that specifically targets the Norwegian market.

451. For Norwegian authorities this is a major challenge. There is no lack of political will to attempt to limit Internet gaming, but the legal and practical difficulties are very severe. This is, however, a field that is subject to ongoing assessment, and contact is also being maintained with the competent authorities in other countries.

452. One of the measures the authorities is considering as a means of restricting online gaming is to crack down on credit transactions effected by Norwegian banks and financial institutions for foreign internet companies that operate gaming activities. Another possibility is to block foreign gambling websites from being hosted into the country through the local providers of foreign sites. This has been considered and implemented in several countries, inter alia the Netherlands, Italy, Australia, and the USA.

5.4 Other legal challenges to the Norwegian system – the Ladbrokes case

453. Since the turnover involved in the gaming business has increased significantly the later years, both in Norway and internationally, more commercial companies are trying to get involved in this sector than ever before. For the gaming regulators this has resulted in an increasing number of lawsuits from commercial companies.

454. The single most aggressive company in this respect is Ladbrokes Inc, a UK bookmaking firm, which has filed basically similar lawsuits in Norway, Denmark, Sweden and Finland. The action in Norway was taken in December 2004. The background was that Ladbrokes had applied for licences to operate virtually all kinds of gaming available in Norway with the exception of slot machines. First, the company applied for a permit under the Lottery Act despite the fact that it does not meet the requirements for being a non-profit organisation. Second, it applied for a licence to offer betting on horse racing despite the fact that it is not a company that aims to promote the equine sector in accordance with the Totalisator Act. Third, it applied for permission to operate the forms of gaming that are regulated by the Gaming Act (football pools, Lotto), despite the fact that the Act stipulates that these are exclusively the preserve of Norsk Tipping. All applications were rejected. Formally, the action concerns the validity of the rejections. In substance the action concerns the legality of Norwegian gaming and lotteries legislation in its entirety in respect of EEA law.

455. The arguments of EEA law on which Ladbrokes bases its action are largely the same as those of the private operators in the slot machine case before the national courts (Ladbrokes is represented by the same law firm as NOAF), and therefore very similar to those of the Authority in the present action. Seen in combination the two legal actions constitute an assault on the *entire* Norwegian gaming and lottery legislation.

456. Moreover, the slot machine case and the Ladbrokes case are not the only challenges against Norwegian gaming legislation. In July 2004, members of the World Wide Games company brought an action before Oslo City Court for a licence to market its gaming activities in Norway, arguing on the basis of EEA law, and in particular Gambelli. In reply the State argued that the persons concerned did not have sufficient legal interest under procedural law. This was accepted by the City Court and confirmed by the Court of Appeal.

457. In another case before the authorities, the British bookmaker firm Stanleybet, which is another large company of more or less the same type as Ladbrokes, applied on 12 August 2004 for a permit to operate and market betting and gaming in Norway. Once again reference was made to the same EEA rules. The application was rejected by the Ministry on 29 September 2004. Stanleybet appealed, and the appeal was rejected by Royal Decree of 18 February 2005.

5.5 Concluding remarks

458. Slot machines have their own part in the history of gambling, in Norway as well as in other countries. But through the development of the electronic slot machine the principles of slot machines has converted into the more general multitude of electronic

gaming opportunities. The difference between the slot machines, internet gambling and the traditional casino games is getting increasingly harder to identify, as technicians have succeed in combining the traditional elements with new knowledge inside the microchips that control the games.

459. The decision of the Norwegian Parliament in 2003, to incorporate the modern slot machines into the existing exclusive rights system traditionally regulating other major and advanced forms of gaming in Norway, was therefore a decision well overdue in order to preserve and uphold basic principles in national gaming policy. The increasing problem gambling of the later years has awoken political awareness and created a widespread public opinion very critical of the present slot machine sector and other aspects of liberalised gambling.

460. This has led to a series of efforts in order to preserve and strengthen control of the national gaming and lotteries sector, amongst the most important are:

- A national action plan to fight problem gambling
- Denial of new gaming opportunities to both private and state owned operators
- Reluctance against the increased gaming opportunities on the internet
- Guidelines to avoid unwanted marketing efforts
- Radically reforming the slot machine sector in order to fight problem gambling and diminish gambling opportunities.

461. The start of this process was the Ministry's White Paper of March 2003, and the single most important measure was the reform of the slot machine sector, which was to be a main pillar in the ongoing process to reintroduce moderation and consistency in the Norwegian gaming and lotteries sector. It is a severe blow to the forces of responsibility and moderation that this reform so far has been stopped by the aggressive commercial interests which are behind the legal actions before the national courts and the complaints to the Authority in the present case.

6. THE COMPARATIVE PERSPECTIVE – GAMBLING RESTRICTIONS IN OTHER COUNTRIES

6.1 Introduction

462. Norwegian gaming and lottery legislation, as described above, has its own national characteristics. But as a system it is not unique. On the contrary, essentially similar structures exist in almost all European countries and in the majority of other developed nations across the world. Common to them all is that gambling is regarded as a distinct sector, in which ordinary market rules are not applicable, and in which more or less stringent national restrictions prevail. The use of exclusive-rights schemes is widespread, and the same applies to the principle by which the proceeds of gambling are not to go to private profit, but to be channelled to non-profit and public-interest causes.

463. In the other Scandinavian countries the regulation is basically similar to the Norwegian model, with the major games organized under a public exclusive rights model in order to preserve full public control. Both Sweden and Finland have such a model for the operation of slot machines. A comparative survey of how the gaming sector is regulated in Sweden, Denmark and Finland is included in Bill to the Odelsting no. 44 (2002-2003) in chap. 3.2.5. This will not be reiterated here.

6.2 Gambling restrictions in the other EFTA countries

Iceland

464. The gaming regulation in Iceland is tradisionally based on a restrictive approach. In the spring of 2005 the Althing issued a general law on lotteries, law nr. 38/2005. Paragraph 2 of this law states that: "To preserve "ordre public" and prevent harmful influence on public it is forbidden to operate lottery unless by licence of the Minister of Justice or by special provision of law".

465. Six companies are operating in the Icelandic lottery market. These operate different types of lotteries, such as class lotteries, scratch tickect, etcetera. All profit goes to the benfit of good causes, such as the University, tuberculosis and rehabilitation in general, Red cross, sport activites and support for the disabled. Each company gives its total profit to good causes only. The Althing (the Icelandic Parliament) has issued laws for each of the above mentioned lotteries. No one may operate a lottery or even a tombola without a permission from the legal authorities, generally from the Ministry of Justice.

466. There are two companies allowed by law and regulations to operate "lottery machines". They are the University of Iceland Lottery and Íslandsspil. Although the machines of these two companies may seem similar there is a basic difference between them. The machines of Íslandsspil are "stand alone" machines. That means that progressive games giving Jackpots cannot be used in the machines. They only can be interlinked for

statistic purposes. On the other hand the machines of University of Iceland Lottery are interlinked. They are classified as VLT-machines and include progressive games.

Liechtenstein

467. Pursuant to internal laws in Liechtenstein, gambling and betting are prohibited in Liechtenstein, irrespective of the means used to gamble or bet (cards, dice, etc.). The applicable ordinance expressly mentions that gambling machines are not allowed.

468. However, according to a customs agreement between Switzerland and Liechtenstein dated 1923 (the "Customs Agreement") and to its annexes (amended in 2005), certain Swiss laws are applicable in Liechtenstein, including the Swiss Law on Lotteries and Bets. Therefore, activities covered by this law are restricted and/or allowed as in Switzerland. On this basis certain lotteries and games are run in Liechtenstein by the Swiss state-owned lottery organization responsible for the German part of Switzerland to which Liechtenstein has granted specific authorizations to run lotteries (like any Swiss canton).

469. The annexes to the Customs Agreement do not mention the applicability of the Swiss Law on Games of Chance and Casinos in Liechtenstein. *A contrario*, one must therefore assume that the general prohibition of gambling and betting contained in the internal laws of Liechtenstein applies to games of chance which are allowed in Switzerland under a licensing system.

Switzerland

470. Swiss gaming regulations are based on three main layers. The first Act is the Swiss Federal Constitution. Art. 106 of the Swiss Constitution allows for casinos to be operated under a licensing system. Before the amendment of the Swiss Constitution in 1993, casinos were prohibited in Switzerland. Lotteries and bets were otherwise allowed under certain conditions already existing before the amendment of 1993.

471. The second Act is the Swiss federal law. The Swiss Federal Law on Lotteries and Bets dates back to 1923 and has not been amended so far. Recent efforts of the federal government to amend the Law on Lotteries and Bets have failed. The Law on Lotteries and Bets prohibits any lotteries, however leaving room for exemptions to be granted by Cantonal authorities. Authorizations to run lotteries may only be granted to charitable organisations. The Swiss Cantons jointly run two such charitable lottery organisations based on two different inter-cantonal agreements (third Act), one for the French and one for the German speaking part of Switzerland. These inter-cantonal agreements reserve monopoly rights to the two (state-controlled) lottery organisations. As a result, professional private operators are not allowed in the Swiss lottery market.

472. In April 2000, the Swiss Federal Government enacted the Federal Law on Games of Chance and Casinos. Casinos are allowed under a licensing system. The number of available licenses is restricted and the Cantonal authorities have to agree to host casinos within their territory.

473. Both games of chance (including casinos) and lotteries are subject to legal monopolies in Switzerland. The Federal authorities grant a limited number of licenses to operate casinos. The federal law prohibits lotteries in general, leaving room for exemptions by Cantonal authorities. The Cantons exercise their power to grant permits for lotteries to charitable organisations in a coordinated manner based on two inter-cantonal agreements. According to these inter-cantonal agreements authorizations for lotteries are only granted to the two state-controlled lottery organisations.

474. Slot machines may be subject to lottery law or to the law of games of chance, depending on the nature of the games they support. Lottery machines may be operated by the two lottery organisations and are not allowed otherwise. Slot machines for games of chance are only allowed in casinos that hold a license.

475. The policy underlying the Swiss gaming regulations is to prevent gambling addiction, money laundering and social harm. The system provides for tight regulations. Nevertheless, as already mentioned, the system was liberalised to some extent in the year 2000 when casinos were allowed under a licensing system. The main reasons behind the liberalisation of the casino industry were tax reasons: The Federal state receives tax income from issuing licenses for casinos. Regulations of the lottery industry were tightened in 2005 by a new inter-cantonal agreement that seeks to coordinate better the Cantonal practices with respect to the granting of authorizations for lotteries and to the prevention of gambling addiction. This new inter-cantonal agreement has not been implemented yet.

6.3 Gambling restrictions in the EU Member States

476. A full and detailed comparison of the traits of the various countries' schemes is difficult because they are so different. However, a rough comparison is feasible, and serves to illustrate the State's point that the Norwegian gaming regime is not in any way unique, but, on the contrary, a variant of forms of regulation that are common in the majority of developed countries.

477. A survey of the different gaming regulations in EU Member States reveals that three main categories prevail depending on which operators are authorised to offer gaming. The first of these are the exclusive rights (monopolies). These may either be administrated by the State authorities themselves, or may be assigned to state-owned or state-controlled agencies or companies, or may (in a few instances) be granted as a fixed-term licence to a single private operator. The second category is a market based on restricted competition, with a licensing system, in which more than one licence is granted at a time. The third category is virtually a free market, in which there is essentially no upper limit to the number of operators that may be granted licences. When it comes to slot machines some countries have a total ban, and others have a ban against slot machines except in casinos.

478. Information obtained by the Government permits a tabulation based on these three categories, which comprise the major lotteries, betting on sports and athletics (not including horse-racing), and slot machines.

479. Reservations are made as to possible inaccuracies and simplifications owing to the difficulty of obtaining relevant data. But essentially, a table of the EU's 25 Member States looks as follows:

Country	**Major lotteries**	**Sports betting (horse-racing not included)**	**Slot machines outside casinos**
Austria	Exclusive-rights model	Competition (unrestricted number of licences)	Limited competition (Only allowed in three states)
Belgium	Exclusive-rights model	Competition (unrestricted number of licences)	Limited competition (Only allowed in licensed gaming halls)
Cyprus	Exclusive-rights model	Information not available	Not allowed at all
Czech Republic	Limited competition (multiple licences)	Limited competition (multiple licences)	Information not available
Denmark	Exclusive-rights model	Exclusive-rights model	Limited competition (multiple licences)
Estonia	Information not available	Information not available	Information not available
Finland	Exclusive-rights model	Exclusive-rights model	Exclusive-rights model
France	Exclusive-rights model	Exclusive-rights model	Not allowed outside casinos
Germany	Exclusive-rights model	Exclusive rights model in majority of German federal states	Limited competition (multiple licenses)
Greece	Exclusive-rights model	Exclusive-rights model	Not allowed outside casinos
Hungary	Exclusive-rights model	Limited competition (multiple licences)	Limited competition (multiple licences)
Ireland	Exclusive-rights model	Competition (unrestricted number of licences)	Not allowed (?)
Italy	Limited competition (multiple licences)	Limited competition (multiple licences)	Limited competition (multiple licences)
Latvia	Exclusive-rights model	Information not available	Not allowed outside casinos (from 1. January 2007)
Lithuania	Exclusive-rights model	Information not available	Limited competition (multiple licences)
Luxembourg	Exclusive-rights model	Exclusive-rights model	Not allowed outside casinos
Malta	Exclusive-rights model	Exclusive-rights model but with open competitive market for offshore betting	Limited competition (multiple licences)
The Netherlands	Limited competition (multiple licences)	Limited competition (multiple licences)	Limited competition (multiple licences)
Poland	Exclusive-rights model	Exclusive-rights model	Limited competition (multiple licences)
Portugal	Exclusive-rights model	Exclusive-rights model	Not allowed outside casinos
Slovakia	Exclusive-rights model	Competition (unrestricted number of licences)	Limited competition (multiple licences)
Slovenia	Exclusive-rights model	Exclusive-rights model	Competition
Spain	Limited competition (multiple licences)	Exclusive-rights model	Limited competition (multiple licences)
Sweden	Exclusive-rights model	Exclusive-rights model	Exclusive-rights model
United Kingdom	Exclusive-rights model	Competition (unrestricted number of licences)	Limited competition (multiple licences)

480. As the table indicates, the Norwegian regulatory system for gaming is not unique. What is unusual is in fact for a country to have a gaming market with no special restrictions. The types of gaming subject to regulation and the instruments employed do, however, vary a good deal, which is presumably due to different levels of protection, but also to different national traditions. Some countries are liberal on some things, but tend then to be restrictive about others. The table below is based on the information in the first table, and indicates the number of countries using each model in the different categories.

Model/type of gaming	Major lotteries	Sports betting (not horseracing)	Slot machines outside casinos
Competition		5	1
Limited competition	4	4	13
Exclusive-rights model	20	12	2
Total ban			2
Banned outside casinos			5
Unknown	1	5	2

6.4 More on slot machine restrictions

481. Looking at slot machines specifically, the main features are the same as for other categories of games. There are few or no European countries that have a free slot machine market, and there are also few or none that have as liberal a regime as Norway has had in recent years. The information on slot machines in the two tables above in section 6.3 is based on the legal study of The Swiss Institute of Comparative Law published in April 2006. The regulation varies a great deal, and the table does only include regulations on slot machines located outside casinos. In so far as it is possible to refer to a ’pervasive model’, then it would be that the machines of the type installed today in Norway are only permitted to be installed in casinos (which may be under State or private ownership). Since casinos are prohibited in Norway, this model makes for difficult comparison. But the effect of this model will tend to be at least as restrictive as that resulting from the Norwegian Storting’s prospective slot machine reform.

482. In two of Norway’s nearest neighbouring countries, the legislator has chosen instead to regulate slot machines through exclusive public rights schemes, which bear great resemblance to the Norwegian reform, and which indeed served as inspiration when it was conceived. These are Finland and Sweden.

483. Finland has a long-standing tradition for only permitting slot machines to be operated by a single state-owned exclusive-rights company. This scheme was challenged before the ECJ, in the *Läärä* case, as discussed below in section 7.2. Here the ECJ found that the scheme did constitute a restriction, but that this was permissible as a legitimate and proportionate measure to combat the harmful effects of gaming on slot machines.

484. Under the Swedish scheme, the state-owned gaming company Svenska Spel holds an exclusive right to all operation of slot machines. The system served as a direct

inspiration to the Norwegian reform, and is therefore described in detail below in the next section.

485. For purposes of comparison, in Denmark, the state-owned gaming company, Dansk Tipstjeneste, also has extensive gaming-machine operations. However, this company does not hold an exclusive right, and has to compete with private players on the market.

486. In Iceland there are two companies operating slot machines. Both of these are non-profit. One is Universitetslotteriet (revenue go to the University), and the other company is Islandsspill (Íslenskir söfnunarkassar), which is owned by three non-profit organisations.

487. Austria, France, Luxembourg and Portugal only permit the installation of slot machines in casinos. In some countries it is the case that certain types of slot machines ("hard" variants) are permitted only in casinos, whilst other types may be installed in amusement arcades, and in some instances in other establishments, depending on the actual regulations. Examples of this are Belgium and the Netherlands. In certain countries, including the Netherlands and Portugal, only the state is authorised to run casinos. In the majority of other European countries, the main rule is that private enterprises may be permitted to operate slot machines under a separate licence and subject to varying restrictions. The most liberal countries would generally appear to be the new EU Member States from Eastern and Central Europe.

488. The study from the Swiss Institute of Comparative Law estimates that the gambling marked in EU was worth 51.6 billion Euro in 2003. 18.3 % (or 10 billion Euro) of this came from machine gambling. In Norway alone the Slot machine marked in 2003 was 2,5 billion Euro, rising to 3 billion Euro in 2004. This means that the size of the Norwegian gaming marked in 2003 was 25 % the EU slot machine marked, whilst the size of the Norwegian population is approx. 1 % of the EU-population. Compared to the 18.3 % share for the slot machines in the total EU gaming marked, it is also notable that the Norwegian slot machines in 2003 had 65 % of the total gross turnover from gaming in Norway this year.

489. The international gaming machine industry may be characterized as an industry marked by major competition and with vast economical resources. As any other competitive industry, the market participants strive to create the most attractive products catering for a maximisation of profits for operators and charities in the different jurisdictions. Most jurisdictions experience challenges when regulating their respective gaming machine markets. Manufacturers and operators are in possession of strong ability to innovate during the process of machine production, and seek to exploit loopholes in legislation to create attractive functions on machines. Through the technological changes and developments of electronic gaming machines over the last 20 years, the industry has developed a flexibility to adjust towards new regulations. Electronic machines and video screen terminals allow for new kind of games end new elements in the development of machines. It is also well known that manufacturers use psychologists in this process to incorporate elements and functions in machines that are implemented consciously to attract players to the machines and to keep them playing.[108]

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[108] This is evident at the annual ICE/ATE machine exhibition in London where one may obtain an insight into the market forces in the industry and its innovation and creativity. The slot machine business also have its own periodical, the

6.5 The Swedish model for regulating slot machines

490. Under Swedish law, the state-owned gaming company Svenska Spel holds an exclusive right to all operation of gaming machines. The system is described in a letter of reply sent by the Swedish authorities in December 2004 to the European Commission in connection with the Commission's investigation of its compatibility with EU legislation.[109]

491. The State brought as a witness before the Court of Appeal Jan Nyrén, Chief Legal Adviser with the Swedish Gaming Board, who provided a detailed account of the Swedish gaming machine monopoly. His written deposition before the Supreme Court is enclosed as Annex 73, with an English translation enclosed.

492. In 1979 all machine gaming was prohibited in Sweden. This happened in the wake of social problems caused by machine gaming, which led the Swedish Riksdag (parliament) to impose a total ban on machines. 1995 saw the introduction of the current Lotteries Act, and during the drafting of the new Lotteries Act it was decided that gaming on machines was to be permitted.

493. It was considered that the licences for machines should be granted to non-profit organisations, in connection with discussions on a possible divestment of Svenska spel. However the divestment never took place and it was decided that the right to operate gaming machines should be a part of the exclusive gaming rights of the state owned Svenska Spel.

494. Pursuant to Lotteries Act, the Swedish government currently grants a single 2-year licence to Svenska Spel for 7,500 allowing for the operation of gaming machines, of which 7,000 in restaurant & hotel environments licensed to serve spirits, and 500 in bingo halls. The permit states that each individual permit for gaming machines must be authorised by the National Gaming Board upon assessment.

495. The Swedish Riksdag has adopted an allocation system for the entirety of Svenska Spel's profits. According to this system, the revenue from the gaming machines is treated like other revenues from Svenska Spel. Out of Svenska Spel's profits in year 2004 of approximately SEK 4.8 billion, the Swedish Sports Confederation received approx. SEK 1 billion and the Swedish National Board for Youth Affairs received approx. SEK 150 million to be allocated to youth affairs projects. The remainder of the proceeds went to the State.

496. An exclusive rights model for machines in Sweden has entailed a moderate machine market with only moderate increases in turnover since the market became fully established at the end of the 1990`s. This may be illustrated by the following table:

Year	Gross turnover, SEK millions	Net turnover, SEK millions

Coin Slot Review, which is an eye-opener for those trying to restrict and regulate this business. **Annex 150** may serve as an illustration of this.

[109] Cf. **Annex 133**, Formell underrättelse om den svenska lagstiftningen om spelautomatern [*Formal notification of Swedish legislation on gaming machines*], Swedish Ministry of Finance, 15.12.2004

2004	7,270	2,217
2003	6,919	2,110
2002	5,993	1,828

497. Compared to the development in Norway in the same period the Swedish system has led to a more moderate number of machines and a more moderate development in gross turnover. In 2004 the gross turnover from the 7500 slot machines in Sweden was 7,2 billon SEK. In Norway approximately 16 000 machines generated a gross turnover of 26 billion NOK (100 SEK is 82 NOK in may 2006). This means a double gross turnover per machine in Norway compared to each machine in Sweden. Since Sweden has 9 million inhabitants and Norway 4,5 million its also means that the average Norwegian in 2004 put *eight times* more money on slot machines than the average Swede.

498. The Swedish slot machine model is of particular interest to the present case because it served as a direct inspiration for the 2003 Norwegian slot machine reform. Representatives from Norwegian authorities consulted Swedish colleagues several times in 2002 and 2003 during the development of the Ministry's White Paper of March 2003. The Swedish experiences also illustrate the advantages of a fully state controlled system as a safe key to a modest and responsible development of slot machine services.

499. On 19 October 2004 the Swedish Cabinet Office and the Ministries received a letter of formal notice from the European Commission. In short, the Commission considers that the Swedish regulation of slot machines is in conflict with the provisions of EU legal provisions concerning the free movement of goods and services and the freedom to establish and that the rules cannot be justified by reference to public-interest objectives as the purpose of the Swedish legislation "appears be to the economic objective .

500. After the Swedish reply, submitted on 15 December 2004, the Commission on 4 April 2006 announced that it had sent an official request for information on national legislation restricting the supply of sport betting services to seven Member States, including Sweden. Slot machines were not mentioned, which might indicate that the Commission will not pursue this investigation further, at least not in the original way, as a challenge to the model as such.

6.6 The debate and struggle on the future of gambling in Europe

501. In recent years there has been wide political debate and numerous legal confrontations on the future of the gambling sector in Europe – both on the EU level and in a number of Member States. The fundamental question is whether gambling should continue to be a special sector, subject to the traditional strong national restrictions and exclusive-rights arrangements – or whether this sector should be more "normalized", and subjected to partial or full liberalization and privatization.

502. This is a relatively recent process. There have been debates and confrontations on the legal framework of gambling in Europe also in earlier times, but the main overriding

principle was that this was clearly a matter for the Member States to decide themselves, based on the particular moral, social and other public aspects of gambling.

503. The Government holds that this principle still applies, both politically and legally. But it is a fact that in recent years it has been repeatedly challenged, on a number of arenas, either by private commercial gambling interests, or by political interests advocating the virtues of liberalization, privatization and harmonization. The challenge has been partly on the political and legislative level, but more often it has taken the form of legal action, usually invoking Community law on the freedom of services and establishment, and in recent years always with reference to the 2003 Gambelli judgment of the ECJ.

504. There are a number of complex and interlocutory reasons for the new struggle on gambling which is raging across Europe. Some of these seem to be that:

- With increased prosperity there has also been increased popular interest in gaming and lotteries, as well as harder forms of gambling, all over Europe
- Technical innovation has been strong in the gambling sector in the last decade, most notably on the Internet, but also as regards more traditional forms of gambling (casinos, slot machines, bingo, etcetera)
- Traditional public gaming and lottery enterprises in many countries have increased their gaming portfolios and marketing, in a way which questions the basic restrictive principles on which they are founded
- New private and commercial gambling interests have appeared, many of them traditional UK bookmaking companies recently strengthened by Internet revenue, and now actively seeking liberalization in the traditional fields of gaming
- The 2003 Gambelli judgment of the ECJ has created a certain legal uncertainty which is being actively invoked by private companies

505. In a general perspective, it may be argued that these developments and forces have led to an expansion of gaming and gambling across Europe, which questions the basic principles on which the traditional system and national discretion is founded. At present the process is at a cross-road, and the question is whether to go further ahead with expansion, which would have to imply legal liberalization and harmonization, or to try to halt the process, to invoke the traditional restrictive principles, and to strengthen or reintroduce public responsibility and control.

506. This is the core question in what has become a huge tug-of-war, fought on many levels and arenas across Europe in the last few years. These arenas include:

- The EU legislature, the Council and the European Parliament, where gambling has recently been a major issue in the debate on the new Service Directive
- The European Court of Justice, which has decided on several cases concerning gambling, with other cases pending
- The European Commission, both as legislative initiator and supervisory body
- The national legislatures in a number of Member States, which have had to review and sometimes reconsider national gambling legislation
- The national courts in a number of Member States, which have had to decide on cases concerning gambling, with other cases pending

507. And as a Norwegian reflection under the EEA Agreement:

- The overall review of national gaming policy by the Norwegian legislator in 2003
- Pending cases before the national courts (against NLD/NOAF and Ladbrokes)
- The Authority's investigation, resulting in the present case before the EFTA Court

508. In this perspective it is the view of the Norwegian Government that the struggle over the parliamentary slot machine reform, and the present case before the EFTA Court, should be rightly seen as one of many on-going battles in this broader struggle. The Authority's Application, based on complaints from private companies and voicing identical arguments to theirs, has its own pre-history. But at the same time it clearly fits into the general European perspective. In legal terms, it is the same law which applies as in all the other cases, and the arguments and allegations of the Authority are similar in essence to those voiced by the private commercial gambling companies in their legal actions and political campaigns.

509. In this perspective it is, first, of *legal* interest to the present case to study how EU law has been interpreted in the gambling sector not only by the ECJ, but also how it has been interpreted and applied by the EU legislator, and by national courts. Second, it is of interest to the *factual* assessment of the slot machine reform to study similar national gambling arrangements in other countries have been assessed and evaluated according to the criteria of Community law, both by the ECJ and by national courts.

510. This is the reason why Part II (section 7) on "The Law" below includes a presentation not only of the relevant articles in the Agreement and the case-law of the ECJ, but also a presentation of the EU legislator's approach, the approach of the Commission, and the approach so far of national courts in a number of Member States.

511. This will be elaborated in detail in section 7. But the clear conclusion is that on the whole the trend in the European Union in recent years has *not* been towards a deconstruction of national exclusive right arrangements on gambling, but merely towards an insistence that such arrangements must be operated in a moderate and responsible manner in order to be legitimate and consistent.

6.7 Gambling restrictions in the United States

Europe compared to the Anglo-American countries

512. Even though none of the European countries can be said to have identical gaming policies, a general impression is that there are some basic differences between the regulator's attitudes towards gambling in Europe as compared to the gaming policies in the Anglo-American countries. The so-called social welfare-state model (e.g. the Nordic and some other European countries), seems to have led to a more preventing attitude in the policy on gambling, whilst the tendency in the last couple of decades in countries like Canada, the USA, Australia, New Zealand, have been towards a slightly more liberal attitude to regulation models based on competition, with less focus on prevention and stronger focus on subsequent control of gaming operators and treatment of problem gambling. This is not only seen in the regulatory approach in some of the countries or states, but can also be recognized by the approach from gambling problem researchers

in these countries, where the focus on treatment and treatment programmes in connection with gambling is accepted as a necessary part of the gaming operation.

513. The picture is however complex. In many Anglo-American countries the regulatory models vary radically between the different federal states. Nonetheless, in all countries and states, irrespective the form of government and political approach, the lesson learned over the centuries seems to have been that the liberalisations of gaming opportunities over a period leads to problems that provoke a general call for stricter regulations.

The United States in general

514. In the USA the federal states are responsible for most of the gaming regulations. This tradition has led to a federal prohibition on gaming activity through telephone (The Wire Act from 1961) to avoid cross border gaming activity. The Wire Act was intended to assist the states, territories and possessions of the United States, as well as the District of Columbia, in enforcing their respective laws on gaming and bookmaking and to suppress organized gaming activities. The act has lately also been used trying to stop cross border gaming through internet from foreign countries into USA and between the federal states. Subsection (a) of the Wire Act, a criminal provision, provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

515. As in Europe the USA have had its liberal waves of gambling during the latest centuries. These waves tends to be followed by more restrictive periods of prohibition as a reaction to the problem gambling and social disorders that follows from the liberalisation. According to one description the latest wave of legalized gambling came in the final quarter of the twentieth century:

> "In 1976, at the beginning of the most recent wave of gambling legalization, only thirteen states had lotteries, two states (Nevada and New York) had approved off-track wagering, and there where no casinos outside of Nevada."…… "Today, a person can make a legal wager of some sort in every state except Utah, Tennessee, and Hawaii; thirty-seven states have lotteries, twenty-eight states have casinos, and twenty-two have off-track betting."[110]

516. It still remains to see how the third wave of gambling in the USA will end. The awareness of gaming problems still seem to rise, as it does in Europe. At the same time the federal authorities struggle to enforce the Wire Act Regulation on the new gambling services on then Internet.

Slot machines in the United States

517. When it comes to slot machines it is difficult to draw a specific picture of the situation

[110] Cf. Rachel A. Volberg in *When the Chips are Down* (2001). In the same period pathological gambling became one of the new conditions that psychiatrics and other mental health workers could officially identify

in the United States, because the situation actually differs in each of the 50 states. But it is clear that slot machines through the third wave of gambling gradually have become a more important part of the games available, both in casinos as well as in arcades and other more public places. It also seems clear that the slot machines in the same period have been hard to regulate as the development of new machines opens for a multitude of varieties in how the different elements in each game work together.

518. In an interesting recent development, the Iowa House and Senate this spring have called for the removal of 6,000 slot machine-like lottery devices installed at more than 2,800 retail locations, and the state's governor has said he will sign the bill into law.[111] The state attorney general's office is said to claim that the government has "strong defences" against any potential lawsuits from investors calling for damage payments.

519. Another recent example from the USA of how rapidly perceptions of what constitutes responsible slot machines may change is found in the state of South Carolina, where electronic slot machines were permitted in 1993 and totally prohibited by 2001 because of problems with gambling addiction. The prohibition came after a protracted legal battle in the courts between public interests and private slot machine operators.[112]

520. One important lesson to learn from the United States is that even in the land of the original slot machine, the "one-armed-bandit", and even in a country usually associated with the gambling cities of Las Vegas and Atlanta City, the actual regulations on slot machines are in fact in most states quite severe and restrictive, including both total prohibition and various forms of exclusive rights models.

521. The most interesting lesson in relation to the present case is however the fact that even in a tightly-knit federation like the USA, with great traditions of free trade in goods and services, the operation of gambling services is indisputably a matter for the *states* to regulate according to their own discretion. The relevance to the present debate on whether the member states should have a particular margin of appreciation under Community and EEA law is obvious, and the Government holds that the answer should be the same as in the United States.

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[111] Cf. **Annex 124**, Iowa legislature calls for removal of retail slot machines, (BO) News 17 March 2006, and **annex 115**, Judge rules against delaying ban on TouchPlay, Quad City Times, 3 May 2006. Observers say the machines had become more attractive to children than anticipated, drawing their attention with buttons and flashing lights. Their easy accessibility made them more tempting than other forms of gambling, especially for problem gamblers. Responding to a surge of public opinion against the machines, the Iowa Senate voted 40-10 on 13 March 2006 to give businesses 45 days from the ban's enactment to remove them, and the Iowa House voted 80-18 the next day on a similar measure. The legislature's move could pose an economic problem for Iowa, because after prizes are paid out, the state receives 24 percent of the profits, which would total an estimated $40 million this year.

[112] Cf. **Annex 147**, "From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gaming" *in Mississippi Law Journal,* Volume 72, Winter 2002.

II. THE LAW

7. THE GAMBLING SECTOR UNDER EU/EEA LAW

7.1 The legislative framework

522. It has not been contested for some time that the operation and offering of gambling is an economic activity, which as such falls within the scope of EU/EEA law on the four freedoms, in particular the freedom to provide services, and (more recently) freedom of establishment.

523. This means that national restrictions on the operation of gambling must be evaluated according to the basic principles laid down in the EC Treaty Articles 43 and 49, corresponding to Articles 31 and 36 of the EEA Agreement. Furthermore it is not contested that the relevant provisions of the Agreement should be interpreted and applied in this sector in the same way as the original provisions of the EC Treaty. The relevant case-law of the European Court of Justice (the ECJ) in the field of gambling is thus of direct relevance also to the interpretation of EEA law.[113]

524. Apart from the application of the main articles on services and establishment, there is no Community legislation on gambling. Not only has the Community legislator refrained from adopting directives harmonizing gambling activities, but such activities are also specifically excluded from the more general attempts at harmonizing trade in services, such as the e-trade directive and the recent proposal for a general service directive. This means that the national legislator remains free to regulate the gambling sector as seen fit, according to national tradition and requirements, as long as the basic requirements of the general provisions on services and establishment (as interpreted in this specific sector) are respected. The only legal question is whether national legal restrictions on gambling are within the limits set by Community and EEA law.

525. When interpreting the basic articles on services and establishment the main source of law is the case-law of the ECJ. It is clear from this case-law that the operation and offering of gambling must be seen as a particular activity, different in many ways from other forms of ordinary economic activity. The general case-law of the ECJ on services and establishment is thus of lesser direct interest. Most important are those cases in which the ECJ has ruled specifically on national gambling restrictions. There are a limited number of such rulings, of which five are the most important, starting with the 1994 Schindler judgment and so far ending with the 2003 Gambelli judgment. All are preliminary rulings, interpreting Community law in the field of gambling, but not actually applying it to national facts and law.

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[113] Cf. Article 6 of the EEA Agreement and Article 3 (2) of the Surveillance and Court Agreement.

526. These five rulings – Schindler, Läärä, Zenatti, Anomar and Gambelli – will be discussed in section 7.2.[114] Building one upon the other, and studied as a whole, they demonstrate the approach of the ECJ to national restrictions in the gambling field and show the current status of Community (and EEA) law in this specific sector. The interpretation of this case-law in legal doctrine is also of interest, and will be discussed in section 7.3.

527. There has lately been discussion on the EU legislative level as to whether the gambling sector should be to some extent harmonised and liberalised. This has first and foremost been a discussion on the future of the legislative approach to gambling in Europe, but observations have also been made on the present interpretation of Community law in this sector. These processes are of direct legal relevance, and will be described in section 7.4.

528. In contrast to the existing case-law of the ECJ on gambling, the present case is a direct action taken by the Authority, and not a request for a preliminary ruling (or advisory opinion) from a national court. The EFTA Court is thus not only called upon to interpret the relevant provisions of EEA law, but it must also apply this law to the actual case at hand. In this perspective, the Government holds that it is of direct relevance to see how Community law has so far been concretely applied to the gambling sector. First, it is of interest to study the position taken by the Commission as a supervisory body to national gambling restrictions. This is described in section 7.5. Second, it is of interest to study how national courts in the Member States have applied Community law in this sector and the way in which they have assessed national legal restrictions on gambling according to the general requirements which are laid down by the ECJ. This is described in section 7.6.

7.2 The Case-Law of the ECJ – from Schindler to Gambelli

Introduction

529. In the Authority's Application there is no overview of the legal framework of EU/EEA law on gambling, and no attempt to describe and analyze the legal status in general, as it must be interpreted in the light of the case-law of the ECJ. Instead the Authority goes straight into the specifics of the case, basing its submissions in section VII on "tests" which are isolated from the general legal situation and context, and which are based on a partial and selective reading of the relevant case-law. Furthermore, the references of the Authority are almost exclusively to the Gambelli judgment, without analyzing the specific nature of this case, and without interpreting it in the light of the rest of the relevant case-law.

530. This legal approach is familiar to the Norwegian Government, as it is very similar to that taken by the private commercial parties (NOAF and NLD) before the national courts. These parties were however clearer and more coherent in their argument. They

[114] Cf. case C-275/92 Schindler, case C-124/97 Läärä, case C-67/98 Zenatti, case C-6/01 Anomar, and C-243/01 Gambelli. Reference will also be made to the 2003 Lindman case (C-42/02), which is of lesser interest to the case at hand, as it concerned an example of actual discrimination with regard to the national taxation of winnings from foreign gambling activities. There are also a few pending cases from Italian national courts, inter alia the Placanica case (joined cases C-338/04, C-359/04 and C-360/04), which appears to be rather similar to the Gambelli case.

argued outright that the 2003 Gambelli judgment was a complete turning-point (a “shift of paradigm”) in EU/EEA law on gambling, setting aside the former rulings in Schindler, Läärä, Zenatti and Anomar, and making the operation of gambling an “ordinary” economic sector of the internal market. This interpretation is clearly wrong, but at least it is straightforward. The Authority, on the other hand, is very vague in its general interpretation, leaving great uncertainty as to its legal position on the status of gambling under EU/EEA law.

531. Another surprising aspect of the Authority’s application is the fact that it continuously tries to identify the present case with the Gambelli case. This is simply not correct. From a factual perspective there are great and numerous differences between on the one hand the statutory transferal of slot machines from a private market to the existing public exclusive-rights gaming system in Norway, diminishing slot machine gambling and increasing public responsibility and control, and on the other hand the facts of the Gambelli case as described in the judgment (a thousand new national licenses for sports betting, increasing both the volume of gaming and state income). By contrast, the ECJ case which is obviously most similar to the present is the 1999 Läärä case, concerning the Finish state monopoly on slot machines, which was one of the models for the Norwegian reform. Yet this case is hardly mentioned in the Application of the Authority, much less analyzed in relationship to the present case.

532. This leaves an open question of whether the Authority holds that the Läärä judgment of the ECJ was actually overturned by the Gambelli judgment, or whether the Authority sees some (as yet undefined) difference between the present case and the Läärä case.

533. The position of the Norwegian Government is clear. The case-law of the ECJ on national gambling restrictions must be read and interpreted as a whole. The Gambelli ruling is the most recent so far, and therefore of particular interest. But it can not be interpreted in isolation from the previous rulings, and it must be read in light of the specifics of the case. It is not a “shift of paradigm”, but a continuation, setting out somewhat more precise criteria for the evaluation of national restrictions, but without overturning previous case law. The Läärä ruling still applies as concerns the legal and factual evaluation of national exclusive-right systems for the operation of slot machines, which is still relevant for the judicial adjudication of the case at hand. And the other rulings (Schindler, Zenatti and Anomar) are also still of relevance when interpreting the approach of the ECJ to national gambling restrictions.

The Schindler judgment

534. The first case in which the ECJ was called upon to consider national restrictions on gambling was the Schindler case, presented by the UK High Court of Justice in April 1992 and ruled upon by the ECJ in March 1994. The case concerned the seizure by UK authorities of advertising material sent by mail from a German lottery, under legislation prohibiting lotteries which were not licensed by UK law.

535. The ECJ considered the case under the freedom of services (then Article 59), and found that the national rules constituted a restriction, but that they were nevertheless legitimate, suitable and proportional. The broad and thorough opinion of Advocate General Gulmann is still of general interest, as this was the first ever evaluation of the

application of Community law on the specifics of the gambling sector. Many of his observations are still of relevance. Amongst the most pertinent are the following:

> 1. In the legal systems of all the Member States there is a fundamental prohibition on lotteries and other forms of games of chance. The reasons for the prohibitions are broadly the same. Lotteries and games of chance are activities which, for ethical and social reasons, should not be permitted. Citizens should be protected against the dangers that may stem from the urge to gamble and there is a significant risk of criminality in this field.
> But at the same time in all Member States there are to a greater or lesser extent exceptions from that prohibition. That is because it may be appropriate to permit some measure of gambling, partly to meet the citizens' desire to gamble and partly to prevent unlawful gambling. It is possible to lay down requirements concerning permitted forms of gambling in such a way as to limit the risk of criminality. In addition a significant factor in all the Member States is that it is possible to make authorization subject to conditions whereby the revenue from gambling is used for public-interest purposes or accrues to the State exchequer.
> 2. The lotteries sector, with which the present case is concerned, is characterized by the fact that in most of the Member States there is one or more large country-wide lottery which is either operated directly by the public authorities or is subject to tight public controls and there are also rules under which small local lotteries are permitted subject to certain conditions, in particular as regards their revenue. Moreover, according to the information given, there are prohibitions or far-reaching restrictions on the activities of foreign lotteries in the Member States.
> The internal market has thus not been achieved in the lotteries sector. The large country-wide lotteries have been given exclusive rights and they are to a large extent protected against competition from foreign lotteries.
> 3. In the present case the Court of Justice is called on to determine whether the rules in the Treaty of Rome are applicable in this sector and if so whether the restrictions which apply to the activities of foreign lottery operators are compatible with the Treaty.
> The case is thus of considerable practical and fundamental interest and all the Member States except Italy have submitted their observations.
> […]
> 31. There can be no doubt that the Member States regulate this sector in an intensive and fairly restrictive manner.
> The question is not whether the Member States may undertake such regulation. The Treaty does not affect the Member States' fundamental competence to lay down rules on the access to and exercise of occupations. The only question is what limitations are to be inferred from the Treaty rules for the Member States' regulatory power in this sector.
> 32. As stated above, the present case concerns the significance in this context of the Treaty rules on services. But it may be useful, before considering the rules on services, to make more general observations regarding the Member States' general competence to regulate the access to and exercise of activities in the lottery sector.
> 33. The starting point in all the Member States is, as mentioned above, that gambling is prohibited and that legal position cannot be contrary to the Treaty. In practice certain forms of gambling are, however, allowed in all Member States under certain specified conditions. There are quite considerable differences between the Member States as regards the forms of gambling that are permitted and as regards the conditions for such authorization. As a result, one form of gambling may be prohibited in one Member State but permitted in another.
> […]
> 41. There must be good reasons for not allowing the general mechanisms of the market to function. In an open market economy it is market forces and not public regulation which should in principle determine what supply of certain goods or services there should be.
> 42. But in this particular field cogent grounds have been put forward for such interference with the mechanisms of the market. All Member States have in any event taken two key measures: first, either no lotteries are allowed at national level at all or only one or a few

> lotteries are allowed, and secondly, no ordinary commercial undertaking may be operated in this sector.
> […]
> 120. What is more important, however, in my view, is that the Court in the present case is considering a market of a very special nature where the rules of all the Member States show that the general mechanisms of the market cannot and should not apply. So far as I can see, not one of the Member States considers it appropriate to have free competition in this area with the consequences that are detailed above.
> 121. There would be competition that could hardly fail to have far-reaching consequences for a number of lotteries of long-standing which are a major source of finance for important benevolent and public-interest organizations. Acceptance of the competition that would result from the opening of the markets might curtail national diversities and cannot, in my view, be regarded as a necessary consequence of the attainment of the internal market.
> 122. It is hard to point to any effects of the opening of the markets that would merit protection. So far as I can see it would not serve to further any of the aims referred to in Article 2 of the Treaty.

536. The Court of Justice confirmed the position of the Advocate General, stating, inter alia, that:

> 57. According to the information provided by the referring court, the United Kingdom legislation, before its amendment by the 1993 Act establishing the national lottery, pursued the following objectives: to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.
> 58. Those considerations, which must be taken together, concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society. The Court has already held that those objectives figure among those which can justify restrictions on freedom to provide services […].
> 59. Given the peculiar nature of lotteries, which has been stressed by many Member States, those considerations are such as to justify restrictions, as regards Article 59 of the Treaty, which may go so far as to prohibit lotteries in a Member State.
> 60. First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.
> 61. Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

537. The result was that the ECJ not only expressed itself on the general interpretation of Community law, but explicitly stated that legislation such as the UK prohibition on the offering of lotteries from abroad was not precluded.

The Läärä judgment

538. The second gambling case is the 1999 Läärä ruling, on the Finish slot machine monopoly. Under article 1 the Finish gaming act, games of chance may only be organised and offered after authorization by the authorities, and only for charitable and other benevolent non-profit purposes. Under article 3 only one license may be issued for the operation of slot machines, and the authorities may issue this to a public-law enterprise with the view to the collection of funds for various listed public interest purposes. Such an exclusive-right license was issued to the publicly controlled RAY Association.

539. Mr Läärä was the chairman of a private commercial company (TAS) which had illegally operated a number of private "Golden Slot" machines, and which had subsequently been fined and the machines confiscated. The case arose from the criminal proceedings before the national courts, and the Court of Justice was asked to consider whether the Schindler lottery ruling also applied to slot machines, and whether a public exclusive-rights system for such machines was compatible with "Articles 30, 59 or 60 or any other article of the EC Treaty".

540. The argument of the private commercial operator was that Schindler was not applicable, and that the monopoly arrangement was contrary to the rules on the freedom of goods and services both because the national exclusive rights did not in fact pursue the public interest objectives relied upon to justify it, and because it was not necessary, as these objectives "could be attained by less restrictive measures, such as regulations imposing the necessary code of conduct on operators" (11).

541. The Court of Justice did not agree. It started by referring to "the moral, religious and cultural considerations which attach to lotteries, like other forms of gambling", and the national tendency to prevent gambling "from being a source of private profit", as stated in the Schindler judgment, as well as other particular factors which together "justify national authorities having a sufficient degree of latitude" in this sector (13-14). The Court then stated that although Schindler only involved lotteries, the same considerations were equally applicable to "other comparable forms of gambling", including slot machines (15).

542. The Court then went on to analyze the differences between the Schindler case and the Läärä case, the most important being that while the national legislation in Schindler prohibited the offering of lotteries from abroad, in Läärä "the legislation at issue in the present case does not prohibit the use of slot machines but reserves the running of such machines to a public body holding a licence issued by the administrative authorities (`the licensed public body')" (21). In other word, the question in Läärä was the legitimacy of a public exclusive-right system (monopoly) on slot machines, similar to the model chosen by the Norwegian legislator in 2003.

543. The Court found that such an exclusive-right was an impediment to the freedom to provide services (29), and that it could therefore only be justified by overriding reasons relating to the public interest, and only if the exclusive right was "such as to guarantee the achievement of the intended aim", and if it did not "go beyond what is necessary in order to achieve it" (31).

544. The Court then found that a system such as the Finish public exclusive right on slot machines was in clear compliance with these requirements:

> 32. According to the information contained in the order for reference and in the observations of the Finnish Government, the legislation at issue in the main proceedings responds to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud, to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.
> 33. As the Court acknowledged in paragraph 58 of the Schindler judgment, those considerations must be taken together. They concern the protection of the recipients of the service and, more generally, of consumers, as well as the maintenance of order in society. The Court has already held that those objectives are amongst those which may be regarded as overriding reasons relating to the public interest […]. However, it is still necessary, as stated in paragraph 31 of this judgment, that measures based on such grounds guarantee the achievement of the intended aims and do not go beyond that which is necessary in order to achieve them.
> 34. As noted in paragraph 21 of this judgment, the Finnish legislation differs in particular from the legislation at issue in Schindler in that it does not prohibit the use of slot machines but reserves the running of them to a licensed public body.
> 35. However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment, recognised by the Court in paragraph 61 of the Schindler judgment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.
> 36. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.
> 37. The fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.
> 38. The position is not affected by the fact that the various establishments in which the slot machines are installed receive from the licensed public body a proportion of the takings.
> 39. The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.
> 40. On that point, it is apparent, particularly from the rules on slot machines, that the RAY, which is the sole body holding a licence to run the operation of those machines, is a public-law association the activities of which are carried on under the control of the State and which is required, as noted in paragraph 5 of this judgment, to pay over to the State the amount of

> the net distributable proceeds received from the operation of the slot machines.
> 41. It is true that the sums thus received by the State for public interest purposes could equally be obtained by other means, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.
> 42. In those circumstances, in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the operation of slot machines do not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue.

545. The Government has quoted this reasoning in length because it holds that it applies equally and fully to the present case. The slot machine reform adopted by the Norwegian parliament in 2003 is very similar to the Finish public exclusive right system, which was indeed one of the legislative models, together with the Swedish system. It is not possible for the Government to find any differences in national law and fact between the situation in Norway and Finland which could explain why the Läärä evaluations of the ECJ do not apply equally to the case at hand.

546. To the extent that there are differences, the Government holds that the 2003 Reform is in fact even easier to justify than in the Läärä case. In that case the question was whether to uphold an existing national system which was continually making revenues at a slightly rising level. In the present case the question is whether to allow a measure which will very substantially *reduce* slot machine gambling opportunities, sharply diminishing national turnover and revenue.

The Zenatti judgment

547. The next gambling case before the ECJ was *Zenatti*, in which the ruling fell only one month after *Läärä*, in October 1999. This case concerned Italian legislative restrictions on the operation of sports betting. Such betting in Italy is restricted by law under a system by which the agents offering betting have to operate on behalf of the National Olympic Committee (CONI) or the National Union for the Betterment of Horse Breeding (UNIRE). Mr Zenatti was an agent in Italy for the London based company SSP Overseas Betting Ltd, who ran an information exchange for Italian betters wanting to place bets with SSP. He was ordered by the authorities of Verona to cease this activity, and initiated legal proceedings, claiming that the order was in breach of Community law.

548. The question referred by the national court was whether the Treaty provisions on services "preclude rules such as the Italian betting legislation in view of the social-policy concerns and of the concern to prevent fraud that justify it".

549. The Court started by reiterating the remarks from the Schindler judgment on the "the moral, religious and cultural considerations" in the gambling sector, and the justification of a sufficient national "degree of latitude" (14-15). It went on to state that this latitude applied both to the scope of protection, and what measures to take in the context of the aim pursued:

> 32. (…) the Italian betting legislation differs from the legislation at issue in Schindler, in particular in that it does not totally prohibit the transactions at issue but reserves them for certain bodies under certain circumstances.
> 33. However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

550. The most important new aspect of the Zenatti ruling, as compared to Schindler and Läärä, was that the Court elaborated further on the issue of the underlying financial implications and considerations of national gambling law. The reason might have been that the Court this time was more inclined to suspect that the system had strong financial motivations. Anyway, it stressed that the public interest purposes justifying restrictions would have to be the real (genuine) purposes, and that the financing of social activities from gambling could only be "an incidental beneficial consequence and not the real justification for the restrictive policy adopted":

> 35. As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 Läärä and Others […] in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.
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> 36. However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

551. The expression "incidental beneficial consequence" in the English version gave rise to some discussion in the present case before the national courts, as the private slot machine operators claimed that it meant "coincidental" (in Norwegian: "tilfeldig fordel"). This is clearly a misunderstanding. Under the Zenatti formulae it is perfectly permissible for the financial considerations to be planned, and to be part of the original legislative intent and the preparatory works, as long as they do not constitute the necessary main justification. There need be no element of "coincidence". This appears more clearly from the original Italian and French versions, which speak of financing as an *accessory* advantage, "une conceguenza vantaggiosa accesoria", "une conséquence bénéfique accessoire".[115]

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[115] The Swedish version also uses the word "aksessorisk", while the Danish is "ekstra fordel". See section 9 below for a

552. Any other interpretation would also be impossible to apply. Behind all national regulations on gambling there will always be financial considerations which form part of the legislate deliberations, along with other considerations, of social, moral or other character. The point of the Zenatti formulae is only that financial considerations cannot "in itself" be part of the objective justification for the restrictions. In other words, they will have to be subtracted, before assessing whether the remaining public interest considerations are sufficient to uphold the restrictions.

553. While in recent years reference is usually made to Gambelli, this ruling does not really go much beyond Zenatti, except on one point, concerning the more precise nature of the suitability test.

The Anomar judgment

554. The September 2003 Anomar ruling was a Portuguese case involving restrictions on slot machines. Under Portuguese law "the right to operate games of chance or gambling is reserved to the State", though licenses agreements may be issued. Major forms of gambling may as a main rule only be offered in casinos, and this includes slot machines which pay out winnings in cash. The casinos are in turn subject to a public exclusive-rights system. This system was challenged before the national courts by eight private commercial companies involved in the marketing and operation of slot machines, who argued that Portuguese authorities had not demonstrated any moral or public-order concerns to justify such a legal regime.

555. The Court of Justice did not agree. In a very clear ruling the Court found that national gambling restrictions such as the Portuguese public exclusive rights system for the casino based operation of slot machines were in compliance with Community law. Pertinent passages include:

> 70. All the governments which submitted observations maintain that such legislation is compatible with Article 49 EC. According to them, it must be regarded as being justified by overriding reasons relating to the public interest such as the protection of consumers, prevention of fraud and crime, protection of public morality and the financing of public-interest activities. […]
> 73. The various considerations leading to the adoption of such legislation to govern games of chance or gambling must be taken together, as the Court pointed out in paragraph 58 of the judgment in Schindler, cited above. In the present case, those considerations concern the protection of consumers, who are the recipients of the service, and the maintenance of order in society. […]
> 74. Furthermore, as the Commission points out, the Portuguese legislation in issue in the main proceedings is substantially similar to the Finnish legislation on slot machines, in issue in Läärä and Others, in respect of which the Court found that it was not disproportionate, in view of the objectives which justified it (Läärä and Others, cited above, paragraph 42). Moreover, the Court considered that limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, falls within the ambit of such public-interest objectives (Case C-67/98 Zenatti [1999] ECR I-7289, paragraph 35). […]
> 79. It is common ground that it is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or

further interpretation of the Zenatti ruling.

only to restrict them and to lay down more or less rigorous procedures for controlling them (Läärä and Others, cited above, paragraph 35, and Zenatti, cited above, paragraph 33). […]
86. As the Portuguese Government points out, the Court has held that national measures which restrict the freedom to provide services, which are applicable without distinction and are justified by overriding reasons relating to the public interest - as is the case here, as is evident from paragraphs 68 and 72 to 75 of this judgment - must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it […].
87. None the less, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict (see, to that effect, Schindler, cited above, paragraph 61; Läärä and Others, cited above, paragraph 35, and Zenatti, cited above, paragraph 33) and which have been deemed compatible with the Treaty.

556. The Government holds that alongside Läärä, the Anomar ruling is also of particular relevance to the case at hand, as it too specifically concerns a public exclusive rights system for the operation of slot machines.[116]

The Gambelli judgment

557. Two months after Anomar, in November 2003, the ECJ passed judgment in the Gambelli case, which has left some uncertainty as to its more detailed interpretation and application, and which has been heavily leaned upon by the private commercial parties and the Authority in the present case, to some extent misinterpreting and misapplying the criteria formulated by the Court.

558. The case concerned the national restrictions on sports betting in Italy, which were basically the same as those tested in the Zenatti case a few years earlier, but which had since then been amended, so as to increase the number of license-holders and the volume of such betting, as well as tightening the criminal law provision against unauthorised betting operations. Mr Gambelli was an Italian agent for the British bookmaking company Stanleybet, who was indicted on criminal charges (together with more than a hundred other persons) for having offered unauthorised sports betting services over the internet on behalf of Stanleybet in Liverpool.

559. In a lengthy opinion, Advocate General Alber held that Article 49 on the freedom of services precludes national legislation such as the Italian one "which provides for prohibitions enforced by criminal penalties on the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, where such activities are effected by, on the premises of, or on behalf of, a bookmaker which is established in another Member State and which duly carries out those activities in accordance with the legislation applicable in that State".

560. The Advocate General based this conclusion partly on legal interpretation, which he wanted to formulate more restrictively than in earlier gambling cases, and partly on the factual characteristics of the case, under which he quoted the referring court's remarks

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[116] It should be mentioned that this Portuguese system is still in place today, and that the Commission has not started infringement proceedings neither against the Portuguese nor the Finish exclusive right regimes for the operation of slot machines. See below section 7.5.

that the recent legislative amendments were dictated mainly by the need to protect a group of Italian companies (the Totoricevitori), that there were "no evidence of any public policy concerns that could justify a restriction of rights under Community law" (17), and that there was an "apparent imbalance between domestic legislation that rigorously restricts the activity of accepting sports bets by foreign Community undertakings and an opposing policy of considerably expanding gambling and betting pursued by the Italian State at national level for the purpose of generating State revenue" (19). He further held that:

> 121. […] The Italian State itself has made it possible, through the legislation it has adopted, for the range of gambling opportunities on the Italian market to be substantially extended. It has further been submitted, without contradiction, that the Italian State has also made it easier to collect bets. Reference was made earlier to the fact that the infrastructure has been expanded through the award of 1 000 new concessions. […]
> 123. As regards the amendments made to the Italian legislation in 2000 by the Finance Law, and the circumstances surrounding the adoption of that law, which reinforced the provisions previously applicable (as examined by the Court in Zenatti), it should be pointed out that, according to the legislation cited in the written observations, those amendments were made at least partly in order to protect Italian concession holders. These are clearly protectionist motives which are not capable of justifying the legislative amendments in question and, what is more, cast doubt on the legislation as a whole.

561. The Court of Justice neither followed the Advocate General's conclusion, nor all of his proposals for a more restrictive legal interpretation. The Court was, however, also clearly struck by the facts of the case,[117] and it did take the opportunity to further develop Community law on national gambling restrictions, revising and somewhat tightening it. The language of the judgment is harsher than in the previous cases, and it is apparent that the Court is in serious doubt as to the justification for the Italian rules, even if it does not actually conclude that they are illegitimate.

562. One of the new things about the Gambelli ruling is that the Court assesses the national restrictions not only under Article 49 on the freedom of services, but also under Article 43 on the freedom of establishment. The two sets of rules were however in this case interpreted and applied in the same way.

563. The Court started its assessment by referring to the Zenatti formula that national restrictions on gambling must "reflect a concern to bring about a genuine diminution of gambling opportunities", and that the financing of social activities from gambling revenue must constitute "only an incidental beneficial consequence and not the real justification for the restrictive policy adopted" (62). This passage reflects the underlying doubt as to the real justification of the Italian sports betting restrictions, but from a legal point of view it is just a confirmation of Zenatti.

563. The Court then went on to confirm that the basic approach to national gambling restrictions under Community law still applied:

> 63. On the other hand, as the governments which submitted observations and the

[117] Cf. paragraph 22, where the Court refers to the remarks of the national court on "the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other".

> Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

564. The Court pointed out that national restrictions must still satisfy the basic requirements of Community law on justification, suitability and necessity, and that these were for the national court to assess. In that regard, the Court asked the national court to take account of the following issues, which from a legal point of view are the most important new interpretative parts of the judgment:

> 67. First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.
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> 68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.
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> 69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

565. The central element here is the formulation of a “consistency test” in paragraph 67 – stressing that in order to be suitable, national restrictions must “serve to limit betting activities in a consistent and systematic manner”. In the two next paragraphs (68-69) the Court first points to the facts of the Italian case, as described by the referring court, whereby the state is accused of pursuing a policy of substantially expanding national betting in order to increase public revenue while at the same time protecting the existing national operators. The Court then states that as long as national authorities incite and encourage betting to the financial benefit of the public purse, it cannot at the same time rely on public order concerns relating to the need to reduce betting opportunities in order to justify measures such as those at issue in the Gambelli case. The wording of paragraph 69 is rather general, but must clearly be read in light of paragraph 68.

566. The remarks in Gambelli paragraphs 67-69 leave a number of questions open. Should this test of whether a certain restriction contributes in a “consistent and systematic” manner be used on all kinds of national gambling restrictions, or does it only apply to cases where there is suspicion of protectionism or arbitrary discrimination, like in Gambelli? And what is to be tested? Is it the consistency of the contested restriction in itself, or should this be tested as part of general national gambling law and policy?

567. This will be further elaborated in section 10 below. But the opinion of the Government is that the remarks on “consistency” in Gambelli must be read and interpreted in light of the particular facts of the case, as well as the previous case-law on the Court, and the

specific characteristics of the gambling sector. Seen in this perspective, the Gambelli judgment is clearly not a “shift of paradigm”, but rather a correction of the course, marking the outer limits, but otherwise not limiting the margin of appreciation of national legislators in this sector. The threshold is still high.

568. After a few remarks on the need for invitations to tender for sport betting licenses to be applied in a non-discriminatory manner (70-71), the Court went on to pronounce on the proportionality issue (72-75):

> 72. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court's case-law (…), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.

569. In its discussion of proportionality and necessity the Court did not formulate any new criteria for the gambling sector, nor did it pronounce itself on the necessity of the Italian restrictions as such. Rather, the direct remarks on the proportionality/necessity test are of a very limited nature, merely directing the national court to assess the proportionality on a few minor points, such as the national criminal provision, questioning the need for punishment of up to a year of prison for agents serving as intermediaries to bookmaking firms operating legally in other Member States.

570. Finally the Court stated (unlike the Advocate General) that it is for the national courts determine whether the national legislation actually serves the aims that might justify it, and whether the restrictions imposed are proportionate. What later actually happened was that the Italian Supreme Court found that the national legislation on sports betting fulfilled the Gambelli criteria (see below section 7.6).

571. It should be noted that the Gambelli case was about sports betting, and that it directly concerned restrictions on the cross-border offering of sports betting from companies legally operating in other Member States. Furthermore, the case did not question the privileged position of UNIRE as such within Italy, but rather the way in which this system functions, shutting out agents of foreign bookmaking companies, and reserving the licenses to offer UNIRE betting to national agents. Unlike Läärä and Anomar, the ruling is not about an exclusive-rights system.[118]

The Lindman case

572. Reference should also briefly be made to the Lindman judgment (C-42/02), which was handed down a week after Gambelli, on 13 November 2003. This case was not about a gambling restriction as such, but about the fact that under Finish law winnings from national lotteries and gaming were not taxed, while winnings from foreign games were.

[118] It is a curious aspect of the Authority’s Application that it consistently tries to draw parallels between the present case and the Gambelli case. There are no such parallels. On the other hand, the present case is very similar to the Läärä case, which the Authority hardly refers to at all.

The Court held that the Finish tax legislation in this respect had a "manifestly discriminatory character" and found it in breach of Article 49.[119]

Analyzing the ECJ case law on gambling – some cardinal points

573. Based on the above, the following twelve points may be inferred from the case law of the Court of Justice on national gambling restrictions:

1. The relevant case law consists mainly of five judgments, which must read as a whole. The later rulings complement the earlier, but do not derogate. There has been gradual development, but no radical new departures. All five judgments are still of interest, and the basic points of the first cases still stand.[120]

2. The Gambelli judgment is the most recent, but it must be read in context, and it can easily be misinterpreted if seen in isolation from the earlier case law and the particular factual circumstances of the case.

3. All five judgments refer to the special "moral, religious and cultural" aspects of gambling, and the "morally and financially harmful consequences for the individual and society" associated with it. Gambling is still seen as a special sector. The basic approach of the Schindler judgment still applies.

4. The national legislator's "degree of latitude" (Schindler, Läärä), or "margin of appreciation" (Gambelli) in the gambling sector not only applies to the level of social and public protection sought, but also to some extent to the means (measures) by which to achieve this level – whether by prohibition, exclusive rights, or regulation within a restricted marked.

5. Exclusive rights systems for the operation of gambling – as found in some form or another in most Member States – are in themselves recognised as a legitimate and suitable way of restricting gambling opportunities and ensuring effective public control and responsibility. This was stated in Läärä and repeated in Anomar – the only two judgments where exclusive right systems were evaluated as such. Both concerned public exclusive rights for the operation of slot machines.

6. National restrictions on gambling may legitimately serve a number of public interest purposes, including the prevention of compulsive gambling, consumer protection for the players, restricting the volume of gambling out of other moral or social considerations, protecting public order, preventing crime and fraud, etcetera. When assessing the legitimacy of the restrictions, these considerations "must be taken

[119] On p. 88 (paragraph 331) of its Application the Authority refers to the Lindman case as proof that the ECJ has "considerably limited the discretion which its earlier judgments seemed to accord to the Member States". What the Authority fails to mention, is that this was a case of clear discrimination, unlike any of the earlier cases before the ECJ, and very much unlike the present case. The Lindman judgment is not a reversal of earlier case law, and it is not relevant for the case at hand.

[120] It is not clear to what extent this is contested by the Authority. Before the national courts, the private slot machine operators argued that the only relevant cases were the two Italian ones – Zenatti and Gambelli – and that Gambelli is a clean break with earlier case law. This prompted the Court of Appeal to remark that all the five rulings are still of relevance: "The five rulings – read chronologically and seen in relation to each other – show legal practice in the area in question", cf. the August 2005 judgment of the Court of Appeal, **Annex 36** p. 23 of the original text.

together" (Schindler 58, cf. Läärä 33, Zenatti 31, Anomar 73), and evaluated *as a whole*.

7. In Läärä the Court recognized as a particular advantage of public exclusive rights systems that these may serve the purpose of "confining the desire to gamble and the exploitation of gambling within controlled channels" (37, cf. Zenatti 35). The idea of "controlled channels" for gambling desire, ensuring public control and responsibility, is basic in most Member States, and this is recognized as legitimate by the Court.

8. The Court of Justice recognized in Schindler that it is basically laudable that lotteries and gaming make "a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture", and that this was not without relevance, although it could not "in itself be regarded as an objective justification" (60). In later rulings the Court has elaborated on this. The result is the Zenatti formula, stating that the financing of social activities from gambling revenue may be an accessory (incidental) advantage of the system, as long as it is not "in itself" the objective reason for the restriction.

9. National legislative intent that gambling should not be "a source of privat profit" was recognized as a legitimate concern in itself in Schindler (60), and later referred to in Läärä (13) and Zenatti (30). Why this is so is not elaborated by the Court. The Government holds that this must partly be seen as a part of the (recognized) moral aspects of gambling, and partly out of consideration for the fact that private profit will always serve as a particulary strong incitament to increase gambling opportunities and volume.

10. In the Gambelli case the Court redefined the suitability test as a consistency test, stating that national gambling restrictions must "serve to limit betting activities in a consistent and systematic manner". How it is to be further interpreted and applied, however, still leaves room for debate.

11. In Zenatti the Court interpreted the traditional doctrine of legitimate national requirements with regard to the economic aspects of the gambling sector, and in Gambelli it elaborated on suitability. By contrast, the Court has been very cautious as regards judicial testing of the *proportionality* principle in the gambling sector. In the first four cases it stated that the proportionality and necessity is for the national authorities to decide, with wide latitude. And even in the Gambelli case the ECJ only directed the national court to make a very restricted proportionality review, on a few minor aspects of national law – not on the contested restrictions as such.

12. The five major gambling judgments are all preliminary rulings, in which the Court was only called upon to interpret Community law, not to apply it to the facts at hand. Nevertheless, in four out of five the Court went far in stating that restrictions such as those at issue were legitimate under Community law. In Läärä it explicitly concluded in favour of the national exclusive right arrangement. The only exception is the Gambelli case, where the Court left the factual evaluation to the national courts, albeit hinting that the consistency of the national legislation was questionable. (The Italian Supreme Court later found that it was legitimate). Thus,

none of the cases considered have led to the national gambling restrictions being set aside.

574. It should finally be noted that at least four of the five cases considered by the Court concerned the evaluation of existing national gambling restrictions, in systems generating a steady or sometimes rising level of gambling (and revenue). In the fifth case, Gambelli, attention was also on the dynamic element of recent legislative amendments leading to a "considerable expansion of betting and gaming". None of the five cases involved a dynamic element of *diminishing* gambling opportunities and reducing revenue as compared to earlier levels. This is one of the main reasons why the Government holds that the Norwegian 2003 parliamentary slot machine reform is indeed *easier* to justify under Community and EEA law than any of the cases considered by the Court of Justice so far. More on this later.

7.3 Legal doctrine on the gambling case law of the ECJ

575. Following the 2003 Gambelli judgement there has been a number of articles analysing its alleged importance for the further development of Community law in the gambling sector. The most in-depth analysis to be published so far in English is an article by professor Straetmans of the University of Antwerp in the Common Market Law Review, in which he considers the three judgements passed by the ECJ in 2003 (Anomar, Gambelli and Lindman), and analyses the approach taken by the Court of Justice.

576. Professor Straetmans main point is that the Court has not basically changed its previous approach (from Schindler, Läärä and Zenatti), which is founded on relaxed principle of proportionality, due to the special concerns and sensitivities of the gambling sector. The Court has only adjusted and refined this approach, pointing out the outer limits of national legislative discretion:

> In that sense *Gambelli* and *Lindman* do not herald a generalized application of a *strict* suitability and proportionality test in lottery or gambling markets. The precise and extreme circumstances of the cases stand in the way of such generalization, all the more when one compares the Court's analysis in the present cases with the much more straightforward assessment of the Advocate General in *Gambelli*. Therefore it is submitted that the Court in line with previous case law confirms the existence of a margin of appreciation for the Member States in the lottery and gambling field but instantly adds in a much clearer way than hitherto that this discretion has its limits. If Member States demonstrate that national restrictions bring about a genuine diminution of the gambling opportunities, the Court will continue to apply a relaxed proportionality test and will be reluctant to substitute itself for the national competent authorities. In case of excess, e.g. when a Member State deliberately and gravely exceed the non-economic purposes of the imposed restrictions or if a Member State does not limit the exploitation of the human passion for gambling at all, the Court is now prepared to apply a strict proportionality test.[121]

577. The Norwegian Government agrees with this analysis, which is similar to the interpretation of the Court of Appeal in the present case, as well as that of national

[121] Cf. **Annex 149** Straetmans "As you sow, so shall you reap: On Member States overstepping the mark", Common Market Law Review 2004 pp 1409-1428, at p 1424 (original emphasis).

courts in a number of Member States. By way of contrast, the position taken by the Authority implies a much stricter legal approach, which seems to be based on a very narrow reading of certain passages of the Gambelli judgement, disregarding other passages, as well as disregarding the facts and context of the case.

578. As regards the test formulated by the Court and emphasized by professor Straetmans, it is not possible for the Government to see how it can be argued that the Norwegian slot machine reform will not "bring about a genuine diminution of the gambling opportunities", when the aim of the reform is to cut machine turnover and revenues to a fraction of the present level, in order to reduce problem gambling. In fact, the Government knows of no other recent public measure in any country which will so dramatically reduce gambling in a specific field.

579. Given the facts of the case, it would also be absurd to claim that the Norwegian legislator by adopting the 2003 Reform has in any way "deliberately and gravely exceeded the non-economic purposes of the imposed restrictions" or that it does not try to "limit the exploitation of the human passion for gambling at all". The contested Norwegian reform is indeed factually very far from the threshold formulated by professor Straetmans from his analysis of ECJ case law.[122]

7.4 The EU legislator's approach to gambling

580. In many areas of EU/EEA law secondary legislation (directives) has been adopted which supplements the general provisions, and which to a greater or lesser degree harmonises various sectors. This has *not* been done in the area of lotteries and gaming. Not only has the EU legislature not wanted to harmonize gambling activities specifically, not even to a limited extent. But the EU legislator has even chosen to *exclude* gambling activities from more general attempts at harmonizing the trade in services.

581. On a few occasions the Commission has proposed to include gambling activities in such harmonizing directives, but this has been stopped both by the EU Member States and by the European Parliament – with reference to the specific nature of gambling activities and the special requirements of social policy and public order in this sector.

582. One example is the directive on electronic commerce (2000/31/EC). The Commission had originally proposed that it should apply to lotteries and gaming, but this was rejected by the Member States and the European Parliament. Instead, all forms of "gambling activities" were specifically excluded. This follows from Article 1 paragraph 5 point d, which states that the directive shall not apply to "gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions".

583. The same legislative considerations have been strongly manifested in recent years throughout the process to adopt a general Service Directive.

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[122] In fact, the legal tests applied by the Borgarting Court of Appeal in its August 2005 judgment were formulated in a stricter manner than those formulated by professor Straetmans in his article.

584. In January 2004 the Commission submitted its proposal for a Service Directive to The Council and the European Parliament. According to this proposal lotteries and gaming would in principle be covered by the scope of the directive, although in a limited way.[123] Even this cautious approach to harmonizing gambling met with strong opposition in the Member States, and in July 2005 the whole 25 of them came out against the Commission's proposal, holding that they considered gambling a special sector, which should fall outside the scope of the directive.

585. A broad majority in the European Parliament was of the same opinion. The proposal was referred to the Committee on the Internal Market, which also received opinions from a number of other committees. In May 2005 the Internal Market Committee presented a Draft Report, in which one of the many proposed amendments was that all kinds of "gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions" should be excluded from the scope of the directive. This was stated in a new recital as well as in Article 2. The justification given was that:

> *Justification*
> In its established case-law, the European Court of Justice has left it up to the Member States' governments to decide what restrictions to impose on the freedom to provide these services for the purposes of maintaining the social order and consumer protection, objectives which are deemed to be overriding reasons relating to the public interest.[124]

586. In the spring of 2005 a number of the other committees gave opinions on the directive proposal, and several of them commented upon the gambling issue, stating that gambling activities should be excluded from the scope of the directive. The Committee on Culture and Education gave the following justification:

> *Justification*
> This amendment is in the interests of consistency with the amendment proposed to Article 2, which aims to exclude gambling activities which involve wagering a stake, including lotteries and betting transactions, from the scope of the Directive. The delicate area of games of chance calls for a regulatory policy and social policy approach, which would not be ensured under the Services Directive. Moreover, surplus profits from games of chance are first and foremost channelled to sport. [125]

587. The justification of the Committee on Industry, Research and Energy was shorter:

> *Justification*
> Gambling is not an EU competence and should not be covered by this directive.[126]

588. The Committee on Legal Affairs had the following justification:

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[123] See the Commission's proposal of 13.01.2004 "Proposal for a directive of the European Parliament and of the Council on Services in the Internal Market". Pursuant to art 18 of the proposal the general rules would not apply to lotteries and gaming until and if special rules for this sector had been adopted, and according to art. 40 (1) § b the Commission had a year in which to present a possible proposal for harmonising rules for lotteries and gaming.

[124] Cf. **Annex 127**, European Parliament Draft Report of 25.5.2005 (2004/0001 COD) p. 12. The rapporteur was Evelyne Gebhardt.

[125] Cf. **Annex 128**, Opinion of the Committee on Culture and Education of 22.04.2005, drafted by Marie-Helene Descamps.

[126] Cf. **Annex 129**, Opinion of the Committee on Industry, Research and Energy of 27.04.2005, drafted by Jorgo Chatzimarkakis.

> *Justification*
> The gambling sector should be excluded from the scope of this directive. Gambling is subject everywhere in Europe to special and exclusive rights based on the public interest. Government supervision and national regulations are necessary in order to combat fraud and organised crime in this sector. National lotteries also generate considerable income for public interest objectives.[127]

589. In the final Report of the Internal Market Committee in December 2005 the proposed recital stating the gambling exemption was justified as follows:

> *Justification*
> Amendment linked to the amendment to Article 2 seeking to ensure that gambling activities are not covered by the directive. Gambling activities are intrinsically linked to public order and consumer protection issues and therefore lie outside the sphere of competence of the Community institutions and must remain a sector which the Member States are free to regulate as they see fit. Attention should therefore be drawn to the fact that they are a special case.[128]

590. On 16 February 2006 the European Parliament adopted its Position with regard to the Service Directive. Here the gambling exemption was laid down in Recital 30 and Article 2 point l:

> **Recital 30**
> Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive, in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public order and consumer protection. The specific nature of these activities is not called into question by Community case law, which simply requires national courts to examine in depth the reasons of public interest which may justify derogations from the freedom to provide services or the freedom of establishment. In addition, given the considerable disparities in the taxation of gambling activities, which are at least partly related to differences in Member States' public order requirements, it would be totally impossible to establish fair cross-border competition between operators in the gaming industry without either first or simultaneously dealing with questions of fiscal cohesion between Member States, which are not addressed by this Directive and which are not part of its scope.
>
> **Article 2**
> This Directive shall not apply to the following activities:
> […]
> (l) gambling activities that involve wagering a stake with pecuniary value in games of chance, including lotteries, casinos and betting transactions;

591. On 4 April 2006 the Commission adopted an amended proposal for the directive, which built on that of the European Parliament, and in which the Commission acknowledges that gambling shall be excluded. Thus, it is now clear that gambling will not be covered when the Service Directive is finally adopted.

592. The preparatory works to the Service Directive illustrate how the EU legislator interprets the EC Treaty and the ECJ case law on gambling, as a special sector, where particular considerations of social policy and public order apply, and where national

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[127] Cf. **Annex 130**, Opinion of the Committee on Legal Affairs of 1.7.2005, drafted by Kurt Lechner.
[128] Cf. **Annex 131**, European Parliament Report A6-0409/2005 Final of 15.12.2005.

authorities have a wide margin of appreciation to apply restrictions in the public interest.

593. Furthermore, these preparatory works show that there is a strong and broad opinion in the EU legislature that gambling should be allowed to *remain* a specific sector, due to the specific nature of these activities, and that they should not be subject to future harmonization, much less to Community-led liberalization and privatization.

594. On this basis the Norwegian Government holds that respect for the legislative intent and the democratic processes of the EU and the EEA strongly argues against the kind of judicial activism applied for in the present case by the Authority.

7.5 The Commission's approach to gambling

595. The position of the Commission on the gambling sector has been more ambiguous and shifting than that of the Member States and the European Parliament. In recent years there have been voices in the Commission arguing for at least a certain level of harmonization and liberalisation, either through legislative initiatives, or by way of infringement proceedings against the Member States, threatening legal action before the ECJ. This is, however, not a universal and consequent position. The desire for harmonization and liberalisation of gambling seems to have been stronger in the late Prodi Commission than in the present Barroso Commission, and stronger in DG Internal Market than in other departments.

596. Traditionally the Commission has not tried to take direct action against any of the numerous national prohibitions, monopolies, exclusive right arrangements and other restrictions existing in the field of gambling ever since the Community was first founded. In some of the preliminary cases before the ECJ the Commission has argued for a more restrictive line than that adopted by the Court. But the Government is only aware of one single case in which the Commission has launched an infringement action against a Member State over national gambling restrictions, and this is a Greek case concerning lack of notification of technical restrictions in the slot machine sector, which appears to have very little resemblance to the present case.[129]

597. Following the November 2003 Gambelli judgment, the Commission has, however, received a number of complaints from private commercial companies with interests in gambling operations. These complaints prompted the Commission to open informal investigations against a number of Member States in the spring of 2004, and in some cases they were followed by letters of formal notice, informing national authorities that official inquiries were being conducted, and asking them for comments. Most of these cases concern the sports betting sector, which is the one ruled upon in Gambelli, and the one with the largest number of major existing commercial operators, many of them originally British bookmaking firms.

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[129] Cf. case C-65/05, mentioned in the Authority's Application on p. 42, footnote 103. The Commission seems to hold that Greece has breached both article 28, 43, and 49, as well as article 8 of Directive 98/34/EC, by not notifying the new legislative amendments as a technical restriction. The Government has tried to obtain more information on this case, but so far unsuccessfully. The question of notification of technical restrictions was the subject of case E-4/03 before the EFTA Court.

598. An example of this was the letter of formal notice served to Denmark in March 2004, questioning the fact that Danish law prohibits the cross-border offering and advertising of sports betting from companies legally operating in other Member States.[130] Similar letters of formal notice on sports betting was served against several other Member States.

599. Apart from sports betting, the Commission also launched an investigation against the Swedish public exclusive right on slot machines, following a complaint. A short letter of formal notice was served in October 2004, and the Swedish government replied in December. The basic questions of the Commission on the Swedish slot machine legislation are similar to those of the Authority at earlier stages of the present case, but the Commission's letter of formal notice is far shorter and sketchier than the Authority's letter of April 2004. The December 2004 reply of the Swedish government is public, and this is a 12-page document with legal arguments basically similar to that of the Norwegian government in the present case.[131]

600. By contrast, the Commission did not launch infringement investigations against the exclusive right systems on the operation in Finland and Portugal, which had earlier been cleared by the Court of Justice in the Läärä and Anomar rulings.

601. After the November 2004 appointment of the Barroso Commission little happened for a long time with the commenced infringement investigations in the gambling sector. The parallel legislative Service Directive process demonstrated that there was very little political support for attempts to liberalise the gambling sector, and the Commission was also internally split on the issue. This was admitted on several occasions, as reported inter alia in July and October 2005 by the media.[132] In the meantime the investigations were put on ice, and national authorities such as the Danish and Swedish did not get any response on their comments to the earlier letters of formal notice.

602. While the Commission deliberated, DG Internal Marked Commissioner McCreevy argued on several occasions rather strongly in the press against national gambling restrictions. On one occasion, when visiting Sweden and Finland in October 2005, McCreevy's remarks to the press prompted the Finish Minister of the Interior, Ms Kari Rajamäki, to send a formal letter to the Commission, stating that the Finish government did not share his opinion, as well as pointing to the mixed signals of the Commission, the political position of the Member States and the European Parliament on gambling harmonisation, and the fact that the case law of the ECJ leaves the Member States a broad discretion to determine how gambling activities should be regulated, including by monopoly arrangements.[133]

603. After a stand-still of almost a year and a half, the Commission decided on 4 April 2006 what to do with the pending gambling investigations. A decision was made to go ahead

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[130] Cf. **Annex 132**, Commission press release of 30 March 2004 (IP/04/401) on "Free movement of services: Commission inquires into Danish restrictions on sports betting".

[131] Cf. **Annex 133**, Letter from the Swedish Ministry of Finance to the Commission of 15 December 2004. See also the written deposition of Jan Nyrén, **Annex 73** at pp. 7-9.

[132] Cf. **Annex 134**, "Commissioners divided over move to liberalise gambling market", Europe Information 20 July 2005, and **Annex 135**, "Future gambling policy unclear as infringement cases postponed", Europe Information 19 October 2005.

[133] Cf. **Annex 136**, Letter from the Finish Minister of the Interior, Ms Rajamäki to Commissioner McCreevy of 11 October 2005 titled "Your Comment on Gambling Monopolies".

with some of the inquiries, but only in the sports betting sector. The Commission did not issue reasoned opinions to those states which had already received earlier letters of formal notice, such as Denmark, but only signaled that there would be new amended letters asking for further information. The tone of the press release was unfamiliarly close to being apologetic, and the Commission explicitly stressed that it was neither seeking to challenge the existence of national gambling monopolies as such, nor to liberalise the gambling sector in other ways. The main part of the Press Release reads:

> The European Commission has decided to send official requests for information on national legislation restricting the supply of sport betting services to seven Member States (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden). The Commission wishes to verify whether the measures in question are compatible with Article 49 of the EC Treaty which guarantees the free movement of services. This decision relates only to the compatibility of the national measures in question with existing EU law, and only to the field of sports betting. It does not touch upon the existence of monopolies as such, or on national lotteries. Nor does it have any implications for the liberalisation of the market for gambling services generally, or for the entitlement of Member States to seek to protect the general interest, so long as it this is done in a manner consistent with EU law i.e. that any measures are necessary, proportionate and non-discriminatory. […] The Commission hopes that the answers it receives will lead to an early and satisfactory resolution of the matter.
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> Internal Market and Services Commissioner Charlie McCreevy said: "The Commission has an obligation under the Treaties to ensure that Member States' legislation is fully compatible with EU law. This is an important responsibility which it takes seriously. It has received a number of complaints from operators in the area of sports betting, and it feels obliged to respond. It has, therefore, decided to seek information on the matter from the Member States concerned. I don't underestimate the sensitivities that exist in many Member States on the question of gambling. In sending these letters, we are not seeking to liberalise the market in any way. Rather, we are seeking reassurance that whatever measures Member States have in place are fully compatible with existing EU law, or have been brought fully into line. I hope that the replies we receive will offer us sufficient reassurance. In that case, it will be the end of the matter. I will certainly do what I can to facilitate an early resolution, and I encourage all concerned to play their part too."[134]

604. This April 2006 decision of the Commission did not touch upon the pending investigation of the Swedish slot machine monopoly, on which nothing yet has happened since the December 2004 reply of the Swedish authorities. At present it does not seem likely that the Commission will try to press this inquiry further in the direction originally sketched out.

605. Altogether, it does not seem very probable that the pending Commission inquiries will result in infringement actions before the European Court of Justice, not even in the sports betting sector, much less as regards the existing exclusive right systems for slot machines in Sweden and Finland.

606. In this perspective, the contrast between the present situation in the EU and the attitude and Application of the Authority is striking, and difficult to understand. In the EU, the Commission has left the Finish exclusive right arrangement for slot machines in peace, and so far only briefly looked into the Swedish arrangement back in 2004 – while in the EFTA pillar the Authority has conducted a massive and rather aggressive investigation

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[134] Cf. **Annex 137**, Commission Press release IP/06/436 of 4 April 2006.

over several years against the new parallel Norwegian reform, ending in an Application the size, character and one-sidedness of which is unprecedented.

607. Furthermore, in order to substantiate the allegations made in the Application, the Authority has presented legal arguments and factual assessments which are impossible to reconcile with anything less than a general position that an exclusive right arrangement on slot machines as such is incompatible with EU/EEA law. This is far from the ECJ's interpretation of the corresponding provisions of the EC Treaty, as well as far from the present position of the Commission.

608. Why the Authority has taken a different position on gambling than the Commission is open to speculation. The Authority normally coordinates its actions closely with the Commission on major issues. The discrepancy between the two on the present issue may therefore only be explained either as a result of breach of communication, or as an attempt to run a "test-case" in the EFTA pillar.

609. The Norwegian Government finds it surprising that the Authority has chosen a more activist, aggressive and liberalistic position on national gambling restrictions than the Commission. This is not in compliance with the principle of homogeneity, which applies both to the interpretation and the application of Community and EEA law. And the EEA Agreement is certainly not the right arena for a "test-case" on national gambling restrictions, arguing for a liberalization and privatization to be achieved through judicial activism, going beyond both the present case law of the ECJ and the political positions of the Member States and the European Parliament.

7.6 Relevant case law on gambling in the national courts of the Member States

610. In recent years there have been a number of cases before the national courts in the Member States on the relationship between national gambling legislation and Community law. The Government holds that these are of relevance for two reasons. First, they illustrate how national courts have interpreted Community law, inter alia the Gambelli judgment, and this is of interest, even if it is not formally a source of law at the Community/EEA level. Second, these cases demonstrate how national courts have actually *applied* ECJ case law on gambling and how they have assessed national gambling restrictions in this context. This is of obvious relevance in an infringement action such as the present, wherein the EFTA Court will not only have to interpret EEA law, but also apply it to the case at hand.

611. The Government does not claim to have a full overview of all recent national case law on gambling in all Member States. But it has found cases of relevance from Sweden, Finland, Germany, Italy and the Netherlands.[135]

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[135] These are cases which have been finally decided by the national supreme courts, the Dutch Ladbrokes-case albeit only in a preliminary procedure. In addition there is national case-law from the lower courts, of which the Government does not have a full overview. And then there are *pending* cases, as in Denmark, where there is a Ladbrokes-case (very similar to the Norwegian Ladbrokes-case) coming up for the Østre Landsret (the Eastern District Court) probably in August. The Finish Ladbrokes-case was decided by the Council of State on 9 December 2005, and is now pending before the Supreme

612. National case law on gambling restrictions under Community law is hardly mentioned in the Application of the Authority, except in an extremely partial and selective footnote on page 42, where the Authority refers to criticism of the Swedish Supreme Administrative Court's judgment of 26 October 2004 (without describing the judgment itself) and a first instance judgment from the Dutch Administrative Court of Breda on 2 December 2005 (which is pending appeal). To present this as an outline (however brief) of relevant national case law is highly misleading. In fact, as far as the Government is aware, the first-instance Breda case and a few German first-instance cases are the only ones in which national courts have set aside national gambling restrictions with reference to Community law.[136]

613. By comparison, there are Supreme Court judgments from several Member States explicitly confirming that national exclusive right arrangements or other restrictions are legitimate under Community law. Indeed the overall impression from national case law so far is that it is massively in favor of maintaining existing national restrictions in the gambling sector. The legal interpretation and factual assessments of the national courts are clearly in line with those of the Government in the present case, both before the Court of Appeal and now before the EFTA Court.

214. This is particularly evident in the cases decided so far by the Supreme Courts of Sweden and Finland, two Nordic Member States with similar traditions and gambling legislation as in Norway.[137]

Sweden

615. In Sweden there have recently been two gambling cases before the Supreme Administrative Court and one before the (ordinary) Supreme Court. In all three cases the existing national restrictions were found to be in compliance with the requirements of Community law.

616. The most important of these cases is the Wermdö Krog case, which was decided by the Supreme Administrative Court on 26 October 2004. The case concerned an administrative decision fining the restaurant Wermdö Krog for transmitting bets on behalf of SSP Overseas Betting Ltd and ordering this activity to end. The action was however broadly formulated, and the Supreme Administrative Court used the case to judge on Swedish gambling regulation as a whole under Community law, including not

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Administrative Court. The Swedish Unibet-case is pending before the Eskiltuna tingsret and will probably be decided in the first instance before the end of 2006. More national cases are referred to in the April 2006 preliminary report of the Swiss Institute on Comparative Law, inter alia from France.

[136] The German Karlsruhe judgment of 28 March 2006 is a special case, in which the Constitutional Court (under German constitutional law) found that a public monopoly on sports betting in principle may be a suitable and legitimate arrangement, but that the present monopoly in Bavaria did not comply with the requirements which must be set. The Court gave national authorities two years to fix this. The case is described below.

[137] It should be noted that these supreme courts did not find reason to refer questions to the ECJ for preliminary ruling. In the Wermdö Krog case the Swedish Supreme Administrative Court invoked the *acte clair* principle by holding that "The EU court has made it very clear that any further specifications in a case as this does not need to be treated at the community level, but that it is the responsibility of the national courts through the application of the specified criteria to determine whether the domestic lottery system can be accepted". This is parallel to the assessment of the Norwegian Government in the present case, which is the most important reason why it has earlier argued against asking the EFTA Court for an Advisory Opinion in the present case.

only sports betting but also the restrictions on other forms of gaming, inter alia on slot machines.[138]

617. Before assessing the case, the Supreme Administrative Court analyzed the case law of the Court of Justice on national gambling in general, from Schindler to Gambelli. The analysis is thorough, and may serve as an example of proper national interpretation and application of the relevant case law.

618. On the proportionality test, the Supreme Administrative Court held that:

> The proportionality criterion would appear, in the light of the ECJ's above-cited statement concerning the Member States' freedom to choose the level and method for such protection as they wish to accord those interests which are regarded by the Court as legitimate, to play a less prominent role. The mere fact that one Member State has opted for a system of protection which differs from that of another Member State cannot affect the assessment of the need for and proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued and the level of protection which they are intended to provide (Läärä paragraph 36, Zenatti paragraph 34). If alternative solutions are available, these are a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard "must not be" or "must not appear to be" disproportionate to the aim pursued (Läärä paragraph 39, Gambelli paragraph 75).

619. After interpreting the relevant Community case law, the Supreme Administrative Court went on to assess national regulation according to the criteria of the ECJ. The Court had some remarks on the development and marketing of lotteries and gaming under the exclusive rights arrangements, and on the suitability of the authorities' supervision and control. All in all, however, the Court found that the Swedish gambling legislation meets the requirements of Community law:

> To sum up, the Supreme Administrative Court will cite the following. The EU court has in the gaming area shown a significant tolerance for member states general practice of implementing powerful limitations to the treaty based freedom to offer and receive services and to establish within the union. The Supreme Administrative Court does find that the lottery legislation and its application raises questions on compatibility with the conditions which EU court in this context has set, but that the Swedish system still in total is considered to comply with these requirements.

620. On 20 June 2005 the Supreme Administrative Court ruled on a case brought forward by the large UK gambling firm Ladbrokes (which have similar cases pending in Denmark, Norway and Finland).[139] The arguments in law were similar to those of the Wermdö Krog-case, and what Ladbrokes tried for was to get a second and different assessment. The court was however unconvinced, and affirmed its earlier ruling.

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[138] Cf. **Annex 139**, judgment of the Swedish Supreme Administrative Court of 26 October 2004 in the case between Wermdö Krog AB and the National Gaming Board, with a full English translation enclosed. The president of the court was Hans Ragnemalm, former Swedish judge at the ECJ. See also the deposition of Jan Nyrén, former Chief Legal Advisor with the Swedish National Gaming Board, enclosed in English translation as **Annex 73**, on pp 6-7 (questions 20-22) on Swedish case law, and the fact that the Supreme Administrative Court in the Wermdö Krog case ruled on whether "Swedish lotteries regulation as a whole is compatible with EU legislation in this domain".

[139] Cf. **Annex 140**, judgment of the Swedish Supreme Administrative Court of 20 June 2005 in the case between Ladbrokes Worldwide Betting and the National Gaming Board, with an English translation enclosed.

621. Swedish legislative restrictions on gambling have not only been before the administrative courts, but also before the ordinary courts. In October 2001 Göta Hovrätt (an appeal court) ruled on a criminal case concerning breaches of the Lottery Act by two agents on behalf of SSP Overseas Betting Ltd. The case was appealed to the Supreme Court, with the appellants claiming that the relevant restrictions were contrary to Community law. In its decision of 8 December 2004 the Supreme Court referred to the premises of the Supreme Administrative Court in the Wermdö Krog-case, and stated that it did not find any cause to make a different assessment on the legality of Swedish gambling legislation.[140] The appeal was therefore dismissed.

622. It should be added that there is another Swedish gambling case (on sports betting) pending before the Eskiltuna tingrätt, which concerns yet another UK bookmaking company, this time Unibet. This case was started in 2003, and is still pending. In this case a request for a preliminary ruling has been sent to the ECJ, but only on a question of procedural and constitutional law relating to interim measures, not on the substantive law as applied in the gambling sector.

623. So far, the situation in Sweden is that both the Supreme Administrative Court and the Supreme Court have found national gambling restrictions to be in compliance with the requirements of Community law. These legal assessments also apply to the Swedish public exclusive rights system for the operation of slot machines.

Finland

624. On 24 February 2005 the Supreme Court of Finland (Högsta Domstolen) handed down a ruling on the compatibility with Community law of the Finish exclusive right arrangement on gambling.[141] This was a criminal case, arising from the fact that the Åland Penningautomatförening (the Åland Slot Machine Association) had offered different forms of gambling over the Internet to customers on the Finish mainland.

625. The case raised some questions on the special status of the Åland Islands, but also on the general compatibility of Finish gambling legislation (including slot machines) with Community law.

626. The main argument of the Åland Penningautomatförening was that Finish gambling law was in breach of Community law, and this was discussed in length by the Supreme Court with reference to the case law of the ECJ. The main finding of the Supreme Court was that the Läärä judgment still applies to the Finish exclusive right arrangements, and that this is not altered by the Gambelli judgment. Pertinent passages include:

> 30. The system prescribed in the Finnish lottery legislation and which is based on a licence and monopoly for special types of gaming, has been the express subject of a EU court judgment in the Läärä et al. case. […] There are no grounds to question the basic judgement

[140] Cf. **Annex 140**, decision of the Swedish Supreme Court of 8 December 2004 in the case between the Attorney General and Ms Runesson, Mr Rees and SSP Overseas Betting Ltd.
[141] Cf. **Annex 142**, decision of the Finish Supreme Court of 24 February 2005 in the case between the Attorney General and Åland Penningautomatförening (the Aaland Slot Machine Association). The full text of the judgment is enclosed in Swedish, but the paragraphs on the interpretation and application of Community law (23 to 38) is also enclosed in English translation.

> found by the EU court in issues relating to the Finnish lottery law, according to which the Finnish system of a monopoly is considered to be compatible with EU treaty.
> 31. The EU court judgment in the Gambelli case does not change this conclusion, as the circumstances on which the evaluation of this case was based were different. […]
> 32. It is therefore only a question of whether the Gambelli case judgment, irrespective of the different circumstances, contains any positions which should mean that such a change in legal position could be considered relevant to EU court judgment in the Läärä et al. case with respect to the Finnish lottery law. It can first be stated that nothing in the Gambelli case judgement indicates that the EU court should have deviated from the interpretations presented in the court's previous decisions in the case concerning the regulation of gaming for money. In the judgment, it is stated that this is rather a question of specification in the criteria that are applied in the evaluation of the compatibility of national measures with the treaty. […]
> 35. With respect to the Finnish regulation, that presented in this case gives no grounds to suspect that the real goal of lottery legislation or the monopoly in question, is to strengthen the public treasury and not that presented in the legislation's preparatory work, specifically to prevent exploitation of the population's desire to gamble in individual profit motive and to limit and control the market for gaming to prevent social problems, abuse and criminal activity which otherwise could arise.

627. The Supreme Court also had a brief evaluation of the proportionality of national law with regard to the criminal aspects of the lottery legislation (like in Gambelli), but found this to be clearly proportionate.

628. The situation in Finland is thus that the Supreme Court has made a new evaluation of national gambling restrictions, following Gambelli, and has come to the conclusion that the Läärä judgment still basically applies to the Finish exclusive right arrangements.

629. There is also a Ladbrokes case pending in Finland before the Supreme Administrative Court, similar to the Ladbrokes cases in Denmark, Sweden and Norway, and based on the authorities' 2004 rejection of Ladbrokes' application to operate sports betting, horse race betting, dog racing, betting on special events, and games with fixed factors. In February 2005 the Supreme Administrative Court reversed the decision of the authorities on formal grounds, the reason being that they had based it solely on Finish law, and not considered the extensive Community law arguments of Ladbrokes, in particular on the Gambelli ruling.

630. On 9 December 2005 the Finish Council of State made a new Decision, this time after a more thorough administrative procedure, with a new round of statements given by Ladbrokes and other interested parties. The new decision confirms the result of the earlier, but this time with a substantial reasoning on the relationship between Finish gambling legislation and Community law, in particular the interpretation and application of the Läärä and Gambelli judgments.[142] The main finding is that Läärä still basically applies, and that Finish legislation also complies with the supplementary specifications added by the ECJ in Gambelli:

> The Gambelli case decision does not reverse the Court's earlier precedents but supplements and specifies them. […]
>
> The European Court specifies the acceptable legal justification of providing services in Gambelli sections 67 and 69. The purpose of the exclusive gaming law set in the Finnish

[142] Cf. **Annex 143**, Decision of the Finish Council of State of 9 December 2005, enclosed in English translation.

Lotteries Act is to guarantee the legal protection of those who engage in gaming activities, prevent abuse and criminal activity and reduce social problems created by gaming. The main purpose of ratifying exclusive gaming licences and gaming rules is to restrict the supply of gaming services. Ratification is a means used by the government to regulate the harshness of the gaming activities and to reduce the addictivity of the games.

Limiting the number of gaming providers limits the amount of games available and it also limits competition between the gaming providers, which would in itself, let alone unregulated, lead to aggressive forms of tempting people to play. Competition would thus lead to growing numbers of players and to the growth of gaming related negative consequences. The principle of exclusivity adopted in the Finnish Lotteries Act is in keeping with the Gambelli verdict, section 67 requirement to limit betting activities in a consistent and systematic manner. Neither is the system based on exclusivity a disproportionate action, as the European Court of Justice has concluded in its assessment of exclusivity granted by the Finnish Lotteries Act in regard to the operation of slot machines. The Court explicitly states in its Läärä decision that granting exclusive rights is not disproportionate in so far as they affect freedom to provide services, to the objectives they pursue.

631. This Decision is now pending appeal before the Supreme Administrative Court.

The Netherlands

632. There have been several cases before the Dutch courts on the relationship between national gambling restrictions and Community law.

633. The major case so far is the one between the De Lotto Foundation (which has exclusive rights) and Ladbrokes Ltd. This case has been pending before the courts since December 2002, with several rulings in an interlocutory procedure, ending in a ruling by the Supreme Court of the Netherlands on 18 February 2005, and then the judgment in the main action, which was decided by the Court of Arnhem on 31 August 2005.[143] In all instances, the courts held that the contested Dutch restrictions on gambling are in compliance with Community law, as they are based on imperative requirements, form part of a consistent policy aimed at reducing gambling, and are necessary in order to achieve the required aims.[144]

634. Other Dutch gambling cases include a case between the Dutch authorities and Betfair, under which Betfair applied for permit to organize sports betting. This was denied, and a call for provisional relief was dismissed by the Court in Interlocutory Proceedings (The Hague) on 9 December 2004. In another case between De Lotto and the companies Interwetten, Grün Weis and Betfair, they were ordered to stop their Internet offering of games to the Dutch public in interlocutory proceedings before the Court of Appeal in Arnhem on 23 November 2004.

635. In one Dutch case so far the court has found national gambling restrictions to be in breach of Community Law. This is the Holland Casino case referred to by the Authority

[143] Cf. **Annex 144,** Ruling by the Supreme Court of the Netherlands of 18 February 2005, and **Annex 145.** Judgment of the Court of Arnhem, Civil law section, of 31 August 2005. Both rulings are enclosed in English translation.

[144] In this case, special attention was paid to the argument by Ladbrokes' that the contested Dutch legislation did not meet the Gambelli Formula because De Lotto is allowed development and extensive marketing of its gaming portfolio. This argument was rejected first by the Court of Appeal and the Supreme Court in the interlocutory proceedings, and then in the main action by the Court of Arnhem.

in its Application (p 42, footnote 103), in which the Administrative Court of Breda held that the casino monopoly of Holland Casino has not been justified according to the criteria of the ECJ in Gambelli. The case is pending appeal.

Italy

636. In Italy there have also been several cases before the national courts on the relationship between gambling restrictions and Community law. Most of them have been related to sports betting, and two of these (Zenatti and Gambelli) gave rise to preliminary proceedings before the ECJ.

637. Following the November 2003 Gambelli judgment the issue before the Italian courts was to actually assess the contested legislation according to the criteria stated by the ECJ. This was done by the Italian Supreme Court in April 2004 in another case already pending before it, the Corsi case.[145] After referring to the previous ECJ case law on gambling the Supreme Court stated that the Gambelli judgment "belongs to this constant jurisprudential vein, even if it contains innovative considerations" (12.2). It then went on to assess the Italian legislation according to the Gambelli test, stating that although it was clear that the Italian legislator for many years had been expanding gambling opportunities for fiscal reasons, and although this in itself was not legitimate under Community law, the legislation was still legitimate because it *also* protected Italian society against "criminal infiltration" and prevented "a possible criminal degeneration" (12.2.3). On this basis it found the legislation to be justifiable.

638. Under the proportionality test the Italian Supreme Court took the same approach as the ECJ in Gambelli, and only assessed the proportionality of the penal sanctions as such, which were upheld as proportionate (13).

639. Italian restrictions on the operation of sports betting continues to be contested, and several gambling cases currently awaiting preliminary judgment by the ECJ come from Italian courts, inter alia the Placanica case.

Germany

640. On 28 March 2006 the German Constitutional Court in Karlsruhe handed down its ruling on the "sportwetten" case, which involved federal and state legislation requiring that sports betting in Bavaria can only be offered by the Free State of Bavaria.[146] The case concerned the requirements of freedom of occupation under German constitutional law (the Basic Law art. 12), but the Court made it clear that it regarded the judgment to be in conformity also with Community law, with particular reference to the Gambelli judgment. Formally the case only concerned sports betting at fixed odds but the Court made a number of observations of more general interest.

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[145] Cf. the decision of the Italian Supreme Court of Appeals of 26 April 2004, enclosed in English translation as **Annex 146**. This was a criminal case, involving Mr. Corsi, who (like Mr. Gambelli) was an agent for the bookmaking company Stanleybet.

[146] Cf. the decision of the German Bundesverfassungsgericht of 28 March 2006 in case 1 BvR 1054/01, enclosed in English translation as **Annex 147**.

641. The most important aspect of the case is that the Constitutional Court recognized the specific nature of the gambling sector, as well as the legitimacy and suitability of strong restrictions, including monopoly arrangements. However, in the specific case, it held that the state betting monopoly in Bavaria in its current legal and actual form is disproportionate under the constitutional requirements, because it is not structured to achieve the legitimate aims of fighting gambling addiction and containing the betting urge of the population. The German legislature was given until 31 December 2007 to amend the law. In the meantime the present regulation remains in force, and sports betting in Bavaria can still only be offered under the public exclusive right arrangement.

642. The offering of sports betting in Bavaria differs from operating slot machines in Norway in many ways. The more general observations of the Constitutional Court are however of interest to the pending case.

> d) The legal establishment of a state betting monopoly is a fundamentally suitable means of achieving the legitimate objectives. (111)
> In the sense of constitutional law, a means is suitable if, with its help, the desired success can be achieved whereby the possibility of achieving the objective is sufficient […]. Therein, the legislator has precedence of assessment and prognosis […]. It is primarily up to the legislator to decide which measures it will apply in the interest of the common good with observance of the subject laws of the respective subject area […]. (112)
> aa) According to this criterion, the assumption of the legislator that the establishment of a state betting monopoly is a suitable means of combating the risks and dangers associated with gambling cannot be rejected in principle. This also applies for the assumption that the competition that would arise from opening the betting market would lead to considerable expansion of the betting services on offer and that this expansion would cause an increase in problematic and addiction-influenced behaviour. (113)
> bb) This suitability does not fail because the state betting monopoly can only be enforced with limitations. There will always also be illegal forms of games of chance, which cannot be prevented completely. Furthermore, with today's technological circumstances, sports bets can be placed globally on the internet without the state being able to prevent such internet gaming offers completely, However, impediments to execution arising from technological and economic developments do not render an essentially suitable organisation of the state's pursuit of the common good on a national level unsuitable. (114)
> e) The legislator may also assume the necessity of a betting monopoly. (115)
> aa) It also has scope of judgement and prognosis for assessing necessity […]. Subsequent to this prerogative of assessment, measures deemed necessary by the legislator for the protection of an important community good such as the prevention of risks associated with the operation and mediation of games of chance can only be rejected under constitutional law if, with the facts known to the legislator and in respect of experiences already gained, it can be established that the restrictions considered as alternatives promise the same efficacy but burden the affected parties less […]. (116)
> bb) With these criteria, the assessment of the legislator of a betting monopoly as being necessary is not to be rejected. (117)
> Nevertheless, it is not to be excluded from the onset that consumer protection and the protection of minors, as well as the prevention of crime associated with gambling and gaming is realized by the standardization of appropriate legal requirements on commercial betting services offered by private betting operators. These requirements could be enforced by licensing reservations and official control by means of the trade supervision commission (see also ECJ, decision of 6 November, 2003 - C-243/01 - Gambelli a.o., coll. 2003, I-13076, fig. 73 ff.). In light of its broad scope of assessment, the legislator should, however, assume that the risks of addiction can be controlled more effectively with a betting monopoly aimed at combating addiction and problematic gambling behaviour with a betting offer with state

responsibility than by control of private operators […]. (118)

643. In this way, the Constitutional Court gave clear recognition to the principle that state betting monopolies are a "a fundamentally suitable means" for restricting gambling, and that the legislator must have a "scope of judgement and prognosis for assessing necessity" in this regard.[147]

7.7 Conclusions on the legal framework

644. Based on the above, the following main conclusions may be drawn on the legal status of the gambling sector under EU/EEA law:

- The operation of gambling is recognized in ECJ case law as a special sector, in which special legal criteria has been formulated, giving the national legislator a wider margin of appreciation to restrict gambling than other kinds of services, according to national traditions, evaluations and requirements.

- At the legislative level, the Member States and the European Parliament have held that gambling is a special sector, in which the national legislator should have wide latitude and discretion, and they have rejected proposals for harmonization of gambling services put forward by the Commission.

- The Commission has not been completely consistent on the gambling issue, but it has recently stated that it does not seek to harmonize, liberalize or privatize the existing national gambling arrangements, including national monopolies.

- National courts have to some extent been puzzled by the Gambelli formula, which has led some of them to make a critical assessment of traditional national gambling arrangements. But on the whole, national courts have massively come out in favour of maintaining existing restrictions and monopolies. In some cases (like the recent Karlsruhe case) the courts have stated that national gambling policy and legislation should be even stricter in order to be consistent.

- On the whole, the trend in the European Union in recent years has not been towards a deconstruction of national exclusive right arrangements on gambling, but merely towards an insistence that such arrangements must be operated in a moderate and responsible manner in order to be legitimate and consistent.

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[147] As regards the Court's actual assessment of the Bavarian monopoly arrangement, the Government holds (i) that this was clearly stricter than that required by the ECJ under Community law, and should therefore be seen as additional German legal requirements, and (ii) that the Norwegian parliamentary slot machine reform of 2003 would (hypothetically) anyway pass actual assessment according to all the criteria stated by the Karlsruhe Court.

III. ASSESSMENT

8. LEGAL ASSESSMENT OF THE REFORM UNDER EEA LAW

8.1 The scope and subject of the present action

645. The scope of the present action is commented upon by the Authority in the introduction to the Application (pp. 4-5) in the later section VII.1 on “the scope” (pp. 50-51), and in the conclusion (p.107).

656. What the Authority is applying for, is a judgment declaring that Norway by amending the gaming and lottery legislation, by way of the parliamentary statute of 29 August 2003, “which introduces a monopoly with regard to the operation of gaming machines”, has infringed Articles 31 and 36 of the EEA Agreement, as stated in the conclusion (p.107). This wording is not quite exact, as it may give the false impression that the parliament introduced a new form of monopoly arrangement. It would be more precise to say that this is an amendment “which transfers the operation of slot machines to the existing exclusive right (monopoly) of Norsk Tipping”.

647. It is the statutory amendment of August 2003 which is the subject of the present action.[148] In other word, it is *the basic structural reform as such* – the transferal of slot machine operations from the relatively liberal regime of the 1995 Lottery Act to the stricter exclusive-right regime of the 1992 Gaming Act – which the Authority holds to be in breach of Articles 31 and 36. It is not any of the particular aspects of the reform which is being challenged – it is the reform as such. The finer details, as laid down in the preparatory works and later instructions and regulations, are only of interest to the extent that they are necessary in order to understand and evaluate the reform as such.

648. So far the Government agrees that this must be the correct “scope”, or rather *subject*, of the present action. What the EFTA Court must consider is the structural reform. Is it possible for the national legislator under EEA law to restrict gambling opportunities in such a way as done by the Storting, by transferring a particularly problematic form of gambling from a liberal part of national legislation to a stricter part, that is, to the existing public exclusive right system?

649. The Government however disagrees with the Authority when it then tries to break apart the different elements of the 2003 slot machine reform, and to present the scope of the present action as relating “exclusively to the necessity of establishing a model with

[148] As explained in section 4.6 this amendment is brief and simple. In the 1995 Lottery Act § 10 is deleted, taking slot machines out (and a new § 15 added) – and in the 1992 Gaming Act § 2 is amended, taking slot machines in. There are also some other minor amendments to the Gaming Act. The amendment statute is enclosed as **Annex 61**. It also includes some other changes, which are not directly related to the Slot Machine Reform.

exclusive rights for a State undertaking".[149] In doing so, the Authority tries to empty the reform of a number of laudable elements which it classifies as "parallel but separable", and which presumably include all those measures which the Authority holds could have been achieved by stricter regulations within the system of the Lottery Act.

650. The Government does not agree to this limitation in the "scope". First, this is not how the ECJ has evaluated national gambling restrictions. When assessing national exclusive-right arrangements, such as in Läärä and Anomar, it has not first broken these apart and discarded some elements as irrelevant. On the contrary, such national arrangements have specifically been evaluated as a whole. Second, this is not how the Norwegian legislator has envisaged, prepared and decided the reform. The slot machine reform has never been seen as a series of "parallel but separable measures", but on the contrary as a whole, with a number of integrated elements. Third, it is from a factual point of view impossible to draw any clear distinction between those elements of the reform which are inherent in the exclusive rights system, those which are partially related to and integrated into it, and those which could also be (more or less) envisaged under other legal regimes.[150]

651. From a legal point of view what the Authority is doing is mixing its categories. The question of whether some elements could also have been achieved by other means is part of the "necessity-test" – as a question of whether the same aims could have been reached by other (less restrictive) measures. It is not about the "scope" of the action.

652. What the Authority is really trying to do, is to get around the fact that the 2003 slot machine reform will indisputably serve to radically diminish gambling opportunities. And it is trying to do so by emptying the reform of as many positive elements as possible, claiming that they fall outside "the scope of the present action". Elements which are taken out in this way include for example that the number of machines will be reduced to half, that the rules on location will be severely tightened, that the technical standards will be much stricter, that the new Multix machines will be much less aggressive and addictive, that supervision and control of the machine operations will be hugely improved, etcetera. These and other elements are to be discarded from the legal evaluation as "parallel but separable" and therefore irrelevant.[151]

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[149] Cf. p. 51 paragraph 187 of the Application, see also p. 4 paragraph 5.

[150] It is also blatantly wrong when the Authority in paragraph 187 claims that "nearly all the Norwegian Government's arguments concerning the alleged advantages combined with a monopoly model in reality do not refer to the monopoly solution itself, but rather to the objectives and envisaged effects of the various other measures that have been planned as part of the Government's ownership of Norsk Tipping". First, these alleged "other" measures have not been "planned as part of the Government's ownership", but are stated by the Ministry in the Bill to Parliament, as part of the proposal, and as such forms an integrated part of the reform which Parliament debated and approved. Second, there are large and substantive sections in the Bill which specifically discuss the pros-and-cons of an exclusive right model as compared to other basic models – as referred to and partially quoted above in section 4.4.

[151] The one-sidedness of this approach becomes clear if one tries to envisage the reaction of the Authority if these elements had been of the *opposite* kind, such as to increase slot machine gambling – for example if the reform had aimed to double the number of machines, increase availability, liberalise technical standards, triple the volume of gambling, etcetera. It is not very likely that the Authority would have presented this as "parallel but separable" measures, without relevance to the case. In fact, when the Authority finds details in the model which it considers to be discreditable these are presented as highly relevant, as for example the early statements from Norsk Tipping that it hoped to double the number of players. This has long since been refuted by the Ministry. Still the Authority continues to claim that this is relevant, while on the other hand for example the fact that the number of machines will be reduced to half is presented as an irrelevant "parallel but separable" measure, which falls outside of "the scope of the present action".

653. The Norwegian Government does not agree. These are not “separable” measures, but integrated and important elements of the reform which the Storting has passed, of obvious relevance to the legal evaluation according to the criteria of the ECJ.

654. In other words, the “scope of the action” must of course be the reform as such – with all its integral elements. Some of these elements are specific to the exclusive right arrangement, others are partially integrated into it, and some could in principle also be envisaged under other models. But even these are parts of the reform which parliament adopted as a whole, and which cannot be correctly understood and evaluated without them. All the various elements of the model are therefore of relevance – to the extent that they contribute to the understanding and evaluation of the reform as such.

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656. From the Authority’s remarks on “the scope”, the Government presumes that it does not challenge the *former* restrictions on slot machines in Norway, under the Lottery Act, including the principle that only charitable and beneficial organisations could get licenses. Furthermore, the Authority seems to hold that the national legislator should be free “to regulate every aspect” of the operation of slot machines, at least under the Lottery Act system, even if this would mean new and severe legal restrictions on the freedom of services in this sector.[152] The Authority also states that the national legislator may even *prohibit* slot machines altogether.

657. In other words, the only form of reform which in the opinion of the Authority seems to be incompatible with EEA law is to transfer slot machines to the existing public exclusive rights system which for decades has been the regulatory framework for all other major forms of gaming and lotteries operated in Norway.

658. The Norwegian Government disagrees. First, exclusive rights arrangements such as the Norwegian one is a traditional and widespread form of gambling regulation in most of Europe, which can not in themselves be considered inappropriate or illegitimate. Second, the ECJ has specifically recognized such arrangements as legitimate and suitable in Läärä and Anomar. Third, the regulatory transferal of slot machines to the existing exclusive rights system in Norway is particularly easy to defend, being a measure which will radically diminish slot machine gambling opportunities in Norway.

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659. It is altogether a curious aspect of the Authority’s Application that it hardly mentions, much less analyses the fact that the core of the contested parliamentary 2003 reform is to transfer slot machine operations to the *existing* main regulatory gambling regime under Norwegian law. In stead the Authority seems to insist that the reform is about a “new monopoly”, or “the introduction of a monopoly”. This is legally and factually wrong. The reform is about applying an existing regulatory framework on slot machines. There is no new statutory model, and the amendment to the 1992 Gaming

[152] Cf. p. 5 paragraph 6 of the Application

Act is very small. This is a regulatory model which has existed and functioned well for many decades for the other major forms of gaming and lotteries in Norway.

660. This raises an acute and essential question of what is really the legal position of the Authority. Does the Authority actually hold that the exclusive rights arrangement of the Norwegian 1992 Gaming Act as such is illegitimate, inconsistent and disproportional? And does the same apply to the exclusive system in the equine sector under the 1927 Totalisator Act? If not, why is it that exclusive rights for Lotto, football and horse betting are appropriate, while the same is not appropriate for slot machines?

661. In other words: What brings the Authority to the conclusion that the most addictive form of gambling has to be regulated under the least restrictive model?

662. Seen in this perspective, it is legally and logically impossible to escape the notion that the Application of the Authority is in fact a veiled attack on the Gaming Act as such, and probably also on the Totalisator Act. This is confirmed when studying the details of the argument in the Application more closely. In fact large parts of the Authority's argument are not specifically about the slot machine reform at all, but about the Norwegian regulation of gaming and lotteries in general. This in particular applies to the "consistency-test" of the Authority, which hardly refers to the particularities of the slot machine reform at all, but in stead to the operation of the traditional games of Norsk Tipping under the Gaming Ac, and to the operations of the Norsk Rikstoto Foundation under the Totalisator Act.[153] But elements of misconstrued condemnation of the exclusive rights arrangement as such are visible in all parts of the Authority's submissions, also a regards the legislative requirements and the proportionality of the 2003 reform.

663. The fact that under EEA law the 2003 slot machine reform can not be seen in isolation from the legitimacy of the traditional gambling regulation as such has become even more clear to the Government following the extensive legal action taken before the national courts by Ladbrokes Inc in late 2004 against almost all the other traditional restrictions in Norwegian gambling law (except slot machines) – using almost exactly the same legal arguments as those of the commercial operators and the Authority in the present case.[154] And it is further confirmed when studying legal actions before the national courts in other countries, most of them concerning exclusive rights on sports betting, but raising the exact same questions of legal interpretation, and to some extent even also the same questions of factual assessment, as the present case.

664. The threefold argument of the Government is simple:

1. The existing exclusive rights model of Norsk Tipping is as such fully compatible with the requirements of EEA law.
2. This existing model is particularly appropriate for the operation of slot machines, this being the most problematic form of gambling legally offered in Norway.

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[153] The Authority even refers to gaming and lottery offered under the 1996 Lottery Act by private charitable organisations (such as the "Yezz" scrape card) in order to substantiate its argument. It is not clear to the Government how this can be of relevance for the question of whether slot machines can be transferred from this Act to the Gaming Act.

[154] See section 5.4 above on the pending Ladbrokes case, which the Oslo City Court has decided to refer to the EFTA Court for an advisory opinion.

3. The 2003 reform is particularly easy to defend, as it indisputably aims at a drastic reduction in slot machine gambling opportunities.

665. By way of contrast, the Authority in its Application, by attacking the 2003 reform in the way it does, in effect challenges the fundamental structure on which not only Norwegian gambling law but also gambling law in most other EEA states is based. The approach of the Authority is radical and drastic when compared to the present state of the gambling sector in the Community, and it goes far beyond any challenges mounted so far by the Commission, both in content, scope and aggressiveness. Whether this is a planned and conscious approach by the Authority, or whether there are other causes (such as lack of understanding of this specific sector), is not for the Norwegian government to speculate on, and not important for the judicial assessment.

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666. One of the main arguments of the Authority is that the 2003 reform as a new restriction is too strict and severe, and therefore not consistent and proportional. At the same time, a substantial part of the Application seems devoted to demonstrating that Norwegian gambling policy and regulation is not strict *enough*. Here, the Authority seems to hold both that the former regulation on slot machines has been too liberal (and the current problems are therefore the authorities' own fault), and that other parts of the present gambling legislation are too relaxed, for example in allowing Norsk Tipping and the Norsk Rikstoto Foundation margins in which to develop and market their portfolios. From this the Authority draws the conclusion that the 2003 reform is not in compliance with the requirements of EEA Law.

667. The Norwegian Government does not agree.

668. First, while it is certainly true that earlier national regulation on slot machines has been too liberal, and that the authorities in this respect bear partial responsibility for the explosion in slot machine gambling in recent years, it is impossible to see why this should block the legislator from later reevaluating earlier assessments and correcting the faults of the past. Such an argument is neither logical nor sensible. Nor is it very democratic, given the fact that there were parliamentary elections in the autumn of 2001, bringing in a new government with a consistent and clear determination to fight gambling problems.[155]

669. Second, it is not correct that the other parts of national gambling regulation and policy referred to by the Authority are necessarily too liberal. Most of them are presented in a misleading or misunderstood way. The rather biased selection of examples presented in the Application also serves to hide the fact that Norwegian gambling legislation and policy in general is much more restrictive than alleged by the Authority, and that in recent years it has become even more so (see sections 3 and 4 above, and 10 below).

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[155] In other words, the broad parliamentary majority which in the spring of 2003 assessed and debated the suitability and necessity of the proposed reform is both politically and constitutionally another assembly than that which was ensnared by the lobbying campaigns of NLD three years earlier into liberalizing the slot machine sector against the wish of the Government and the competent authorities, see above section 4.2.

670. Third, it is not correct to hold that even if some parts of national gambling legislation and policy are too liberal, then the legislator must be barred from further restrictions in *other* areas. Or as the argument of the Authority in the present case actually goes: Because the Norwegian legislature is too slack on Lotto, it cannot restrict slot machines. Such an argument is neither legally nor logically tenable. On the contrary, the only logical conclusion if one really holds that certain aspects of the gambling regulation and policy currently in force in Norway are too liberal, would be to insist that they should be tightened. In other words, to the extent that these are the Authority's objections to the 2003 slot machine reform, then it is not the reform itself which is at fault, and the objections could probably have been rather easily solved during the early informal stages of the Authority's infringement proceedings. Yet, the Authority has not put forward any ideas or proposals on how the alleged inconsistencies in other parts of the regulation and policy could have been remedied. Following insistent pressure from the complainants, the only conclusion drawn by the Authority throughout the procedure has instead been the illogical one – that it is the reform which has to be changed.[156]

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671. The Government also finds it hard to understand exactly which aspects of the 2003 reform the Authority is challenging under EEA law. Is it the use of an *exclusive* right in itself, or is it the *public* aspect, that the exclusivity is exercised by a public enterprise, without prior competition? In other words: Would the Authority have challenged a system under which only one licence for slot machines operations were issued at the time, under for example a three year period, and the licence awarded according to an open competition in which not only non-profit entities but also private commercial companies?[157]

672. This is not clarified in the Application, but it is an important question when assessing the relevance of the various arguments and allegations of the Authority. If the problem is just with the *public* aspect of the future slot machine arrangement (and the lack of competition), then all the Authority's arguments relating to exclusivity are really outside the scope of the action. If on the other hand the problem for the Authority is the *exclusivity* as such, then the public aspects are at the most of a secondary relevance, and the implicit scope of the action is then even wider than what it would otherwise be.[158]

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[156] It is interesting here to compare the present case with the conclusions drawn by the German Constitutional Court in its recent ruling on the Bavarian sports betting monopoly, as described earlier in section 7.6. Here the Court came to the conclusion that an exclusive right arrangement on gambling could in itself be a legitimate, suitable and proportional arrangement, and when the actual Bavarian arrangement was considered not to be consistent enough, the result was not that it was declared invalid, but that the legislature was given a period (of almost two years) to tighten and improve it. In this case the inconsistent features belonged to the same arrangement as that challenged, unlike in the present case, where almost all the alleged inconsistencies are from other parts of the gaming sector, which has little to do with slot machines. But otherwise, the German case is interesting – because it demonstrates the only logical approach to this kind of challenge. For most other courts it is difficult to pass the kind of ruling done bye the German Constitutional Court in this case. But for the Authority this kind of approach would have been the clearly most natural during the earlier infringement proceedings. If, for example, the Authority had held that marketing of the games offered by Norsk Tipping or Norsk Rikstoto was a major obstacle to the consistency of the slot machine reform, then it could have suggested ways in which this marketing could have been reduced and regulated. It should here be mentioned that the Ministry has now (on its own accord) seen to it that this is exactly what has happened, as described above in sections 3.8 and 5.3.

[157] This is a model chosen in some member states for some forms of gaming and lotteries, for example the National Lottery in the UK. It is also one of the alternative models assessed by the Ministry during the legislative preparations, as described in the Bill of Enactment chapter 4.4, cf. Annex 9.

[158] This was also left unclear during the proceedings before the national courts, and the impression of the Government

673. The position of the Government on this point is clear:

  1. It is legitimate under EEA law to have exclusive rights arrangements in the gambling sector.
  2. It is also legitimate that these exclusive rights arrangements are operated by public entities, under public ownership, instruction and control.

674. It is not required under Community or EEA law for such public exclusive arrangements to be of a "non-profit" character, or isolated from the state finances. In some countries revenues from public exclusive arrangement on gambling are wholly or partially integrated into general state revenue. In Läärä the ECJ even went far in recognizing such arrangements as an effective way of collecting taxes. But it may be seen as an added factor, further strengthening the legitimacy of the arrangement, when the revenues from the gambling activity are not part of state finances, but instead are channeled directly and entirely to socially beneficial causes – as is the case of Norsk Tipping.

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675. Finally, it is unclear to the Government which market interests the Authority is trying to protect by its Application. Is it only the commercial interests of the complainants in the case – that is, the "freedom" to make private profit from the operation of gambling, in this case the selling of slot machine operation services from commercial companies to the charitable license-holders? Or does the Authority also consider itself to act in the interest of the charitable and socially beneficial non-profit organisations and associations, which are the actual machine licence-holders under the former regime, and which have not legally challenged the reform?[159]

676. Again, this is of interest to the "scope" of the action and the relevance of the Authority's various arguments. If it is the restrictions on the commercial freedom which is the central point of objection, then this is a different action from what it would be if the conceived problem is with the new restriction on the licence-holding rights of non-profit organisations. A few hypothetical examples may illustrate the point. One can for example imagine an alternative reform amending the Lottery Act in such a way as to require charitable licence-holders to own and operate the machines themselves, and which prohibited employing commercial agents to help, and especially not against a percentage of the cash-box. Such a reform would have had exactly the same consequences for the commercial operators, which are the complainants in this case. Or as another example one might envisage an alternative reform changing the regulated 40:40:20 scales on distribution of the "cash box" to 90:5:5, in effect transferring almost the entire revenue to the charitable organization. Such a reform would have had almost

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was that the two parties NLD and NOAF were not quite synchronized. While NLD was in particular attacking the *public* aspect of the exclusivity, NOAF was more concerned with the *exclusivity* as such. The interests of the two parties were different, with NOAF representing some 50 of the 138 small and medium operators, for whom any kind of "monopoly" – public or commercial – would be just as bad. For NLD on the other hand, the main problem is the public aspect, since NLD as the only major commercial slot machine operating company would probably have been in position to compete under a legal regime with just one or a few machine license issued.

[159] See above section 3.2.

the same consequences for the present operators, as it would probably have driven all except perhaps one or two out of business. From the point of view of protecting the freedom of commercial economic activity these two alternatives would have had more or less the same effect as the present reform. But would the Authority have acted upon complaints in such a case? Would it have considered this incompatible with EEA law?

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677. All in all, the Authority has presented an Application the "scope" and subject of which at first glance seems clear and defined, but which at closer scrutiny is riddled with ambiguities and unanswered questions.

678. Until otherwise explained, the Government will have to address the Application in a way which covers the whole explicit and implicit "scope" – which means that this is a full frontal attack not only at every conceivable aspect of the parliamentary 2003 slot machine reform as such, but also a full attack (if not exactly frontal) on the basic principles and structures of Norwegian gambling regulation and policy – implying a vague and undeclared wish for privatization and liberalization of this sector.

8.2 The relevant articles on the EEA Agreement – 31 and 36

679. It is undisputed that the 2003 slot machine reform constitutes a restriction on the freedom to provide services within the meaning of EEA Article 36. The ECJ has for a number of years evaluated national gambling restrictions in the Member States under the corresponding provision of the EC Treaty (now Article 49). To operate and offer games of chance, including slot machines, is a "service" in legal terms, even if the Government holds that it is a very particular kind of "service".

680. Starting with the Gambelli judgment, the ECJ has also held that national restrictions on the operation of gambling may constitute a restriction on the freedom of establishment, as protected by Article 31 of the EEA (EC Article 43). The ECJ however did not distinguish between its application of EC Articles 43 and 49 in that case, but made a combined evaluation. The distinction therefore appears to have little importance to the case at hand, and the Government acknowledges that EEA Article 31 also applies. Indeed, this may arguably be the most relevant, since the present action concern a form of "service" (the operation of slot machines) which even under the former regime could not be offered from abroad, but by its nature only by physically placing slot machines on locations in Norway, and only by companies authorized to do so, which were all established in Norway.

681. Unlike in some of the gambling case before the ECJ, the Authority has not claimed that the slot machine reform is a restriction on the free movement of goods. Article 11 is therefore not relevant, and neither is Article 16 on public monopolies for the procurement and marketing of goods. From the perspective of Article 11 there is no new "restriction" even if Norsk Tipping will in future be the only buyer of slot machines on the Norwegian market.[160] For mainly historical reasons there is no provision in the

[160] Norsk Tipping buys its new Multix machines from a Swedish producer. In this respect, the reform has led to

Agreement (or the Treaty) corresponding to Article 16 for the freedom to provide services. The Government however holds that public monopolies on gambling services are in reality not so different from monopolies on, say, alcohol. The existence of Article 16 is therefore an added argument why exclusive right arrangements as such should be legitimate also in the services sector. Furthermore, as the Court is aware, Article 16 is first and foremost a prohibition against discrimination, not necessarily non-discriminatory restrictions. This is an added argument that non-discriminatory public monopolies on the operation of gambling "services" may in principle be fully in compliance with the basic principles and considerations of Community and EEA law.

8.3 What kind of "restriction" is the slot machine reform?

682. The Authority does not really say so, but it might be concluded from its argument that it acknowledges that the reform is a *non-discriminatory* restriction.

683. If so, then this is undisputed. It is also in line with ECJ case law on national gambling restrictions, inter alia the Läärä judgment, in which the Court discussed the issue, coming to the conclusion that a public monopoly on slot machines must be evaluated as a non-discriminatory measure.[161]

684. It is also in line with the facts of the case. The Norwegian 2003 slot machine reform is clearly non-discriminatory to the extent that it does not directly or indirectly distinguish between Norwegian and foreign companies. Indeed all the present operating companies are Norwegian, with the exception of Norsk Lotteridrift, which is registered and established in Norway, but owned by the Swiss bank UBS.

685. Apart from its basically non-discriminatory character, there seems to be diverging opinions between the Authority and the Government on the nature and severity of the restriction imposed by the 2003 slot machine reform.

686. The Authority holds on page 4 (paragraph 3) of the Application that the slot machine reform "unquestionably constitutes a severe restriction".

687. The Government will not only question this statement, but argue that the reform on closer scrutiny only constitute a rather *minor* and indirect "restriction" on the freedom to provide services and the freedom of establishment, with no actual and very limited potential impact on cross-border economic activity within the EEA.

688. The first observation to make on this point is (again) that it is the reform as such which is the subject for evaluation. Even before the reform, the slot machine sector in Norway has been subject to several restrictions in the EEA legal sense of the word. There has

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increased cross-border trade, as compared to a situation under which the old operators would go on offering their slot machines. Furthermore, as a public entity, Norsk Tipping was obliged to follow EEA and Norwegian rules on public procurement when contracting the machines, thus producing increased competition amongst slot machine producers.

[161] By comparison the Italian legislation under considerations in Gambelli was evaluated by the Court as being formally non-discriminatory, although there was open suspicion that it had a protectionist function. This is one (of many) clear differences between the Gambelli case and the present case. The difference with the Lindman case (C-42/02) is even greater, as the Court in that case pronounced the disputed legislation to be "manifestly discriminatory". It is therefore wrong when the Authority on p. 88 (paragraph 331) interprets the Lindman judgment to mean that the ECJ has in general limited the discretion of the Member States to operate non-discriminatory gambling monopolies.

not been a free for all, or a normal market. Licences to offer slot machine gambling have only been obtainable for charitable or benevolent non-profit organisations (the "causes"). The only opening for private commercial companies has been as operators of machines, as service-providers to the organisations holding the licences.[162]

689. What the reform does is to turn the screw one more time, making a restricted sector even more restricted. The greatest impact from a formal point of view is for the charitable organisations, which loose their present slot machine licenses under § 10 of the Lottery Act. Several of the major license-holders have however supported the reform, while the rest have more or less grudgingly accepted it without trying to take legal action.

690. The complainants in the present case, as far as the Government is aware, are the same parties as in the national legal proceedings – the NLD company and the NOAF association. They represent the purely commercial part of the present slot machine business, which make their living from offering operating services to the non-profit licence-holders.[163] From a purely formal point of view these operators are not really affected by the reform, as they get to keep their authorizations under § 4c of the Lottery Act, which still enables them to offer their services to license holders of the gaming and lottery still regulated by this Act. What they loose is the opportunity to go on offering their services to charitable license-holders against a percentage of the cash box. For the individual operator this is of course serious. But in a general perspective it is a rather small new market restriction.

691. From an EEA perspective the severity of the "new" restriction caused by the reform is even less, as it is almost entirely an internal Norwegian effect.

692. As for the freedom to provide services, the case at hand does not involve a restriction on the cross-border offering of services which are legally operated in other EEA states. Unlike many other gambling propositions it is not possible to operate a slot machine from another country. It has to be physically located in Norway, and even under the former regime there had to be a special permit ("oppstillingstillatelse") from the local police, in addition to the authorisation of the operator and the license of the charitable organisation. In this regard, the present reform is alike to the Läärä and Anomar cases, and different from Schindler, Zenatti and Gambelli, all of which concerned restrictions on the direct cross-border offering of lottery tickets (Schindler) and sports betting (Zenatti and Gambelli) from another Member State in which this service was legally operated. In the present-case there is no "country-of-origin" aspect.

693. It is indeed even an open question whether under the former Norwegian slot machine regime it would be possible for a foreign company to obtain an authorisation under § 4c of the Lottery Act without some kind of residence requirement. What is certain is that *all* the presently active 138 slot machine operating companies are registered in Norway. Under the former regime there has not been any cross-border offering of services, and the reform therefore does not preclude any such on-going business.

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[162] Se above section 3.4.

[163] As described in section 3.4, the NOAF association changed its statutes in 2002 to allow for membership of charitable organisations holding slot machine licenses, and have since obtained a few such members, representing less than one percent of the total licences. For all practical purposes NOAF is still very much an organisation for the *commercial* slot machine business.

694. As for the ownership of the 138 operating companies, 137 of them are (as far as the Government is aware) for the overwhelming part one hundred percent Norwegian owned, while a few claim to have foreign majority owners. The only exception is the largest company, NLD, which is owned by the Swiss (non-EEA) bank of UBS, through a Dutch subsidiary. There is thus a formal element of cross-border EEA ownership, but no actual activity as regards the operation and running of the company.

695. The direct or indirect effects of the reform on actual EEA cross-border economic activity are therefore marginal, if there are any at all.

696. As for the potential impact on the future freedom of establishment, in order to offer slot machine services in Norway, this must be evaluated against the fact that a new foreign company would first have to sign a contract with a charitable non-profit organisation holding a license, and this in a market already saturated by 138 competing companies. It is of course in principle possible that this could have happened, but has not happened so far during the slot machine bonanza of the recent years, and it is not likely that it would have happened in the foreseeable future had it not been for the reform.

697. On this basis, the Government holds that even if the 2003 slot machine reform is severe for the present Norwegian commercial operators, it is by no means a severe new restriction in the EEA legal sense, which is the only relevant perspective in the present action. On the contrary, this is from a cross-border EEA legal and economic point of view a rather small and harmless new "restriction", with no actual and little potential impact on the freedom to provide services and the freedom of establishment.

698. The fact is that the 2003 reform is of a character which almost exclusively concern internal economic activity in Norway, and which barely suffices to fulfil the cross-border requirement which is necessary to give it an EEA dimension. The Government does not formally contest that this is fulfilled, but the fact that it is only just, provides an important perspective to the case, which is absent in the Application of the Authority.

700. This is the general background on which the 2003 reform should be evaluated according to the criteria laid down in the case law of the ECJ.

8.4 What kind of "service" is the operation of slot machines?

701. Even though the operation of gambling is classified as a "service" which is subject to the basic freedoms of Community and EEA law, it is still important to keep in mind that this is a "service" unlike any other ordinary service on the internal market.

702. To understand this, it is necessary to distinguish between gambling and the *operation* of gambling. In most civilized countries it is perfectly possible for private individuals to bet against each other, or to have a private game of poker, or whatever. What characterises the forms of gambling which are subject to regulation, however, is the involvement of a *gambling operator* who organises the activity for the players. This operator usually does not take a risk, but skims a certain percentage of the turnover, before paying out the rest as "winnings". Statistically the players will always loose,

while the operator will always win. The size of the profit will depend upon the turnover and how large a proportion is back as winnings.

703. This kind of operation differs in principle from other sales of services, which are normally based on a much more balanced cost-benefit assessment. When one purchases ordinary goods and services, these have a price which reflects the demand. When one purchases “gambling services”, the principle is that one party will always lose money in the long term without getting anything in return except the entertainment derived from participating. Sometimes this is real entertainment, especially if the gambling is of a “soft” and non-addictive nature, at low stakes. But too often the players develop delusions about their chances of winning and are therefore driven to lose increasing amounts. Thus the entertainment element grows rapidly smaller, and the compulsive element larger. This is particularly dangerous in a sector where the profit potential is vast, and the incitements therefore strong.

704. Broadly put, while ordinary services are based mainly on a balanced cost-benefit assessment, gambling operations are often mainly based on delusion. And this is particularly true of slot machines, which are impossible to beat for the player, and which will function as “money machines” for the operator.

705. This is why there are not only moral and ethical reasons, but also hard and substantial arguments why the operation of gambling should be assessed and regulated as a very particular form of “service” – unlike almost any other kind of service.

8.5 Assessing the legitimacy, suitability and proportionality of the reform

706. Being a non-discriminatory “restriction” on the freedom of the “service” of operating gambling, it is not contested that the 2003 slot machine reform of the Norwegian parliament must be assessed according to the general requirements of EEA law, as interpreted and stated in the case law of the ECJ and the EFTA Court.

707. This means that in order to be compatible with EEA law the reform must be (i) based on legitimate public requirements, (ii) suitable, and (iii) not disproportional.

708. In the present case all three aspects are contested. The Authority claims that none of the three criteria are fulfilled. The Government holds that all three are so, and by a good margin. The general position of the Government is that the 2003 reform is mainly based on the dominant and obviously legitimate urge to fight compulsive gambling, that it is a most suitable and consistent measure in order to reduce gambling opportunities, and that it is clearly proportional and necessary. This was also the assessment of the national Court of Appeal in its August 2005 judgment, following extensive proceedings.[164]

709. The submissions of the Authority follow the three main themes, and this is a natural outline, which will also be deployed in the following, in sections 9, 10 and 11.

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[164] Cf. **Annex 36.** The ruling of the Court of Appeal represented a complete reversal of the earlier ruling by the Oslo city court, in which the private parties won on all three of the contested issues, in a way which very much resembled the argumentation of the Authority’s previous letter of formal notice, which was presented during the proceedings.

710. Under each of the three themes, the dispute is partly about legal interpretation of EEA law, and partly about the understanding, evaluation and assessment of national law and fact under the criteria of EEA law.

711. The Government holds, as it has consistently done throughout the national proceedings, that the dispute is primarily and overwhelmingly about the *factual* assessment. In this case there is a broad and fundamental divergence in the conception and evaluations of the relevant facts, between on the one hand the competent national authorities and on the other hand the private commercial operators and the Authority.

712. The main legal dispute between the parties seems to be on the interpretation and general importance of the Gambelli judgment, and on the level of judicial review actually required by the ECJ in the gambling sector. The extent of this dispute is difficult to assess precisely, as the Authority has not presented a more general view of the present legal status in the gambling sector, such as that given by the Government in section 7. The Authority does, however, start its assessment of each of the three major themes by presenting its views on "the test", in which certain aspects of interpretation is raised. The Government will later do the same, but this has to be read in relationship to what has already been discussed in sections 7 and 8.

713. The main divergence on points of law between the parties under each of the three themes is that the Authority argues for stricter and more detailed judicial review by the EFTA court than what the Government holds is correct, both in general and especially in the gambling sector. There are also divergences on the more detailed interpretation of some of the legal criteria for judicial review. But on the whole, the Government holds that most of these legal disputes (interesting as they may be) are of little or no importance to the final *outcome* of the case at hand. The reason for this is that under a correct factual assessment the 2003 slot machine reform passes *both* the correct legal evaluations, and the stricter evaluations argued for by the Authority. For this reason, there are several secondary assessments in the following chapters – first an assessment based on the correct interpretation of EEA law, and then a secondary assessment based on the legal interpretation of the Authority – but with the same outcome.

8.6 The dynamic element of the case

714. The present case has a dynamic element in the sense that the subject is a new national measure, the new legislative amendment of August 2003. This dynamic element to some extent distinguishes this case from the cases considered by the ECJ in the gambling sector so far.[165] Even if the dynamic element is not quite as pronounced as claimed by the Authority, it is of course undisputed that the 2003 referral of slot machines from the 1995 Lottery Act to the existing system of the 1992 Gaming Act is a new measure.

715. From a legal point of view it is however irrelevant whether the contested measure is an existing restriction or a new one. If it is compatible EEA law to have a monopoly, then

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[165] Of the five major cases, the first four concerned national restrictions which had been in operation for a long time. In the Gambelli case there had been recent legislative amendments, which were used to distinguish the case from the earlier Zenatti ruling, but the contested subject of the case was still first and foremost the basic restrictions which had been in effect also before the amendments.

it is also compatible to introduce a new one. If the traditional exclusive rights arrangements on slot machines are legitimate under Community law in Sweden and Finland, then it is legally possible under EEA law to introduce a similar system in Norway.

716. To some extent the Authority grudgingly accepts this on page 87 (para. 329) of its Application, where it agrees that "as a matter of law" the substantive test "might, buy and large, coincide" for existing and new monopolies. The Authority then immediately goes on to stress that "from a factual perspective, the two situations are quite different" (330). This is then used to argue for increased judicial review of new arrangements, because the courts can compare with the actual former situation, before the new restriction, when assessing whether it was legitimate and necessary. This is in contrast to an evaluation of an existing restriction, under which the alternatives are hypothetical.

717. To some extent the Government has no problem with this line of argument, as far as it goes, as a description of differences with regard to the character (and freshness) of the evidence which may be presented. This relates to the presentation of proof. The Government however disagrees if the Authority's remarks are to be read as suggesting that the legal intensity of judicial review with national gambling restrictions, or the threshold for finding them illegitimate, unsuitable or unnecessary, should be any different depending on the age of the contested restriction.

718. Furthermore, the argument of the Authority on pp. 87-88 misses and hides the most important point, which is in this case massively in favour of the 2003 slot machine reform. One of the most important tests prescribed by the ECJ when assessing national gambling restrictions is whether they are aimed at bringing about a genuine diminution of gambling opportunities. When assessing existing arrangements this is difficult for the reasons described by the Authority – namely that one has no actual knowledge of how the situation would have been in a more liberal system. Under an existing exclusive rights system in which turnover is growing, it is certainly possible to argue that it is still far lower than it would have been in a more liberalized system, but this can never be more than a more or less plausible hypothesis.

719. In the present case, the factual situation is completely different.

720. First, the authorities know very well, down to the exact annual turnover figures, and with a pretty good estimation of the number of persons negatively affected, what the effects of a liberal slot machine market has been in Norway – in terms of growth, volume, compulsive gambling and other gambling-related problems. This is described earlier in sections 3.4 and 3.5, and it shows that there is ample "hard evidence" to support the claim that a liberal regulatory regime is highly inappropriate for the slot machine sector.

721. Second, the slot machine reform indisputably aims at bringing about a genuine and very substantial diminution of gambling opportunities, both as compared to the levels when the act was proposed and passed in 2003, and even more so as compared to present levels. The reform targeted aim is to bring gross turnover on slot machine gambling down from the present level of 26-27 billion kroner to some 6-7 billion, with a corresponding fall in net turnover from approximately 5 billion to little more than 1

billion[166]. Such a reduction in gambling volume following from a singular legislative initiative is unparalleled in the earlier Norwegian history of gaming and lotteries (at least since some fierce royal restrictions in the 18th century), and also very rare in a recent comparative perspective.

722. Thus, the main distinguishing factor between the present case and the gambling cases earlier considered by the ECJ is the fact that this case involves the introduction of a new restriction specifically aimed at reducing gambling opportunities and volume.

723. This is the (dynamic) reason why the Government holds that the 2003 slot machine reform is in fact *easier* to justify under Community/EEA law than any other existing national gambling restriction in the EEA area of which the Government is aware.

8.7 On the factual assessments and "burden of proof"

724. So far all the gambling judgments from the ECJ have been preliminary rulings, in which the Court has not had to pronounce on the facts of the case. The present case, however, is an infringement action, in which the EFTA court has to assess the whole case, both as regards law and fact.

725. The present case is also large and voluminous, much more so than any infringement action previously launched by the Authority before the EFTA Court. The Application itself is more than a hundred pages, and the annexes several thousand. This makes the present case not only by far the largest ever before the EFTA court, of any kind, but also quite unusually voluminous compared to the infringement actions normally taken by the Commission before the ECJ.

726. The volume of the case is almost entirely of a factual nature. The otherwise extensive Application of the Authority actually holds quite little by way of legal interpretation, and is instead dominated almost entirely by factual assessments and allegations.

727. The Government in turn, is now responding with this Statement of Defense, which is even longer than the Application and contains large sections both on facts and law.

728. All this the EFTA Court will have to consider. The legal interpretations should cause little problem in the present case. They are not of a specifically complex nature, and the Court is well experienced in this regard.

729. On the factual side, the Government would however respectfully advise the Court to exercise a certain degree of caution in its evaluations. The procedure before the EFTA court is better suited to solve questions of legal interpretation than challenges of factual assessment, and especially on the scale presented by the present case. This is partly because the proceedings are mainly written, as opposed to the oral proceedings before most national courts. And it is partly because the combined effect of language, culture and geographical distance makes it more difficult for the EFTA Court to correctly assess all aspects of national law and facts, as compared to the position for a national court.

166 See sections 3.4 and 4.7 above on the economic consequences of the reform.

730. These considerations are the most important reason why the European Court of Justice frequently exercises a substantial degree of caution when assessing national law and fact, not only in preliminary rulings, but actually also often in infringement actions. This is particularly so in large and complex cases, or in cases which concern sensitive sectors of national law, or both – as the present case.

731. An additional factor in the present case is the fact that there have already been very extensive national judicial proceedings, in two instances, with thorough assessments of national facts and law, based on an exhaustive presentation of the relevant documents and a large number of witnesses. On this basis the Court of Appeal has presented its assessments of all the factual aspects of the case. These are assessments of which the Government respectfully submits that the EFTA court should take note, and be hesitant in overruling.[167]

On the burden of proof

732. It is not disputed that in cases concerning restrictions on the four freedoms the point of departure is that the national authorities have a certain "burden of proof", in the sense of an obligation to prove that the contested restriction is legitimate, suitable and proportional. This has been stated both by the ECJ and the EFTA Court on numerous occasions, as referred to by the Authority on p. 89 of its Application.

733. This, however, is no more than the point of departure, on a subject which on closer scrutiny is much more complex.

734. In cases involving national legislation, like the present, the national legislator will normally have been fully aware of its obligation not to introduce restrictions which are in conflict with Community/EEA, and will already have considered this aspect and explained why the new legislation is nevertheless legitimate, suitable and necessary. This is very much so in the present case, in which the competent authorities gave great consideration not only to the actual legitimacy, suitability and necessity of the reform in itself, but also evaluated this according to the criteria of EEA law, and in detail presented its reasons and evaluations in the Bill of Enactment, as later approved by a broad parliamentary majority.

735. In such a situation, where the national legislator has explained prima facie why the new measures are legitimate, suitable and necessary, the Government holds that the "burden of proof" shifts onto the Authority to establish that this is not the case. This has been stated directly or by implication by the ECJ on several occasions, as in Case C-96/81 Commission v the Netherlands:

> 6. It should be emphasized that, in proceedings under Article 169 of the Treaty for failure to fulfill an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the

[167] The same does not apply to the earlier assessments of the Oslo City Court. First, the proceedings before the Court of Appeal were far more thorough and substantial. Secondly, the assessments of the individual judge in the case before the City Court were in themselves subject to review by the three senior judges in the Court of Appeal, who overturned them on every point of importance.

Court the information needed to enable it to determine whether the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.[168]

736. As regards more specifically the justification for national restrictions, the Court has held in the context of Article 90(2) [Article 86(2) EC]:

> 101. Whilst it is true that it is incumbent upon a Member State which invokes Article 90(2) to demonstrate that the conditions laid down in that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the contested measures, the performance of the tasks of general economic interest under economically acceptable conditions would, in its view, be jeopardized, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions.
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> 102. In proceedings under Article 169 of the Treaty for failure to fulfill an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled (see Case 96/81 Commission v Netherlands [1982] ECR 1791, paragraph 6).[169]

737. As stated in this case by the ECJ, it is also important to note that the "burden of proof" can not be interpreted as an obligation on national authorities to "prove" positively that no other conceivable measures would have sufficed, as this by its very nature would be hypothetical. In cases like this, the essential question is not really so much the "burden of proof", but rather to what extent, and with which intensity, the courts (national or supranational) should review and overrule the assessments, explanations, discretion and expertise of the national legislator.

738. Furthermore, the Government holds that the answer to this question may differ under each of the three main evaluations (legitimacy, suitability and proportionality), an also according to the special characteristics and sensitivities in various sectors, and the factual complexity of the individual case.

739. As regards the question of whether a national restriction is based on legitimate public requirements, the Government holds that the obvious main rule must be that the reasons given by the national legislator are in fact the real justification for the restriction. If the Commission or the Authority claims that there are other, hidden and illegitimate objectives, then the "burden of proof" naturally lies heavily on them to prove so.

740. As regards "suitability", it is noteworthy that the very wording of this notion reveals that it is not incumbent on the Member States to prove that the intended effect will materialize in full. As noted by Jans, "'suitable' seems to imply a less strict causal relationship than 'indispensable', while at the same time being less flexible than merely 'useful'".[170]

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[168] Case C-96/81 *Commission v Netherlands* [1982] ECR 1791, (para. 6). This is repeated in Case C-404/00 *Commission v Spain* [2003] ECR I-6695, para 26; Case C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, para 21; and Case C-117/02 *Commission v. Portugal* [2004] ECR I-5517, para 80.

[169] Case C-159/94 Commission v France [1997] ECR I-5815, paras 101-102.

[170] See **Annex 149**, Jans, 'Proportionality Revisited' 27 Legal Issues of Economic Integration (2000)239, at 243.

741. It follows analogously from case law on judicial review of Community legislation for the protection of public interest, herein consumer protection, that it suffices to demonstrate that the measure was 'likely to make an effective contribution'[171] to attaining the relevant aim or that 'ex hypothesi'[172] the measures were suitable and necessary. The question has also been formulated as whether it is 'possible for the Community legislature to take the view' that the measures are suitable and necessary.[173] As noted in the Opinion in British American Tobacco, where the effect of the legislation is difficult to demonstrate, the Community legislature is not required to prove such an effect.[174] This view is borne out of the precautionary principle, which applies where the Community legislature, or the national legislature in this case, seeks to ensure consumer protection and public health.[175]

742. Under "proportionality" and "necessity" the Member States are furthermore, as already noted, not in general required to "prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions". The judicial test in this respect is rather of whether the national authorities have provided enough of an explanation for the plausibility of its claim to necessity to satisfy the Court. And in this regard, it is noteworthy that the Court has not applied stringent requirements either in the context of preliminary references or infringement proceedings.

743. The observations so far on the complexity of the "burden of proof" question are of a general nature and apply equally to all sectors of the internal market, and all kinds of cases. In addition there is the fact that the ECJ in certain sectors have been particularly hesitant to overrule the discretion of the national legislatures.

744. The gambling sector is very clearly such a sector, as demonstrated in the first four major gambling cases, and on closer scrutiny even in the Gambelli ruling. This in particular applies to the necessity-test, where the Court has held that the national authorities have a wide margin of appreciation, which the courts should only review and overrule in cases of manifest excess. This is further elaborated below in section 11.2.

745. Before leaving the "burden of proof", it is of some interest to see how this was actually applied in the gambling case ruled upon in February 2005 by the Supreme Court of the Netherlands in the case of De Lotto versus Ladbrokes, on one particular point, which is directly relevant also to the case at hand.

746. The question was how far national authorities have a "burden of proof" to provide evidence that a certain gambling restriction is based on a desire to combat crime and fraud. The argument of Ladbrokes was that the contested Dutch gambling restrictions were not adequately based on such requirements, because the threat of crime or fraud had not been actually proven by the Dutch authorities. Ladbrokes argued that "the mere possibility of fraud or abuse does not provide justification". The Supreme Court did not agree. After referring to the case law of the ECJ, in particular Gambelli, the Court stated that:

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[171] Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paras 129.
[172] Ibid, para 130.
[173] Ibid, paras 137 and 139.
[174] Opinion in Case C-491/01 B*ritish American Tobacco* [2002] ECR I-11453, para 249.
[175] Ibid, para 249 cfr. paras 229-230.

> There is no indication whatsoever that the ECJ would require that there be a concrete threat of fraud or abuse for the application vis-à-vis providers of games of chance from other member states of a national law intended in part to combat fraud, such as the Betting and Gaming Act.[176]

747. The Government agrees with this interpretation. In cases concerning existing national gambling restrictions it is impossible to "prove" what the crime situation would be without the restrictions. And in cases concerning new gambling restrictions it is equally impossible to "prove" in advance what will be the effect on crime. Also, in both cases, the national legislator must be allowed to conduct a preventive policy, in order to prevent crime from rising in the future, even if this has not yet happened.

[176] Cf. **Annex 144**, ruling of the Supreme Court of the Netherlands of 18 February 2005 in the case of Ladbrokes v De Lotto, paragraph 3.6.3.

9. THE LEGISLATIVE REASONS FOR THE REFORM

9.1 The legal test

748. The slot machine reform decided by the Storting in June 2003 was the result of long and thorough administrative and political preparations and processes, as described above in section 4. The main and dominating reason for the reform was the need to fight the gambling addiction created in just a few years by the explosion in slot machine gambling. But other additional and supplementary reasons and requirements were also voiced during the processes leading up to the final considerations of the Parliament, some of which may be considered part of the original "legislative intent".

749. After the enactment of the statute in the summer of 2003, there have been continuous political and administrative evaluations of the reform, not least because of the legal actions, which have confirmed and strengthened the original legislative assessments on the legitimacy, suitability and necessity of the reform.

750. The question before the EFTA Court is whether the slot machine reform is objectively justifiable according to imperative public requirements which may be recognized as legitimate under EEA law. In this respect original legislative intent is important, although not necessarily decisive if other objective requirements may be demonstrated.

751. The legal point of departure is the general doctrine on imperative requirements, as formulated by the ECJ and the EFTA Court on numerous occasions. According to this doctrine, a long list of public concerns may in principle be considered legitimate. Roughly speaking, requirements which are sensible will normally also be legitimate in the legal sense. The main exemption is so-called financial considerations, which are not legitimate. The exact outer limits of this legal concept are not always clear. But the core is clear. National restrictions on the four freedoms can never be justified in themselves by reference to the need to increase or protect state income. If a national restriction is otherwise based on legitimate objective requirements, however, the fact that it also serves objectives of a financial nature does not impair the justification.

752. In many sectors the ECJ has given more precise and specific instructions, supplementing the general doctrine on imperative requirements. The gambling sector is one of these. Starting with the 1994 Schindler ruling the Court has specifically listed national requirements in the field of gambling which are to be considered legitimate, and this list has been repeated in the later rulings, as described above in section 7.2.[177]

753. In general the ECJ has recognised that national restrictions on gambling may legitimately serve a number of public interest purposes, including the prevention of compulsive gambling, consumer protection for the players, restricting the volume of gambling out of other moral or social considerations, protecting public order, preventing crime and fraud, and preventing gambling from being a source of private profit.

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[177] Cf. Case C-275/92 Schindler, paragraphs 57-60, as quoted above in section 7.2.

754. As regards national exclusive rights arrangements on gambling the ECJ has specifically recognised in Läärä that they legitimately strengthen public control and responsibility, and also that they may legitimately serve the purpose of “confining the desire to gamble and the exploitation of gambling within controlled channels” (Läärä 37, cf. Zenatti 35).

755. National restrictions on gambling operations are in practice seldom based on one singular requirement, but usually on a set of supplementary objectives. The reason for this is of course that gambling restrictions may typically serve several aims at the same time, but it is also a fact that such restrictions are often the result of long national legislative traditions, which over time have developed in a way that makes it difficult to point out one decisive and objective justification at any given point in time.[178] The ECJ has recognized this, and it has explicitly stated that when assessing the legitimacy of the restrictions, such considerations “must be taken together” (Schindler 58, cf. Läärä 33, Zenatti 31, Anomar 73), and evaluated *as a whole*.

756. The only widespread traditional requirement in the gambling sector which has caused the ECJ some difficulty are the national economic considerations and ramifications common in this sector. Here, it is a fact that most European states at least to some extent apply a principle under which revenues from gambling should as far as possible be channeled to socially beneficial causes, making this a major source of income for such activities. This is a fact which the ECJ has had to reconcile with the the traditional principle that public “financial considerations” may not be considered a legitimate requirement.

757. The result is that the Court of Justice recognized as early as in Schindler that it is basically laudable that lotteries and gaming make “a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture”, and that this was not without relevance, although it could not “in itself be regarded as an objective justification” (60). In the later rulings the Court has elaborated on this, in particular in the 1999 Zenatti ruling, in which it stated that the financing of social activities from gambling revenue may be an “incidental beneficial consequence” (meaning an accessory advantage) of the system, as long as it is not “in itself” the objective reason for the restriction.[179]

758. In its Application the Authority seems to argue that this means that national gambling restrictions must be “based exclusively on public interest objectives”, and that a national piece of legislation therefore almost automatically becomes illegitimate if the national legislator has included considerations on how the revenue from gambling should be spent, and for the benefit of whom.[180]

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[178] The main example is the fact that gambling restrictions were in the old days often justified by reference to religious and moral considerations. In recent years this has in most countries been eclipsed by social and health policy requirements, primarily the need to prevent and contain gambling addiction. But that is not to say that old legislative not still be of great importance to substantial parts of the national population.

[179] Cf. Case C-67/98, paragraph 36, which is described above in section 7.2, including an analysis of the concept of an “incidental beneficial consequence”.

[180] Cf. pages 52-54, paragraphs 190 to 198, of the authority’s Application. As regards the quote from Advocate General Fennelly in Zenatti in paragraph 193 of the Application, it should be mentioned that his remark about the “unacceptable” character of the considerations discussed (which the Authority has even underlined for good measure) were specifically *not* repeated by the ECJ, neither in Zenatti nor Gambelli. On the contrary, in Zenatti para. 36 the Court explicitly repeats to the remarks in Schindler to which Fennelly had objections. As for the quote from Advocate General Alber on p. 53 of the Application, it should also be borne in mind that his advice in the Gambelli case was not followed by the Court.

759. This is clearly a wrong interpretation of Zenatti, as well as an impossible requirement to make. Behind almost all existing national gambling regulations, whether old or new, in all the Member States, there will always be legislative considerations of an economic nature, including in most states clear statements that gambling revenue should be used for the benefit of socially benevolent and humanitarian causes. This is perfectly natural and sensible, and can of course not mean that the legislation as such is illegitimate.

760. The point of the Zenatti formula is that such "economic" considerations cannot in themselves be part of the legal justification for the restriction under Community law. They may only be accessory (incidental) advantages. As such they are legitimate. But when assessing whether a national restriction is based on recognised public interest considerations, they have to be subtracted. The test is then whether the remaining considerations behind the legislation are enough to objectively justify the restriction. If there are strong social or other public policy concerns justifying the restriction, this will then of course be considered legitimate under Community law, even if there are also economic considerations at the national level.

761. The Government holds that this interpretation follows directly from the wording used by the ECJ in Zenatti (and later in Gambelli), and that it is indeed the only interpretation which makes sense in the gambling sector. Furthermore, this is how the test was applied by the ECJ itself in Zenatti and Anomar, and how it has been applied since by national courts, including supreme courts in Sweden, Finland, Italy and the Netherlands.[181]

762. One should add that this is also the viewpoint adopted by the ECJ in its case law outside the area of gambling. The Court has thus in several cases emphasized that if a public interest justification is found, it is irrelevant that the national measure also enables the achievement of economic objectives:

> The mere fact that national provisions, justified by objective circumstances corresponding to the needs of the interests referred to therein [Article 36, now Article 30 EC], enable other objectives of an economic nature to be achieved as well, does not exclude the application of Article 36 [Article 30 EC].[182]

763. In the present case the "economic" element of the legislative intent behind the reform is different than in most other cases, because the reform is intended to radically *diminish* slot machine gambling, and therefore also *reduce* slot machine revenue. The "economic" legislative consideration was not to increase (or even maintain) revenue to benevolent or public interest activities, but rather to the lessen the pain, and to lessen the necessary reductions in revenue, and the corresponding reduction in socially beneficial and benevolent activities, by ensuring that a larger share of the reduced future revenue will go to such activities (and not to private profit). This is clearly *not* the kind of economic concern considered by the ECJ in Zenatti or Gambelli.

764. When assessing whether a national restriction is based on legitimate public requirements, the natural place to look is in the preparatory works, and other sources stating or indicating the national *legislative intent* behind the regulations. In the case at hand, the relevant preparatory works are the March 2003 Bill, the June 2003

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181 See above sections 7.2 and 7.5.

182 E.g. Case 72/83 *Campus Oil* [1984] ECR 2727; para 36 and Case 118/86 *Nertsvoederfabriek* [1987] ECR 3883, para 15.

Recommendations of the Committee, and the minutes from the parliamentary debate. These are thorough and exhaustive, and reflect fully the considerations of the "legislator", in this case the Storting (parliament), following the proposal of the Government, as prepared by the Ministry of Justice.

765. In its misconstrued search for further "hidden" intent the Authority has taken great interest in the earlier consultation papers sent out by the Ministry in June and October 2002. These are of interest for understanding the early processes, as described above in section 4.3. And they contain nothing which undermines the legitimacy of the later parliamentary reform. But as a matter of principle it must nevertheless be emphasized that they are not relevant from a legal point of view when evaluating legislative intent under EEA law. They are consultation papers, of a sort which is often later altered or put aside, they belong to an early stage, they do not reflect the view of the Ministry at later stages (after the consultations have taken place), and – most important – they do not form part of the considerations which are presented to parliament. This is all rather elementary, but it must be emphasized because of the Authority's insistence on making a point of the different approaches in the first and second consultation paper.[183] The same kind of argument was presented by the commercial operators before the national courts, which prompted the Court of Appeal to remark rather dryly that:

> The Court of Appeal comments that law bills are normally handled by that the Ministry first issues a green paper for comments. On having received reactions to the proposal, the Ministry can introduce minor or major changes to its original proposal. That changes are introduced during the process is thus by no means unusual. Green papers with various proposals show the history of the act, but it is the view of the Court of Appeal that it is the Ministry's bill for enactment and the recommendation of the Parliamentary Committee that are of the greatest import in identifying the factual basis of the Act's form. When an assessment is to be made of the objectives behind the change in the law in the present case, it is thus the statements in these documents – Ot. bill No. 44 (2002-2003) and Recommendation O. No. 124 (2002-2003) – that must be the central authority.[184]

766. Even if original legislative intent is a main source for evaluating the legitimacy of national public considerations under Community and EEA law, it is not the only one, and it is not necessarily decisive. This was illustrated in the Finalarte judgment of the ECJ, in which it was clear that the German legislator had originally based its decision on illegitimate considerations of a clearly financial nature. The Court of Justice found that the contested restriction was nevertheless legitimate, because it could also be justified with reference to other clearly legitimate public requirements.[185]

767. The Government will not elaborate further on this, as it is obvious in the present case that the legislative considerations stated in the Bill and the Recommendations are more than sufficient to give the slot machine reform a legitimate basis.

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[183] The reasons for this difference, and the broader processes which caused it, are elaborated above in section 4.3.

[184] Cf. the August 2005 judgment, **Annex 36**, on page 34 of the English translation. The Court of Appeal then added "that on the basis of the evidence presented in the case, one must regardless base any conclusion on that the Ministry of Culture already at the time the first green paper was issued had commenced on the preparation of a monopoly model. […] Simultaneously with the preparation of the proposals in the initial green paper, the Ministry was in the process of considering the introduction of a monopoly for pay-out machines." See further on this above under section 4.3.

[185] Cf. Case C-70/98 Finalarte, paragraphs 37-42.

768. But if for some reason the EFTA Court should follow the Authority's argument, and find decisive fault with the original legislative intent behind the slot machine reform, then the Government holds that it would still have to apply the Finalarte-test, of whether the reform could nevertheless be objectively justified. And the answer would clearly be affirmative.

9.2 General comments on the legislative reasons for the reform

769. As described in detail in section 4, the June 2003 slot machine reform of the Norwegian parliament was the result of a long and thorough preparatory process, which lasted a year and a half, and which is fully documented.

770. The process started in the Ministry in the winter of 2002, when it became clear to the new political leadership that radical measures had to be taken in order to fight the new and explosive problems of gambling addiction caused by slot machines. Following this, the question was not whether to reform, but which alternative to chose.

771. This was studied and considered during the spring and summer of 2002, and several options were considered. The two main alternatives were either to try stricter regulations within the framework of the Lottery Act, or to transfer slot machine operations to the regime of the Gaming Act. Originally, the Ministry was in doubt as to the feasibility of the latter approach. This was the reason why a first modest consultation paper was issued in June 2002, describing the first steps if reform should be confined within the framework of the Lottery Act. During the summer of 2002, the Ministry was however presented with the commissioned proposal from Norsk Tipping on how the exclusive rights system might work for slot machine operations, and a delegation sent to Sweden and Denmark reported on how the systems are there. As a result of continuous evaluations during the summer of 2002 the exclusive rights model overtook the restricted market model not only as the ideal solution in principle, but as a solution which was actually feasible in practice. This was confirmed when the responses to the first consultation paper were received in September, with both the commercial operators and the non-profit charitable and benevolent license-holders arguing strongly that even the proposal for modest reform within the present regime was completely unacceptable.

772. On this background the Ministry decided to go ahead with the exclusive rights model, and a second consultation paper was drawn up and issued in late October 2002.

773. This was the start of the preparations for the reform. During the autumn of 2002 and the winter of 2003 the Ministry was hard at work turning the early sketches into a fully reasoned proposal to parliament, and the envisaged slot machine reform was also incorporated and integrated into a more general presentation and discussion of Norwegian gambling policy, to be debated by the Storting. The result was the Bill of Enactment, which was presented on 14 March 2003. This in turn was followed by extensive parliamentary scrutiny and discussion in the Standing Committee on Culture, which presented its recommendations on 6 June 2003, ending in a plenary debate on 12 June 2003. This is all described in more detail in sections 4.3, 4.4 and 4.5.

774. The results of these processes were extensive preparatory works, reflecting original legislative deliberations and intent. The main documents are:

- The Bill of Enactment of 14 March 2003 – Ot.prp. no. 44 (2002-2003).
- The Committee's Recommendation of 6 June 2003, Innst. S. no. 124 (2002-2003).
- The Minutes of the Debate in the Odelsting on 12 June 2003.

775. These are all annexed with full English translations enclosed,[186] and the Government holds that they have to be read in full by anyone who wants to understand and review the reasoning and requirements of the reform. The most thorough reasoning is to be found in the Bill of Enactment, but this has to be supplemented by the parliamentary recommendation and minutes, in which a broad majority not only approves of the proposal of the Minority Government, but also gives its own reasons for the reform.

776. The most important part of the Bill of Enactment for understanding the legislative reasons for the reform is the Introduction in Chapter 1, and the whole of Chapter 4 on the slot machine sector. But the general review in Chapter 3 of basic principles and challenges in national gambling policy, including assessments of problem gambling and comparative reviews, is also an integrated part of the reasoning behind the reform.

777. When studying and analyzing the legislative reasons for the reform, a rough distinction may to some extent be drawn between two main elements. First, there are the arguments why slot machine gambling has to be radically reduced and modified. Second, there is the discussion on various alternative models for the reform, and the reasoning on why the public exclusive rights model is the superior. However, the two elements are tightly connected to one another in the legislative discussions, and the arguments intertwined. The main argument for using the existing exclusive rights model is precisely that this is seen as the superior model for achieving the overriding aims of reducing and moderating slot machine gambling and thus fighting gambling addiction and other problems caused by the machines.

778. Analyzing the preparatory works, including the parliamentary recommendations and debate, the Government holds that the following requirements may be identified as part of the original legislative intent:

- To fight gambling addiction and other gambling problems.
- To reduce slot machine gambling to a socially defensible level.
- To strengthen and increase public control and responsibility in the gambling sector in general, and in the slot machine sector in particular.
- To protect public order, by preventing and reducing crime and malpractice and enforcing the 18 year age limit more effectively.
- To eliminate the market incentives which have caused the gambling explosion.
- To limit the necessary reductions in revenues for the former charitable and benevolent license-holders.

[186] The Bill of Enactment is enclosed as **Annex 9** to the Authority's Application, and the Committee's Recommendations as **Annex 11**. The Minutes of the Odelsting are enclosed in Norwegian by the Authority as **Annex 12**, and in English translation by the Government as **Annex 67**.

779. Of these considerations the first one, to fight gambling addiction and other problems caused by the explosion in slot machine gambling, was by far the most important. This was the original and overriding requirement. By comparison, the other concerns are of a supplementary character. The line between aims and means is not clear, and most of the other requirements may also be seen as means by which to achieve the main concern.

780. In its preparatory works the Ministry is clear on the fact that some of the objectives of the reform may also – to a greater or lesser extent – be achieved under other regulatory models and that is indeed why a discussion on alternative models is included at all. The Ministry concluded that some objectives may *only* be achieved under the existing exclusive rights model, while others would be *far better* achieved in this way than under alternative regimes.

781. The core argument is really that the existing exclusive rights regime of Norsk Tipping is the superior model for fighting gambling addiction and reducing slot machine gambling because it is the only one which makes it possible for the authorities to directly control the volume and character of this activity in the future, and thereby to diminish it to an acceptable level and ensure that it is moderate in character. This is the core, which is then supplemented by additional considerations and requirements, into an integrated and fully reasoned legislative position.

782. According to the case law of the ECJ it is clear that when judicially reviewing the legitimacy of the 2003 slot machine reform, the legislative requirements must be taken together and evaluated as a whole.

783. The Government holds that each of the public requirements listed are legitimate under EEA law, and that several of them would by themselves be sufficient in order to justify the reform. Taken together and evaluated as a whole they justify the reform under EEA law by a wide margin.

784. This was also the assessment of the Borgarting Court of Appeal, following a much more direct and extensive presentation of evidence than what is possible to achieve in the present action:

> From that which is quoted here from the Norwegian preparatory works, the Court of Appeal cannot see that there can be any doubt that the dominant objective behind the introduction of the state monopoly model is to combat compulsive/habitual gambling. Other objectives are in the first instance better and more effective control over the gaming machine market and more effective enforcement of the 18 year rule for gambling and – to a certain degree the prevention of criminal activities. Another objective behind the restriction is the wish to reduce private profits from gambling activities. EU Court practice shows that such objectives, seen as a whole, are legitimate as grounds for introducing restrictions in the gambling sector. The Court of Appeal refers here to among other sources the Schindler ruling's premises 57 and 58 (…), the Läärä ruling's premises 32 and 33 (…) and the Zenatti ruling' premise 35 (…).[187]

785. Under the case law of the ECJ it is sufficient when facing judicial review to demonstrate the combined legitimacy of the relevant public requirements, seen as a whole. It is not necessary to further elaborate on each of the specific requirements seen

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[187] Cf. **Annex 36**, on p. 38 of the English translation.

in isolation, nor on the often complex inter-relationship between them. Given the scope and character of the Authority's submissions a brief run-through may still be appropriate.

9.3 Fighting gambling addiction

786. The urge to fight and if possible eradicate the extensive problems with gambling addiction caused by slot machine gambling is the main and dominating public requirement throughout the legislative process, during both the early stages assessment, the preparation of the proposition, and the parliamentary scrutiny and debate.

788. The background for this, as described above in section 3.4 was the explosive emergence of compulsive gambling as a major problem in Norwegian society in the late 1990s and early 2000s. By 2002 the competent authorities had started to get ample "hard evidence" on these developments from a number of sources, which showed beyond any doubt that:

1. Gambling addiction was growing at an alarming speed, and was already far beyond any levels previously known in Norway.
2. This was almost exclusively caused by slot machines.

789. For the competent authorities, following developments closely, it was clear that this problem was not only caused by a regulatory failure to set stricter technical standards and rules on location, but that the expansion and aggressiveness of the slot machine sector was due to more fundamental forces, with a high degree of competition and very strong economic incitements forcing developments.

790. On the other hand, the authorities had long experience with the established exclusive rights model of the Gaming Act, and more than fifty years of experience with Norsk Tipping as a gaming operator – showing that in all these years the company has operated a moderate and responsible gaming and lotteries portfolio, without extensive growth, and without ever creating any large scale gambling problems. The authorities further knew that they would be able to exercise full control over any future operations of Norsk Tipping. And they had hard evidence that the exclusive rights arrangement for slot machines in place in Sweden since 1997 had functioned in a superior way, with machine gambling per capita at a fraction of that in Norway.

791. This was the basis for the assessment of the parliamentary majority in June 2003 that:

> The majority believes that prize machines in Norway should be state-operated as is the case in Sweden.
> The majority therefore believes that Norsk Tipping AS are the most capable company to organise this work. The majority believes that Norway has good experience over a long period of Norsk Tipping AS as a gaming operator, and that Norsk Tipping AS will be able to have clear control of prize machines.[188]

[188] Cf. **Annex 11**, Recommendations to the Odelsting (Innst.O.) no. 124 (2002-2003) chapter 2.4.

792. In this way the need to fight gambling addiction was both the main legislative reason for (i) radical reform and (ii) choosing the existing exclusive rights system as the superior alternative for achieving this aim, at a level which is simply not attainable within a marked based license system with numerous commercial operators.

793. When the slot machine reform was proposed in the spring of 2003 part of the criticism from the private operators was that it was not scientifically based, and that it was not proven that slot machines were indeed causing large-scale problems of addiction. The authorities did not agree. They already had ample evidence of the new problems, and though this mainly came from "non-scientific" sources (psychiatrists in the field, treatment institutions, new associations for compulsive gamblers and their relatives, reports in the media, letters to the Minister, etcetera), it was clear beyond doubt what was happening. This was described by the Ministry in the Bill (chapter 3.2.4), and endorsed by the parliamentary majority.

794. While the Government holds that the information available in 2003 was then certainly more than sufficient to justify the reform under the requirements of EEA law, it is still of interest to note that later and findings have massively supported and confirmed the original assessments. As described above in section 3.5 the main sources of hard evidence that slot machines are the cause of huge problems of gambling addiction in Norwegian society include:

- SIRIUS report no. 2/2003 "Pengespill og pengespillproblemer i Norge" (2003).
- "Sluttrapport. Hjelpelinjen for spilleavhengige" (2005) (annex 81).
- The Gaming Board's comprehensive report on "Proposal for an action plan to prevent problem gambling and reduce the harmful effects of excessive gambling" of December 2004 (annex 21).
- The MMI Report on "Gambling habits and gambling problems in the population" of September 2005 (annex 40).

795. These and other reports confirm that there is a large problem with compulsive gambling in Norway today, and that it is almost entirely (probably around 90 %) caused by slot machines. In 2003 the number of people to suffer from compulsive gambling problems was estimated at approx. 50,000. By September 2005 the estimates according to the MMI Institute had risen to 71,000, with another 133,000 classified in a "moderate risk" category. The estimates are rough, and divergences may partly be explained by different methods, but the main findings are clear – and even more alarming today than in 2003.

796. In recent months (the spring of 2006) there has been a marked upsurge in press reports on gambling problems caused by slot machines. Some of these are enclosed, and illustrate that the problem is still very much on the agenda.[189]

9.4. Reducing slot machine gambling to a defensible level

797. When the slot machine reform was originally envisaged, the main focus was on fighting gambling addiction, not so much on the volume of gambling as such. Experiences with Norsk Tipping show that one might have a quite high level of gaming and lotteries in

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189 Cf. **Annex 83, 84, 85, 86 and 87**.

the population without creating any significant problems. Had the explosion in slot machine gambling occurred without corresponding problems of gambling addiction, the reform would probably not had taken place, at least not in the present form.

798. As it happened, it was clear to the competent authorities from the beginning that there was an obvious (if not exactly parallel) link between the volume of slot machine gambling and the corresponding problems of addiction. Thus, a significant reduction in slot machine turnover was very much a part of the original intent, but more as a means than as an aim in itself.

799. As earlier describes in more detail, the preparation of the slot machine reform was done on the basis of the 2001-figures for turnover. This was natural early in 2002, when these were the only figures available. But the important thing to note is that the 2001 figures were kept as a point of reference for the reform even after new continuous estimates in late 2002 and early 2003 were showing huge increases. This was by no means uncontroversial, and the charitable organisations tried hard to adjust the targets and framework of the reform to 2002 or 2003 estimates. But the Ministry and the parliamentary majority were steadfast, and insisted on using the 2001 level the relevant point of reference.

800. As regards total slot machine turnover, the targeted aim of the reform in the spring of 2003 when it was presented was to achieve a 40 % reduction as compared to turnover in 2001. This is the figure stated in the Bill of Enactment in March 2003, and quoted by the parliamentary committee in June. As the total gross turnover from slot machines in 2001 was approx. 9 billion kroner, this meant a reduction by some 3 ½ billon, to a gross annual level of approx. 5 ½ billion. This figure also corresponded roughly to the internal estimates of Norsk Tipping in late 2002 on the budgets for the new operation.[190]

801. Even compared to the early 2001-level, the reform was therefore aimed at drastically reducing the volume of slot machine gambling.

802. When this was proposed and debated in the spring of 2003 all the parties involved however new that the market had grown rapidly since 2001, and that the real reduction in volume would be far more than 40 %. Based on the actual gross turnover of 15 billion kroner in 2002, which was known in the spring of 2003, the reduction to the stated level would actually be closer to 60 %. And compared to the (not yet known) turnover figures for 2003, at 23 billion kroner, the reduction would be more than 70 %.

803. The estimated reduction in net turnover from slot machines corresponds to these figures, as the net turnover is always approx. 22 % of the gross.

804. While this targeted reduction was primarily a means by which to fight problem gambling, it is true to say that it has since then also to some extent become a target in itself. Following the rapid growth in volume in recent years, it has become increasingly clear to the competent authorities that this is in itself problematic from a social and moral point of view. Even disregarding the compulsive element, the sheer volume and extent of slot machine gambling in Norway today is problematic for a number of reasons. Crime is one, which is elaborated below. Another is socio-economics. A

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190 Cf. **Annex 112,** Norsk Tipping's internal budget plan for the new reform dated 12 December 2002.

person's propensity to gamble on slot machine gambling is roughly inverted to the level of income, education and social standing. In this perspective the net turnover from slot machines (gamblers' loss) might be seen in socio-economic terms as a "tax on the poor" (regressive taxation).

805. On this basis it is correct to say that reducing the volume of machine gambling to a morally and socially defensible level is an objective of the reform in itself, even if it is still primarily a means by which to fight compulsive gambling.

9.5. Strengthening public control and responsibility

806. There is a huge difference, both in formal and real terms, between the level of public (political and administrative) control attainable over a publicly owned entity as compared to private commercial companies. Likewise there is a gap between the public control with gambling operations attainable within the existing public exclusive rights model of Norsk Tipping on the one hand and on the other hand that attainable in any conceivable alternative form of regulated marked involving several private licence-holders and commercial operators.

807. The wish to strengthen public control over the gambling sector in general and the slot machine sector in particular, was a clear and stated objective of the reform. Once again, this was primarily regarded as a means rather than an aim in itself. The reason why public control should be strengthened is primarily that this will enable the authorities to fight gambling addiction at a level and intensity which is not possible to achieve simply by regulating a market with a number of private actors.

808. It should be emphasized that this is not a question of degrees of efficiency, or the amount of administrative effort needed. This is not an "administrative" concern. It is a concern as to what level of public control is attainable. The assessment of the legislator is that in order to fight the present problems with slot machine addiction, the competent public authorities have to have powers of direct instruction, and they have to be able to pursue them in a continuous and flexible way, which is not possible to achieve through regulatory measures.

809. While public control in this way is primarily a means, it is to some extent also an objective in itself. There is a long tradition in Norway, as in many other countries, that major forms of gambling should because of their very nature be operated by the public authorities, and not by private commercial interests.

810. The aspect of public control was substantially developed during the parliamentary discussions on the reform, under which the corresponding notion of *public responsibility* was also introduced. For the Committee majority a major advantage with the exclusive rights system of Norsk Tipping was that "this arrangement makes clear the responsibility the government has at all times with regard to gaming enterprises being operated within a defensible framework". Thus, the majority stressed the aspect of political responsibility in the gambling sector. By transferring slot machines to a public enterprise which is wholly owned and controlled by the state, the reform thus increases ministerial accountability and responsibility for future developments in this sector:

> The majority believes that the proposition is a step in the right direction and sees the measures put forward as important contributions to cleaning up the gaming market. The proposition's proposals place the responsibility for the total development of the gaming market with Norsk Tipping AS, and thereby maintain a public responsibility for market development. The proposition also entails that the government and the Storting will be responsible for following up developments in this market. These members believe that when the responsibility for the prize machine market is now given to a public operator, Norsk Tipping AS, this will prepare, strengthen and clarify public responsibility.[191]

811. In this way, public control and responsibility forms an important part of the original legislative intent. From a legal point of view this requirement is clearly legitimate according to the case law of the ECJ – both in general, at least in sensitive sectors, and in particular in the gambling sector, where it has been recognized in the Läärä and Anomar rulings.

9.6. Reducing crime and malpractice

812. Another objective of the reform is to "prevent crime in a more effective manner", as stated in the introduction to the Bill of Enactment, and further elaborated later in chapters 4.3 and 4.5.1.

813. Because of the generally tight and restricted legal regime, there has traditionally been very little crime and malpractice in the Norwegian gaming and lotteries sector. The rise in slot machine gambling in the last decade has however led to a rise in several forms of criminal and illegal activity, directly or indirectly linked to slot machine gambling, as described above in section 3.7. Much of this is related to the increased volume of machine gambling as such, as for example the many machine burglaries, and the problems with slot machine addicts committing crime in order to finance their addiction.

814. But some of the other forms of crime and malpractice are more closely related to the way in which the slot machine sector has functioned, as a market with huge profits to be made and a lot of actors involved as licence-holders, operators and location owners. This includes suspected money laundering through the machines, and embezzlement and bribes from operators to proprietors of premises in order to gain access to the most lucrative installation sites. The same applies to the operation of machines which are not in compliance with the technical requirements, and the problem with illegal (serial) programming of machines.

815. Preventing the different forms of crime and malpractice associated with the present slot machine sector is an integral and consistent part of the objectives of the reform.

816. The most important aspect of this will presumably be that a radical diminishing of gambling volume and opportunities will contribute to a fall in machine burglaries, and that the fall in gambling addiction will lead to less crime in order to finance this. This objective is related to the choice of the exclusive rights model to the extent that this

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[191] Cf. **Annex 11**, Recommendations to the Odelsting (Innst.O.) no. 124 (2002-2003) under "General comments", as earlier quoted more extensively above in section 4.5.

model is the best suitable for diminishing gambling opportunities and fighting gambling addiction.

817. Apart from that, preventing slot machine related crime and malpractice is an objective which is only partially related to the choice of model, whether it should be an exclusive rights model or a regulated market-model. The Government, however, holds that the incitements and opportunities for various forms of crime and malpractice is much larger in a market-based regime with a huge number of interested parties than it is under an arrangement where the whole sector is operated by a single public entity.

818. From a legal point of view it is clear that the prevention of crime and malpractice is a legitimate legislative consideration under EEA law, and that the national authorities are not obliged in this respect to actually prove that there is a concrete threat, nor the hypothetical effects of a measure which has not yet been enacted. It is sufficient for the authorities to plausible state why the restriction is likely to have an effect, and this effect may well be of a purely preventive character.

819. On this basis the Government submits that the prevention of crime and malpractice in the slot machine sector is an integral and legitimate part of the objectives of the reform.

9.7 Enforcing the 18 year age limit

820. It is indisputable that under the former slot machine regime, the 18 year minimum age limit has not at all been effectively enforced. Surveys show that slot machine gambling is widespread amongst minors, and the phenomenon is easy to see in everyday life. This is the responsibility both of the location owners and of the operators and license-holders, for not insisting upon and checking that the limit is respected.

821. Enforcing the 18 year age limit more effectively is one of the stated objectives of the slot machine reform. One of the ways of doing this is by radically diminishing gambling opportunities for minors, by reducing the number of future machines available in places minors may go, and locating a larger proportion in places with effective age controls, such as bars and restaurants.

822. This objective and the way in which it will be achieved forms a consistent and integral part of the reform. It is also clearly the one objective which is the least related to the choice of model. In principle increased enforcement of the 18 year limit may also be envisaged under alternative models, within a more liberal regulatory framework.

823. Having said that, the Government still holds that the existing exclusive rights system is likely to be much more effective in terms of enforcing the age limit, as compared to an alternative market regime. The present operators (and licence-holders) have themselves blatantly demonstrated a lack of ability and responsibility in this regard, which is probably to a large extent explainable by economic factors. By way of contrast, the Government has made it very clear to Norsk Tipping that it expects the age limit to be respected, and it has every reason to believe that this will happen in a way which the private operators would never in practice be able to – both because Norsk Tipping will have better procedures for supervision and control, because Norsk tipping will apply

much harder pressure on location owners, and because Norsk Tipping will have no incitement of its own to break the rules.

9.8 Eliminating private commercial profit as a market incentive

824. Preventing the operation of gambling from being a source of private commercial profit is an ancient principle in Norwegian gambling legislation and policy, as described above in section 3.2. This is not particular to Norwegian tradition, but can be found in many countries, even in traditionally quite liberal countries, such as the UK, which referred to this principle in its defense in the 1994 Schindler case. As demonstrated in section 7.2 this was accepted by the ECJ as a separate legitimate objective, and this has later been upheld and repeated in later judgments, see Schindler (60), Läärä (13) and Zenatti (30).

825. The historical reason behind the principle that private commercial profit should as far as possible be excluded from the gambling sector is probably threefold. First, there are moral aspects to this. Private persons should not profit from the misfortune of others. Second, private profit is the most important market incitement, and should therefore be suppressed or excluded if the aim is to contain gambling. Third, national legislators have traditionally wanted to reserve gambling revenue as a source of income for charitable and socially beneficial causes.

826. The importance of eliminating private commercial profit as a market incentive is part of the argument of the Ministry in chapter 4.4.4 of the March 2003 Bill of Enactment, on why the exclusive rights model is superior to a regulated market regime. This argument is quoted in section 4.4 above, and it was later approved by the parliamentary majority.

827. Analyzing the arguments in the preparatory works, it is clear that the legislator saw the elimination of commercial operational profit only as a means by which to achieve the overall aim of curbing gambling volume and making the sector more responsible, which in turn are prerequisites for reducing slot machine addiction in society. The intention stated is to eliminate the market incentive – not to condemn “profit” as such.

828. This is the original legislative intent in this regard, which is recognized by the ECJ as a legitimate public requirement in the gambling sector – whether one sees this as an “objective” in itself or as a means by which to achieve other legitimate objectives.

829. While the moral argument against private commercial gambling profit was not raised in the original legislative deliberations on the reform, the Government holds that it is still from a more objective perspective an interesting and relevant point to the case. The alternative presented by the slot machine reform is clearly more morally sound than the way in which the former market regime had operated, and this is a supplementary and legally legitimate advantage of the reform, which is also consistent with old and established principles of national gaming and lotteries policy.

830. In its Application the Authority seems to argue that eliminating private profit can not be a legitimate requirement.[192] The argument is that to accept this would be “fraught with

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[192] Cf. p. 90 (paragraphs 338-339) of the Application. The argument is not quite clear. It is introduced as part of the proportionality assessment, but the question which the Authority primarily addresses is whether the elimination of private

danger", and would mean that member states "would be given a blank cheque to introduce state monopolies in basically all sectors". This is a curious argument. The reason why the elimination of private profit might be a legitimate consideration in itself is quite specific to the gambling sector, and follows from the moral and ethical character of this sector. This is the reason why the prevention or elimination of private profit might be a legitimate end in itself in the gambling sector, something which is explicitly recognized by the ECJ as legitimate in Schindler, Läärä and Zenatti. It is not an argument which is transferable to other sectors of the service economy.

831. Apart from this, the prevention or elemination of private profit is not an end (or a public consideration) in itself, but as demonstrated above an effective *means* to achieve other ends, namely to restrict and diminish gambling volume and opportunities. Once again this argument is quite spesific to the gambling sector. In normal sectors of the economy the authorities have no legitimate interest in restricting activity. In the gambling sector the oppositie is true. Here the restriction, diminuation and moderation is in itself a legitimate aim. In this situation the elemination of market incenticves, such as private commercial profit, becomes an effective and efficient means by which to achieve this aim. The legitimacy of this is recognized both in Läärä and Anomar.

832. Based on this, the Government holds that the elemination of market incentives through a public exclusive right is a recognized and effective way of diminishing gambling opportunities, as well as a certain moral consideration in itself.

9.9 Limiting the reduction in revenue to socially beneficial and humanitarian causes

833. Another legislative objective behind the slot machine reform was to find a solution which to some extent took into account the interests of the 3,500 charitable and socially beneficial organisations and associations which would loose their slot machine licenses under the Lottery Act, and thereby a source of income upon which many of them are more or less dependent.

834. These organisations include a limited number of large licence-holders – amongst them the Norwegian Red Cross, Redningsselskapet (the Lifeboat Association), Redd Barna, Kreftforeningen, Handikapforbundet, Norges Skiforbund, Landsforeningen for hjerte- og lungesyke and Norges Blindeforbund – and a large number of small and often local organisations and associations holding one or two licenses (local sports clubs, musical associations, etcetera).[193] They are all worthy causes, of great benefit to society, but they belong to the "civil society", for which the state has not taken economic responsibility. They are not part of the state finances, nor should they be, nor has there ever been any plan to make them so.

835. Any radical reform of the slot machine market, aimed at substantially reducing gambling opportunities and volume, necessarily means reduced income for the license-holding organisations. For the authorities it was clear that this had to happen. At the same time they saw that this necessary reduction could be limited under the existing

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profit can be a legitimate consideration under Community law. (If the answer is affirmative, then it will later be another question whether a restriction based on such a consideration is proportionate).

[193] See section 3.4 above for a more detailed description.

exclusive rights system, if the former licence holding charitable and socially beneficial organisations were instead given a percentage of the revenues of Norsk Tipping, under the statutory distribution scale, alongside sports and culture.

836. The way in which the Ministry came to this solution, in cooperation with the major licence holders, is described above in section 4.3. In the Ministry's view it was – and is – the ideal solution, which has the combined effect of diminishing slot machine gambling drastically while still not ruining completely most of civil society. It also meant that the organisations would not oppose the reform, something which was important for the minority government in order to get any substantial reform enacted. For the organisations the solution was a deal under which they would accept the loss of their slot machine licenses without protest, and under which they would also have to accept a substantial reduction in income as compared to the 2002 (and even more the 2003) level, but under which they would instead have the stability of annual transfers from Norsk Tipping, and under which they would also be free from the increasing moral difficulties of holding slot machine licenses in the face of rising gambling addiction.[194]

837. As earlier described, the point of departure for the calculations that followed were the 2001 figures. Norsk Tipping had ensured the Ministry that even with a 40 % reduction in gambling volume, as compared to the 2001 level, the revenues from the machines available to be channeled to worthy causes would be at approximately the same level as in that year, which was 933 million kroner. This sum was therefore used for calculating the future percentage of the total revenue of Norsk Tipping which should go to the former license holding organisations, and the resulting number was 18 %.

838. The economic reason why the authorities could promise to reduce slot machine gambling volume drastically with a much smaller proportional reduction in transfers to worthy causes is twofold. First, the solution means that the private commercial operating profit is eliminated, as Norsk Tipping keeps nothing for itself. Thus, the former "commercial" share will in the future go instead to the non-commercial causes. Second, Norsk Tipping will be able to operate the future diminished machine sector at far lower cost than the present 138 operators, and the increase in revenue from lower costs will also directly benefit the benevolent causes.

839. This was the economic element of the slot machine reform, or the "financial considerations", as the Authority calls it. It was not in any way hidden, as alleged by the Authority.[195] On the contrary it was openly stated in the Bill of Enactment that the reform sought to secure the former license holding organisations a level of revenue directly from Norsk Tipping at approximately the 2001 level, and in chapter 4.6 on "Distribution of profits" quite elaborate calculations on this are included. In the June

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[194] Even when the reform was first discussed with the organisations in the autumn of 2002 it was clear to them that it would mean a reduction in income, as compared to the 2002-level. And this was even clearer in the spring of 2003, during the parliamentary process, where many of them tried to change the figures to a 2002-level, or even a 2003-level. Paragraphs 220-221 on the Authority's Application (p. 59) is therefore misleading, as commented upon above in section 4.7.

[195] Cf. the Application p. 56 (para 207), where the Authority asserts that the statements on the objectives of the reform in the Bill "are few and somewhat contradictory" and that it is therefore necessary to look into "the entire legislative history" in order to find "the genuine objectives behind the restriction". This is wrong on all points. First, the Bill has extensive sections on the objectives of the reform. Second, there are no hidden "genuine objectives". And third, the scrutiny of the Authority on pp. 56-59 reveal nothing on the economic considerations behind the reform which is not clearly stated in the Bill and the Committee Recommendations.

2003 Committee Recommendations the parliamentary majority includes this objective in its overall discussion in the following manner:

> The majority believes that the exclusive rights model is a prerequisite for the most socially defensible organisation of the gaming machine market in Norway. In this regard it is important that exclusive rights for Norsk Tipping AS should entail the best possible opportunities for inspection and that the machines' functionality can be changed rapidly, as knowledge of which factors increase the risk of gambling addiction grows. Through the benefits of rationalisation this model will also secure the government's goal of a reduction in the number of machines to 10,000 and ensure a significant reduction in total machine turnover, at the same time as the profits to the socially beneficial and humanitarian causes are maintained at the 2001 level.[196]

840. This quote from the Committee's recommendation shows well the way in which the "economic" concern to limit the necessary reduction in charitable income was part of the legislative considerations upon which the reform was decided. It was not the main objective, but it was one of several supplementary objectives. It was not "hidden", and indeed it was no reason to do so, as it was and still is considered perfectly sound and legitimate by the authorities.

841. The economic reality of the reform is that the sharply diminished revenue generated under the exclusive rights model will go to the *same* charitable organizations which today hold the licenses for slot machines, but in the future channeled through Norsk Tipping. No one else will profit from the reform, and no revenue will go into the state coffers.

842. The legitimacy of this under EEA law was acknowledged by the Court of Appeal. After describing the "dominant" objective, namely to combat compulsive gambling, as well as describing several other objectives, the Court went on to comment upon the allegations of illegitimate "financial" considerations:

> As is seen in the Norwegian preparatory works, there is also a desire behind the monopoly model to minimize the reduction of revenues to the socially beneficial and humanitarian organisations. The Court of Appeal does not consider this to be decisive grounds for the restriction, but as a supplementary objective that it must be admissible to afford meaning to in the total assessment. Reference is made in this connection to the Court of Appeal's understanding of the Zenatti ruling's premise 36 and the Gambelli ruling's premise 62 (…). The Court of Appeal also refers to that the monopoly model will not result in any increase in the socially beneficial and humanitarian organisation's revenues, but will on the contrary represent a reduction in revenues in comparison to the current level. Reference is made to the preparatory works, where it can be seen that the organisation's revenues are premised to remain at the 2001 level, cf. page 6 of the bill (…) and the recommendation, page 18 (…). The Court of Appeal points out in connection with this that in 2001 the gross turnover for pay-out machines was approximately 9 billion kroner, while turnover was approximately 26 billion kroner in 2004 (…). Otherwise it is noted that the present case differs from the Gambelli case, where the situation as previously mentioned was that the Italian authorities had made arrangements for an increase in gambling in order to increase revenues to the state.
> The Court of Appeal finds in accordance with the above that the Norwegian restriction is based on legitimate grounds.

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[196] Cf. **Annex 11**, Recommendations to the Odelsting (Innst.O.) no. 124 (2002-2003) chapter 2.4.1, as more extensively cited above in section 4.5.

843. The Government holds that this assessment is correct. To be even more precise, the Government holds that the "economic" concerns behind the reform are irrelevant to its legitimacy under EEA law for two reasons, each of which is sufficient:

1. The objective of the Norwegian legislator in this case, to limit the future reduction in income to the charities loosing their slot machine licenses by ensuring that they will still receive revenues under the new arrangement, albeit at considerably reduced levels, is not an illegitimate "financial" consideration under EEA law, and therefore not subjected to the test stated in Zenatti and Gambelli. In these cases, the issue was how to evaluate restrictions leading to increased income for national purposes, and this does not bear any relevance for situations in which revenues will (i) be reduced, and (ii) still benefit the same causes as before.

2. If the present objective is to be assessed under the Zenatti formula, then it is clear that it is merely "an incidental beneficial consequence and not the real justification for the restrictive policy adopted". It is not the main motive for the reform, but merely one of several supplementary motives, the rest of which are clearly legitimate in themselves. The concern to limit reductions to charitable causes is in itself worthy and commendable, but it is not necessary under the EEA judicial test in order to establish an objective justification for the adopted new restriction.

9.10 Summary and conclusion

844. The 2003 parliamentary slot machine reform was based on a set of public considerations. The dominant legislative concern was to fight gambling addiction, but the reform also aimed at sharply reducing the volume of slot machine gambling, strengthening public control and responsibility, preventing crime and malpractice, enforcing the 18 year age limit, and eliminating private commercial profit as a market incentive. These objectives should be assessed together under EEA law, and as a whole they clearly form a sufficient and legitimate basis for the reform.

845. The reform also included a solution under which the reductions in income for the former charitable and benevolent license-holders would be limited, and under which they would still receive revenues, through Norsk Tipping, albeit at a lower level than before. This does not constitute an illegitimate "financial" concern under EEA law. And even if it did, it was still only a supplementary and accessory objective for the legislator, which was not "the real justification" for the reform, and which is not an indispensable part of the original legislative intent and justification for the reform.

846. Finally, even if one should assume that the economic considerations of the reform are (i) to be regarded as illegitimate "financial" considerations, (ii) that they were decisive for the adoption of the slot machine reform, and (iii) that they form a necessary part of the original legislative intent – then one must still ask whether this original legislative intent is necessarily decisive in order to assess the *objective* justification for the reform. This is the Finalarte-test, and the Government holds that under such a test the reform is still eminently justifiable, regardless of original legislative intent, and for the same overriding public requirements as those stated in section 9.2 to 9.9 above.

10. THE SUITABILITY AND CONSISTENCY OF THE REFORM

10.1 The legal test – "suitability" or "consistency"?

847. If the EFTA Court agrees with the Government that the 2003 slot machine reform is based on legitimate public requirements, the next question is whether it is also a suitable measure in order to achieve these aims.

848. Before the EFTA Court can review this, it must first consider what is the correct legal test of suitability in the gambling sector. In the first four gambling cases the ECJ applied a traditional test of suitability, and it did so in a careful manner, instructing the national courts to leave national authorities a wide discretion as to which measures are most suitable in order to contain gambling problems.

849. In the Gambelli case, however, the ECJ increased the level of judicial review by holding that in order to be suitable, a national gambling restriction must "serve to limit betting activities in a consistent and systematic manner".[197]

850. How this new legal criterion is to be interpreted and applied is not quite clear, and there is little guidance to find in the earlier case law of the ECJ. A search in the Court's register of all cases handed down since 1997 reveals that the Gambelli judgment seems to be the only ruling in which the Court has used the phrase "consistent and systematic". Yet, this single reference is enough for the Authority to conclude that the ECJ has formulated an entirely new and far-reaching "test" unique to the gambling sector – an area of law in which there is consensus that the Member States enjoy a particular broad margin of discretion. And furthermore that this test should be applied to all gambling cases, not only cases resembling Gambelli, but also cases similar to for example Läärä and Anomar – such as the present case.

851. The Government does not agree. Read and interpreted in its proper context, it is clear that the "Gambelli formula" is not a new general criterion, and it does not in general limit the traditional discretion of national authorities to decide which measures are most suitable for protecting legitimate public concerns in the gambling sector.

852. In order to understand this, it is necessary to examine the context in which the Gambelli formula was introduced by the ECJ and in particular the issues which the national court was required by the ECJ to take into account when assessing the consistency and systematic nature of the Italian restrictions.

853. "In that regard", the Court stated, "the national court […] has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licenses" (para 68). The ECJ tersely noted in response that the Member State cannot invoke public order concerns under such circumstances, and indicated that the national court should assess

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[197] Cf. Gambelli para. 67, as described earlier in section 7.2.

more closely the justification for the national measures and whether they were discriminatory (paras 69-71).

854. Against this background, it appears likely that usage of the words “consistent and systematic” actually corresponds to the similar and more familiar, but less diplomatic notions of ’arbitrary discrimination or a disguised restriction’, cf. Article 30 EC by analogy. This rhymes also with the fact that Gambelli is to date the only gambling case in which the Court has formulated a consistency-test, while also being the only case where the referring national court explicitly invited the ECJ to consider what it described as arbitrary and discriminatory features of the national legislation.

855. Such a conclusion is corroborated by a recent ruling from 2004, Commission v. France, which was rendered after Gambelli.[198] Seemingly inspired by Gambelli, the Commission attempted to challenge French restrictions on alcohol advertisements with claims of inconsistency.[199] There were no indications that the French rules were discriminatory. The ECJ did not venture into any “consistency” evaluation. Instead it merely responded to the inconsistency claim by holding that:

> [I]t is sufficient to reply that that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved. (para. 33)

856. On this basis the Government submits that in the absence of any indications of arbitrary discrimination or protectionist intention, the ECJ will also in the gambling sector confine itself to the traditional review of suitability, in respect of which it is for the Member States to decide on the degree of protection and on the way in which that protection is to be achieved.

857. In other words, Gambelli para 67-69 is *not* to be interpreted as a general shift in the gambling sector, which must be applied equally to all kinds of national restrictions. It is rather a particular test, designed for use in those cases in which there is reason to suspect that the contested restriction might have a discriminatory character.

858. In the present case this is not so. Even the private commercial parties in the national proceedings did not really claim that the 2003 reform is discriminatory in character, and the Government can find no such allegations in the Authority’s Application.

859. On this basis the Government submits that it is clearly sufficient for the EFTA Court to conduct its review according to the traditional criteria for reviewing suitability, and not extend its judicial review into the vague and uncharted concept of “consistency”.

860. If the EFTA Court agrees, then the suitability test can be conducted quickly, and the result is clear, as demonstrated below in section 10.2. If not, then further interpretation of the consistency concept is needed (10.3). It is conceivable to interpret the test both in a confined and manageable manner (10.4) and in a much wider and more unruly way (10.5). The result in the present case is however not dependent on legal interpretation,

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[198] Case C-262/02 *Commission v. France* [2004] ECR I-1795.

[199] More specifically, the Commission alleged that the French rules were inconsistent since they only applied to alcoholic beverages exceeding 1.2°, concerned only television advertising, and did not apply to advertising for tobacco.

since the slot machine reform is clearly consistent and systematic, both in itself and as part of a general national policy and regulation aimed at limiting gambling activities.

10.2 The correct test – the suitability of the reform

861. Under a traditional suitability-test the Government submits that the 2003 slot machine reform is well suited to achieve the legislative objectives listed and described above in section 9. The Government can not see how this can be contested, nor can it see that the Authority has really tried to do so.

862. The Government submits that the reform passes the traditional suitability-test regardless of the degree of intensity with which the EFTA Court should choose to perform its judicial review. It should however be noted that the ECJ in its gambling case law has been clear on the point that it is primarily for the national authorities to assess which measures are best suited to address gambling problems and problem gambling. This has been the consistent approach of the ECJ in Schindler (61), Läärä (35), Zenatti (33), and Anomar (87):

> [I]t is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, *to determine the means which they consider most suited to achieve them* and to establish rules for the operation and playing of games, which may be more or less strict […] and which have been deemed compatible with the Treaty.[200]

863. Furthermore, even if it otherwise holds that this is for the national legislator to decide, the ECJ in Läärä still went out of its way to expressly state that a public exclusive rights system is suitable for achieving public policy requirements in the gambling sector, such as control and confinement of gambling, and the prevention of crime and exploitation. The appellants in the case had stressed the fact that the Finnish legislation did not entail a prohibition, and questioned whether a restriction in the form of an exclusive rights system was suitable for achieving the purported aims. The Court gave this argument short thrift and held that an exclusive rights arrangement for slot machine operations was a *per se* suitable measure:

> 37. […]. Limited authorisation of such games *on an exclusive basis, which has the advantage* of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.[201]

864. Hence, the Court has found that it is for the national authorities to assess the suitability of national measures intended to restrict gambling problems, and has explicitly added that exclusive rights systems such as the present are indeed suitable for achieving those aims. The matter must be deemed *acte éclairé* and clearly fulfilled in this case.

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200 Cf. Anomar para 87 (emphasis added).
201 Cf. Läärä para 37 (emphasis added). The same wording was used in Zenatti para 35.

10.3 The "consistency-test" – what is the content?

865. When read and interpreted in context, the Government holds that it is highly unlikely that the ECJ in Gambelli actually meant to introduce the requirement of "consistent and systematic" as a new general criterion for assessing the suitability of all kinds of national gambling restrictions, in all kinds of cases, even those in which there is no reason to suspect national authorities of arbitrary discrimination or protectionism.

866. In particular, it is not likely that the ECJ meant for the new consistency test formulated for use in Gambelli to be also applied in general on the kind traditional public exclusive rights arrangements such as the one earlier recognized in Läärä.

867. Should the EFTA Court choose to apply a "consistency-test" on the present case, the Government therefore holds that this would mean extending judicial review in the gambling sector much further than previously called for by the ECJ.

868. It would also be a difficult test to determine more precisely. The remarks of the ECJ in Gambelli paras 67-69 are short and clearly influenced by the apparent suspicion declared in para 68. Furthermore there is little or no guidance to be found in other parts of the case law of the ECJ, certainly not in the other gambling cases, but even not in the more general case law, since the concept of "consistent and systematic" has not been used in other cases neither before nor after November 2003.[202]

869. In the absence of authoritative legal sources, the Government holds that the consistency test laid down in Gambelli can basically be interpreted and applied in two rather different ways.

870. The first alternative is to test whether the contested national gambling restriction is "consistent and systematic" *in itself*, meaning that it does not contain elements which are contradictory or arbitrary – typically by both restricting and expanding gambling at once. This, it must be remembered, was the suspicion in Gambelli – that the national authorities were expanding gambling opportunities for Italian concession-holders of sports betting while at the same time imposing new and stricter criminal punishment on the agents of foreign bookmakers. This kind of confined consistency test is manageable within the usual limits of judicial review.

871. The other alternative is to test whether the contested national gambling restriction forms a "consistent and systematic" *part of the wider* national gambling policy and regulation in a way that serves to limit gambling opportunities. One part of this could be to test whether the contested restriction systematically fits into the existing legislation and policy or whether it derogates from this, in such a way as to increase gambling. Another part might be to test national regulation and policy itself is aimed at limiting gambling. But a more probable interpretation would be to test whether the contribution of the

[202] The lack of other legal sources which might help in interpreting and understanding the concept "consistent and systematic" is apparent in the Authority's discussion on this legal "test", on pp 60-63 (paras. 226-236) of the Application. Except for quoting the ruling paras 67 and 69 (omitting para 68 on the national characteristics) the only reference is to the opinion of GA Alber in the same case. First, his opinion was not followed by the ECJ in this case. Furthermore, the last part of the passage quoted refers to the factual characteristics of the Gambelli case, under which 1000 new concessions were given, all of them to Italians, in order to substantially increase gambling. By comparison, in the present case 3.500 organisations, all of them Norwegian, are to *loose* their licenses, in order to substantially *reduce* gambling. The rest of the section on the "legal test" is the Authority's own opinions and arguments – to which the Government disagrees.

contested restriction to overall national policy serves to limit gambling activity in a way which is consistent with the systematic structure of the wider national law and policy.

872. To interpret Gambelli in such a way puts a formidable task upon the courts which are to exercise judicial review, Not only will they then have to study and assess the contested restriction, but they will in fact have to study and assess all other aspects of national gambling law and policy as well, to evaluate whether the contested restriction contributes in a consistent and systematic manner to the overall aim of limiting gambling opportunities. To make such an evaluation requires a degree of insight into national law and fact which is difficult even for the national courts to obtain.

873. The Government submits that these are the two basic interpretations possible as regards the "Gambelli test", if it is really to be applied as a general test, on all gambling cases, on all kinds of national restrictions, whether or not there is suspicion of discrimination.

874. One interpretation which the Government strongly submits is *not* possible, is the one suggested by the Authority, which is both wide and narrow at the same time. It is in one sense a very wide test, as it is not confined to the contested restriction. In fact the Authority hardly makes any mention of the slot machine reform at all in section VII.3 (pp. 60-83) on consistency. The section is titled "The consistency of the Norwegian gaming policy", and the criticism is directed at the "authorities' approach to gaming addiction" (para 236), which the Authority claims is inconsistent because it allows for (i) marketing and (ii) expansion of other games and lotteries under the exclusive rights model. So it is a *wide* perspective, because it is all about general policy. But at the same time it is a very *limited* perspective, because it narrows the test down to just two elements of general policy, namely the marketing and development of the games offered by Norsk Tipping and the Norsk Rikstoto Foundation. And it is finally a very *detached* perspective, as it only discusses marketing and development of other games than slot machines, without relating to the reform, and assessing the consistency of the reform, neither in itself nor as part of broader policy.

875. In other words, what the Authority does is first to inflate the Gambelli test so as to cover national gambling policy in general, and then narrows in down again to the two elements of which it disapproves, but which in fact bear no direct relation to the contested reform. The approach is very selective and biased, and this is made even worse by the fact that the Authority then exaggerates and misunderstands both the issue of marketing and the alleged "expansion" on the gaming portfolio of Norsk Tipping and Norsk Rikstoto.

876. The Government submits that if the EFTA Court is really to exercise judicial review according to a wide interpretation and application of the Gambelli formula, then it must consider *all aspects* of Norwegian gambling law and policy, not just the two elements criticized by the Authority. And it must do so in relation to the slot machine reform, which is the subject of the case. Such a review will give a completely different picture than that drawn by the Authority, as shown below in section 10.5.

877. But the probably more correct way of interpreting the Gambelli formula is the more limited one – reviewing whether the reform in itself in a consistent and systematic way serves to limit slot machine gambling opportunities.

10.4 The slot machine reform as a "consistent and systematic" restriction in itself

878. The Government submits that when the ECJ formulated the Gambelli test, it was questioning a national set of rules (on sports betting) which were at the same time very liberal (for national license-holders) and very restrictive (for others), and which had also recently been amended so as to increase the volume of betting, while also increasing criminal punishment on the cross-border offering of sports betting from another country (in which this activity is legal). This was not enough for the ECJ to declare the contested legislation unsuitable, as proposed by the Advocate General. But it was enough for the Court to instruct the national courts to review whether the legislation really did contribute to limiting betting in a consistent and systematic way.

879. On this basis, the most natural way to interpret the test is that the courts should assess whether the contested restrictions in themselves are consistent and systematic in their approach to limiting betting opportunities. This is also in conformity with the wording in para. 67, which states that "…restrictions … must also be suitable … inasmuch as *they* must serve to limit betting activities in a consistent and systematic manner".

880. In the present case, the Government submits that there can be no doubt that the 2003 slot machine reform in itself serves to limit slot machine gambling activities in a consistent and systematic manner.

881. The main objective of the reform is to fight problem gambling caused by slot machines, and this is to be achieved in a consistent and systematic manner, by both reducing the volume of such gambling and by ensuring that the remaining activity is of a far less aggressive and addictive form. These are integrated and consistent elements, which pulls in the same direction, towards the same overriding requirement.

882. The main element of the slot machine reform is the transferal of slot machines to the exclusive rights arrangement operated by Norsk Tipping. If this new restriction had been combined with a sharp increase in slot machine gambling, then questions could perhaps have been raised about "consistency". But this is not so. As it is, there is perfect consistency between the introduction of the exclusive rights system in the slot machine sector, and the aim of radically reducing slot machine gambling. The following elements also form consistent and systematic parts of the same:

- The reduction in the number of machines
- The new and stricter technical requirements
- The new and stricter rules on location
- The new and stricter principles of public control and instruction
- The assuming of direct public responsibility for a problematic activity

883. The reform is also "systematic" in the sense the slot machines are transferred to the existing system of the Gaming Act, which regulates the other major forms of gaming.

884. On this basis the Government submits that the contested reform in itself is designed to limit gambling activity in a consistent and systematic manner.

10.5 The reform as a consistent and systematic part of national gambling policy and legislation

885. What remains is to see whether the slot machine reform also integrates into the general national law and policy on gambling in a way which consistently and systematically contributes to limit gambling opportunities. This is a far broader perspective, under which it is necessary first to analyze the contested restriction (the reform), then all the other elements of national gambling law and policy, and then to review the relationship between them, to see if the contested reform fits consistently into a broader system aimed at limiting gambling opportunities.

886. It must be emphasized that the Government does not hold this to be a required or even sensible interpretation of the Gambelli formula. Having said that, the Government has no problems with applying this kind of test. The fact is that the deeper one goes into Norwegian law and policy in the gambling sector, the more obvious it becomes that the 2003 slot machine reform not only forms a consistent and systematic part of this overall law and policy (aimed at limiting gambling), but that it is in fact *the most* consistent measure adopted by the national legislator in many years.

887. The Government holds that the reform may be evaluated on two levels, as:

- A consistent and systematic part of traditional gambling law and policy
- A consistent and systematic part of recent developments in gambling law and policy

The reform as a consistent and systematic part of traditional gambling law and policy

888. The traditional Norwegian gaming and lottery sector is earlier described in detail in section 3, including an overview of the relevant legislation in section 3.1 and an analysis of the main principles and instruments in section 3.2. The way in which this sector has functioned can be deducted from the figures in section 3.3, showing moderate growth over the years, and from the description of problem gambling in section 3.5, which indicate that there was very little problem gambling in Norway until the rise in slot machine gambling in the 1990s, and that problem gambling today is not caused by the other games and lotteries offered under the traditional system, but by the slot machines, and to some extent by internet gambling offered from abroad.

889. The traditional legal framework in the gambling sector is also regulated in a consistent and systematic way. The basic rule is that it is prohibited to offer gambling services unless explicitly allowed under statutory law. There are then three such statutes; the 1927 Totalisator Act, the 1992 Gaming Act and the 1995 Lottery Act. The traditional major games and lotteries are regulated under the strict exclusive rights arrangements of the Gaming Act and the Totalisator Act. The Lottery Act is more liberal, though only charitable and benevolent organisations may receive licenses. This Act has traditionally served to regulate the small and medium size lottery schemes allowed for charitable and beneficial purposes (including traditional lotteries, scratch cards, bingo and etcetera).

890. The Norwegian Government submits that this traditional system of gaming legislation and policy over the years and on the whole has served well to limit and confine gambling in a consistent, systematic and effective manner, as well as to channel gaming desire into the least harmful outlets.

891. The one blatant exception is the development of the slot machine sector. This is a recent phenomenon. The old kind of mechanical slot machine (the “one-armed bandit”) was forbidden in Norway, and the only machines allowed were the “coin-flick” machines, which were not even considered to be a “game of chance”. The technological development of new electronic slot machines in the early 1990s caught the Norwegian legislator unprepared, and when legislation was passed in 1995, these machines were subjected to the relatively liberal regime of the Lottery Act. As described in section 4.2 this was at the time natural, as turnover was very modest. With hindsight, it is clear that it was a mistake not to subject the new kind of slot machines to the stricter exclusive rights regime of the Gaming Act even then (as was done in Sweden in 1997).

892. In the years following 1995 there has been an explosive growth in slot machine gambling, as described in section 3.4. From being a marginal form of game, the machines have developed into by far the major one, with 65 % of the gross turnover market in 2005. This has been followed by an almost parallel rise in problem gambling, as described in section 3.5. Until ten years ago gambling addiction was a marginal occurrence in Norway. Since then it has become a major problem – and this is almost entirely caused by the slot machines.

893. The only major *inconsistency* in the Norwegian gaming and lotteries sector in the past decade has been the way in which slot machines have been regulated and functioned. The legal framework of the Lottery Act has simply not been strict enough to confine a form of gambling which is potentially as aggressive and addictive as the slot machines, and this regulatory weakness has been exploited to the full by the private (charitable and commercial) actors.

894. The reform presented by the Government in March 2003 and adopted by Parliament in June the same year repairs this inconsistency. Transferring the operation of slot machines from the Lottery Act to the Gaming Act means that they will be subjected to the same strict legal regime as the other major forms of gambling in Norway. By using the existing public exclusive rights model, the legislator made sure that slot machines will in the future be integrated into the normal systematic structure of Norwegian gambling regulation. Under the regime of Norsk Tipping the operation of machines will in the future take place within a public framework which has over decades proved that it is moderate and responsible.

895. On this basis the Government submits that the 2003 slot machine reform fits in very well as a consistent and systematic part of traditional national law and policy in the gambling sector. Not only that, but the reform actually repairs the one major inconsistency in the sector, which has been the explosive growth in slot machine gambling and the corresponding rise in gambling addiction in recent years.

The reform as part of a consistent and systematic review of gambling policy in recent years

896. The 2003 slot machine reform not only contributes to traditional gambling law and policy in a consistent and systematic manner, but it also forms a consistent and systematic part of recent developments in this sector, which are aimed at confining gambling opportunities and fighting problem gambling.

897. As described in detail in section 5 national gambling policy has in recent years been going through a process of review and reform, which has led to increased awareness and stronger support for the traditional restrictive principles upon which it was originally founded. This was a reaction partly to national developments in the 1990s and partly to influences from abroad, as well as to technical development and new actual and legal challenges.

898. This process started around 2000, and a first major sign was the establishment of the Gaming Authority in 2001. The main step was however the White Paper of March 2003, Ot.prp. nr. 44 (2002-2003), which was the first overall review of gambling policy in a decade, as well as the most thorough ever to be presented to parliament. The main proposal in this bill was the slot machine reform, but there were also a number of other proposals and discussions, as described in section 5.2. The overall perspective of the White Paper was to ensure that gaming and lottery should continue to be a confined, moderate and responsible sector, with limited gambling opportunities. This was approved of by a broad parliamentary majority.

899. In this way, the 2003 reform was prepared and adopted not as an isolated measure, but as part of a consistent and systematic political and administrative initiative aimed at confining gambling opportunities. The reform was in fact not only part of this, but a main pillar, around which other lesser initiatives were constructed.

900. In this perspective, the postponements of the slot machine reform caused by the legal actions of the commercial operators and the Authority are highly regrettable, and it means that the single most important element of the new and stricter gambling policy has not yet been implemented.

901. The most important of the other elements and developments in recent gambling policy are described in some detail in section 5.3, and they include:[203]

- The establishment and strengthening of the Gaming Authority
- The establishment of the Helpline
- The Government's action plan against gambling addiction
- Increased research on problem gambling
- Royal Decree with instructions for the marketing of Norsk Tipping and the Norsk Rikstoto Foundation
- Revised and tightened control of Norsk Tipping

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[203] Some of the elements mentioned are measures enacted after the December 2004 expiry of the time limit for responding to the reasoned opinion of the Authority. The Government submits that they are still of direct interest and relevance to the case at hand, even if the main principle is that the EFTA Court must determine the case with reference to the situation at the end of the time limit for responding to the reasoned opinion, cf. case E-3/00 para. 39. There has been a continuous and consistent development in Norwegian gaming and lotteries policy since the presentation of the White Paper in March 2003, and most of the later decisions are directly related to this, and constitute a follow-up. Thus, they were very much in the pipe-line in the autumn of 2004.

- The refusal to allow for interactive internet gambling in Norway
- The refusal to allow for development of interactive SMS-gambling
- The refusal to allow for a proposed "bottle deposit lottery"
- The new regulations on network marketing companies ("pyramidespill")
- The consistent refusal to allow casinos in spite of frequent proposals
- The consistent refusal to allow for gambling on credit
- Continuous (but difficult) assessments on how to meet Internet gambling

902. On this basis the Government submits that the 2003 reform is an integral and important part of a more general consistent and systematic national gambling policy aimed at confining gambling opportunities and fighting gambling addiction.

The Evaluation of the Court of Appeal

903. This was also the conclusion of the Court of Appeal, after extensive argument and presentation of evidence from both sides on the consistency-issue:

> The Court of Appeal is also of the opinion that the Norwegian restriction must be deemed to contribute in a coherent and systematic way to limiting gambling activities cf. the stated requirements in the Gambelli ruling premise 67 (…).
>
> The Court of Appeal agrees with the State in that Norwegian gambling legislation – in relation to legal rules and their enforcement – will have a more coherent and systematic structure when pay-out machines are transferred from the Lottery Act to the Gaming act. Thus gambling on pay-out machines will be transferred from under the auspices of the act that regulates private gambling and lotteries to the act that regulates State-controlled gambling and that for many years has been a monopoly for Norsk Tipping. Gambling on pay-out machines can, on the basis of its character, best be compared to the other major and in part problematic games that are already regulated under the Gaming act. The Lottery Act will then be left with more or less "safe" games.
>
> The introduction of the Norwegian restriction will also contribute in material terms to reducing gambling activities in a coherent and systematic manner. As the Court of Appeal sees it, one must take the starting point that the tradition in Norway has been the objective of limiting the extent of gambling. The account the Court of Appeal has given above, (…), on Norwegian legislation in the gambling and lottery sector, shows that accountability and moderation are basic principles. As pointed out by the State there has been – as a result of the vigorous growth in gambling activities and in particular gambling on pay-out machines in recent years – an increase in awareness and tightening of the authorities' policy in the gambling sector, through among other measures the establishment of the Lottery Gaming Board (in 2001), an increase in research into compulsive/habitual gambling (research project commenced in 2001) and the Lottery Gaming Board's proposal for a plan of action to combat compulsive/habitual gambling (December 2004). It is against this background that that the introduction of a state monopoly must be viewed.

On the consistency objections of the Authority – marketing and expansion

904. Even though the title of section VII.3 in the Application is "The consistency of the Norwegian gaming policy", which implies a broad and general perspective, the many elements of this policy described above are not discussed by the Authority. Instead it

narrows its discussion down to two factors – the marketing and so-called expansion of the gaming activities of Norsk Tipping and Norsk Rikstoto.

905. The Government does not object to including these two elements if one chooses to apply a very wide test. It does however hold that in the present case they are of a rather detached nature, and of little more than marginal relevance to the “consistency” of the contested measure. Had there been plans for marketing and expansion of slot machine gambling, this would have been different. But the marketing and development of *other* games, most of them of a traditional and non-addictive nature, and none of them related to slot machines, is a different question.

906. The Government does however object to the fact that these two elements are the only ones chosen by the Authority, while other elements of national law and policy which are more important and far more related to the contested reform are dismissed or ignored. This was the tactic of the commercial operators before the national courts. It is more distressing to see the same approach taken by the Authority.

907. The Government also objects to the description of the marketing and development of the gaming and lotteries offered by Norsk Tipping and Norsk Rikstoto, which is again biased and selective, as well as exaggerated and partly misleading.

908. The Government will in the following confine itself to comment upon the activities of Norsk Tipping, which are the only ones that can be said to have at least an indirect connection to the present case, since Norsk Tipping is the entity which under the reform will assume responsibility for operating the future machines. The activities of the (non-public) Norsk Rikstoto Foundation are totally detached from the case at hand. But most of the remarks about Norsk Tipping also apply to Norsk Rikstoto.

Development of the gaming portfolio of Norsk Tipping

909. The Government objects both to the concept of “expansion” and to the overall picture which the Authority tries to draw in section VII.3.c, of a rapid and aggressive expansion in the gaming offered by Norsk Tipping.

910. The correct picture is one of gradual and moderate development of the gaming portfolio of Norsk Tipping, which has taken place under responsible public control, and which has not led to any significant gambling problems in Norwegian society.

911. This is first demonstrated by the figures given in section 3.3, which show that the overall turnover of Norsk Tipping over the years has grown at a moderate pace, which over time is not very different from the general growth in national income and private purchasing power. In recent years the slow growth in Norsk Tipping’s turnover has stopped completely, with zero growth in 2003 and negative growth in 2004 and 2005.

912. The responsible nature of gaming developments is furthermore demonstrated by the fact that Norsk Tipping’s gaming propositions have caused very little gambling addiction, as discussed in section 3.5. While Norsk Tipping has operated for more than fifty years, compulsive gambling on any significant scale was not a problem in Norway until in recent years, and this is caused almost exclusively by the slot machines (with Internet

gambling from abroad as a rising menace). The only game operated by Norsk Tipping which has a potentially addictive side is Oddsen, and here measures have been taken in recent years which have caused turnover to fall.

913. The largest game operated by Norsk Tipping is by far the Lotto games, with approximately 65 % of total turnover. These are a particularly “soft” and non-aggressive form of gaming. The Government disagrees fundamentally with the Authority’s position that “channeling” gaming desire is not a legitimate concept (pp. 66-70 of the Application). Channeling is a basic principle of great effect and significance, which has to be included in any national policy aimed at limiting gaming opportunities in a consistent and systematic manner. This principle has been applied by the Norwegian authorities and by Norsk Tipping for many years, and it is one of the main reasons why there was little or no problem gambling in Norway until the rise of the slot machines in the 1990s. The concept of channeling is also used by national gaming authorities in most other European countries, and it is recognized as legitimate in the case law of the ECJ.

914. Finally, as described in detail in section 3.8, there has been little “expansion” of the gaming portfolio of Norsk Tipping in recent years, in the meaning of new forms of games, which come in addition to the others. On the contrary, Norsk Tipping operates a limited number of games, which has not risen in a long time. The Ministry has not approved of any more games for Norsk Tipping since 1993. What has happened since then has been in the way of adjustments and modernizations of the existing games portfolio. The last major replacement was when Joker replaced the former “cash lottery” in 2000. Norsk Tipping has not been allowed to use the Internet for anything else than distribution of its existing games portfolio, and it is not offering interactive gaming.

915. By comparison, the two gambling sectors which in recent years have experienced rapid and deeply problematic “expansion” are the slot machines and internet gambling from abroad. Both are market-based sectors, driven by commercial operators, at great profit, and without the inherent moderation and responsibility of Norsk Tipping.

916. On this basis the Government holds that there is nothing inconsistent in the development of the gaming portfolio of Norsk Tipping, much less anything which could impair the consistency of the non-related slot machine reform.

Marketing of the gaming portfolio of Norsk Tipping

917. The same applies for the marketing of Norsk Tipping’s games. It is true that this is quite extensive. But it is not true that it is inconsistent. In style and content the marketing is moderate, and it primarily promotes the Lotto games, which are the most harmless forms of money games imaginable. The channeling effect is substantial and valuable, and the extensive marketing of Norsk Tipping over the years has neither led to great jumps in turnover nor to any significant problem gambling. Marketing has always been well below the level which would have been commercially optimal, and has in recent years declined.

918. On the advice of the Gaming Authority, and in order to preserve and tighten the moderate and responsible nature of the marketing of Norsk Tipping, the Government has recently issued instructions, which apply both to Norsk Tipping and Norsk Rikstoto.

919. If one accepts the concept of public exclusive rights arrangements as a legitimate and suitable way of regulating the gambling sector and limiting gambling opportunities, then it is necessary to give these public entities a certain possibility to market and develop their portfolios. And in fact, the more moderate and responsible the public gaming portfolio is, the greater the need for a certain level of marketing, in order for it to compete with the far more aggressive and addictive forms of gambling offered today over the Internet from abroad, much of it from jurisdictions with little or no public control and supervision.

920. The marketing of Norsk Tipping are described in detail in section 3.8 above, to which reference is made. As regards the allegations of the Authority that this marketing is inconsistent, and that it impairs the consistency of the 2003 slot machine reform, the following would like to summarize its argument as follows:

- There are no plans for Norsk Tipping to market slot machines, nor has there ever been. The marketing issue is therefore of no direct relevance to the present case.
- The marketing of Norsk Tipping is extensive, but less extensive than claimed by the Authority.
- The marketing of Norsk Tipping is of a moderate character and effectively contributes to channeling gaming desire into the least harmful outlets, like the Lotto games
- The marketing of Norsk Tipping has not led to any great increase of gaming activities, and not to problem gambling on any significant scale.
- It is consistent with the basic idea of having public exclusive rights arrangements to allow these a certain degree of marketing and development.
- The Government has recently issued a Royal Decree giving instructions which will serve to ensure that the marketing of Norsk Tipping and Norsk Rikstoto continues to be of a responsible nature.

921. On this basis the Government holds that there is nothing inconsistent in the marketing of the gaming portfolio of Norsk Tipping, much less anything which could impair the consistency of the non-related slot machine reform.

922. The Borgarting Court of Appeal reached the same conclusion in its August 2005 judgment, after hearing extensive argument on the marketing issue:

> Further to this, Norsk Tipping's relatively comprehensive marketing of State-controlled gambling does not change the Court of Appeal's view. At a time when uncontrolled gambling is offered at an ever-increasing rate from abroad via the Internet, it is a particularly important social responsibility that the gambling habits of the population at large are channelled to gambling activities that are run by responsible and controlled companies – such as the company Norsk Tipping. This indicates among other things that Norsk Tipping should be able to market its games. The Court of Appeal otherwise remarks that on the basis of the evidence there has recently been an increasing degree of awareness in connection with the company's marketing. Reference is made to that by the Royal Decree of 10th June 2005 guidelines have been laid down for the marketing of State-controlled gambling. Regardless,

> Norsk Tipping's marketing has limited influence in the present case, in that there is no marketing of pay-out machines.

923. This is also in line with how the marketing issue has been evaluated by the Supreme Courts in Sweden and the Netherlands. It should be emphasized that it both cases the issue was directly connected to the contested restrictions, in the sense that it involved marketing of the same gaming activities which were under consideration, and not marketing of other games (as challenged by the Authority). Nevertheless, the courts held that a certain degree of marketing was fully compatible with Community law.

924. The first example is the Swedish Wermdö Krog case, which was decided by the Supreme Administrative Court in October 2004. On the expansion and marketing issue the Court held that:

> If the intention is to channel the gaming interest that unquestionably prevails among large sections of the population towards enterprises that are regarded as ensuring better consumer protection and less risk of irregularities, then one cannot reasonably deny those companies that are in receipt of a permit and responsible for such enterprises the opportunity to launch their products and design them such that they attract gambling clientele and encourage them to favour the State-controlled gambling propositions over other variants.[204]

925. In the Dutch case of De Lotto versus Ladbrokes, the development and marketing of De Lotto's games has been a central theme, with Ladbrokes arguing that gaming under the exclusive right is growing rapidly, and that the games are being advertised on a large scale. In the interlocutory proceedings the Court of Appeal held that this did not in itself make Dutch public policy on gambling inconsistent, and this was confirmed by the Supreme Court of the Netherlands in its ruling of 18 February 2005:

> 3.6.6 […] In this way, the Court of Appeal has expressed that the circumstances whereby new games of chance are regularly permitted and that advertising takes place on a large scale for the games of chance offered, as argued, are not in themselves irreconcilable with the restrictive policy still advocated by the Dutch government, which is geared towards curbing the desire to gamble. […]
> 3.6.7 The Court of Appeal's judgment is not in conflict with the objectives of the Betting and Gaming Act […] the basis of which is, in part, that permitting a limited range of legal games of chance prevents the public becoming drawn to the illegal ones, which results, in the word of the ECJ in the above-mentioned Läärä et al case, in the desire to gamble and the exploitation thereof being anchored in a controllable setting and in preventing the risks of the exploitation having a fraudulent and criminal purpose. The judgment that this objective of channeling, which under certain circumstances can result in an attractive and, if appropriate, extensive and innovative range of legal games being brought to the public's attention as an alternative to illegal games of chance and games of chance bearing a greater risk of the occurrence of gambling addiction, still forms the basis of the government policy, […]. Against this background, the Court of Appeal's actual judgment that the policy of the Dutch government in the area of games of chance still has a restrictive nature is not incomprehensible, […].[205]

[204] Cf. **Annex 139.** Ruling by the Swedish Supreme Administrative Court of 26 October 2004.
[205] Cf. **Annex 144**,Ruling by the Supreme Court of the Netherlands of 18 February 2005, and **Annex 145,** Judgment of the Court of Arnhem, Civil law section, of 31 August 2005, both in English translation. See section 7.6 above.

926. On this basis the argument of Ladbrokes was dismissed. The ruling of the Supreme Court was part of an interlocutory proceeding, but the assessment was later upheld in the main action by the Court of Arnhem in August 2005:

> 2.20. […] In this respect it should be borne in mind that a related and systematic restriction of participation in betting and gaming is not necessarily involved only if there is absolutely no expansion of the regulated offer. The idea of restricting compulsive gambling by channeling this through a regulated offer may demand a certain expansion of the offer and of advertisements in connection with technical and societal developments. The chief issue in restriction is that through a regulated offer, gambling has a (far) more restricted scope than it would have if the gambling had not been regulated by (national) rules […].

927. In the pending Finish Ladbrokes case the same assessment has been made on the administrative level by the Council of State in its December 2005 decision: [206]

> The European Court of Justice preliminary rulings do not contain any grounds stating that an exclusive rights institution would not be allowed to promote their activities, develop their selection of games or sales point network or entering their revenue to the government to be used for the public good. On the contrary, the Court states that revenues can be used to serve the public good as long as this is not the sole purpose or goal of the operation. From the point of view of Finnish legislation, the restrictive measures taken against gaming operations serve the purpose of consumer protection. The fact that the proceeds are used to serve the public good is just a positive add-on benefit of the restrictive policy.
>
> As the exclusive rights institution is a monopoly, it is required to make its services known. Informing the public must be carried out in such manner that people living in all parts of the country have equal access to information about playing possibilities. The licensing authority and the consumer protection authorities are required, among other things, to control gaming services and advertising thereof in order to ascertain that the advertising does not tempt people into gambling. The gaming licence holder's advertisements of gaming activities inform bettors about the legality of the operation. Developing the chain of sales points does not conflict with the obligations set for an exclusive rights institution. It is the duty of an exclusive rights institution to see to it that the gaming services are available equally all over the country. An exclusive rights institution can also develop their selection of games thus channelling the demand for games into the legal gaming sector. The applying company has also referred in its application to the fact that uncontrolled service providers can pose a great risk to the consumer.

928. The Government submits that these examples illustrate that a certain degree of marketing of the gaming portfolios operated under public exclusive rights arrangements is fully compatible with the requirements of Community and EEA law, and in particular with the Gambelli judgment paras. 67-69.

930. In the present case this is even more obvious, as the marketing issue is completely separate from the 2003 slot machine reform.

10.6 Summary and conclusion

931. The Government's argument as regards the "suitability" under EEA law of the 2003 slot machine reform of the Storting may be summarized as follow:

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[206] Cf. **Annex 143**, Decision of the Finish Council of State of 9 December 2005, enclosed in English translation. See section 7.6 above.

- The correct legal test is whether the reform is a suitable measure by which to achieve the legitimate objectives of the legislator.

- The ECJ has repeatedly held that in the gambling sector the suitability of restrictions is primarily for national authorities to decide, but it has also added that in this sector exclusive rights arrangements are per se well suited to control and confine gambling and to prevent crime and exploitation.

- The 2003 slot machine reform is clearly a suitable measure according to such a test. The Government can neither see that this is contested by the Authority, nor on what basis it could possibly be contested.

- The Gambelli test of "consistency" is not a new general test for all national gambling restrictions, but only a test to use when there is reason to suspect arbitrary or discriminatory features. To apply the Gambelli test to the case at hand would mean extending judicial review of national gambling restrictions much further than previously done or called for by the ECJ.

- If the EFTA Court should choose to apply the Gambelli formula, then the correct test must be confined to the "consistency" of the slot machine itself, and whether it aims at genuinely diminishing gambling opportunities. The reform clearly fulfills this by a wide margin.

- If the EFTA Court should choose to follow the invitation of the Authority to assess whether the reform is a consistent and systematic part of overall national gambling policy and regulation, then it must take into account all relevant aspects, and not just the two elements singled out by the Authority. This is a daunting task. But should the Court choose to enter into such evaluations, it will find that the 2003 slot machine reform fits into national policy as a *particularly* consistent and systematic measure aimed at reducing gambling.

- This is in no way affected by the fact that Norsk Tipping is allowed to develop and market its other games, which furthermore takes place in a moderate and responsible manner very unlike the description given by the Authority.

932. On this basis the Government submits that the 2003 slot machine reform is an eminently suitable measure for the achievement of the legitimate public objectives described in section 9. The reform is also highly consistent and systematic, both in itself and as a part of a national gambling policy and regulation aimed at limiting gambling opportunities.

11. THE PROPORTIONALITY AND NECESSITY OF THE REFORM

11.1 Introduction

933. Before the 2003 slot machine reform was decided, the proportionality and necessity of such a measure was assessed and debated by the Norwegian legislator, as described in the preparatory works. The authorities were aware of the requirements of EEA law, and the reform was evaluated according to these.

934. The main discussions on the necessity of transferring slot machines from the market based regime of the Lottery Act to the exclusive rights regime of the Gaming Act are to be found in chapter 4 of the Bill of Enactment, in particular in chapter 4.4.4 on "The Ministry's assessment", where the exclusive rights model is assessed in comparison to other alternative models.[207] But the rest of chapter 4.4 is also of direct relevance, and so are chapters 4.3 on the current situation and the need for change, 4.5.1 on the contents of the reform, and 4.5.3 on the relationship to EEA law.

935. The assessments of the Ministry were approved by a broad majority in parliament, and from the remarks in the Committee Recommendations it is clear that the majority has assessed the necessity on its own accord, arriving at the conclusion that transferring slot machine operations to the existing exclusive rights model is "a prerequisite for the most socially defensible organisation of the gaming machine market in Norway".[208]

936. Thus the Norwegian legislator conducted a thorough assessment of proportionality, or rather necessity, before arriving at the conclusion that the slot machine reform is by far the best and most efficient measure in order to achieve the stated objectives. These are, as will be recalled, to fight gambling addiction, to reduce the volume of slot machine gambling, to strengthen public control and responsibility, to prevent crime and malpractice, to enforce the 18 year age limit more effectively, and to eliminate private commercial profit as a market incentive.

937. The remaining question is whether, and if so to what extent and with which intensity, these assessments should be subjected to judicial review by the EFTA Court.

938. From the Authority's Application there seems to be a consensus that national authorities enjoy a wider margin of appreciation in the field of gaming activities than in other areas of EEA law, although there is disagreement as to the exact limits of discretion and the required intensity of judicial review. Furthermore, there is agreement that national authorities are free to set the requisite level of protection. The question is thus whether this level of protection could have been achieved by less restrictive means.

939. Here the agreement ends, both as concerns the legal content of this proportionality test and its actual application. After stating in the legal "test" that national authorities should in principle have a "somewhat broader" margin of appreciation in the gambling sector

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[207] Cf. **Annex 9**, chapter 4.4.4, which is quoted in full in section 4.4 above.
[208] Cf. **Annex 11**, chapter 2.4.1, parts of which are quoted in section 4.5 above.

than in other sectors (page 85, para 323) the Authority in the following sections in effect goes on to invite the EFTA Court to a far *stricter* and more intensive necessity review than the tests prescribed so far by the ECJ even in ordinary sectors of the internal market, let alone in the gambling sector.[209]

940. The basis for the Authority's assessment is also incorrect. In section VII.4.a it starts its attack on the proportionality of the 2003 slot machine reform by giving what is called "An outline of Norway's justification" (pp. 83-85, paras 314-320). Most of this is based on early correspondence between the Authority and the Government, in September 2003 and June 2004, based on which the Authority gives a short and rather biased "outline". This is untenable. If the EFTA Court is to substantially review the necessity of the 2003 reform, then this clearly has to be based on a direct review of the considerations of the Norwegian legislator, as these are stated in the preparatory works.

941. The short version of the Norwegian Government's reply to the Authority's attack on the necessity of an exclusive rights arrangement on the operation of slot machines is: Läärä. In Läärä the ECJ acknowledged the *raison d'être* of having public exclusive rights arrangements in the field of lotteries and gaming. The Authority's submissions under "necessity" are in fact a full attack on such arrangements, and thereby also in effect on the ruling of the ECJ in Läärä. But Läärä still applies, as later confirmed in Anomar, and this is in itself enough to confirm the proportionality and necessity of applying the Norwegian exclusive rights model to slot machines.

942. The longer version of the Norwegian Government's position is twofold, with regard to the criteria for judicial review of national gambling restrictions.

943. The primary position of the Government is that in the gambling sector, the ECJ has left the final assessment of necessity to the national authorities. There shall be judicial review of the legitimacy of the public requirements, and the suitability of the restrictions. But as long as a national restriction on gambling fulfills these requirements, then it is for the national authorities to assess the necessity, which should not be subject to substantive judicial review.

944. The secondary position of the Government, if substantial judicial review of necessity is required in the gambling sector, is that this should be moderate, and confined to examining whether there has been a manifest error of assessment. This is in line with the more general approach of the ECJ in sectors which concern sensitive national considerations, as well as in factually large and complex cases.

945. The legal aspects of the necessity-test are discussed in section 11.2. Section 11.3 contains a brief assessment of the reform on the basis of what the Government primarily holds to be the correct legal test. Section 11.4 contains a (secondary) assessment, according to the alternative interpretation of the test.

[209] The Government thus holds that there is little correspondence between the legal "test" formulated by the Authority in section VII.4.b, and the following actual submissions in sections VII.4.c to i. There are also other weaknesses in the formulation of the "test" on pp. 85-89. One is that the Authority keeps referring almost exclusively to Gambelli, without facing the fact that the present case is far more similar to the Läärä case. Another more curious aspect is that the Authority keeps in referring to the opinion of GA Alber in Gambelli, cf. para. 327, even though the ECJ in this case did *not* follow his advice. The attempt to draw conclusions from the Lindman case (para 331) is also erroneous, as this was a case of manifest discrimination, as earlier commented upon. And finally the remarks on the "burden of proof" in para 334 is so simplified as to be misleading, as discussed earlier in section 8.7 and below in 11.2.

946. Under both these alternatives the 2003 slot machine reform passes by a wide margin. The Government holds that it is legally untenable to insist on a third alternative, which would be the complete and strict necessity test which in effect is called for by the Authority. But even under such a test the Norwegian 2003 slot machine reform must be regarded as proportionate and necessary. This is commented upon in section 11.5.

11.2 The legal test

947. When assessing the so-called "proportionality-test", it should initially be pointed out that the test generally formulated by the ECJ in its case law on the gambling sector does not strictly question whether a national measure is proportionate, but rather whether it is not *disproportionate*. As noted by one distinguished commentator, "Proportionate or not disproportionate may seem a mere play on words, but it does seem to enable the Court to carry out a more (is the measure proportionate?) or less (is the measure not disproportionate?) intensive review".[210]

The relevant questions are more specifically (1) whether it is for the national authorities or the courts to assess whether national measures in the gambling sector are disproportionate, and in the latter case (2), to what extent and with which intensity?

Is it for the national authorities or the courts to assess proportionality?

948. In the gambling sector, the Court of Justice has held that the proportionality test is first and foremost for the national authorities to make. This is stated both in Schindler (61), Läärä (35), Zenatti (33) and Anomar (87), in which the Court held that albeit the national restrictions had to adhere to the requirements of suitability and necessity:

> 87. None the less, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider must suitable to achieve them and to establish rules for the operation and playing of games, which may be more or less strict […] and which have been deemed compatible with the Treaty.

949. Against this, the Authority claims that Gambelli and apparently also Lindman have considerably limited the discretion which the earlier judgments accorded to the Member States.

950. As regards the Lindman-case, this is certainly not correct. As explained in section 7.2 this case concerned a national measure which the Court found to be of a "manifestly discriminatory character", and the level of judicial review chosen is therefore of no relevance whatsoever in cases involving clearly non-discriminatory restrictions.

951. As regards the Gambelli-case, it should first be noted that this ruling came only two months after Anomar, and it is highly unlikely that the ECJ should in this short time-

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210 Cf. Jans, 'Proportionality Revisited' 27 Legal Issues of Economic Integration (2000) 239, at 261, enclosed as **Annex 149.**

span drastically change its entire view on the proportionality test in the gambling sector, and forfeit its previous case law not only in Anomar, but also in Schindler, Läärä and Zenatti. Second, the distinguishing feature of the Gambelli case is that unlike the previous gambling cases it involved a strong suspicion that the national measures were discriminatory and economically protectionist. Under such particular circumstances, it is reasonable that the national court should conduct a review of the national authorities' assessment of proportionality.

952. Gambelli therefore does not depart from the main rule laid down in previous strand of case law, but simply provides for an exception in cases where the facts of the case presents a clear indication that the national measures are discriminatory and promote protectionist aims.

953. This is clearly not the situation in the present case, and main rule in Schindler, Laara, Zenatti and Anomar therefore applies, according to which it is in principle for the national authorities to assess the proportionality of the national measures.

954. This interpretation is basically the same as that provided by professor Straetmans, as quoted earlier (above section 7.3), who stated that "if the Member States demonstrate that national restrictions bring about a genuine diminution of the gabling opportunities, the Court will continue to apply a relaxed proportionality test and will be hesitant to substitute itself for the national authorities".[211] As the 2003 slot machine reform is indisputably aimed at bringing about "a genuine diminution of the gabling opportunities" it is clear that this requirement is fulfilled.

955. The conclusion that the EFTA court under such circumstances should not advance further than assessing the legitimacy and suitability of the national legislation follows not only from the ECJ case law, but gains also support from the position taken by the Community legislature in this sector.

956. As described above in section 7.4 the Community legislature has specifically exempted gambling from the e-commerce directive, and will also do so in regard to the pending general service directive. It is noteworthy that the reasons advanced by the EP in this respect is not limited to taking due notice of the politically sensitive nature of this field, but it has in fact acknowledged that gambling falls altogether outside the Community's sphere of competence. As stated in the final report of the Internal Market Committee, which is otherwise not known for its deferential attitude to the Member States, "Gambling activities are intrinsically linked to public order and consumer protection issues and therefore lie outside the sphere of competence of the Community institutions and must remain a sector which the Member States are free to regulate as they see fit."[212]

957. Hence, since the Member States have exclusive competence in the matter of proportionality it follows that the judiciary cannot substitute its assessment for that of the national authorities, but must be limited to an examination of misuse of powers.

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211 Cf. Straetmans, as quoted more extensively above in section 7.3, and enclosed as **Annex 149**.

212 Cf. **Annex 131**, European Parliament Report A6-0409/2005 Final of 15.12.2005. See also above section 7.4.

958. Indeed, as Jans comments on outcome in Laara in his expose on the proportionality principle in EC law:

> Such self-restrain in the application of the proportionality principle is found rarely in the Court's decisions. The explanation is of course self-evident. The grounds put forward in justification of the measure here (regulating the passion for gambling, avoiding gambling-related crime, collecting funds for charity) do not as such constitute policy areas in which the Community could take regulatory action. […] Where the powers are so divided self-restraint in the application of the proportionality principle by the Court is appropriate.[213]

959. With regard to the influence of the position taken by the Community legislature in the review of proportionality, the ruling in Preussen Elektra is also of some interest. In this case the Court applied restraint in the proportionality test inter alia because the relevant Community directive in the case 'constitutes only a further phase in the liberalization of the electricity market and leaves some obstacles to trade in electricity between Member States in place'. [214] Restraint was thus called for because the Member States still enjoyed a margin of discretion, whilst the Court did not want to pre-empt the discretion of the Community legislature to further liberalize the market. These reasons militates a fortiori in favour of restraint where the Community has not only refrained from liberalizing the market, but stated that it has no intention to do so and explicitly left the Member States to regulate it.

960. The same conclusion follows also from the principle of separation of powers as the judiciary would otherwise run the risk of not only exhausting the discretion of the national legislature, but also acting counter to the position of the Community legislature. It should in this respect be emphasized, as done in the EP report above, that the level of discretion in the gambling sector is exceptional, and it is therefore nonsensical when the Authority submits that a limited review of proportionality in this case will provide a carte blanche for national monopolies in other areas of the EEA law.

961. On this basis the Government submits that the correct legal position would be for the EFTA Court to refrain from assessing the proportionality and necessity of the 2003 slot machine reform, and to state that in a case like the present, this is left for the national authorities to determine.

Given judicial review of proportionality in the present case – with which intensity?

962. As a secondary line of argument, and in the event that the EFTA court should reach a different conclusion, the next question is to what extent, and with which intensity, the national legislator's assessment of proportionality should be reviewed.

963. It is noteworthy that even in the Gambelli case only the first limb of this question was touched upon by the ECJ. The Court specifically did *not* direct the national courts to make a full assessment of the proportionality and necessity of contested Italian restrictions as such, but only directed them to a few very specific elements. The national court should first examine whether the severe criminal sanctions laid down in national

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[213] Cf. Jans, 'Proportionality Revisited' 27 Legal Issues of Economic Integration (2000),239, at 250, enclosed as **Annex 149**.

[214] Cf. Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, para 78.

legislation were necessary, and secondly whether it was necessary to prevent capital companies quoted on capital markets of other Member States from obtaining licenses, especially where there are other means of checking the accounts and activities of such companies with a view to check fraud.

964. In this way the Court of Justice in Gambelli clearly delimitated the scope of the necessity test to specific issues, as opposed to the completely open-ended test suggested by ESA in our case, where the EFTA Court is invited to examine the proportionality of every conceivable aspect of the national legislation. Second, both issues raised by the ECJ in Gambelli are closely linked to the discriminatory and seemingly protectionist nature of the Italian legislation. Third, none of these issues are relevant in this case which concerns an exclusive-rights system.

965. What ESA is actually asking the EFTA court to do is something much more far-reaching, which has not before been raised before the ECJ, namely to assess whether a license system offers equal level of protection as a monopoly system in the gambling sector. In doing so, it claims that the EFTA court should substitute its assessment for the national authorities concerning numerous different issues ranging from the activity of operators in a free market, the expeditiousness of administrative licensing procedures in national law, the relative effectiveness of the system of corrections and enforcement in national law, comparative advantages in reducing crime and ensuring that the 18 year restriction is better respected to name but a few of the issues raised.

966. ESA does understandably not provide any citations from case law as regards the intensity of review in such complex matters (this was, as mentioned, not dealt with in Gambelli), and it might be worthwhile to examine how the ECJ has dealt with such matters.

967. As a preliminary observation, it should be noted that the where the Member States utilize the possibility under the Treaty (or EEA law) to protect overriding public interests, they enjoy the same margin of discretion as when the Community legislature enacts harmonizing legislation with the same aim. This was implicitly recognized most recently in the opinion in British American Tobacco, where AG Geelhoed noted that where the Community legislature through harmonization promotes protection of matters of public interests laid down in Article 30 EC, in this case health protection, it enjoys a broad degree of discretion which 'does not differ […] from the national legislature which utilizes the scope conferred on it by Article 30 EC'.[215]

968. It follows next from the principle of coherence that the intensity of judicial review of the national legislature's discretion must be carried out on the same terms as the ECJ examines acts by the Community institutions in similar matters. This has been recognized by the ECJ in various relations. In relation to state liability, for instance, the ECJ held in Brasserie du pêcheur that judicial review of whether a sufficient breach has been committed by the national legislature in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, must be examined on the same terms as those applying to the Community institutions.[216] The ECJ held in the same vein in Upjohn that where national authorities are called upon

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[215] Opinion in Case C-491/01 B*ritish American Tobacco* [2002] ECR I-11453, para 120.

[216] Case C-46 and 48/93 *Brasserie du Pecheur* [1996] ECR I-1029, paras 45 and 47.

to make complex assessments, they are only subject to the same marginal review as the Community institutions are in similar circumstances.[217]

969. The ECJ has consistently held that in matters which involves political, economic and social choices, and in which the legislature is called on to undertake complex assessments, 'only if the measure is manifestly inappropriate in relation to the objective which the competent authorities are seeking to pursue can the lawfulness of such a measure be affected'.[218] In fact, the 'manifest error of assessment' test has been applied by the ECJ in infringement proceedings even in areas where the Member States clearly did not have the broad margin of discretion as they do in the gambling sector.[219]

970. The application of the 'manifest error' norm in relation to proportionality was elaborated upon in the aforementioned British American Tobacco case. Although it is somewhat tedious to recall the advocate general's and the ECJ's reasoning at any length, there are interesting parallels to our case which may assist in illuminating the proper application of the proportionality principle. This case also concerned challenge of legislation aimed at ensuring consumer protection against a societal evil, namely the harmful effects of cigarettes.

971. The advocate general started off by saying that the task of the Community legislature to offer adequate protection for matters of public interests, herein public health, 'is no different from national legislative bodies'.[220] His following observations on proportionality principle are therefore equally relevant to a situation such as ours where the national legislature must take it upon itself to ensure protection of society against the negative effects of gambling.

972. On a general level, AG Geelhoed noted that that 'the scope of judicial review is limited. Examination may be made only as to whether the Community legislature did or did not exceed the limits of discretion'.[221] As for the necessity test in particular, it was noted that the Community courts exercise a limited appraisal as concerns whether less intrusive measure provide equally good protection as an alternative measure.[222] He continued:

> The Court need not examine in detail whether [a system existing in Spain], which undeniably has a less obstructive impact on trade, provides equally good protection for public health. The Community legislature enjoys a freedom of appraisal in choosing the most appropriate instrument. The Court rules simply on whether the Community legislature could reasonably have come to the conclusion that the Spanish version does not provide equivalent protection for public health.[223]

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[217] Case C-120/97 Upjohn [1999] ECR I-223, paras 34-35.

[218] Eg. Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 61; Case C-491/01 B*ritish American Tobacco* [2002] ECR I-11453, paragraph 123; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, para 48.

[219] Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paras 85 and 87; and Case C-508/03 *Commission v. UK*, nyr, para 91.

[220] Opinion in Case C-491/01 B*ritish American Tobacco* [2002] ECR I-11453, para 225.

[221] Ibid.

[222] Para 230.

[223] Para 251.

973. This deferential approach was taken up by the Court, and it might in this relation be helpful to note how it assessed the necessity of certain specific issues which are analogous to our case.

The first question was whether prohibition on manufacture of cigarettes which did not comply with fixed maximum levels concerning harmful substances, with the objective of hindering re-import into the Community, was necessary when this aim could be ensured by reinforcing controls. This question is analogous to the question whether an exclusive rights system is necessary in order to ensure effective control instead of stepping up monitoring and enforcement against licensed operators.

It is therefore interesting to note that the ECJ tersely rejected this challenge on the grounds that it 'has [not] *been established* that reinforcing controls would in the circumstances be enough to attain the objective pursued by the contested provisions'.[224] The Court continued saying that the prohibition is especially appropriate to combat fraud, which '*ex hypothesi*, it is not possible to combat as efficiently by means of an alternative measures such as reinforcing controls'.[225] It follows mutatis mutandis that it is sufficient for the Norwegian Government to demonstrate 'ex hypothesi' that a prohibition in the form of an exclusive rights system is more efficient than a licensing system in this context. The burden of proof thereafter shifts onto the Authority which must establish that reinforcing control of [licenses] would in the circumstances be enough to attain the objective pursued by the contested provisions.

Similar observations may be derived from the ECJ's treatment of the next question, namely whether the prohibition on misleading cigarette labeling such as mild, ultra-light, low-tar etc was unnecessary since the legislature could instead have regulated such descriptors through objective criteria based on their noxious substances, as done in Spain. The advocate general noted in this regard, as quote above, that the Court need not examine in detail whether the Spanish system provided the same level of protection as long the legislature could reasonably have come to the conclusion that a prohibition was the most appropriate instrument. The ECJ concurred, stating that it was '*possible* for the Community legislature to take the view […] that […] there was no alternative measure which could have attained that objective as efficiently […].[226] It added that '[i]t is *not clear* that merely regulating the use of descriptors […] would have ensured that [objective]'.[227]

These quotes illustrate that the Authority is turning things around when claiming that the Norwegian authorities must adduce 'hard evidence that it cannot regulate the market by way of generally applicable laws and regulations' (p. 91) and later stressing (incorrectly) that the Norwegian authorities have found that gambling can be controlled 'reasonably well without the need for an exclusive right for Norsk tipping' (p. 105). Quite the contrary, as the British American Tobacco case illustrates mutatis mutandis, it suffices that Norway can demonstrate 'ex hypothesi' that an exclusive rights system provides more efficient protection than a licensing system', and whether the latter would have ensured reasonable, but not as good, protection is irrelevant. Only if the

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224 Judgment in Case C-491/01 B*ritish American Tobacco* [2002] ECR I-11453, para 130.
225 Ibid.
226 Para 139.
227 Para 140.

assessment by the Norwegian legislature is 'manifestly inappropriate' can the lawfulness of the gaming machine legislation be called into question.

974. There are in addition factors specific to the present case suggesting that the intensity of review should be limited even further. The position taken by the Community legislature in the gambling sector is of course highly relevant in this context, and it may be referred to the aforementioned treatment in this relation.

975. Another element which bears relevance on the review of the proportionality is the fact that national courts in Norway as well as in other Member States, herein courts of last instance, have already assessed the proportionality of exclusive-rights systems as the one in issue here, as shown above in section 7.6. These judgments are of course not binding on the EFTA court, but the unique system of co-operation between national and supranational courts in the EEA suggests that judgments of national courts, in particular courts of last instance, are relevant and given due consideration. The ECJ has on many occasions stressed the importance of loyal co-operation between national and Community courts, and it may rock the very foundations of the legal system, herein the willingness of national courts to refer preliminary questions, if their contributions in upholding the respect of the EEA agreement are not accredited sufficient weight. This viewpoint has particular strength in a sensitive area of social policy, where the Member States have been given a broad margin of discretion.

976. A last, equally significant factor in this respect is that the assessment of proportionality in this case is highly complex, and requires broad and in-depth analysis of substantive and procedural national legislation, administrative and judicial practice, and enforcement. In such cases Jans has cautioned that 'this requires a, sometimes, detailed appreciation of the degree to which national legislation is effective in an often complex national context'.[228] He has for this reason advocated that the 'national court is better able to do this, and that even preliminary reference proceedings […] are not really suitable for a detailed description of facts and consequences'.[229]

977. Indeed, as the Court held in the Gourmet case concerning a Swedish ban on advertisement of alcohol:

> [T]he decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.[230]

978. It is noteworthy that the Court did not defer to the national court because it lacked the necessary facts to carry out the analysis, but acknowledged that the domestic court was in a better position to assess those facts and the intrinsic details of national law.

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[228] Cf. **Annex 149**, Jans, 'Proportionality Revisited' 27 Legal Issues of Economic Integration (2000) 239, at 241.

[229] Ibid, at 255-256. The words 'even in preliminary reference proceedings' may at first seem puzzling, since the Court of Justice has regularly a better overview of the facts in infringement proceedings, but the crucial point he seems to be making, which has been emphasized by advocates general of the Court, is that the preliminary reference procedure offers a better view of the law in motion, rather than the abstract examination carried out in infringement proceedings.

[230] Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paras 33 and para 41.

979. In the present case the proportionality of the reform has been assessed by the Court of Appeal after a very thorough national judicial procedure, and the EFTA Court should be careful in setting aside that assessment.

980. The aforementioned observations are perfectly in consonance with the case law in the gambling sector, and the findings in this section may be summed up as follows:

1. Review of proportionality of national legislation aimed at and suitable for the protection of important public interests remains in principle within the ambit of the national authorities' competence (Schindler, Läärä, Zenatti and Anomar).

2. If, on the basis of the facts of the case, the Court finds that the national measure may be discriminatory and there is a suspicion that it in fact promotes illegitimate protectionist aims, the Court should assess the proportionality of the domestic legislation (Gambelli).

3. When assessing the proportionality of national legislation in a field where the national legislature is called upon to take sensitive social and political choices concerning protection of public interests, which also involves complex assessments, the Court shall suffice to review whether the national measure is manifestly inappropriate.

11.3 The proper proportionality review

981 From what is argued above, the Government submits that as long as the 2003 slot machine reform is based on legitimate public requirements, and as long as it is suitable for bringing about a genuine diminution of gambling opportunities, then it is for the national authorities to assess the necessity of the exclusive right reform.

982. The Government would like to emphasize that it holds this to be the only legally correct interpretation of the case law of the ECJ, in Schindler, Läärä, Zenatti and Anomar, which has not been changed on this point by Gambelli (much less Lindman). It is also the only interpretation which is in conformity with the position of the majority of the European Parliament and a majority of the Member States.

983. The review appropriate under these circumstances is thus limited to verifying that the national authorities had a complete and correct set of facts necessary to conduct a proper assessment of proportionality, and that it has actually carried out this assessment. The actual assessment of proportionality remains within the ambit of the national authorities' competence.

984. In the present case, it is clear that the Ministry of Culture in 2002-2003 had a complete and correct set of facts, as described in detail in the extensive text of the Bill of Enactment which was presented to parliament in March 2003. It is further clear that the Ministry carried out a thorough proportionality assessment, as laid down in chapters 4.3 and 4.4 of the Bill, and that this assessment was subsequently approved and supplemented by the parliamentary majority in the Committee Recommendations.

985. This is for the EFTA Court to review, as a review of the national procedure. However, having done so, the Government respectfully holds that it would be most correct for the EFTA Court to refrain from carrying out a substantial (material) judicial review of the proportionality and necessity assessments of the national legislator.

11.4 A moderate proportionality review

986. If the EFTA court should find itself competent, and the circumstances appropriate, to review the national legislature's substantial necessity assessment, it is nevertheless clear that this review must be done within the confines of review exercised by the ECJ in similar cases. In cases revolving around sensitive social and political choices, the ECJ has only carried out a limited review of proportionality. The level of protection necessary belongs to the discretion of the legislature, and the only question is whether the disputed measure is necessary in order to attain the chosen level of protection. Only if the legislature conducted a 'manifest error of assessment' in this relation may the lawfulness of the measures be called into question.

987. For the purposes of reviewing this norm the ECJ does not assess the facts in any detail, but suffice to examine whether, ex hypothesi, it was possible for the legislature to take the view that the chosen measure is more efficient in ensuring the requisite level of protection than an alternative measure which has less restrictive effects.

988. The question is thus whether, ex hypothesi, it was possible for the Norwegian legislature to arrive at the conclusion that the slot machine reform is the best and most efficient measure in order to fight gambling addiction, to reduce the volume of slot machine gambling, to strengthen public control and responsibility, to prevent crime and malpractice, to enforce the 18 year age limit more effectively, and to eliminate private commercial profit as a market incentive. Only if this assessment is manifestly inappropriate may the Norwegian legislation be called into question.

989. One might add that the corollary of such a conclusion would be that the assessment of proportionality by the Norwegian Court of Appeal was manifestly erroneous, as were the assessments of similar exclusive rights systems by the courts of last instance in Sweden and Finland.

990. During the proceedings before the national courts the necessity of the reform was extensively argued, with large amounts of evidence presented by all parties. On this basis the Court of Appeal found that the reform is proportionate and necessary. The main part of the Court's assessment reads:

> As the Court of Appeal has previously stated, the EU Court has in all the five rulings relating to restrictions on gambling activities, based its findings on that gambling is a special area where the national authorities must be afforded a greater degree of discretion than for other areas, both in determining the level of protection and the choice of measures (…). The Court of Appeal understands this such that proportionality criteria play a lesser role in the gambling sector. Reference is made to among other sources the comments in the Läärä ruling, premise 36 (…) and the Zenatti ruling, premise 34 (…) on that the circumstance that a nation state has chosen a different method of protection than another state cannot in itself affect the judgment of whether the restriction is necessary and proportional.

> It is not contested by the opposing parties that compulsive/habitual gambling is a real and genuine problem – including in Norway – and that it must be taken seriously. On the basis of the evidence the Court of Appeal finds it proved beyond doubt that there was a need for a fundamental grasp to combat this problem. Particular reference is made here to the vigorous growth in the use of pay-out machines that has been seen in recent years (above, page 6). The difficulties encountered in controlling a machine market in strong growth are described in depth in the preparatory works to Act 90/2003, cf. among others point 4.3.2 in Ot. bill No. 44 (2002-2003) where it says (pages 22-23):
> […]
> In the opinion of the Court of Appeal this shows that such control measures that the opposing parties have discussed will not be sufficient in the current situation.
> The Court of Appeal otherwise finds reason to remark that in the Läärä case – which also concerned a restriction in the form of a state-owned monopoly model – the EU Court arrived at the conclusion that the restriction was not disproportionate. The legitimate considerations behind the introduction of the state monopoly arrangement in Norway are very similar to the considerations that the Finnish authorities quoted as grounds for the state-controlled monopoly arrangement in the Läärä case. Reference is made to the Läärä ruling's premise 32 (…).

991. The Court of Appeal went on to quote Läärä paragraphs 41 and 42, in which the ECJ states that even if the national authorities could obtain revenue from gambling by other means than through a public exclusive right, such an arrangement is "certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities", and that the Finish legislation on the operation of slot machines "do not appear to be disproportionate". The Court of Appeal then concludes that:

> The Court of Appeal can not see that there is anything to indicate a different assessment of the proportionality criteria in the present case, and the Court finds that it can base its deliberations on that the Norwegian restriction cannot be deemed to be a disproportionate measure.

992. The brief but essential remark of the Court of Appeal on necessity is the statement that "On the basis of the evidence the Court of Appeal finds it *proved beyond doubt* that there was a need for *a fundamental grasp* to combat this problem", and a little bit later "that such control measures that the opposing parties have discussed *will not be sufficient* in the current situation".

993. This is the main point. The explosion in slot machine gambling and the corresponding explosion in gambling addictiveness had by 2002-2003 created a situation in which fundamental change was necessary. To merely adjust the existing legal regime would simply amount to patching up a system which had proved itself basically flawed. In this situation, transferring the operation of slot machines to the existing moderate and responsible public exclusive right system of Norsk Tipping was a clearly proportionate and necessary measure.

994. The Government submits that if the necessity and proportionality of the exclusive right arrangement should be judicially assessed at all, then this is clearly the correct way of doing it. It is not correct, as stated by the Authority that the Court of Appeal has applied "a limited and overly cautious proportionality test".[231] In fact the Court of Appeal has

[231] Cf. p. 88, paragraph 332 of the Application. The Authority goes on to state that the Court of Appeal has not

on the contrary probably applied a somewhat *stricter* proportionality test than that prescribed in similar cases by the ECJ, and certainly not a more limited one.[232]

995. On this basis the Government respectfully suggests that if the EFTA Court ventures into a proportionality test, then it should confine itself to a moderate test similar to that applied earlier in the case by the national Court of Appeal.

11.5 A strict and complete proportionality review

996. For the sake of completeness, it is finally necessary to comment on the possibility of strict and extensive review of proportionality in the gambling sector, such as that in effect proposed by the Authority. Since this has never been done before in the gambling sector, or in any other sensitive social and political areas for that matter, there is no guidance in the case law of the ECJ on how such a review should be carried out. Suffice to say that even if a strict review were to be carried out, the EFTA Court would have to consider the proper role of the judiciary in the legal order, and to what extent it is well-placed, not to say better placed than national courts and authorities, to assess the relative advantages of operating an exclusive rights system versus a license system in a complex domestic law setting.

997. Furthermore the Government holds that even under a strict review the proportionality of the national legislation may not be called into question unless it may be demonstrated by a sufficient margin of certainty that the national legislature committed an erroneous assessment. It may be recalled in this respect that the question formulated by the ECJ in the gambling sector is not whether the national measures are proportionate, but whether they are disproportionate.

998. Instead of trying to adjust the argument to a judicial test which really does not apply, the Government will in the following confine itself to briefly recapitulating the essence of the legislator's necessity-test in the present case. The assessments themselves are to be found in the preparatory works, in chapter 4 of the Bill of Enactment and in the general comments and in chapter 2.4 of the Committee's Recommendations, and these are the texts which will actually have to be reviewed. The following are some brief points only.

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conducted "a substantive verification of the factual basis for the Norwegian Government's claims concerning the need for a monopoly solution". This is clearly incorrect. The fact that the Court of Appeal has referred to the legislative considerations in the preparatory works, with approval, of course does not mean that it has not conducted a substantive test of whether these are correct. Large parts of the three-week procedure before the Court of Appeal were spent arguing and presenting evidence on the necessity of the reform, and this has of course been assessed and evaluated by the Court. By referring and agreeing to the evaluations made by the Norwegian legislator on the points of necessity and proportionality, the Court of Appeal in effect also refers to and evaluates a very large amount of underlying fact and argument, as presented exhaustively by both parties. In fact, after the three weeks, the Court of Appeal was in a much better position to assess the realities of the case than the Authority has ever been, and also better than what is possible to achieve under the mainly written procedure before the EFTA Court in Luxembourg.

[232] To go even beyond this is something which the Court of Appeal would constitutionally not be competent to do, given that the subject of the evaluation is a parliamentary statute. The national courts can only set aside such statutes if they are either in breach of the Constitution (which it is not) or in breach of EEA law. The Court of Appeal was thus empowered to apply the test prescribed by the ECJ, but if the statute passes this test, the court could not go on and apply a stricter proportionality test than that required by EEA law.

999. The first point to emphasize in order to understand the necessity of the reform is the background, which is the way in which the "old" market-based slot machine regime has functioned in Norwegian society in the last decade. The short version, which has earlier been described in great detail above, is that is has functioned in a highly irresponsible and destructive manner, creating massive gambling and huge problems of gambling addiction, for the first time in Norwegian history.

1000. The second point to emphasize is the way in which, by comparison, the existing exclusive rights arrangement of Norsk Tipping has functioned over more than fifty years. The short version of this, which has also already been described in great detail, is that it has functioned in a highly responsible and moderate manner. There has been a continuous development of the gaming and lotteries offered by Norsk Tipping, but this has taken place without creating any significant gambling problems in society.

1001. The basic evaluation of the Norwegian legislator, as already mentioned, and as acknowledged by the Court of Appeal, was that the explosion in slot machine gambling and the corresponding explosion in gambling addiction by 2002-2003 had created a situation in which fundamental change was necessary.

1002. In this situation, transferring the operation of slot machines to the existing moderate and responsible public exclusive right system of Norsk Tipping was the obvious solution, and the Government holds that it was also clearly a proportionate and necessary measure, even using the strictest tests possible.

1003. These are the general observations. The more specific objectives of the reform are earlier described in section 9, where the legitimacy of each of them was assessed, but in a way which also touched upon the question of necessity. The basic point in this regard is that some of these objectives could also in principle have been achieved to some extent under alternative regulatory models, but not to the same extent as under the exclusive rights system of the Gaming Act. And other objectives could, on closer analysis, *only* be achieved within the framework of this Act.

1004. As regards the main objective, namely to fight the gambling addiction problems caused by the slot machines, the Government holds that this problem can not be adequately tackled under a regulated market regime with a number of license holders and private commercial operators competing to offer the most attractive machines placed at the most lucrative locations. Some measures are certainly possible. But the fundamental problem is the system itself, and the way in which it encourages the licence holders and operators to compete for profit, thus always maximizing gambling opportunities within the legal framework. And the most profitable machines will always be those which are the most aggressive and addictive.

1005. As regards the closely related objective of reducing the volume of slot machine gambling to a socially defensible level, the Government again holds that the existing public exclusive rights model is by far the best suited, and in the given situation therefore also a necessary measure. This is partly because a public monopoly in itself inherently reduces turnover as compared to a competitive market. And it is partly because the public exclusive rights model provides the authorities with the opportunity to directly supervise and control the level of machine gambling offered to the population at any given time, and to continuously adjust this, as the need arises.

1006. This kind of direct public control, based on ownership of Norsk Tipping and legal right of instruction, is a clearly superior, more efficient and more flexible instrument for reducing gambling volume and preventing addictive initiatives than any level of control attainable by way of regulating a private market. Such direct public control, and thereby actual and direct public responsibility, is also an objective in itself, as stressed by the parliamentary majority. This is an objective which is only attainable under the public exclusive rights model.

1007. Eliminating private commercial operational profit from the slot machine sector is, as earlier described, primarily a means by which to achieve other objectives, but it might also to some extent be regarded as a legitimate objective in itself, based on moral and ethical considerations. It is certainly more worthy that commercial profit is replaced by charitable and benevolent interests, which serve society as a whole. The public exclusive rights model is the only one which can fulfill this objective.

1008. Finally, the Government holds that even if crime and malpractice may also be prevented under a regulated market regime, the exclusive rights model is also in this regard clearly better suited, partly because it eliminates the possibility of some forms of crime and malpractice, partly because it reduces gambling as such, and partly because the public operator may on the whole be relied upon to adhere more closely to rules and regulations than what is always the case with private companies. This also applies to the effective enforcement of the 18 years age limit.

1009. These were the necessity assessments of the Norwegian legislator when the reform was presented and debated in the spring of 2003, and the Government holds that they are manifestly sound. On this basis the legislator held that it was not only legitimate and consistent, but in the given situation also necessary in the strictest sense of the word to eliminate the former slot machine market, and to transfer the future operation of such machines to the existing exclusive rights regime of Norsk Tipping.

1010. The argument of the Authority may be interpreted so as to claim that the legislator could not choose this measure without first trying out less restrictive measures, in effect by regulating the existing market more strictly, and then only afterwards, in case that did not work, several years later eventually move on to the stricter model. If this is the argument, then it is not correct. In a situation where the national legislator, based on correct facts and a proper necessity assessment, comes to the conclusion that a certain measure is necessary in order to achieve legitimate public objectives, then there is no requirement under EEA law to first try out less restrictive but much more uncertain measures.

1011. On this basis the Government holds that the 2003 parliamentary slot machine reform proportional and necessary, even according to the strictest legal tests imaginable.

12. AS TO THE PROCEDURE BEFORE THE COURT

1012. The present action is voluminous. Depending on the intensity of the judicial review required it may also to some extent be considered factually complex. The Application lodged by the Authority is certainly the largest so far in the history of the EFTA Court, and it is also extraordinary compared to the usual length and character of the Commission's applications before the ECJ.

1013. The Government has found it necessary to reply in the same line. Although it holds that the degree and intensity of judicial review prescribed under EEA law is less extensive and intense than asserted by the Authority, and the need for scrutiny of facts therefore less, the Government has nevertheless felt obliged to reply in full, both to be on the safe side and because many of the allegations of the Authority needs to be refuted.

1014. The case was also voluminous before the national courts, in particular before the Borgarting Court of Appeal. The hearings in June 2005 lasted three weeks, and the court was presented with 3.723 pages of documents, as well as lengthy testimonies from the parties concerned and an additional 12 witnesses, 6 of whom had status as expert witnesses. The judges were also quite active during examinations. In the preparations before the Supreme Court even more witnesses were announced, and the Supreme Court had reserved two weeks for the plenary hearings, which is exceptional.

1015. By contrast, the procedure before the EFTA Court is primarily in writing. The oral hearings are short, and though there is in principle the possibility of calling witnesses under the Rules of Procedure, the Government is not aware that this has ever been done, and even then it would presumably be quite different and more limited sessions than the often long and torturous examinations before the national courts.[233]

1016. During the preparations before the Supreme Court in late 2005 the parties started a process of getting written depositions from all the witnesses (presentation of evidence before the Supreme Court is always in writing). This process was not finished by the time the Supreme Court announced that the case would be stopped. The first round was completed, but not the second round of follow-up questions. The depositions would then have needed a final approval by all sides before they could be presented to the Supreme Court. This stage had not been reached when the process was terminated.

1017. Still, there exist written depositions from all the witnesses based on the first main round of questions. The Government has had translations made of most of the depositions of its own witnesses, including the answers not only to the Government's questions, but also to the

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[233] During the three week proceedings in the present case before the Court of Appeal the actual number of days spent in court was ten. First, each side was given two days in which to present facts. Then four days were spent examining witnesses. Finally each side was given roughly one day to present legal argument. Several of the witness examinations were long and thorough. Head of department in the Ministry, Mr Eivind Tesaker, for example, first spent an hour and a half answering friendly questions from the government's attorney, and then almost two and a half hours answering intense and hostile cross-examination by the attorneys of the private operators, as well as questions from the three judges. This 4-hour session (which in the view of the government went very well) gave the Bench a direct insight into the specifics of the case which is simply unattainable during a the procedure before the EFTA Court in Luxembourg.

questions from the private parties. These depositions have been made use of as part of the factual basis in the case, and they are referred to in the above, and enclosed as annexes.[234] It should be pointed out that they were not finalized, and that they would during the national procedure have been supplemented by follow-up questions, and then subjected to final approval by all sides before being presented. The Government has been in contact with the private parties (NLD and NOAF) about the written depositions from their witnesses, and has offered to enclose these as well. Understanding has however been reached that it is more natural for these parties to decide for themselves whether they want to send their depositions to the Authority, as they see fit, and that it will then be for the Authority to assess whether or not to include them in the case.[235]

1018. The Government holds that it is rational in this way to make use of the existing written depositions which already exists from the national proceedings. These may then of course be supplemented under the Rules of Procedure, Title II, Chapter 3, either by obtaining new declarations, by supplementary questions, or by actually summoning witnesses before the Court. For its for own part, the Government sees no need at the present stage to ask for this, and holds that the documentary basis now seems to be quite sufficient for the Court to evaluate the case. But this may of course need to be reevaluated at a later stage.

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[234] Cf. **Annex 68** (Mr Trond Giske), **Annex 69** (Ms Valgerd Svarstad Haugland), **Annex 70** (Mr Eivind Tesaker), **Annex 71** (Mr Sigmund Thue), **Annex 72** (Professor Mark Griffiths) and **Annex 73** (Mr Jan Nyrén).

[235] For two of NLDs witnesses before the Court of Appeal, professors Rachel Volberg and Max Abbot, this has in fact already been done. What in effect (and under Norwegian procedural law also formally) is their written deposition has already been presented by the Authority, which must have received it from NLD. This is the so-called "report", titled "Report concerning the regulation of VLTs in Norway" dated 23 August 2005 and enclosed as **Annex 41** to the Application. This document was in fact commissioned by NLD following the proceedings in the Court of Appeal, in preparation for the appeal to the Supreme Court, and would have been treated as a written deposition under this procedure. It appears that NLD has also commissioned its two witnesses to make a "review" of the 2005 report of the Norwegian MMI Institute (annex 40), which is dated 28 February 2006, and which must have also been made available to the Authority, as it is enclosed as **Annex 42** to the Application. It is a bit surprising that the Authority makes no mention of the fact that both the "report" and the later "review" are documents commissioned and paid for by the operators for use in the present case.

CONCLUSION

1019. It follows from what has been said that the position of the Government is that Norway has not failed to fulfil its obligations under EEA Article 31 or 36. On the contrary, the 2003 slot machine reform of the Storting is an example of prudent, responsible and coherent national gambling policy, aimed at reducing gambling opportunities.

1020. Thus, the Government respectfully request the Court to:

1. Dismiss the application as unfounded.

2. Order the Applicant to bear the costs.

Oslo, 18 May 2006

Fredrik Sejersted
Agent

Hanne Ørpen
Agent

LIST OF ANNEXES

Annex 61	Act on the introduction of the Reform, amending Act of 28 August 1992 No. 103 on Gaming Schemes and Act of 24 February 1995 No. 11 on lotteries etc. The Act is enclosed as Annex 13 to the Authority's Application, but only in Norwegian – an English version is enclosed here.
Annex 62	Penal code §§ 298, 299 in Norwegian and in English translation.
Annex 63	Lov 1. juli 1927 nr. 3 om veddemål ved totalisator.
Annex 64	Act of 28 August 1992 No. 103 on Gaming Schemes in Norwegian and in English translation. The Gaming Act is enclosed in two versions, before and after the 2003 amendment (cf. Annex 61).
Annex 65	Act of 24 February 1995 No. 11 on lotteries etc. in Norwegian and in English translation. The Lottery Act is enclosed in two versions, before and after the 2003 amendment (cf. Annex 61).
Annex 66	Royal decree from 1753.
Annex 67	Minutes from the Meeting of the Odelsting on Thursday 12 June 2003 – English translation. The original Norwegian text was enclosed by the Authority as Annex 12.
Annex 68	The written deposition of Minister of Culture and Church Affairs Mr Trond Giske, prepared before the Norwegian Supreme Court case 2995/1320 – in Norwegian and in English translation.
Annex 69	The written deposition of former Minister of Culture and Church Affairs Ms Valgerd Svarstad Haugland, prepared before the Norwegian Supreme Court case 2995/1320 – in Norwegian and in English translation.
Annex 70	The written deposition of Director of Department with the Ministry of Culture and Church Affairs Mr Eivind Tesaker, prepared before the Norwegian Supreme Court case 2995/1320– in Norwegian and in English translation.
Annex 71	The written deposition of Chairman of the Board of Norsk Tipping Mr Sigmund Thue, prepared before the Norwegian Supreme Court case 2995/1320 – in Norwegian and in English translation.
Annex 72	The written deposition of professor Mark Griffiths, International Gaming Research Unit, Nottingham Trent University, prepared before the Norwegian Supreme Court case 2995/1320 – in English.
Annex 73	The written deposition of former Chief Legal Adviser with the Swedish National Gaming Board Mr Jan Nyrén, prepared before the Norwegian Supreme Court case 2995/1320 – in Swedish and in English translation.
Annex 74	Professor in economics Steinar Strøm, University of Oslo, "Spillegalskap" [*Gambling addiction*], Dagsavisen 2 November 2004.

Annex 75 “Pengemaskiner på oppsigelse” [*Money machines served with notice*], Dagens Næringsliv 30 November 2004.

Annex 76 “Solid spillegevinst” [*Solid gambling winnings*], Nordlys 13 December 2004.

Annex 77 ”Redningsselskapets spilleautomater – lønnsom automatpark”, printed from http://www.redningsselskapet.no

Annex 78 Hans Olav Fekjær, ”Spillegalskap” – vår nye landeplage” (*Ludomania – our new national scourge*) 2002.

Annex 79 Fekjær, “Gambling and gambling problems in Norway”, paper presented at the 4th Conference of the European Association for the Study of Gambling.

Annex 80 Fekjær, Pengespill er på nytt blitt en sosial ulykke i Norge” [*Gambling strikes again as a social disaster in Norway*], *Aftenposten* 6 November 2004.

Annex 81 “Sluttrapport. Hjelpelinjen for spilleavhengige” [*Concluding report: the helpline for problem gamblers*], Innlandet Hospital Trust 31 January 2005 – in excerpts.

Annex 82 Newspaper articles on gambling addiction in Norway – 1999-2005.

Annex 83 Newspaper articles on gambling addiction in Norway – 2005-2006.

Annex 84 Memo, March 2006, “Tapper taperne” [*Draining the losers*].

Annex 85 “Tjente 700 mill. på spillegale” [*Earned 700 mill. on gambling addicts*], 30 March 2006.

Annex 86 “Automatene sluker trygd” [*Slot Machines Devour Social Security*], Oslopuls 21 April 2006.

Annex 87 “Utsettelse gir millioner til Røde Kors” [Postponement gives millions to Røde Kors], Dagens Næringsliv 27 July 2005.

Annex 88 Selection of news clippings reporting on crime related to slot machine. The clippings are not translated.

Annex 89 Letter of 10 December 2004 from X to the Minister of Culture and Church Affairs, concerning the gambling problem of her son.

Annex 90 Psychiatrist Hans Olav Fekjær “A Note on Research on Problem Gambling in Norway”, 9 May 2006,

Annex 91 Professor Mark Griffiths “Gambling Technologies: Prospects for Problem Gambling” (1999).

Annex 92 Two clippings from December 2002, “Sydenturer i bytte mot automatavtaler” [*Foreign holidays in return for slots deals*], and “Svindlet frivillige for en halv million” [*Swindled half a million out of voluntary organisations*].

Annex 93 “Røde Kors-automater er ulovlige” [*Red Cross gaming machines are illegal*], *VG*, 22 January 2002.

Annex 94 “Grunnlaget for Norsk Tippings markedsføring” [*The Basis for Norsk Tipping’s Marketing*], memorandum from Norsk Tipping.

Annex 95 Guidelines for the Marketing of State-Controlled Gaming and Gambling, of 10 June 2005 – in Norwegian and in an English translation.

Annex 96 ”Norsk Tippings program for spillansvarlighet” [*Norsk Tipping’s programme for responsible gaming*].

Annex 97 Ethical guidelines for Norsk Tipping.

Annex 98 “Ansvarlig spilleglede” [*Responsible gaming*], brochure from Norsk Tipping, 2004.

Annex 99 “Spørsmål og svar om spilleavhengighet” [*FAQ on compulsive gambling*], brochure from Norsk Tipping, 2004.

Annex 100 Excerpts from Norsk Tipping’s website, under “Spilleavhengighet” (currently available in Norwegian only).

Annex 101 Article in *Aftenposten* 10 March 2000, “Milliongevinst i det godes tjeneste”, with an English translation.

Annex 102 Article in *Aftenposten* 21 February 2000, “Kjapp gevinst for Borgersen”.

Annex 103 Thorvald Stoltenberg, “Brennpunkt tåkelegger”, Verdens Gang 5 March 2003, with an English translation.

Annex 104 Anne Enger Lahnstein, “Et alvorlig etisk dilemma”, Dagbladet 8 August 2003, with an English translation.

Annex 105 Liste over deltagrene i Kultirkomiteens åpne høring – fremlagt for Borgarting Court of Appeal – list of the organisations, associations and companies invited by the Committee to participate and give their opinions.

Annex 106 Norsk Tipping’s informal minutes from the open Committee hearing of 5 May 2003.

Annex 107 “Vilkår for oppstilling av utbetalingsautomater” [*Terms applicable to the installation of gaming machines*] of 25 May 2004.

Annex 108 “Spilleregler for utbetalingsautomater” [*Gaming rules for gaming machines*] of 25 May 2004.

Annex 109 Letter of 1 November 2004 from the Norwegian Gaming and Foundation Authority to the Ministry of Culture and Church Affairs, “Lotteritilsynets uttale på Norsk Tipping sine spill på utbetalingsautomater” [*The Norwegian Gaming and Foundation Authority’s observations on Norsk Tipping’s games on slot maschines*].

Annex 110 Letter (instruction) of 17 November 2004 from the Ministry of Culture and Church Affairs to Norsk Tipping, “Enerett for drift av utbetalingsautomater” [*Monopoly on the operation of slot machines*].

Annex 111 “Omsetningstall gevinstautomater” [*Turnover figures, slot machines*], Norsk Tipping, February 2005 – evalueringen av pilotprosjektet.

Annex 112 Norsk Tipping's internal budget plan for the new reform dated 12 December 2002 – displayed for the Borgarting Court of Appeal.

Annex 113 Survey from Omnibus on public attitudes to current gaming machines, June and December 2004

Annex 114 Memorandum – evaluation of the monopoly model, The Norwegian Gaming and Foundation Authority 27 April 2005, with an English translation.

Annex 115 The statutes and instructions for Norsk Tipping issued by the Ministry of Culture and Church Affairs, April 2004.

Annex 116 Letter of 18 February 2005 from the Ministry of Culture and Church Affairs to Norsk Tipping, "Endring av spillereglene or Extra" [*Change of game rules for Extra*].

Annex 117 Letter of 3 March 2006 from the Ministry of Culture to Norsk Tipping, "Endringer av spilleregler for Lotto" [*Change of game rules for Lotto*].

Annex 118 Royal decree of 1 July 2005, "Klage på avslag på søknad om forlengelse av prøveprosjekt med spill på Internett" [*Complaint on the decision not to extend the duration of the pilot project on Internet gaming*].

Annex 119 Letter of 3 March 2006 from the Ministry of Culture to Olav Thons stiftelse for samfunnsnyttige formal, "Vedrørende endring av forskrift til lov om lotterier mv. – Pantelotteriet" [*The bottle deposit lottery*].

Annex 120 Application for pilot operation of a casino in Oslo, Letter of 27.06.2000 from the Norwegian Cancer Association to the Ministry of Justice, with a letter from Olav Thon and Norsk Lotteridrift.

Annex 121 "Oslo kan få sitt Las Vegas" [*Oslo can have its Las Vegas*], *Aftenposten* 7 July 2000.

Annex 122 Letter of 8 August 2000 from the Ministry of Justice to the Norwegian Cancer Association, "Søknad om prøvedrift av kasino i Oslo" [*Application for a test run on Casino in Oslo*].

Annex 123 "Vil starte kasino i Bjørvika" [*Will establish Casino in Bjørvika*], Aftenposten Aften 8 April 2005.

Annex 124 **"**Iowa legislature calls for removal of retail slot machines", (BO) News 17 March 2006.

Annex 125 **"**Judge rules against delaying ban on TouchPlay", Quad City Times, 3 May 2006

Annex 126 "Bermuda bans gambling machines", www.ttgapers.com 4 July 2004.

Annex 127 European Parliament Draft Report of 25 May 2005 (2004/0001 COD).

Annex 128 Opinion of the Committee on Culture and Education of 22 April 2005.

Annex 129 Opinion of the Committee on Industry, Research and Energy of 27 April 2005.

Annex 130 Opinion of the Committee on Legal Affairs of 1 July 2005.

Annex 131 European Parliament Report A6-0409/2005 Final of 15 December 2005.

Annex 132 Commission press release of 30 March 2004 (IP/04/401) on "Free movement of services: Commission inquires into Danish restrictions on sports betting".

Annex 133 Letter from the Swedish Ministry of Finance to the Commission of 15 December 2004 – English translation.

Annex 134 "Commissioners divided over move to liberalise gambling market", Europe Information 20 July 2005.

Annex 135 "Future gambling policy unclear as infringement cases postponed", Europe Information 19 October 2005.

Annex 136 Letter from the Finish Minister of the Interior, Ms Rajamäki to Commissioner McCreevy, "Your Comment on Gambling Monopolies" of 11 October 2005 – English translation.

Annex 137 Commission Press release on "Free movement of services: Commission inquires into restrictions on sport betting services in Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden", IP/06/436 of 4 April 2006.

Annex 138 Judgment of the German Bundesverfassungsgericht of 28 March 2006 in case 1 BvR 1054/01 – English translation.

Annex 139 Judgment of the Swedish Supreme Administrative Court of 26 October 2004 in the case between Wermdö Krog AB and the National Gaming Board, with an English translation.

Annex 140 Judgment of the Swedish Supreme Administrative Court of 20 June 2005 in the case between Ladbrokes Worldwide Betting and the National Gaming Board, with an English translation.

Annex 141 Decision of the Swedish Supreme Court of 8 December 2004 in the case between the Attorney General and Ms Runesson, Mr Rees and SSP Overseas Betting Ltd.

Annex 142 Decision of the Finish Supreme Court of 24 February 2005 in the case between the Attorney General and Åland Penningautomatförening (the Aaland Slot Machine Association). The full text of the judgment is Swedish, with an English translation of the paragraphs on the interpretation and application of Community law (23 to 38).

Annex 143 Decision of the Finish Council of State of 9 December 2005 – English translation.

Annex 144 Ruling by the Supreme Court of the Netherlands of 18 February 2005 in the case of Ladbrokes v De Lotto – English translation.

Annex 145 Judgment of the Court of Arnhem, Civil law section, of 31 August 2005 – English translation.

Annex 146 Decision of the Italian Supreme Court of Appeals of 26 April 2004 – English translation.

Annex 147 "From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gaming" *in Mississippi Law Journal,* Volume 72, Winter 2002.

Annex 148 *Straetmans*, “As you sow, so shall you reap: On Member States overstepping the mark”, Common Market Law Review 2004 pp 1409-1428.

Annex 149 *Jans*, “Proportionality Revisited” 27 Legal Issues of Economic Integration (2000)239, at 243.

Annex 150 Coin Slot Review, various marketing campaigns on slot machines.

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