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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

APPLICATION

Submitted 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, by the

EFTA SURVEILLANCE AUTHORITY

represented by Niels Fenger, Director, and Per Andreas Bjørgan, Senior Officer, in the Department of Legal & Executive Affairs, acting as Agents, and assisted by Ólafur Jóhannes Einarsson, Officer of the Authority's Internal Market Affairs Directorate, as Expert

AGAINST

THE KINGDOM OF NORWAY

Seeking an order from the EFTA Court that the Kingdom of Norway, by adopting the amendments to the Norwegian gaming and lottery legislation in "*Lov av 29. august 2003 nr 90 om endringer i pengespill- og lotterilovgivningen*", which introduced a monopoly for the state-owned undertaking Norsk Tipping AS to operate gaming machines in Norway, has infringed Articles 31 and 36 of the Agreement on the European Economic Area.

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I. INTRODUCTION

1. On 17 June 2003, the Norwegian Storting adopted amendments to the gaming and lottery legislation which introduced a sole right for Norsk Tipping AS to operate gaming machines.¹ On 29 August 2003, these legislative amendments were sanctioned by the Norwegian Government (*Lov av 29. august 2003 nr 90 om endringer i pengespill- og lotterilovgivningen*).
2. The amendments to the gaming and lottery legislation abolished the licensing system for the operation of gaming machines. Under that system, licences for the installation of gaming machines could be granted for the benefit of charities. Moreover, the machines could be run by the charitable organisations themselves, or by private operators. Instead of the licensing system, the public company Norsk Tipping AS was awarded a monopoly to operate gaming machines in Norway. The amendments have not yet entered into force, as the Norwegian Government has indicated its intention to await the decision of this Court.
3. It follows from consistent case law that gaming services are covered by Articles 31 and 36 of the Agreement of European Economic Area (EEA). The amendments to the Norwegian legislation entail that existing operators will be removed from the market and that the provision of gaming machine services can, from that point on, only be carried out within the framework of a state monopoly. Such removal of all private economic activity unquestionably constitutes a severe restriction on free movement pursuant to Articles 31 and 36 EEA.
4. Thus, the dispute concerns, in essence, whether the introduction of a monopoly for Norsk Tipping to operate gaming machines fulfils the requirements for imposing restrictions on fundamental freedoms. In line with the case law of the Court of Justice, gaming services constitutes a field in which the EEA States enjoy a certain margin of discretion to impose restrictions on grounds relating to the protection of consumers and maintenance of order in society. Yet, it also follows from this case law, most notably the judgment in *Gambelli*², that the restriction concerned must not be motivated by financial objectives, including the wish to secure revenue to charities. Moreover, a restriction will only be compatible with EEA law if it both reflects a systematic and coherent approach to the gaming market in general and complies with the principle of proportionality.
5. By the present action, the Authority seeks to obtain an order from the EFTA Court that the monopoly for Norsk Tipping does not meet these requirements. The Authority does not dispute either that gambling leads to unfortunate consequences for a considerable number of Norwegians, or that Norway's intentions to combat gambling addiction are laudable. Nor does the Authority raise objections to the concrete measures that Norway has taken in addition to the introduction of the monopoly. However, the Authority respectfully submits that these measures could have been introduced under the old licensing system. The Authority also submits that the level of consumer protection sought with the monopoly model could equally have been obtained by normal public law regulation of a licensing system. Furthermore, the Authority finds that an acceptance of many of the arguments presented for justification of the chosen monopoly solution would give an EEA State a blank cheque for introducing a monopoly without any real possibility for an assessment of whether the monopoly is objectively necessary.

¹ Also called slot machines or prize machines.

² Case C-243/01 *Gambelli* [2003] ECR I-13031.

6. As the Authority will show in the following, the root to the gaming related problems in Norway lies, to a large extent, in the very way the Norwegian authorities themselves have regulated the market for gaming machines. It is the Authority's view that, as long as they respect the principle of proportionality, EEA States have freedom to regulate every aspect of the national gaming market, *i.e.* if and to what extent and under which conditions such services should be offered to consumers. Ultimately, EEA States may even prohibit these types of services. However, the national gaming regulation must adhere to certain basic principles and EEA States cannot respond to their own regulatory failure by simply removing all economic operators from the market and continuing the same activity within a state monopoly.
7. The present application can be divided into three main parts. First, it will be shown that the introduction of the monopoly was motivated by an economic aim, more precisely that the Norwegian authorities saw the monopoly model as the only solution that could reduce the number and aggressiveness of gaming machines in Norway while maintaining the level of revenue to charities. Second, the Authority will demonstrate that the Norwegian gaming policy is not consistent within the meaning of the *Gambelli* judgment. The Norwegian State has, through its wholly owned subsidiary Norsk Tipping, for a number of years actively expanded the gaming opportunities in Norway, *inter alia* by developing new games, utilising new technology to make gambling easier and investing huge sums every year to market gambling activities thereby encouraging consumers to participate. Moreover, Norway has allowed, and continues to allow, similar measures by other providers of gaming services. Third, and finally, the Authority will show that the monopoly was not necessary in order to achieve the aim of reducing problem gambling and that it, therefore, does not respect the proportionality principle enshrined in Articles 31 and 36 EEA.
8. Before developing these arguments in detail, the Authority will, however, first provide the EFTA Court with a description of the regulation of gaming in Norway and the legislative process leading up to the adoption of the contested act, cf. below in point II. It will also give a summary of the arguments for and against the legality of the monopoly that have been presented in the administrative process before the Authority and in the Norwegian Courts, cf. points III and IV. Finally, the Authority will provide information on statistics concerning gambling and the research on problem gambling, cf. points V and VI.

II. FACTS

II.1 The regulation of gaming in Norway³

9. It follows from the Norwegian Penal Code Section 298 and 299 that it is a punishable offence to operate games of fortune that are not permitted by special legislation.
10. Exemptions from the prohibition against gambling are to be found in the Gaming Act (Act of 28 August 1992 No. 103), the Totalisator Act (Act of 1 July 1927 No. 3) and the Lottery Act (Act of 24 February 1995 No. 11).

³ For a more thorough description of the Norwegian gaming market Ot. prp No. 44 page 9-20.

a) The Gaming Act - Norsk Tipping AS

11. Norsk Tipping AS was established in 1946, by the Act of 21 June 1946 No. 2 on betting in connection with sports competitions (football betting).⁴ The Act provided for the establishment of a betting company, organised as a limited liability company, of which the Norwegian Government and various sports organisations were the owners. The profits of the betting company's activities were to be spent on the financing of sports grounds and other aims of social benefit. In the years that followed, a range of money games controlled by the Government were introduced, among these the number game "Lotto", established in Norway in 1985 (Act of 20 December 1985 No. 92).
12. In 1992, the different money games controlled by the Government were consolidated in the Gaming Act. At the same time, the ownership structure of Norsk Tipping was changed so that the company – the ownership of which had previously been shared between the Norwegian government (40%), the Norwegian Sports Association (*Norges Idrettsforbund*) (40%) and the Norwegian Football Association (*Norges Fotballforbund*) (20%) – was, from then on, fully in the hands of the Government and the state's ownership of Norsk Tipping was supervised by the Ministry of Culture.
13. The Gaming Act applies only to Norsk Tipping and gives the company exclusive rights to operate several types of games in Norway. Pursuant to Section 1(1), the Act is applicable to: firstly, gaming in connection with sports competitions and other competitions not regulated in the Lottery Act; secondly, the game "Lotto"; and thirdly, other games as decided by the King.⁵
14. According to Section 10(1) of the Gaming Act, the profits of Norsk Tipping's activities are to be divided equally between sports objectives and cultural objectives. The funds ear-marked for different sports objectives are distributed by the King. Of the revenues provided for cultural objectives, two thirds are distributed by the Storting and one third is distributed by the King.⁶ In addition, Section 10(2) authorises the King to reserve special revenues for research, information, prevention and treatment in the field of gaming addiction.
15. Political control of Norsk Tipping is exercised, firstly, pursuant to Section 11 of the Gaming Act, which gives the Ministry of Culture and Church Affairs the power to draw up the regulations for the games offered by the company. Secondly, it is exercised via the Ministry's capacity as owner of Norsk Tipping. The latter's decisions can thereby be overridden by the Government through instructions.

b) The Totalisator Act - Norsk Rikstoto

16. Originally, the Act of 1 July 1927 No. 3 on Totalisators (hereafter the Totalisator Act)⁷ opened up for betting licences in connection with horse racing using a

⁴ The Act can be found at : <http://www.lovddata.no/all/nl-19920828-103.html>.

⁵ Furthermore, as will be described below, following the 2003 amendments to the Norwegian lottery and gaming legislation, Section 1(1) paragraph c) provides for a monopoly for Norsk Tipping for the operation of gaming machines.

⁶ Following the amendments to the Norwegian lottery and gaming legislation, also organisations with a humanitarian or social aim (not connected with the Norwegian Sports Association (*Norges Idrettsforbund*) and the Norwegian Olympic Committee) are to be allocated a certain share of Norsk Tipping's profits.

⁷ The Act can be found at: <http://www.lovddata.no/all/nl-19270701-003.html>.

totalisator system. The totalisator games were arranged on each individual course. In the nineties, the law was, however, changed so that the foundation Norsk Rikstoto (which was established in 1982) was given exclusive rights to operate horse betting services.

17. The obligations of Norsk Rikstoto are specified in an implementing regulation.⁸ According to the regulation, the totalisator games shall contribute to the strengthening of horse racing and Norwegian horse breeding. Each year, Norsk Rikstoto is obliged to grant money for these purposes.
18. Pursuant to Section 1(4) of the Totalisator Act, the Ministry of Agriculture must approve the different types of games offered by Norsk Rikstoto. Further, it is the Ministry's responsibility to determine the rules of the individual games, and, according to Section 1(5) of the Act, the authorised prize share for each type of game. According to Section 4 of the Totalisator Regulation, the Ministry must also approve the statutes of Norsk Rikstoto.
19. It follows from Section 8(1) of Norsk Rikstoto's statutes that one member of Norsk Rikstoto's board of five members should be nominated by the Ministry of Agriculture. The Ministry appoints the leader of the election committee; cf. Section 17(1) of the statutes.
20. According to Section 4.1 of Norsk Rikstoto's game rules, the minimum age for participating in totalisator games on the racing tracks is 16 years. To be able to register as a Norsk Rikstoto internet player, however, the consumer has to be 18 years old, cf. Section 4 of the terms of Norsk Rikstoto's internet games.

c) The Lottery Act

21. The Lottery Act⁹ covers all gaming activities involving money not regulated by the Gaming Act and the Totalisator Act.
22. According to Section 5 of the Lottery Act, a lottery may only be held for the benefit of a humanitarian or socially beneficial aim. Moreover, pursuant to Section 6 of the Act, a lottery may only (with certain limited exceptions) be operated on the basis of a prior permit on behalf of a charitable organisation. In deciding whether a permit shall be granted, a socially justifiable distribution of the income to be derived from the lottery activity is a factor that may be taken into account.
23. A gaming machine is treated as a lottery pursuant to Section 1(e) of the Lottery Act. Such machines may be installed by charitable organisations in order to provide revenue for charitable causes. When granting approval, a maximum limit may be set for the number of machines that may be installed, and provisions may be laid down as to the kind of machines that may be used, cf. Section 10 of the Act.

⁸ Regulation of 24 January 1997 No. 85 on Totalisator Games and the Statutes for the foundation Norsk Rikstoto. The Regulation can be found at: <http://www.lovddata.no/for/sf/ld/ld-19970124-0085.html>.

⁹ The Act can be found at: <http://www.lovddata.no/all/nl-19950224-011.html>.

II.2 The regulation of gaming machines

a) Regulation No. 853 of 28 August 1998

24. As already indicated, under the licensing system that remains in force until such time as the monopoly for Norsk Tipping may be introduced, gaming machines can only be installed if the objective is socially beneficial or for humanitarian causes. Private persons and commercial enterprises cannot obtain installation permits. However, they can – after having received authorisation from the authorities – arrange lotteries on behalf of an organisation or association, provided that as a minimum 40% (previously 35%) of the profits (*i.e.* turnover after deductions for prizes) goes to a socially beneficial or humanitarian organisation.
25. In 1998, following the development of more advanced gaming machines, a regulation was introduced requiring type approval of the machines and imposing clearer and more restrictive requirements (Regulation of 28 August 1998 No. 853).¹⁰ According to Section 1 of the Regulation, all gaming machines were subject to type approval. Pursuant to Section 7, changes to previously approved gaming machines also required a new type approval. The same was the case for changes in games on existing machines.
26. Section 6 of the Regulation prescribed – among other things – a minimum sequence time (*i.e.* the time between intervals in play) of 3 seconds per game and a maximum prize of NOK 200. The Regulation was supposed to lead to a gradual removal from the market of many of the earlier type approved gaming machines. In connection with the issuing of the Regulation, the Ministry informed the operators that it might in the near future require installation of a surveillance unit in the machines in order for the authorities and the operator to follow the functioning of the machines over the phone net.
27. According to Section 1(2) of Regulation No. 853, gaming machines must be inspected by a test institute before type approval can be granted. This task has been entrusted to a company called Gaming Laboratories International, situated in the Netherlands (GLI Europe). The type approval process consists, *inter alia*, of a technical test. GLI's responsibility in this process is to ascertain whether the gaming machine in question fulfils the technical specifications included in Regulation No. 853. If any doubts arise concerning the interpretation of the specifications, GLI shall contact the Norwegian Gaming Board to clarify any possible problems. If a gaming machine satisfies the requirements, GLI issues a letter of compliance which is sent to the Norwegian Gaming Board, who then, on the basis of GLI's statement, issues a certificate stating that the machine is type approved for the Norwegian market.
28. Pursuant to Section 2 of Regulation No. 853, installation of gaming machines may be allowed by the police only in so far as the machine has been type approved. More detailed rules on installation are to be found in Regulation No. 960 of 22 September 2000 on Installation Licenses for Gaming Machines and Amusement Machines. According to Section 2(1) and (2) of this Regulation, installation licenses for gaming machines and amusement machines are issued by the police for a period of three years at a time. Section 2(3) of the Regulation on Installation Licenses states that the installation license should indicate the name and address of the proprietor, the place of installation, the name and address of the owner of the

¹⁰ **Annex 1**, Regulation of 28 August 1998 No. 853 on type approval of gaming machines.

installation premises, the type, name, producer and serial number of the gaming machine, and the duration of the permission. Section 2(4) requires that the license should be placed, in a way that is well visible, on or in the immediate vicinity of the machine.

b) Ot. prp. No. 84 (1998-99) on the Lottery Act and the Gaming Board

29. In the autumn of 1999, the Storting considered a Bill, Ot. prp. No. 84 (1998-99), concerning the future regulation of the gaming market. The Bill proposed, *inter alia*, to establish a gaming board, to clarify the conditions for obtaining authorisations and to introduce age limit on gaming machines. As regards the functionality of gaming machines the Bill referred to the above mentioned Regulation No. 853 of 28 August 1998 that clarified the criteria for approval. That Regulation entailed that older machines type approved before 1 April 1997 would gradually be phased out of the market. The Bill also stated that it remained an aim of the Government's gaming policy that *"the regulations and market structure shall create good conditions for competition between the market's different sectors and players"*.¹¹

30. In Innst. O. No. 33 (1999-2000)¹², paragraph 10.3, the Parliamentary Committee addressed the new requirements introduced in Regulation 853 of 28 August 1998. It took note of the fact that gaming machines contributed approximately NOK 850 million yearly to various humanitarian and social organisations. Although the Committee in general agreed with the Ministry of Justice about the necessity of technical requirements and a type approval procedure, it could not accept measures that would diminish the revenues to charities:

*"The Committee is of the opinion that requirements must not be laid down in the regulations that require replacement of the machines or reduce the revenues for the organisations. According to the organisations the existing regulation would cause them significant costs. The Committee asks the Ministry to review the regulations on the basis of these presumptions."*¹³

31. As a consequence of this approach, the Committee would not introduce stricter requirements with regard to the location of gaming machines and found that gaming machines should continue to be installed in gas stations, local grocery shops, shopping malls, cinemas etc. Similarly, the Committee referred to the fact that the *"less aggressive"* gaming machines that the draft regulation sought to introduce, would probably not generate as much revenue to charities as the old machines. In the opinion of the Committee, such an effect was not acceptable:

"On the basis of material that has been made available to the Committee during the hearing from the operators in the market, it looks as if these machines [that the Ministry had suggested] do not create the same amount of money for the said causes. For the Storting, it has been a condition that the revenues should remain approximately at today's level."

The majority supports an age restriction for playing on gaming machines and sees this as the most important measure to prevent children and young people from

¹¹ Cf. Chapter 3.2 of the Bill. The Authority's translation. The document can be found on <http://odin.dep.no/jd/norsk/publ/otprp/012005-050048/index-dok000-b-n-a.html>.

¹² Annex 2, Innst. O. No. 33 (1999-2000).

¹³ The Authority's translation.

participating in money games thus avoiding addiction to gambling. The majority considers the attempts to make the machines less tempting, therefore, to be of less importance.”

32. In paragraph 15, the Committee concluded that the Ministry should reassess its proposal:

“The Committee finds that an assessment of the gaming machine regulation must be carried out, based on the premise that the organisations’ income must be secured, and the Ministry should, in particular, emphasise a description of different alternatives thereto.”

c) Regulation No. 982 of 27 September 2000

33. The Ministry of Justice sent out a new proposal for a public hearing.¹⁴ In the new proposal, the Ministry referred to the 1995 amendments to the Lottery Act and the competition between humanitarian organisations to offer the most attractive gaming machines in the market. The Ministry, moreover, argued that:

“The criticism of today’s machine market is to a great extent attributable to the fact that until 1 April 1997 sufficiently clear criteria were not laid down as to which machines could be type approved, combined with lack of control of the machines.”

34. According to the Ministry, a controlled system of type approval would ensure fair conditions of competition for the market players and enhance the general public’s trust in the gaming machine market. The proposed amendments were, furthermore, aimed at complying with the Justice Committee’s wish that revenues for the organisations should be maintained. Moreover, the Ministry stated that the amendments aimed at providing maximum security against manipulation of machine functionality. They also sought to protect the general public’s desire to gamble within an upright and socially acceptable framework whereby addictive mechanisms in games could be countered.

35. As regards prizes, the Ministry explained that the maximum prize should be increased 10 fold from NOK 200 to NOK 2 000 and that:

“[t]he intention with this part of the proposal is to stimulate competition on development of new gaming concepts.”¹⁵

36. In order to stimulate competition, the Ministry also proposed to allow a jackpot prize of NOK 15 000 for machines installed in gaming arcades. This proposal was, however, not adopted.

37. Subsequently, in accordance with the Justice Committee’s remarks, the Ministry of Justice changed the functionality requirements on type approval in Regulation No. 853 by Regulation of 27 September 2000 No. 982 on changes in the Regulation on type approval of gaming machines.¹⁶ The new Section 6 of the Regulation thus allowed for 10 times higher maximum prizes, from NOK 200 to NOK 2 000, and

¹⁴ Annex 3, letter from the Ministry of Justice dated 29 June 2000.

¹⁵ Cf. paragraph 3.4 of the proposal. (The Authority’s translation).

¹⁶ Annex 4, Regulation of 27 September 2000 No. 982 on changes in the Regulation on type approval of gaming machines.

halved the minimum sequence time of a game from 3 to 1.5 seconds. Thus, the changes involved a clear loosening of the restrictions contained in the earlier Regulation. To balance these changes an age limit of 18 years was introduced.

d) The establishment of the Norwegian Gaming Board

38. On 1 January 2001, the Norwegian Gaming Board was established as a supervisory expert body on the Norwegian lottery market, by way of an amendment to the Lottery Act. At the same time, the relevant parliamentary committee: *“emphasise[d] that a main aim for the Lottery Act is to ensure income for charities, thereby ensuring the operation of valuable social and humanitarian objectives that these organisations finance and administrate”*.¹⁷
39. The Gaming Board has the administrative responsibility for private lottery activities in Norway. All organisations wishing to arrange lotteries must apply to the Gaming Board for a licence. Until the implementation of the monopoly for Norsk Tipping for the operation of gaming machines, the Gaming Board, in accordance with Section 10 of the Lottery Act, also has the authority to decide upon applications regarding installation of such machines. In addition, the Gaming Board authorises contractors planning to arrange lotteries on behalf of approved organisations, as well as the owners of the premises in which lotteries are to be held.
40. The Gaming Board is to control the observance of provisions laid down in, or pursuant to, the Lottery Act. In the event of such provisions being violated, the Board has the authority to revoke authorisations and licences, and to order a correction of the illegal situation or the closing-down of the illegal activity. The Gaming Board’s surveillance also applies to the games of Norsk Tipping and Norsk Rikstoto.
41. Since its establishment, the Gaming Board has carried out inspections of the Norwegian gaming machine market. In its first Annual Report concerning the year 2001, the Board stated that, *“When it comes to type approval of gaming machines, we can now conclude that the Norwegian Gaming Board is foremost in Europe”*.¹⁸ The Board also explained that no illegal gaming machines were discovered in 2001. The only irregularities discovered were that 139 machines were not equipped with visible installation permits, although all of those machines had been granted permits.
42. In November 2001, an expert committee established by the Norwegian Ministry of Culture published a report entitled *“Norske Pengespel i ei digital framtid”* (Norwegian money games in a digital future). In the report, the committee suggested the introduction of an online based system for the running of all gaming machines in Norway, possibly with effect from 2004. In support thereof, it was argued that such a system would make it possible for the entrepreneur to upgrade the gaming programs without being physically present at each individual machine. Furthermore, online supervision would be an important step in reducing the risk of manipulation, just as it would give an early warning of theft from the machines. The work towards establishing online surveillance systems in gaming machines continued in 2002. The Gaming Board aimed at presenting a draft regulation in the

¹⁷ Cf. Innst. O. No. 12 (2000-2001), point 1.3. The Authority’s translation. The document can be found at: <http://www.stortinget.no/inno/2000/inno-200001-012.html>.

¹⁸ **Annex 5**, Annual Report of the Gaming Board 2001. The Authority’s translation.

winter of 2002-2003 and for that purpose asked private operators to establish a working group that could come up with suggestions for practical solutions. In this respect, the Gaming Board emphasised that the system could also give the authorities precise turnover figures and ensure that the machines worked according to their type approval.¹⁹

e) Innst. S. No. 153 (2001-2002)

43. In April 2002, the Storting discussed a proposal from three of its members to adopt a “*drastic reduction in the number of authorisations to operate gaming machines*”. The proposal also invited the Government to put forward a proposal for a “*drastic reduction in gaming machine bets and prizes*” and a proposal on how to limit access to gaming machines.²⁰ The competent Committee of the Storting noted that the concern regarding problematic gaming appeared to be acknowledged by both authorities and market players. However, the majority expressed the view that any changes should be based on factual knowledge about the situation, including knowledge about what measures actually affect gambling. For that reason, the Committee found it important that the Ministry made use of contacts with researchers with expertise in gambling problems when drafting a proposal for new rules. In the meantime, authorisations to start new types of money games should not be granted. Nor should the total number of gaming machines be increased.

f) The Ministry’s first proposal of 21 June 2002

44. The Ministry of Culture and Church Affairs (hereinafter referred to as “the Ministry”) responded to the invitation of the Storting by putting forward a proposal for public hearing on 21 June 2002.²¹ The proposal was based on a continuation of the licensing system for private operators, but with a stricter regulation of where gaming machines could be located. The Ministry noted that the majority of gaming machines (numbering, at the time, a total of app. 18 000) were located in shops, petrol stations and shopping centres, something that entailed an unfortunate exposure of minors and people with problematic gaming behaviour to money games. Therefore, in order to enforce the 18 year age threshold on playing, the Ministry proposed that gaming machines should only be allowed in areas where minors would not have access. The Ministry, moreover, proposed to change the provisions on division of the revenues with an increase from 35% to 45% to the charities and a corresponding decrease for the machine operators. The hearing paper contained no mention of perceived problems in the present market for gaming machines, except for the abovementioned question concerning the location of the machines.
45. The Gaming Board submitted its comments to the Ministry’s hearing paper on 20 September 2002.²² It agreed, in essence, with the approach of the Ministry, especially on the point concerning the need to have a more restrictive policy on the placement of machines. This was so because the inspections of the Board showed

¹⁹ **Annex 6**, letter of 16 September 2002 from the Gaming Board to the relevant operators. See also point 5.2 in the Gaming Board’s comments to the Government’s hearing paper of 21 June 2002 described below in point II.2.f).

²⁰ Innst. S. No. 153 (2001-2002). The document can be found at: <http://websir.lovddata.no/cgi-lex/wiftbas?INNS=on>.

²¹ Letter from the Ministry of Culture and Church Affairs dated 21 June 2002, **Annex 31**, reply to the letter of formal notice, enclosure 10 thereto. English translation provided by the Authority enclosed.

²² **Annex 7**, letter from the Gaming Board dated 20 September 2002. The Authority’s translation.

that the age-control had not been sufficiently enforced and because there had been indications that gaming machines caused gambling problems:

“Feedback from persons who suffer from problematic behaviour and/or addiction to gambling is often that these people have a strong aversion to seeing gaming machines in public places. It is often said that it can be very problematic for this group of people to come across gaming machines when they are, for example, carrying out daily errands in shops, kiosks and petrol stations.

For this reason the Gaming Board is of the opinion that gaming machines in public places, especially where children and young people under 18 are allowed to be without supervision, should be hidden.

At the present, we do not possess any new, comprehensive scientific evidence on how widespread gambling addiction and problematic gambling behaviour is in the Norwegian population. The answer will be available when an extensive population enquiry is ready, in Spring 2003. Until then, we have to rely more on indications. It is worth noting that around 80 percent of those receiving treatment for gambling addiction indicated that gaming machines were the main problem.

Even if the number of machines in Norway is diminishing, the Gaming Board’s statistics show that turnover has increased – also in 2001 when the 18 year age limit was introduced.”²³

46. The Gaming Board, moreover, discussed the distribution of the revenue and noted that gaming machines were subject to burglaries, theft and attempts at manipulation. The Gaming Board made no suggestions that the operators violated or “bent” rules pertaining to the functionality of the machines or the placing thereof.
47. Both the operators and the charities benefiting from revenue created by the machines met the proposal with mass opposition. In a joint response dated 20 September 2002, ten of the larger charitable organisations in Norway stated that the proposal would lead to a reduction of gaming locations in the range of 75-80% and a diminution in revenue of approximately NOK 500 million. This would have a corresponding negative effect on a large proportion of the work carried out by voluntary organisations. With respect to under age gambling, the organisations referred to a positive development following the introduction of the 18 year age limit and described how improved control measures could ensure additional improvement.
48. Shortly afterwards, in October 2002, the proposal was replaced with another proposal, as outlined below.

²³ Cf. page 7 of the letter.

II.3 Introduction of a gaming machine monopoly for Norsk Tipping AS

a) Norsk Tipping's letter of 1 July 2002

49. In the meantime, on 1 July 2002, Norsk Tipping, upon invitation from the Ministry, presented a model to the Ministry showing how Norsk Tipping could take over the operation of gaming machines.²⁴
50. The letter contained a description of the perceived weaknesses of the licensing system and experiences with different models from other countries. As an alternative to the licence system, Norsk Tipping proposed a new model entrusting Norsk Tipping with an exclusive right to operate approximately 10 000 gaming machines connected in an electronic network (Video Lottery Terminals). The machines would be placed in kiosks, gaming cafés, pubs and arcades. Norsk Tipping would, moreover, consider the introduction of a system of smart card technology to ensure identification, age control and use of electronic payment. The company underlined that it was of decisive importance to choose a model which provided a good balance between the games available for customers and the biggest possible profits to good causes, as well as limiting the risk of gambling addiction.²⁵ For Norsk Tipping it was also essential that the company could continue to “develop a combined portfolio of available games that ensure the largest possible profits to all good causes.” In this respect, Norsk Tipping stated: “We have calculated that the turnover from machines can be reduced by almost 40% without a reduction in the profits given to the good causes.”²⁶ It was important that the company was given the liberty to develop a complete portfolio of game-offers that would ensure the biggest possible revenue for all the purposes receiving revenue from Norsk Tipping:

“The main reason that Norsk Tipping should be the exclusive operator is that this will ensure the maximum profits to the good causes with fewer machines. ... Based on its model and the provisional calculations made by the company ... Norsk Tipping will bring in just as many millions of Kroner as today, i.e. approximately 800 million Kroner. This is despite the fact that there will be approximately 3 billion Kroner less turnover due to a smaller number of machines, less aggressive machines and a more effective enforcement of the age limit. ... The operation of machines will, as stated above, bring in total profits approaching that which the lottery profit recipients receive in total today. It must also be noted that without Norsk Tipping's entry into the market, these good causes would probably have to expect a reduction in future earnings due to the measures expected from the authorities.”²⁷

51. According to Norsk Tipping, the suggested monopoly solution would give “a unique opportunity to maximise profits from the money game market to good causes, at the same time as the authorities have control over the development of the gaming market and can lead it in the desired direction.”²⁸

²⁴ Letter of 1 July 2002 “Norsk Tipping's possible entry into the machine market”, Annex 27, letter from the Norwegian Government of 1 September 2003, enclosure 1 thereto.

²⁵ Cf. page 6 of the letter.

²⁶ Cf. page 6 of the letter.

²⁷ Cf. pages 13 and 14 of the letter.

²⁸ Cf. page 14 of the letter.

b) Norsk Tipping's letter of 19 September 2002

52. On 19 September 2002, Norsk Tipping followed up its proposal with a more detailed presentation to the Ministry.²⁹ In the presentation, Norsk Tipping claimed that it would contribute to a clean-up of the gaming machine market, to reduce the danger of gaming addiction and to secure revenue for the charities.³⁰ Decisive factors for the choice of gaming machine locations were again described as a “[b]alance between the games available for customers and the biggest possible profits to good causes, and limiting the risk of gambling addiction”. According to the company, one should “[a]void the implementation of such drastic measures that reduce turnover and result in dramatic loss of revenues for the recipients of profits.”
53. Furthermore, Norsk Tipping described how the machines would be placed in four main areas. As a basic principle, machines should be located in areas where the age of entrants could be controlled and in an environment that provided for a positive gaming experience.³¹ The first category, comprising approximately 5 000 machines, would be restaurants/pubs/bars. The second category consisting of 500 machines would be Bingo halls and race tracks. The third category called *Stjerne kiosks* would consist of 2 000 machines placed in kiosks run by Norsk Tipping's agents. The fourth category consisting of the remaining 2 500 machines would be Norsk Tipping's “*Own concepts*”, namely Gaming halls/arcades and Gaming cafés.³² The new model would be introduced gradually between 1 August 2004 and 1 January 2006, at which point Norsk Tipping would be the only operator left on the market.³³
54. Among the things Norsk Tipping referred to as ways to succeed were: “*build up an organisation with “guts”*”, to “*develop brand names (Jack Vegas - Miss Vegas)*”, to “*focus on products that give good earnings*” and to “*emphasise the importance of finding games that attract “non-gamers”*”.³⁴
55. In part II of the presentation, Norsk Tipping underlined that: “[t]he *Stjerne kiosk concept is a condition of NT's model and makes up 25% of contributions.*”³⁵ This latter aspect was further explained in an answer to a question from the Ministry concerning the economic consequences of not allowing machines to be placed in kiosks and petrol stations. According to Norsk Tipping's calculation, such a limitation would reduce the annual income for 2007 “*by over 200 million Kroner*”.³⁶ Finally, Norsk Tipping answered the following question from the Ministry:

“Profit estimate Norsk Tipping has provisionally estimated that the company will be able to bring in just as many millions for profit distribution as today, i.e. approximately 800 million Kroner even with 40% lower turnover (approximately

²⁹ Presentation of 19 September 2002, “*The Big Step*”, **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 2 thereto. English translation provided by the Authority enclosed.

³⁰ Cf. pages 5-6 of the presentation.

³¹ Cf. page 7 of the presentation.

³² Cf. pages 9-14 of the presentation.

³³ Cf. page 23 of the presentation.

³⁴ Cf. page 37 of the presentation.

³⁵ Cf. page 40 of the presentation.

³⁶ Cf. pages 46-47 of the presentation.

5 billion). Can this estimate be used in further consideration of NT's model (e.g. in the r-memo)?”³⁷

56. Norsk Tipping’s reply, based on experiences from Sweden and Canada, was that:

“Our estimates show that when we have reached one full year of operation with 10.000 machines, the profits will be in the region of 830 million. This is based on the conditions that are now part of the NT-model.”³⁸

c) The Ministry’s second proposal of 25 October 2002

57. Shortly thereafter, on 25 October 2002, the Ministry sent out a proposal for a public hearing based on Norsk Tipping’s model.³⁹ This was the first time the Norwegian authorities informed private operators about this alternative model that the Ministry had been examining in parallel with its public hearing concerning alterations to the licensing system.

58. In Chapter 1, *Introduction*, the Ministry introduced the main elements of its new proposal:

“Attached is the proposal for changes to the Act of 28.8.1992 no. 103 on gaming etc. and the Act of 24.2.1995 no. 11 on lotteries etc., cf. attachment 1. The proposal entails that the rules governing prize machines be removed from the Lottery Act and that the right to deployment of such machines be established as a monopoly for Norsk Tipping AS under the stipulations of the Gaming Act.

Furthermore, the proposal also entails that revenues for socially beneficial and humanitarian organisations be secured by these being incorporated as recipients of profits from Norsk Tipping AS in the same way as sport and culture, and that the public authorities are responsible for the allocation of profits.”

59. Point 2.2 of the letter described the gaming legislation and the current gaming market. According to the Ministry, the number of machines was high compared to the population, and the rules governing the location of the machines, the gaming speed and possibilities for high prizes were liberal compared to other countries.

60. The Ministry, moreover, stated that it had become aware of a number of breaches in the conditions for the operation of gaming machines, for example unrecorded turnover, machines with illegal functionality, and illegal purchases of the most attractive machine locations. Furthermore, it had, according to the Ministry, proven difficult to control compliance of the machines with the technical requirements issued by the gaming authorities. It had also proven difficult to introduce restrictions on the machines due to aggressive lobbying from the gaming business. An additional weakness with the current system was, according to the Ministry, that it appeared to be difficult to enforce the 18 year age restriction.

³⁷ The r-memo is a memo prepared by each Minister before decisions are to be taken in government meetings, for instance decisions to submit a legislative proposal to the Storting. For a closer description of the use of r-memo, see <http://www.dep.no/archive/smkvedlegg/01/01/Innma031.pdf>.

³⁸ Cf. pages 59-60 of the presentation.

³⁹ **Annex 8**, hearing paper from the Ministry of Culture and Church Affairs dated 25 October 2002. English translation enclosed.

61. The Ministry also argued that the current Regulation did not ensure that the real surplus from gaming would go to the charities:

“It is the opinion of the Ministry that experiences after 1995 show that the current competition-based market on the entrepreneur side does not provide security for efficient operation and defensible administration according to the intentions of the Lottery Act (i.e. the proportion of profits that goes to the good causes is far too small based on today's rules).”

62. The letter, furthermore, addressed issues concerning gambling addiction. The Ministry explained that gaming machines created more problems with gambling addiction than other money games, something that was confirmed by numbers provided by two treatment centres and by international scientific research. Although the Ministry itself had initiated a country wide survey on gambling addiction, the results of which were to be presented in the first half of 2003, the Ministry considered the available information sufficient to confirm that amendments to the rules on location of gaming machines would contribute to a reduction in levels of addiction.

63. The Ministry, furthermore, explained that its proposal for amendments from 21 June the same year had been met with opposition from both the existing operators and the charities because it would entail a reduction in revenue for the charities. The Ministry referred to estimates from the charitable organisations indicating that their revenues would be reduced from NOK 880 million to between NOK 200 and 400 million.

64. As regards alternatives, the Ministry indicated that it had considered a model in which Norsk Tipping would operate in competition with private operators. This model would, however, not ensure sufficient improvement of the political regulation and control of the market. Moreover, with such a model the income to the charities could not be secured through a statutory share of Norsk Tipping's profits (*“tippenøkkeln”*).⁴⁰

65. In its description of the model, the Ministry again referred to Norsk Tipping's estimates of how the monopoly would secure an equally big surplus from the machines as today, even though the total gross revenue would be reduced by 40%. This would have the effect that the number of machines could be reduced to 10.000 without a substantial reduction in income to charities. The machines would be placed in controllable areas and no longer be located in grocery shops and shopping malls. The Ministry explained that, in contrast:

*“The feedback received from the current operators in the machine market following the Ministry's consultation document of 21.6.2002 suggests that such tightening of deployment policy could not be implemented under the current model without a significant reduction in profits to the socially beneficial and humanitarian organisations.”*⁴¹

66. To sum up, the Ministry emphasised that the new model had the following advantages:

⁴⁰ Cf. point 3.1 *in fine* of the hearing paper.

⁴¹ Cf. point 3.2 of the hearing paper.

*“The organisations’ incomes are assured
The number of machines is significantly reduced
The machines will be less visible in public areas
Enforcement of the 18 year age restriction will be significantly improved
The authorities obtain full control over the mode of operation of the machines”.*⁴²

67. In point 4, entitled “*Financial and administrative consequences*”, the Ministry once again repeated that the new model would, at the same time, ensure a reduction of the number of machines as well as the income to charities:

“This is the best way to be able to reduce the number of machines at the same time as maintaining the financial levels for good causes.”

68. On the same day, the Ministry sent a letter to Norsk Tipping in which the Ministry asked the company to assess in more detail its “conditions” for taking on the tasks described in the second hearing paper.⁴³

69. The Ministry’s proposal was met with strong opposition from the current machine operators, in particular Norsk Lotteridrift ASA (NLD) and Norsk Lotteri og Automatbransjeforbund (NOAF), who claimed that the measure would be contrary to Norway’s obligations under the EEA Agreement. In particular NLD argued that an important aim behind the monopoly model appeared to be the financial consideration of securing a certain level of profit for the charitable organisations. Moreover, it argued that all the measures proposed to reduce gambling addiction and under age gambling could be implemented in a system with private machine operators, and that the introduction of a monopoly therefore was a disproportionate measure.

d) Letter of 19 December 2002 from Norsk Tipping to the Ministry

70. Norsk Tipping replied to the Ministry’s question with a letter of 19 December 2002⁴⁴ in which it stated that:

“We will contribute to a far larger share of the profits from the machine enterprise to the humanitarian and voluntary causes through more efficient operations, good public control of cash flows and the enterprise as a whole. It is equally important that we will also contribute to the machine enterprise taking place within a responsible framework, which is an important foundation of Norsk Tipping's enterprise. We therefore wish to limit access to and the number of machines, as well as ensure that the authorities' stipulated minimum age limit is enforced.

Our goal is therefore that the machine enterprise shall be run according to a model that gives a good balance between the games available to the customer and the largest possible profits, and where the risk of gambling addiction is limited.”

71. The letter further contained Norsk Tipping’s “*main conditions that must be fulfilled in order for the company to be able to carry out such a substantial task and meet the responsibility that the consultation proposal entails.*” Norsk Tipping

⁴² Cf. point 3.3 of the hearing paper.

⁴³ Letter of 25 October 2002 from the Ministry of Culture and Church Affairs, **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 4 thereto.

⁴⁴ Letter of 19 December 2002 from Norsk Tipping, **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 5 thereto.

assumed, *inter alia*, that it would be granted a sole right to operate gaming machines and that it could operate approximately 10 000 machines in a wholly owned subsidiary, which would be allowed to operate on a commercial basis. As regards Norsk Tipping's commercial conditions, four market concepts were described on page 2:

“Within the limit of 10 000 machines we require the company to have the freedom to develop concepts and brand names within the types of deployment locations and the stake and prize limits stipulated by the Ministry. ... Norsk Tipping wishes to establish the machine enterprise based on commercial criteria and wishes to emphasise the synergy effects that localisation together with the current enterprise will entail.”

72. As regards the economic risk involved, Norsk Tipping held that:

“It is our opinion that the company and the authorities have a joint interest in ensuring both a responsible development of the market and a secure income stream for the good causes.

To reduce the financial risk solutions must be found that can be implemented if the estimated income is not earned. An example of such a solution is the establishment of new games within the traditional enterprise.”

e) The Bill, Ot. prp. No. 44 (2002-2003)

73. On the basis of the model presented in the second consultation paper, on 14 March 2003, the Government adopted a Bill to be put forward to the Storting.⁴⁵ The Government stated that:

“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.”

74. As regards revenues to charities, the Government stated:

*“The Ministry would like to emphasise the social benefits of the work carried out by the organisations that currently receive funds from the machine enterprise. It is therefore a fundamental principle that at this stage it is not intended to make any major change in the division of the gaming income to these organisations with regard to the development of the machine income up until 2001. In order to meet the competition from foreign money games on the Internet, the Ministry aims to assess permanent Norwegian games on the Internet after an evaluation of the current test project has been undertaken”.*⁴⁶

75. In Chapter 2, entitled “*Background for the proposal*”, the Government referred to its proposal of 21 June 2002:

⁴⁵ Annex 9, Ot. prp. No. 44 (2002-2003). English translation provided.

⁴⁶ At the same time, the Government proposed supplementary rules on support to charities in the interim period between the introduction of the monopoly and the time when Norsk Tipping would be fully operational so that no reduction in the amount given to charities should occur as a consequence of the monopoly.

“In their consultation submissions both private machine operators and affected organisations expressed strong resistance to the proposal for amended conditions for prize machines, because it was expected that stricter limitations concerning where machines could be deployed would lead to reductions in income. In their submissions the largest operators estimated that the proposal would entail a reduction in income for humanitarian and socially beneficial organisations from 880 million Kroner in 2001 to between 200 and 400 million Kroner per year.

The strong reaction made it clear that the proposals put forward by the Ministry could only partly solve the problems concerning administration and inspection. On this basis the Ministry sent out a new proposal for consultation on the 25th of October 2002.”

76. Paragraph 4.3.2, entitled *“The need for changes to the current rules”*, provided statistical information about gaming revenues created by machines in Norway. In 2001, NOK 876 million was transferred to social or humanitarian activities according to the Gaming Board. Moreover, according to estimates, the gross turnover from the machines increased by NOK 1 billion from 2000 to 2001, and by NOK 6 billion in 2002. Concerning the increase the Government explained:

“There are grounds to assume that this is due to reasons including the development of new types of machine after the changes in the technical approval requirements from the 1st of October 2000, the shift towards more attractive deployment locations as well as more efficient operations.”

77. As regards other problems in the gaming market, the Bill described irregularities with respect to machine functionality and problems experienced with enforcement of 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.”

78. According to the Ministry, it had proven difficult to introduce restrictions on machine functionality due to *“massive resistance from the games operators who fear a decline in turnover from the machines”*. Furthermore, extensive control of the gaming machines in order to prevent the machines containing illegal software was held to be very expensive.

79. As regards irregularities and crime the Government referred to: *“number of breaches of the terms for the deployment of prize machines, including unregistered turnover and the purchase of the most profitable deployment sites”*.⁴⁷ It also

⁴⁷ On 10 March 2003, four days before the Bill was submitted to Parliament, the Gaming Board published its Annual Report for 2002, **Annex 10**, the Gaming Board’s Annual Report 2002. In this Report the Board stated, on pages 18-19, that it had made a check of 16 533 machines. As a consequence it had confiscated 96 gaming machines of which 48 were due to lack of installation permits, 13 to lack of type approval and 35 to lack of both: *“This figure is somewhat lower than the Board had expected, considering that a number of tip-offs from the public and information from the sector itself had indicated that illegal machines could have presented a bigger problem. The Gaming Board also carried out internal checks of 238 prize machines without confiscating any. Some of these checks were the result of tip-offs from players who alleged that the*

mentioned an expert group established by OECD, the Financial Action Task Force, according to which “*the gaming industry is defined as a potential sector in which money laundering could take place*”. With regard to the 18-year age restriction, the Bill stated that experience indicated that “*it is difficult to fully achieve effective enforcement*”.⁴⁸ Finally, in addition to the above mentioned alleged weaknesses with the licensing system, the Bill held that the current rules did not adequately ensure that the real surplus from the gaming machine industry went to the charities.

80. Chapter 4.4, entitled “*Alternatives to the monopoly proposition*”, discussed alternative models: adjustments to the licensing system, or a system built on one, or a few, concessions to operate gaming machines. According to the Ministry, those models would, however, not solve what the Government perceived to be the fundamental problem with the existing market, namely the element of competition among the different market players. In point 4.4.4 the Government explained:

“The gaming and lottery market in general, including the machine market, should not be a 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 and the undesirable competition for the best deployment sites will be maintained. The task of monitoring and exposing illegal practices will require huge resources. Experience shows that it is difficult for the lottery authorities to carry out the necessary regulatory measures as regards deployment locations and the type of machines due to the industry's objections to

machines had to have been interfered with, but no errors or interference with, for example, the software was proven”. The Annual Report continues: “The Gaming Board believes that the new supervision-section has led the sector itself to clean- up. ... But the Board still expects that there are a number of illegal machines located in different gaming environments. This was shown inter alia by major controls that the Board made together with a range of other public authorities in Oslo. Here around 10 machines were discovered and confiscated. This is an environment where it can be difficult to find illegal machines because it requires more knowledge to discover them. But the Gaming Board expects that in the course of 2003 it will be possible to uncover more illegal gaming environments because both technical and tactical competence will be improved.” On the Gaming Board’s homepage, the findings of the raids in Oslo were summarised as follows: “The gaming market in the capital is better than its reputation. It is not nearly as bad as expected.”

The Authority’s translation.

⁴⁸ In the 2002 Annual Report, pages 18-19, the Director of the Gaming Board expressed the view that the situation had been improving, but that there were still too many minors playing on gaming machines. The Gaming Board’s Annual Report for 2001, **Annex 5**, contains no information about how many violations were detected during that year.

reduced earning 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 as the other operators.”

81. In paragraph 4.5 *Exclusive rights for Norsk Tipping*, the Ministry stated that Norsk Tipping’s gaming machines would be linked together in an electronic online network which would provide access to information about the cash flow and functioning of the machines.⁴⁹ Moreover, the payout of winnings would be in the form of a paper receipt that had to be exchanged with the owner of the premises instead of direct cash payouts from the machine. The Ministry stated:

“The proposal will create a significantly improved basis for a proper 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 10 000. 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.”⁵⁰

82. As regards revenue, the Government explained that by giving Norsk Tipping a sole right to operate gaming machines, the surplus generated by the gaming machines would comprise a part of Norsk Tipping’s total revenues. Social and humanitarian organisations would be given an earmarked share of 18% of Norsk Tipping’s total gaming surplus. This model was said to strengthen the political control of the total gaming market and provide the Government with an opportunity to manoeuvre the total gaming portfolio away from games that entail a risk of unfortunate 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 be 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 causes 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 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

⁴⁹ As highlighted by some of the private operators in their comments to the Government’s proposal, a similar system had already been planned in relation to the machines operated by the private operators under the old regime, cf. also point II.2.d) above. To that, the Government, in a letter of 23 May 2003 to the Storting, argued that: *“in relation to a countrywide electronic (machine) network based on the present model for the machine market, a similar network based on the Ministry’s exclusive rights model would have the advantage that Norsk Tipping would have owner’s rights to the whole network including the machines. Preliminary experience from other countries seems to show that a single legal and technical control of the entire network would be an advantage”* (the Authority’s translation). **Annex 27**, letter from the Government of 1 September 2003, enclosure 6 thereto.

⁵⁰ Underlined by the Authority. Indeed, some of the private operators had, in their comments to the Government’s first hearing paper of June 2002, themselves suggested that paper receipts should be introduced under the old system of licences for private operators, cf. e.g. the comments of NOAF dated 20 September 2002.

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 if the total machine turnover falls by up to 40%.”

83. The Government continued by pointing to the perceived problems in the current licensing system, *i.e.* the need for better control of machine functionality and the difficulties of introducing new stricter rules caused by lobbying before the Storting and administrative law procedures:

“The recent restructuring has not only led to the enforcement problems mentioned above, but it has also proved difficult to implement stricter rules for the machines' mode of operation. It appears that both philanthropic organisations and private enterprises that are directly affected by such a proposal use considerable resources to resist the proposal out of the fear of a decline in machine earnings. Reference is made here to the fact that the liberalisation of the requirements concerning the machines' mode of operation that was passed with effect from the 1st of October 2000, took place after massive lobbying campaigns from the operators mentioned above, cf. the comments on this topic from the Justice Committee of the Storting in Innst.O. no. 33 (1999-2000), amongst others. It is the opinion of the Ministry that the model for exclusive rights for a state-owned operator will entail that the machines' mode of operation can rapidly be altered in the light of increased knowledge as to which factors increase the danger of the development of gambling addiction. In such a model the Ministry will be able to change the guidelines for the machines' mode of operation without extensive procedures and long transitional periods. New information will thereby be more rapidly utilised in the design of available lotteries.

This also applies with regard to rules for where and how a machine can be deployed. The Ministry's consultation paper of the 21st of June 2002 contained proposals for significant changes to the rules regarding where a machine could be placed. The proposals met massive resistance from all operators in the machine market due to the anticipation that this would result in a dramatic reduction in revenues. The machine industry's attitude to the Ministry's proposal illustrated how difficult it is to achieve support for the decisions deemed necessary to ensure a defensible development of available money games, as long as the enterprises of the affected operators are directly connected to machine earnings. The Ministry is of the opinion that the lack of understanding for such stricter requirements that quickly occur with operators having a direct interest in the earnings from money games, would occur whether there is one or several operators and regardless of whether the operator is run by commercial owners or by philanthropic organisations. This makes a case for exclusive rights for a state-owned non-profit based operator.”

84. The Government, moreover, reiterated the advantages of incorporating the machine revenues in the total profit from all of Norsk Tipping's games and providing the charitable organisations with a certain percentage of that total profit:

“This will make it significantly easier for the lottery authorities to carry out an effective money games policy - for example if stricter rules for prize machine operation are desired these can be implemented without this having dramatic consequences for the organisations' income.”

f) Innst. O. No. 124 (2002-2003) of the Family, Culture and Administrative Committee

85. In its report of 6 June 2003 to the Odelsting,⁵¹ the Family, Culture and Administrative Committee of the Storting (the Parliamentary Committee) pointed out that the Norwegian gaming market “has represented highly significant revenues for voluntary and humanitarian organisations for many years” and that the extent of gaming should be assessed in connection with its negative effects.⁵² In its further discussions the Committee was split into a majority and a minority. According to the majority of the committee:

“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.”

86. In contrast, the minority expressed its dissatisfaction with the preparation of the proposal and claimed that more time was needed for its proper treatment. It nevertheless supported the proposal’s main objectives:

“These members agree with the main intention of the proposition to ensure income for the humanitarian and socially beneficial causes, as well as to minimise the unfortunate consequences that gambling addiction represents.”⁵³

87. In Chapter 2.3 *Gambling addiction*, the majority considered it to be positive that gaming machines would be removed from grocery stores and shopping malls as it would reduce exposure to money games. The majority also found that placement of gaming machines in areas under supervision would contribute to a reduction in under age gaming. Still, the majority expressed its concern that:

“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.”

Moreover:

“The majority believes that it is worrying that gambling turnover is rapidly increasing. The figures for 2002 show a turnover of approximately 30 billion Kroner. This means that each Norwegian played for an average of 6 500 Kroner last year. The fact that the areas that are increasing most rapidly are the games that are most likely to “trigger” gambling addiction is extremely worrying; for example betting on football, gambling on the Internet and prize machines. In 2002 machine turnover increased by some 67% and the turnover for football betting increased by 62.3%.

The majority believes that there is a clear connection between the extent of gambling and the extent of problems linked to gaming.”

88. In Chapter 2.4 concerning gaming machines, the majority of the Committee expressed its support for the proposal and stated that:

⁵¹ **Annex 11.** Innst. O. No. 124 (2002-2003). English translation provided.

⁵² Cf. page 13.

⁵³ Cf. page 14.

“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 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.”

89. On that basis, the Committee recommended that the Storting adopt the Bill.

g) The adoption of the Act

90. Following this recommendation, the Odelsting discussed the Bill on 12 June 2003. A large majority supported the Government's proposal as they found that the Bill would help to combat gambling addiction by way of improved control of the gaming market and at the same time ensure that charities continued to receive the amount of aid they had received in 2001.⁵⁴ Supporting the Bill, the representative from the Socialist Left Party (SV), however, held that there was reason to question whether *“revenues for organisation and worthy causes shall be maintained at today's levels. ... Increasing the number of games, as e.g. Norsk Tipping suggests – they think they can encourage even more people to gamble in an innocuous way – we would like to think this over first.”*⁵⁵ Only the Progress Party (*Fremskrittspartiet*) argued against the proposal, citing, *inter alia*, Norsk Tipping's intention to double the number of players from 500 000 to a million.⁵⁶
91. On 17 June 2003, the Storting adopted the suggested legislative amendments to the Gaming and Lottery Acts.⁵⁷ The amendments to the Gaming Act mean that Norsk Tipping will have sole rights to own, install and operate gaming machines. At the same time, the administration of lottery operations using gaming machines is transferred from the Lottery Act (which applies to private participants) to the Gaming Act (which applies only to Norsk Tipping).
92. The Lottery Act's new Section 15, first and second sentence, and the amendment to the Gaming Act Section 1c entered into force on 1 January 2004, cf. Regulation of 29 August 2003 No. 1091, while the Lottery Act's new Section 15, last sentence, and the repeal of the Lottery Act's present Section 10 were scheduled to enter into force from 1 January 2006.⁵⁸

⁵⁴ **Annex 12**, transcript from a session in Odelstinget 12 June 2003, cf. comments from representatives of AP and Høyre.

⁵⁵ **Annex 12**. The Authority's translation.

⁵⁶ **Annex 12**. See in this respect below at points III.b and VII.3.c.2).

⁵⁷ **Annex 13**, Act of 29 August 2003 No. 90. Translation may be found in Innst. O. No. 124 (2002-2003) part 4, **Annex 11**.

⁵⁸ As described below in point IV.b), the Borgarting Court of Appeal on 30 November 2004 gave an interim order prohibiting the Norwegian Government from implementing the changes to the gaming and lottery legislation until a final judgment was given on the matter. Following this order, the Ministry stopped the installation of Norsk Tipping's machines in December 2004. At the same time, the Ministry enacted a

II.4 The implementation of the monopoly

a) Norsk Tipping's concept for its gaming machine activity

93. In parallel with the legislative changes, Norsk Tipping prepared its entry into the gaming machine market. In Norsk Tipping's "Concept for a basic solution for Norsk Tipping's gaming machine business" from 3 May 2003,⁵⁹ and thus while the Government's Bill was pending before the Storting, it stated the following:

"Target groups

We shall create a new market for gaming machines – a market with a positive reputation.

In order to reach this aim we must over time address different types of players than today's machine users. This shall be achieved through branding, choice of channels and a tailored offer of games.

Two important guidelines:

We must quickly raise the turnover in all machines in order to fulfil our economic plans/budgets, based on the current ca. 500.000 gaming machine punters. The current machine players will be the main target group for Norsk Tipping's gaming machine business in 2004-2005.

We must recruit new punters and increase the number of punters. Within three years, our goal is to at least double the number of punters on gaming machines. The reason is that we want a larger group of punters who bet for a lower amount each compared to the current situation".⁶⁰

94. The same follows from Norsk Tipping's 2003 Annual Report (published in March 2004). In the Report, the director of the subsidiary of Norsk Tipping responsible for gaming machines made it clear that it was the company's objective to increase the number of players:

"We have been criticised for having expressed the intention of recruiting more gamblers. The fact is that we want to recruit more gamblers who gamble for smaller amounts... We intend to increase the number of gamblers and decrease the turnover pr. gambler. This way we will take out gamblers with unfortunate gaming habits, reduce gaming addiction and create a new market for gaming machines – a market with a positive reputation that contributes with foreseeable profits to the recipients of the turnover."⁶¹

temporary extension of the existing installation permits that have since been extended several times awaiting the outcome of the present procedure. Moreover, the Government has postponed the implementation of the new rules on type approval. Hence, Section 3 of the Regulation of 18 May 2004 No. 774 on Type Approval of Gaming Machines still provides for a maximum prize level of 2 000 NOK, and a minimum sequence time of 1,5 seconds.

⁵⁹ Annex 14, "Concept for a basic solution for Norsk Tipping's gaming machine business" dated 3 May 2003.

⁶⁰ The Authority's translation.

⁶¹ Annex 15, Annual Report of Norsk Tipping for 2003, page 14-15. Also annexed is the 2004 Annual Report of Norsk Tipping.

b) Letter of 3 September 2003 from the Ministry to the Gaming Board

95. On 3 September 2003, the Ministry sent a letter to the Gaming Board containing information about the necessary measures to be carried out for the implementation of the monopoly.⁶² With reference to Section 11 of the Gaming Act, which provides for the Ministry to lay down the rules for Norsk Tipping's games, the Ministry expressed its wish to benefit from the Gaming Board's expertise both with respect to the technical framework for the machines and issues related to gaming addiction.
96. The Ministry mentioned the following regulations and instructions to be prepared: 1) technical control requirements for the gaming platform and network, 2) requirements for Norsk Tipping's games, 3) requirements regarding location of machines, 4) temporary regulation on allocation of funds to compensate for reduced machine revenue in 2005, 5) regulation concerning allocation of funds to social and humanitarian organisations from Norsk Tipping's surplus, 6) establishment of necessary routines for the allocation arrangements, and 7) instructions for the Gaming Board's control of Norsk Tipping's gaming activities.

c) Letter of 15 January 2004 from Norsk Tipping to the Ministry

97. Norsk Tipping sent a letter on 15 January 2004 with proposals for instructions regarding Norsk Tipping's games and conditions for location of gaming machines.⁶³ The proposals were prepared in co-operation with the Gaming Board. In the letter, Norsk Tipping emphasised anew its previously communicated "prerequisites" for accepting the task of operating the gaming machines and the consequences of changes to its framework conditions, *inter alia*, expressed in its letter of 19 December 2002.
98. Under the headline "*Prevent and combat gambling addiction*", Norsk Tipping informed the Ministry that it had sought advice from the professional research community that works actively with gambling addiction and treatment.⁶⁴ On the basis of such advice it had implemented certain clear parameters:

*"Minimum game sequence increased from 1.5 seconds to 3 seconds.
The lowest return percentage is kept on approximately the same level as today,
from 78% to 75%.*

Maximum prize per game is reduced from 2 000 to 1 500.

In a business where it at present is normally discussed whether a minimum game sequence can be changed by one tenth of a second, a doubling will bring along an enormous lift to reduce gaming addiction."

99. With regard to maximum prizes, Norsk Tipping argued that the prizes should be kept at NOK 2 000, but that, based on earlier plans and prerequisites, it could

⁶² Annex 16, letter from the Ministry of Culture and Church Affairs of 3 September 2003.

⁶³ Annex 17, letter from Norsk Tipping of 15 January 2004.

⁶⁴ Norsk Tipping was later criticised by *Norsk Forening for pengespillproblematikk* (The Norwegian Association for Problems connected to Money Games) who in a letter to the Ministry dated 12 March 2004 claimed it had been ignored by Norsk Tipping in its process of preparing the new guidelines. The letter, moreover, stated that Norsk Tipping made use of unrealistic calculations when comparing its new machines with the old ones and that average loss per hour on the old machines was approximately the same as on Norsk Tipping's new machines. Annex 18, letter from Norsk Forening for pengespilleproblematikk, dated 12 March 2004.

“tolerate a limit for the highest prize at 1 500”. To go lower was, however, not advisable:

“The reason can be found in those having unfortunate gaming behaviour. We must in that case introduce a flatter prize plan with several small prizes in order to maintain the return percentage. Too high a frequency of small prizes stimulates the player to believe that he can master the machine so that he remains playing longer. Alternatively the return percentage can be reduced. That will make the games less attractive so that to attract normal players would be difficult. We also believe that a less attractive supply of games will result in leaks over to the illegal gaming market. We would underline that Norsk Tipping might need to return to the issue of a possible increase of the level of highest prize by the development of games with other characteristics.”

100. The letter, moreover, described measures concerning control by the location owner, information about gaming addiction and improved enforcement of the 18-year age restriction. Finally Norsk Tipping emphasised that the conditions that were described in the two attached proposals were:

“... crucial to Norsk Tipping’s ability to deliver. In order to be able to install the first gaming machines by August 2004 we will base ourselves on the conditions in the proposal. Given the acceptance of the attached conditions we believe that Norsk Tipping can be an effective tool for the Government by running the machine business in Norway in a way that provides a good balance between the unfortunate aspects of the gaming business and the revenues to charities.”⁶⁵

101. On 19 January 2004, the Gaming Board replied to the Ministry’s letter of 3 September 2003. The Gaming Board did not agree with Norsk Tipping about the maximum prizes. Based on its expertise on gambling addiction problems and on a comparison with the prize level in other Nordic countries, it proposed maximum prizes of half the size of the Norsk Tipping proposal, NOK 750.

d) Letter of 26 May 2004 from the Ministry to Norsk Tipping

102. On 25 May 2004, the Ministry issued the provisions for Norsk Tipping’s games and the conditions regarding location of machines. Moreover, in a letter to Norsk Tipping the following day, the Ministry informed the company that the new provisions followed, on all essential points, Norsk Tipping’s proposal.⁶⁶ As regards prize level the Ministry, after having referred to the Gaming Board’s recommendation, stated that maximum prizes of NOK 1 500 would contribute to the development of entertainment games instead of money games:

“The Ministry is of the opinion that prizes up to NOK 1500 will enable the development of games that are more long-lasting and characterised by entertainment than today’s machines. The fact that maximum prizes in other countries with more pure money game machines are lower should not restrict the efforts of developing the machine games from being pure money games into having a stronger character of entertainment. The effect of keeping the maximum prize at a

⁶⁵ The Authority’s translation. In fact, the suggested game sequence of 3 seconds corresponds to the one applicable to the private operators under the former 1998 Regulation.

⁶⁶ **Annex 19**, letter from the Ministry of Culture and Church Affairs of 26 May 2004.

*relatively high level will however have to be continuously assessed against negative gaming behaviour.*⁶⁷

e) Letter of 15 September 2004 from the Ministry to Norsk Tipping and the Gaming Board

103. On 1 September 2004, the Ministry issued provisions regarding technical control requirements for the gaming platform. The provisions were communicated to Norsk Tipping and the Gaming Board on 15 September 2004.⁶⁸ According to the provisions, all games for Norsk Tipping's gaming machines should be controlled by the Gaming Board prior to their launch on the market. In the letter, the Gaming Board was, moreover, given the task of evaluating the games already launched on the market by Norsk Tipping for pilot testing.
104. In its reply of 1 November 2004, the Gaming Board pointed to several breaches of the provisions governing Norsk Tipping's games.⁶⁹ As regards the evaluation of the games in connection with gaming addiction, the Gaming Board considered two of Norsk Tipping's games to contain overly tempting sound effects, *inter alia*, giving the player the impression that he had won even if he had actually lost money compared to his stake. Moreover, all the games had too short interruption periods during which the player could assess his gaming history and consider whether to continue playing. The Gaming Board also pointed out that the machines would accept consecutive deposits of NOK 200 bills, which would undermine the limitation of the maximum stake per game to NOK 200. As this, however, could not be considered a breach of the provisions, the Gaming Board recommended an amendment to the rules.

f) Letter of 17 November 2004 from the Ministry to Norsk Tipping

105. As explained in more detail below in point IV.a), the Oslo City Court ruled, in a judgment of 27 October 2004, that the monopoly awarded to Norsk Tipping infringed EEA law, *inter alia*, because it was inconsistent to introduce a monopoly and at the same time wish to double the number of players. Moreover, the Authority delivered a reasoned opinion to Norway on 20 October 2004.⁷⁰ As a consequence of these steps, the Ministry wrote a letter to Norsk Tipping on 17 November 2004 in which it also addressed the findings of the Gaming Board and instructed Norsk Tipping to correct the games.⁷¹ According to the Ministry, both the judgment of the Oslo City Court and the Authority's reasoned opinion had raised a number of issues concerning the monopoly:

“...that should have been clear. The processes have however shown a need to make more visible and further emphasise the following clear presumptions that Norsk Tipping must take as its basis in further work with the so-called sole rights model:

- *The purpose behind providing Norsk Tipping with sole right to operate gaming machines is to combat gaming addiction and prevent crime more*

⁶⁷ The Authority's translation.

⁶⁸ **Annex 20**, letter from the Ministry of Culture and Church Affairs of 15 September 2004.

⁶⁹ Letter from the Gaming Board of 1 November 2004, **Annex 33**, reply to the reasoned opinion dated 19 November 2004, enclosure 2 thereto.

⁷⁰ Cf. below at point III.f).

⁷¹ Letter from the Ministry of Culture and Church Affairs dated 17 November 2004, **Annex 33**, reply to the reasoned opinion dated 19 November 2004, enclosure 1 thereto. The Authority's translation.

effectively, improve the control of irregularities connected to machine operation and better enforce the 18-year age restriction, cf. Ot. prp. No. 44 (2002-2003).

- *Active marketing of Norsk Tipping's gaming machines shall not take place, beyond what follows from the machines bare presence at the location.*
- *It is not an aim that the number of players using gaming machines shall exceed today's level. Norsk Tipping shall supervise this and if the number of players shows sign of exceeding this level, the company shall initiate measures to ensure a responsible policy for gaming development.*
- *It is a condition for the introduction of the sole rights arrangement that turnover from the gaming machines shall be lower than the 2001 level (app. 9 billion). If the turnover shows sign of exceeding this level, then Norsk Tipping shall initiate measures to correct the trend."*

106. Moreover, the Ministry stated that it was a precondition for the introduction of the monopoly that the new gaming machines were considerably more moderate and less addictive than the gaming machines presently on the Norwegian market. It also indicated that it would initiate an assessment of the need for changes in the statutes of Norsk Tipping in order to make the company's role and function in the state gaming policy more visible. That would include an assessment of the conditions for the company's general supply of games, marketing strategy and the need for amendments to the company's production via subsidiaries.

g) Other measures

107. Following the adoption of the monopoly model the Ministry also asked the Gaming Board to initiate a plan to prevent gambling addiction. In December 2004 the Gaming Board delivered its "*Proposal for an action plan to prevent problem gambling and reduce the harmful effects of excessive gambling*".⁷² The plan was later adopted by the Ministry as the "*Governmental action plan to prevent problem gambling*."⁷³ The plan describes measures to increase knowledge about problem gambling as well as regulatory measures that could be taken in order to prevent problem gambling.

III. THE ADMINISTRATIVE PROCEDURE

a) The Government's letter of 24 February 2003

108. By a letter of 22 January 2003⁷⁴, the Authority informed the Norwegian Government of the receipt of two complaints concerning the proposal to grant the state-owned company Norsk Tipping exclusive rights to operate gaming machines in Norway.

⁷² **Annex 21**, Proposal for an action plan to prevent gambling and reduce the harmful effects of excessive gambling, Gaming Board December 2004. (English version).

⁷³ **Annex 22**, Governmental action plan to prevent problem gambling. (English version).

⁷⁴ **Annex 23**, letter from the Authority of 22 January 2003.

109. By two letters of 17⁷⁵ and 24 February 2003⁷⁶, the Norwegian Government replied to the Authority's letter. In the first letter, the Government gave an account of the historical development of the Norwegian lottery legislation. In the second letter, the Government argued that technical development of gaming machines during the 1990's had made it increasingly difficult to control machine functionality. Moreover, it reiterated the view presented in Ot. prp. No. 44 (2002-2003) that the commercial interests of private operators to push "*the limits for interpretation of the regulations and technical requirements with regard to what may be allowed in a machine*" had been a main factor behind the undesired effects on the Norwegian gaming market and that control of machine functionality had "*proven to be extremely difficult since the Lottery Act was passed in 1995. This has also been a relevant problem since new technical regulations were issued in 2000 and the establishment of The Gaming Board as a professional body with technical competence in this area.*" In addition, the Government stated that "*a series of breaches*" of the conditions for installation of gaming machines had been proven and that criminal statistics did "*not show a clear reduction in gaming machine related crime despite of operators placing more focus on the prevention of burglary, plundering and theft from machines.*"
110. The Norwegian Government repeated that lobbying against governmental proposals for more stringent rules concerning *e.g.* machine specifications or location made it difficult, in practice, to introduce more stringent rules. A similar opposition to a change of rules would not arise under a monopoly model. Finally, the Ministry saw as an advantage of the proposed monopoly solution that:

"The proposal implies machine revenues to be incorporated in the total profit from all of Norsk Tipping's gaming activities, whereby charitable organisations will receive revenues a certain percentage of the total profit. The charities' revenues will to a lesser extent be dependent on alternations in earnings from machines, enabling the Ministry to adopt a more suitable and effective gaming policy with regard to necessary amendments to regulations."

b) The first round of questions and answers

111. By a letter of 17 July 2003⁷⁷, the Authority invited the Norwegian Government to explain the considerations behind the monopoly with regard to, *inter alia*, the following points:
- Why would players become less addicted to gambling by using gaming machines operated by Norsk Tipping in comparison with the use of machines run by private operators?
 - Why could stricter rules within a continuation of the former concession system not have reversed the negative trend on the gaming market perceived by the Norwegian authorities?
 - What, more precisely, was the link between the granting of exclusive rights and a more efficient enforcement of the age restriction?
 - How would allowing gaming machines in kiosks and petrol stations contribute to the aim of combating gambling addiction, compared with the Government's original intention of prohibiting the placing of machines in these areas?

⁷⁵ Annex 24, letter from the Norwegian Government of 17 February 2003.

⁷⁶ Annex 25, letter from the Norwegian Government of 24 February 2003.

⁷⁷ Annex 26, letter from the Authority of 17 July 2003.

- What kind of crimes constituted the main problems in relation to the previous system?
- Why would the introduction of a monopoly have any crime-preventing effect?

112. The Norwegian Government replied by letter of 1 September 2003.⁷⁸ Without addressing each question separately, the Government explained that the monopoly model at one and the same time would enable the number of machines to be reduced and ensure that the charities continued to receive the same income as they had when the Government drafted its proposal for the new legislation.

113. Turning to the Authority's questions as to the precise link between the granting of exclusive rights and the aims pursued, the Norwegian Government acknowledged that:

*“There is reason to believe that basically all kinds of regulations concerning the location of gaming machines could be implemented within both a competition/concession market and a state owned monopoly. However, the Ministry expects that violations to the regulations are less likely to occur within a monopoly model. A non-profit state owned operator has no incentive to push the limits of prevailing regulations in order to improve profits or strategic position in relation to competitors. Violation of regulations regarding machine location and functionality is therefore less likely to be instigated by the operator. Within a monopoly model a non-profit operator is more free to institute and enforce contractual obligations towards the owner of the location in order to improve the level of constant control by the staff at the location. As mentioned above, the present model allows the proprietor to contact another machine operator if his contractor chooses to move the machine away from the location”.*⁷⁹

114. With regard to the Authority's question on the link between the granting of exclusive rights and a more efficient enforcement of the age restriction, the Government argued the following:

*“The new act granting a sole right to Norsk Tipping does not include the same strict limitations on the location of machines as outlined in the Ministerial proposal of 21 June 2002. Even though the final concept for machine locations in the monopoly regime has not yet been defined, the Ministry considers that the benefits from the monopoly model itself make it possible to allow machines into locations without absolute access control”.*⁸⁰

115. In answer to the question concerning the relationship between the monopoly and the wish to combat crime, the Government, *inter alia*, claimed that:

“In contrast to the present model, a monopoly system will minimise manufacturers' attempts to find loopholes and bend the framework of current regulations in order to improve market shares through aggressive elements in the machines. Illegal use of charity revenues to secure and improve market shares is also a well known problem within the current regime. Such violations are obviously hard to disclose and even harder to prevent in a competitive system.”

⁷⁸ Annex 27, letter from the Norwegian Government of 1 September 2003.

⁷⁹ Underlined by the Authority.

⁸⁰ Underlined by the Authority.

116. The Norwegian Government, moreover, explained that the monopoly would be combined with a new voucher and network-system that could prevent violations like robbery from machines, theft of machines and money laundering more efficiently. The Government, nevertheless, acknowledged that “*such improvements can however also be achieved in a system with private machine operators.*”
117. With regard to the alleged problems concerning the control of the private operators, the Norwegian Government:

*“... acknowledge[d] the fact that the Gaming Board's control and inspections of machines have found few breaches in legislation with regard to machine functionality after type approval. The Ministry would, however, like to emphasize that in Norway the problem is not the presence of unlicensed software in machines. The problem is however, the presence of aggressive machines in locations that are not considered as natural gaming environments with regard to social considerations. Furthermore, in the type approval process it has been proven difficult to control the functionality of machines. Manufacturers strive to find loopholes and bend the framework of current regulations to allow them to introduce aggressive elements in machines. These attempts to bypass regulations are reasoned by profit motives. Such attempts undermine the efforts of the Gaming Board's Authority to ensure that all machines function in accordance with the prevailing regulations. Only a system where the profit is not prevailing will ensure the social objectives to be sufficiently taken care of”.*⁸¹

c) The second round of questions and answers

118. By letter of 6 January 2004, the Authority invited the Norwegian Government to provide additional information concerning, *inter alia*, the apparent inconsistency between the wish to reduce problem-gambling and the fact that Norsk Tipping was one of the companies in Norway who spends the most on advertising and, furthermore, offered gambling via the internet and accepted payment by smart cards and credit cards. The Authority, moreover, requested the Government to substantiate its allegation in the letter of 1 September 2003 that illegal use of charity revenues to secure and improve market shares took place under the concession system. In this respect, the Authority observed that the Annual Reports of the Gaming Board did not support this allegation.⁸²
119. The Norwegian Government replied by letter of 16 February 2004.⁸³ The Government confirmed that, since 2000, it had been possible for Norsk Tipping to provide money games via electronic platforms such as the Internet. However, the Government stated that this possibility should be seen as a “pilot project”, the purpose of which was to gain experience from electronic gambling services before any approval was given for these services on a permanent basis. In this respect, the Government referred to the preparatory works of the contested act where the following was stated:

"Against the background of an evaluation of the trial projects, among other things, the Ministry will consider allowing games via the Internet and other electronic channels. However, consideration must be given to the fact that the Internet provides easy access to gambling from the privacy of one's own home,

⁸¹ Underlined by the Authority.

⁸² Annex 28, letter from the Authority of 6 January 2004.

⁸³ Annex 29, letter from the Norwegian Government of 16 February 2004.

and this could pave the way for undesirable gambling behaviour. In light of this, the authorities will under all circumstances exercise caution in permitting new money games that are custom-made for the Internet and other electronic channels."

120. The Government confessed to be "*dubious about certain aspects of establishing money games on the Internet.*" It, however, underlined that *Norsk Tipping* had not developed special games for electronic services, but only adapted the games it already had to the Internet. It also informed the Authority that *Norsk Tipping* was similarly offering games via mobile phones (SMS) and digital TV and confirmed that *Norsk Tipping* allowed electronic payment, both when the game was sold over the counter by an agent and when it was sold over the Internet or through other electronic platforms. However, the Government saw no problem in this as it regarded this form of payment as cash settlement on a par with notes and coins.
121. With regard to the marketing of *Norsk Tipping's* games, the Government claimed that "*an increase in Norsk Tipping's marketing budget will not necessarily mean an increase in the company's turnover and profit.*" The marketing was essentially non-aggressive and connected with brand building. Finally, it was a general principle for the Norwegian gaming policy that the "*... Government shall furthermore exercise caution in expanding government-controlled gaming. Traditionally, however, the Government should not plan changes which will diminish the income from these games*".
122. With regard to the request for substantiation that there had been numerous breaches of the rules applicable to the gaming machines, the Government acknowledged that:
- "...inspections carried out by the Gaming Board have not uncovered many breaches of the regulations as regards non-type-approved software in type-approved gaming machines. The main problem in Norway is not that the machines contain software which is not type-approved. It appears, however, that the type approval process does not always reveal problematic elements in the machines, with the result that some machines that are legally released on to the market are later found to contain functions which increase the risk of gambling addiction in the player and which would not have been approved if this information had been known at the time of approval".⁸⁴*
123. In the Government's view, the problem with the licensing system was rather that it did not entail the same possibilities for a rapid change of machine functionality as does the monopoly system:
- "... One of the problems with Norway's current regulations on gaming machines is that software which is type-approved for machines that are to be installed in Norway cannot easily be withdrawn from the market, even if it is later concluded that machines with this software function in a way which is likely to cause an undesirable degree of gambling addiction. ... The technical solution [applied within the monopoly model] provides a flexible platform that allows quick alterations and implementation of desired measures. For example, it will be very easy to remove problematic games (in a matter of seconds with the help of a few keystrokes)."*

⁸⁴ Underlined by the Authority.

124. Concerning the Authority's request for a substantiation of the Government's earlier claim that illegal use of charity revenues to secure and improve market shares was "*a well known problem*", the Government referred to two cases from 1998 and 2001 respectively, and argued that, in any event, "[t]his kind of illegal remuneration is difficult to uncover. It is therefore also difficult to estimate the scope of the problem." As for the request to substantiate the alleged problem concerning crime, the Government acknowledged that "*the statistics show no noticeable increase in recent years in crime linked with gaming machines*".
125. Finally, the Government confirmed that securing revenue to the charities was an objective of the lottery and gaming policy and that such a consideration therefore had "*been part of the basis on which the design of the new gaming machine model has been evaluated.*" However, because of the negative consequences of the use of gaming machines, the Ministry would not secure such revenues at any price. It also emphasised that "*the consideration of the non-profit organisation's income situation was not given decisive importance in the Ministry's choice of operating model*".⁸⁵

d) The Authority's letter of formal notice

126. Not being convinced about the validity of the arguments put forward by the Norwegian Government, the Authority sent the Government a letter of formal notice dated 23 April 2004.⁸⁶ In the letter, the Authority did not dispute that the wish to reduce levels of gambling addiction and combat crime were laudable aims which could, potentially, justify a restriction to a fundamental freedom. However, based on the available information, it seemed to the Authority that the wish to secure a continued amount of revenue for charities had been a driving factor behind the chosen monopoly solution and not just an incidental beneficial consequence thereto. In this respect, the Authority referred to the two hearing papers, the input from Norsk Tipping and to statements made by the Minister of Culture and Church Affairs, Mrs Valgerd Svarstad Haugland, according to whom:

*"We will not accept a reduction (in revenue) to start with. It is a question of large revenues from the machines for Norwegian organisations. Therefore, they cannot just be banned as some would have us do. I cannot give all these billions away just like that."*⁸⁷

127. Furthermore, the Authority pointed out what appeared to be several inconsistencies in the Norwegian gaming policy, in particular in the marketing and product policy pursued by Norsk Tipping.
128. First, Norsk Tipping had in recent years been among the three largest advertisers in Norway. Second, Norsk Tipping had introduced several new games and, furthermore, developed new ways of gambling, including offering its existing games over the internet, on digital TV and by mobile phone (SMS). These new modalities had been accepted by the Norwegian Government also after the act

⁸⁵ Underlined by the Authority.

⁸⁶ Annex 30, letter of formal notice dated 23 April 2004.

⁸⁷ Reference was made to a statement of 6 January 2004, as distributed by Norges Telegrambyrå. The original Norwegian text reads as follows: "Vi vil ikke godta noe tap i første omgang. Det er snakk om store inntekter fra automatene til norske organisasjoner. Derfor er det ikke bare å forby dem slik noen tar til orde for. Jeg kan ikke uten videre gi fra meg alle disse milliardene."

introducing the monopoly was enacted, despite indications that internet gambling could be addictive.

129. As a third apparent inconsistency in the Norwegian gaming policy, the Authority referred to the often and explicitly stated aim of Norsk Tipping to double the number of gaming machine players from 500 000 to 1 million. The Authority took note of Norsk Tipping's statement that such an increase would not be a problem with respect to gambling addiction since the machines would be less aggressive. However, the Authority questioned how Norsk Tipping, through adjustments in machine functionality, could control gambling addiction to such an extent that the aim to double the number of players – and thereby the exposure of twice as many potentially addictive players to gaming machines – would not increase the problem of gambling addiction. The Norwegian Government was therefore invited to substantiate how that would be the case. Similarly, the Authority asked the Government to provide information about how Norsk Tipping planned to reach its goal of doubling the number of players using less aggressive machines and without advertisements or other forms of active marketing. If the intentions of Norsk Tipping did not reflect the Government's own gaming machine policy – regardless of the fact that Norsk Tipping, according to Norway itself, was a fully controlled government instrument for the State's gaming policy – the Authority invited the Government to explain what concrete measures the Government had planned and/or enforced in order to prevent Norsk Tipping's ambitions being fulfilled.
130. Finally, the Authority suggested that the aims of preventing gambling addiction and crime could be fulfilled by less restrictive measures. Starting with the alleged link between the monopoly and the effective control of software and a reduction of the number of machines, the Authority noted that the Government had acknowledged that there was reason to believe that basically all kinds of regulations concerning the location of gaming machines could have been implemented within both a competition/concession market and a state-owned monopoly.
131. As regards the Government's claim that private operators did not follow the regulations, the Authority noted that the Norwegian Government had acknowledged that only a few breaches had been detected. With regard to the Government's argument that economic operators found loopholes and bent the framework of current regulations, the Authority found that where such behaviour resulted in a violation of the relevant rules, the normal remedies of both civil and criminal law applied. Moreover, where an operator had acted within the legal remits of a public law regulation, a monopoly would hardly be a more suitable and necessary remedy than a change of the apparently unfortunately worded regulation.
132. The Authority then turned to the Norwegian Government's argument that it was easier to regulate the gaming sector through ownership control rather than through regulation of a public law nature. The Authority could not see that a desire to avoid public discussion and political pressure from charities and economic operators could be seen as a legitimate aim even if that aim was construed as a means of reacting swiftly in order to combat gambling addiction. Moreover, on a more factual basis, the Authority failed to understand how the economic interests of the charitable organisations could, for several years, hinder the Norwegian Government from regulating the market as it deemed necessary. In addition, the Authority found the argument relating to the lack of ability to control the market somewhat surprising in the light of the Government's earlier regulatory actions in the gaming market. It was the Authority's impression that the Government had, for

a number of years, not just passively observed the development in the market but, on the contrary, through the adoption of significantly more liberal regulations, actively led the development of the market to where it is today.

133. With regard to the alleged link between the monopoly and the laudable wish to enforce the 18-year age restriction, the Authority stressed that enforcement under the new system would still depend on the firmness of the control exercised by the location owner and thus not be related to the monopoly holder. Finally, with regard to the alleged link between the monopoly and combating crime, the Authority found it highly unlikely that thieves would be less inclined to break into a state owned machine than into a machine owned by private operators. Indeed, the Norwegian Government had itself stated that the elements to combat crime envisaged in the so-called new model could also have been enacted in a system with private machine operators.

e) The Norwegian Government's reply to the letter of formal notice

134. By letter dated 28 June 2004⁸⁸, the Norwegian Government gave an extensive reply to the letter of formal notice. After having analysed the case law of the Court of Justice, the Government reiterated the objectives behind the monopoly model as set out in the preparatory works to the contested act. As regards revenue to charities, the Government stated that:

“... in Norway importance is attached to ensuring that the revenue from moderate and authorised games goes to charitable causes, with the aim of preventing financial profit becoming the dominant motive for developing gaming services. ... In this context it is regarded as more ethically and morally acceptable that common public interests or charities receive the economic benefits from gaming, rather than private business interests systematically earning profits as a result of players systematically losing. This initial starting point implies that a justifiable distribution of revenues from gaming in itself has a moderate effect on game development. Thus, it is important also to consider the financial consequences of a proposal on changes in the gaming market. Such an approach is also in accordance with settled ECJ case law in the area of gaming.”

135. The Government stated that the Storting's decision linked the revenue to charities to the 2001 level and, therefore, presupposed that charitable organisations would have to tolerate a substantial fall in revenue precisely in order to reduce the problems of gambling addiction. Moreover, the revenue to charities would no longer be directly linked to gaming machines. The consequence would be better control and *“justifiable development of such gaming. Thus, it is difficult to see that this means that commercial considerations are the driving factor behind the bill. [...] The introduction of exclusive rights is not based on financial interests.”*⁸⁹

136. The Norwegian Government conceded that no new scientific studies concerning gambling addiction and crime related to gaming machines were published or made known to the Government between June and October 2002. However, it stated that two, interlinked, reasons caused it to drop the June 2002 proposal. According to the Government, the proposal was dropped because the Government during the first half of 2002, and thereby before submitting the June proposal for a public hearing, was made aware of *“extensive problems in relation to enforcement of the*

⁸⁸ Annex 31, reply to the letter of formal notice of 28 June 2004.

⁸⁹ Cf. pages 29-30 of the reply. See also page 8 of the reply.

existing regulations. These included problems concerning compliance with and enforcement of the technical requirements applying to the functionality of the machines.” The Government further explained that this information led the Government, in spring 2002, to ask Norsk Tipping to assess the consequences of taking over the operation of gaming machines “*if it did not prove possible to establish a dialogue with existing market operators on moderation and accountability in the money gaming services on offer*”.⁹⁰ The second hearing paper was issued because reactions to the first hearing paper showed that it would be difficult to gain acceptance for the Bill from the market operators and that further measures to regulate the existing market would, in all probability, fail.

137. In any event, the Norwegian Government found that an assessment of the EEA compatibility of the monopoly could legally take account of the financial consequences of the restrictions to be introduced as long as the financial interests did not have an inhibitory effect on the concerns the restrictions are intended to address. In support of this position, the Government claimed that “*a State that, motivated in part by fiscal interests, introduces an exclusive rights model for money gaming services can generally expect to experience fewer social problems than if the gaming were permitted on the same terms in a commercial and competition-based system.*”⁹¹ Moreover, the Government believed that “*exclusive rights and incidental financial interests in themselves lead to less gambling addiction and crime in that they permit better control over and more stable development of gaming*”.⁹²
138. The reply to the letter of formal notice also addressed the question concerning the consistency of the Norwegian gaming policy. According to the Norwegian Government, its policy was not inconsistent as it was based on a distinction between “low risk” and “high risk” games. The Norwegian Government acknowledged that “*one and the same game type can however be designed and presented in many different ways and pose different risks in terms of gambling addiction. A particular type of game may therefore be either soft or hard depending on the playing conditions and the way the game actually works.*” While discussing Norsk Tipping’s activities in relation to gambling over the internet and on mobile phones, the Government underlined that an adjustment of the operational conditions of Norsk Tipping “*towards harder and more aggressive games will not be considered if negative effects with relation to problem gaming are established*”.⁹³
139. As regards the Authority’s reference to the fact that Norsk Tipping had pledged to generate maximum proceeds from a smaller number of machines, the Government held that this statement merely reflected “*that the revenue of the non-profit organisations in 2001, in the assessment of Norsk Tipping, could have been sustained even had there been fewer and more moderate machines if the design of the games and operation of the machines had been changed in relation to existing gaming machines*”.⁹⁴ Moreover, concerning Norsk Tipping’s statements regarding an increase in machine players from 500 000 to one million, the Government stressed that this was not considered to be a goal. Indeed, a representative had stated so “*in a radio debate on P4 as early as 16 May 2003*”.⁹⁵ Although Norsk

⁹⁰ Cf. page 32 of the reply.

⁹¹ Cf. page 31 of the reply.

⁹² Cf. pages 30 and 39-40 of the reply, underlined by the Authority.

⁹³ Cf. page 60 of the reply.

⁹⁴ Cf. page 34 of the reply.

⁹⁵ Cf. page 49 of the reply.

Tipping was fully owned by the Ministry, and the stated purpose for establishing a monopoly model with exclusive right for Norsk Tipping was to steer the development of gambling by other means than issuing regulations under public law, the Government emphasised, that “*letters and media statements of Norsk Tipping ... are the company’s own opinions, the substance of which is not the Government’s responsibility*”.⁹⁶ In any event, one might imagine “*that new machines contain games that e.g. result in three different players using the machine for ten minutes each, instead of one player playing on the machine for one hour*”. According to the Government, “*this will in practice lead to a genuine reduction in turnover and presumably a reduction in the risk of developing problem gambling behaviour*”.⁹⁷

140. With regard to the fact that Norsk Tipping was one of Norway’s largest advertisers, the Norwegian Government maintained that Norsk Tipping’s marketing activities did not have as their primary aim to increase gaming turnover. On the contrary, the purpose was first and foremost to ensure that Norwegian players did not, through the agency of unregulated international gaming opportunities, change their gaming habits in a way that would lead to more problems over time.⁹⁸

141. The Norwegian Government finally dealt with the question of alternatives to the monopoly solution. According to the Government, a complete ban on gaming machines would not necessarily be the most efficient measure for combating gambling problems, as a total ban would lead to illegal gambling. Moreover, it maintained that alternative models for the organisation of the market would not give the authorities the required possibilities of direct control and supervision, and the possibility of swiftly changing the functionality of the gaming machines in the light of new scientific evidence. This was so since:

*“[i]n a licence-based market, such regulatory interventions are usually met with resistance and demands for scientific evidence. [...] The same applies to the possibility of supervising and enforcing existing requirements. Although supervision is essentially a question of resources, the fact is that it would not be possible to assign resources to comprehensive monitoring of compliance with the requirements in a licence-based market. The possibilities of monitoring an exclusive rights operator are far greater.”*⁹⁹

142. The Norwegian Government, moreover, claimed to have sought repeatedly to regulate machine functionality, but in vain:

“In spite of more detailed regulations on type approval and improved supervision of the functionality of gaming machines, the machines have become steadily more aggressive and casino-like”. ... [T]he failed attempts in recent years to impose restrictions on the Norwegian gaming machine market are not due to inefficiency on the part of the Norwegian authorities, but rather to the fact that the development of a profit-based sector for such money games carries a greater risk of irregularities than money games regulated by a state-controlled exclusive rights holder. When the new requirements for type approval of 1th October 2000 ... did

⁹⁶ Cf. page 52 of the reply.

⁹⁷ Cf. page 50 of the reply.

⁹⁸ Cf. pages 53-56 of the reply.

⁹⁹ Cf. pages 41 et seq.

*not succeed, it was not because it allowed 10 times higher prizes, from NOK 200 to NOK 2 000.”*¹⁰⁰

f) The Authority’s reasoned opinion

143. Not agreeing with the arguments presented by the Norwegian Government, the Authority delivered a reasoned opinion on the case in 20 October 2004.¹⁰¹
144. The Authority reiterated that the Norwegian Government, in the reply to the letter of formal notice, had argued that there were no financial considerations behind the decision to withdraw the June 2002 proposal and instead referred to two other interlinked reasons. The Authority expressed its surprise at these explanations. The first explanation would mean that the Government should have been aware of “*extensive problems*” concerning compliance with the technical requirements pertaining to the functionality of the machines when it drafted its June 2002 proposal. Yet, the Government did not address any such problems in that proposal. Instead, it suggested a continuation of the system with private operators without enacting measures that would strengthen the enforcement of the regulations. Moreover, the explanation seemed to contradict what was said earlier by the Government, most notably in its letter to the Authority of 1 September 2003, in which the Government “*acknowledges the fact that the Gaming Board’s control and inspections of the machines have found few breaches with regard to machine functionality after type approval.*”
145. As regards the explanation relating to the operators’ negative response to the June proposal, the Authority could not see why amendments to combat the social problems related to gambling would require acceptance by the market operators. Neither the Government nor the Storting would need any consent from private operators before introducing new rules. For those reasons, the Authority continued to consider that the mass opposition against the Bill from charitable organisations, due to the significant income reduction that a model based on the first hearing paper would entail, was an important factor behind both the withdrawal of the June 2002 proposal and the presentation of the subsequent proposal for a monopoly model.
146. Nor did the Norwegian Government’s arguments concerning the consistency of its gaming policy persuade the Authority.
147. With regard to the massive marketing by Norsk Tipping, the Authority noted that, in essence, the Norwegian Government had argued that Norwegian consumers had to be protected against foreign gaming service providers without having adduced any evidence that all, or most, foreign games were more socially harmful than the ones offered by Norsk Tipping. Moreover, the Authority recalled that advertisement of gaming opportunities could have a more general effect in the sense that advertisement could also encourage consumers in general to gamble and to use other games than the one being advertised.

¹⁰⁰ Cf. pages 39 and 40 of the reply, underlined by the Authority. See also the Norwegian Government’s concluding observations on page 61 of the reply according to which “[f]or a number of years, the Government has endeavoured to impose restrictions on the gaming machine market; for various reasons, this has not succeeded in practice.”

¹⁰¹ **Annex 32**, the Authority’s reasoned opinion dated 20 October 2004.

148. Nor could the Authority see consistency in the fact that Norsk Tipping had introduced a number of new games in recent years and developed new ways of gambling, including by offering its existing games over the internet, on digital TV and by mobile phone (SMS). In the Authority's opinion, this apparent inconsistency in the Norwegian gaming policy could not be justified by a distinction between so-called "high risk" and "low risk" games. First, it seemed doubtful whether a distinction was compatible with the approach taken by the Court of Justice in the *Gambelli* judgment. Second, even if it were, such a distinction did not have a solid factual basis. Third, Norwegian legislation had allowed Norsk Tipping to operate games which it conceded were of a "high risk" nature and, furthermore, allowed other "high risk" games such as horse-betting (Rikstoto) and the internet game www.tivoli.no.
149. Finally, the Authority reiterated that Norsk Tipping had explicitly stated its aim to double the number of gaming machine players from 500 000 to 1 million. With regard to the Norwegian Government's reference to statements made by a Secretary of State in a radio debate on 16 May 2003 disapproving of this aim, the Authority noted that, several times after the radio debate, Norsk Tipping had continued to state that its aim was to double the number of players. Moreover, no information had been given to the effect that the Government had interfered with Norsk Tipping's orders for machines and software, the shaping of the whole gaming machine concept and the budgetary work of the company, in order to hinder the exercise of a significantly more aggressive policy than that described by the Government.
150. Turning to the proportionality of the Norwegian legislation, the Authority still failed to see why the exclusive right for Norsk Tipping was necessary in order to obtain the aims invoked by the Norwegian Government. First, with regard to the described advantage of regulating the gaming machine market through ownership control, the Authority reiterated the arguments in its letter of formal notice as to why regulations of a traditional public law nature did indeed suffice. Second, concerning the Norwegian Government's argument that private operators were violating the current rules, the Authority emphasised that the Government had acknowledged that the Gaming Board's control and inspections of machines had only found a few breaches of the legislation with regard to machine functionality after type approval. In fact, the Government had admitted that the presence of unlicensed software was not a problem in Norway. Third, with regard to the Norwegian Government's claim that the monopoly model was necessary in order to allow for a swift change in regulations concerning the functionality of gaming machines, the Authority reiterated that it could not be a justification for a monopoly that the affected private operators sought to influence the decision-making. Moreover, the normal rules in Norwegian law ensured that swift decisions could be taken also within a licence system. Fourth, with regard to the aim for a better enforcement of the 18-year age restriction, the Authority still failed to see how the monopoly model even partially remedied the problem. Finally, as far as the Government's willingness to combat crime was concerned, the Authority acknowledged the different measures taken by the Government, but could not see the causal link between the potential crime reduction and the monopoly. In this respect, it recalled that the Government had itself previously stated that these measures could just as well have been introduced in a licence system.

g) The Government's reply to the reasoned opinion

151. The Norwegian Government responded to the Authority's reasoned opinion by letter of 19 November 2004.¹⁰² It did not concur with the Authority's assessment. Besides reiterating the arguments already set out in its response to the Authority's letter of formal notice, the Government referred, in particular, to a judgment by the *Regeringsrätten* (the Highest Swedish Administrative Court) of 26 October 2004 upholding a Swedish gaming monopoly.¹⁰³
152. On 17 November 2005, the Authority decided to bring the case before the EFTA Court.

IV. THE NATIONAL PROCEEDINGS

153. In parallel with the proceedings before the Authority, the legality of the monopoly awarded to Norsk Tipping has been the subject of proceedings in the Norwegian Courts.

a) The judgment of the Oslo City Court

154. On 18 August 2003, NOAF brought an action against the Kingdom of Norway represented by the Ministry of Culture and Church Affairs claiming that the introduction of the monopoly was contrary to EEA law. The Norwegian Government's request to dismiss the application for lack of legal interest, as the law introducing the monopoly had not yet entered into force, was rejected by the Oslo

¹⁰² **Annex 33**, reply to the reasoned opinion dated 19 November 2004.

¹⁰³ This judgment should, in the Authority's opinion, be read in the context of the letter of formal notice that the European Commission sent to Sweden on 13 October 2004 and the parallel letter of formal notice sent to Denmark concerning that country's legislation on exclusive rights in the gaming sector. The judgment of the *Regeringsrätten* has been criticised by several EU scholars, see e.g. Niels Wahl, Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten?, *Europarättslig Tidskrift* 2005, page 119, Jörgen Hettne, EU, monopolen och försvaret av den rådande ordningen, *Europarättslig Tidskrift* 2004, page 589 (606-607), and Emanuel Allroth, EU och Svenska Monopol, *Sieps* 2005, pages 66-67. More strikingly, an expert committee established by the Swedish Government later concluded that, notwithstanding the judgment of *Regeringsrätten*, it is doubtful whether Swedish law actually complies with Community law, cf. SOU 2006:11, pages 18, 28-29, 241-246 and 298. **Annex 34**, SOU 2006:11 Spel i föränderlig värld. The document can also be found at: <http://www.regeringen.se/sb/d/6191/a/56935>. Several other national judgments have been rendered after the judgment in *Gambelli*. An overview of some of the cases concerning lotteries and exclusive rights decided by, or pending before national courts is given on page 163-177 of the above-mentioned Swedish report. See also Ewout Keulers, From *Gambelli* to *Placanica* to ... a European framework for remote gaming, www.ulyes.net and Naill O'Connor, European Gambling law, Whiter *Gambelli*, www.e-comlaw.com. To the Authority's knowledge, the latest national judgment concerning national gaming monopolies is a decision of the Administrative Court of Breda of 2 December 2005. In that decision, it was held that the State monopoly in Holland for Holland Casino had not been justified by the reasons set out in the *Gambelli* judgment. The Court arrived at this result stating that the Dutch State had not carried out a policy aimed at protecting consumers, and highlighted the lack of reliable or recent research available on gambling addiction, as well as the intensive marketing policy of Holland Casino. The Commission has brought an application before the Court of Justice concerning Greek legislation imposing a ban on the use and installation of all but mechanical game machines in all private and public places, with the exception of casinos. Greece argues that the situation in the sector of electronic games had become uncontrollable. The players were addicted and spent their time, almost exclusively, engaged in illegal gambling at the expense of their family and professional duties. The Commission, on the other hand, finds that the ban infringes, *inter alia*, Articles 43 and 49 of the EC Treaty, given that more targeted rules and controls could have been adopted. In addition, joined cases C-338/04, C-359/04 and C-360/04 *Placanica*, concerning exclusive rights for gaming services in Italy, are pending before the Court of Justice (oral hearing took place on 7 March 2006, the opinion of the Advocate General is expected on 2 May 2006).

Tingrett by order of 26 November 2003. By decision of 25 February 2004, the Tingrett decided that an advisory opinion should be sought from the EFTA Court. The Norwegian Government appealed against the decision which, however, was confirmed by the Court of Appeal on 6 May 2004. Shortly thereafter, on 27 May 2004, the parties agreed to ask the Oslo Tingrett not to refer the case to the EFTA Court, a request the court agreed to. On 16 June 2004, NLD joined the action for annulment.

155. In its judgment of 27 October 2004, Oslo Tingrett found the introduction of the monopoly to be incompatible with EEA law.¹⁰⁴ The court agreed with the Norwegian Government that an EEA State's intention to combat gambling addiction and crime could, in principle, justify that an EEA State prohibited gambling altogether or imposed restrictions thereon. In this respect, the EEA State should be afforded considerable discretion with regard to the level of protection it chooses in order to achieve the said aims. However, with reference to the Court of Justice's judgment in *Gambelli*, the Tingrett found that the case law concerning suitability and proportionality were fully applicable in the area of gaming.

156. Turning to the case at hand, the Tingrett commenced its analysis by concluding that, in deciding to introduce the monopoly, both the Government and the Storting had had a genuine wish to combat gambling addiction. However, the Tingrett found that this aim was not the sole motive behind the contested act and that there had, in fact, been a double objective: on the one hand, combating gambling addiction and enforcing the age restriction while, on the other hand, ensuring a continuous income for Norsk Tipping and the charities. The Tingrett therefore rejected the argument of the Government that the aim of securing income was merely an incidental beneficial consequence:

“On the contrary, ensuring the income – however big or small it will turn out to be – was an intended, expressed and important part of the reasoning behind the monopoly. As the considerations of controlling and steering are formulated in the preparatory works, these considerations cannot fall within the ambit of mandatory requirements; they do not only serve to take considerations of a socially-political character, but also to ease the work of the State in the distribution of the surplus.”

157. Moreover, the Tingrett noted that although the aim to combat crime was mentioned in the preparatory works to the contested act, no documentation demonstrating that crime was a serious problem had been put forward. In fact, during the proceedings the Government had acknowledged that the consideration concerning crime was not an important part of the case.

158. The Tingrett also found the gambling policy of the Norwegian State to be inconsistent. It was well documented that Norsk Tipping was the second largest buyer of advertising services in Norway, and that its marketing of games aimed to incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse.

159. Finally, the Tingrett turned to the question of suitability and proportionality. The Tingrett commenced by rejecting the argument of the Government that it had consistently tried to strengthen the rules concerning gambling machines. In the

¹⁰⁴ **Annex 35**, judgment of Oslo Tingrett (Oslo City Court) of 27 October 2004. The citations from the judgment in the following paragraphs have been translated by the Authority.

opinion of the Tingrett, the Government's argument that it did not have available sufficient mechanisms to steer the development of the market was untenable. On the contrary, the court found it to be proven that the operators generally did comply with the rules. Moreover, if the Government found reason to believe that the new gaming machines developed by Norsk Tipping were better designed to combat gambling addiction, then the normal rules concerning machine functionality could legally require a similar functionality for private machines, without the need for a monopoly. Similarly, the wish to control the location of the gaming machines could be ensured equally well via ordinary public law regulations as via a monopoly. The same applied in relation to the enforcement of the age restriction. Both before and after the introduction of the monopoly, control of the age restriction had to be performed by the owner of the property where the machines were placed. In this respect, it had no relevance whether the machines were owned by a monopoly or by private operators. In conclusion, the Tingrett stated that:

“... the court cannot see that the considerations of a general character which the monopoly is established to promote cannot be obtained equally well via the former laws and regulations, possibly after a tightening of these [laws and regulations]. Hence, the court finds that the establishment of the monopoly on gambling machines for Norsk Tipping in Act 90/2003 is neither sufficiently justified by relevant (legal) considerations, a result of a consistent gambling policy nor necessary to achieve the desired level of protection against gambling addiction, crime and violations of the age restriction, and that it is therefore contrary to Article 31 and 36 of the EEA Agreement.”

b) The judgment of the Court of Appeal

160. The Norwegian Government appealed against the judgment of the Tingrett. Moreover, the question on interim measures was raised before the Court of Appeal. By decision of 30 November 2004, the Court of Appeal decided to grant the interim protection sought by the applicants, as it agreed with the reasoning in the judgment of the Tingrett, and as it did not accept the claim of the Norwegian Government that social policy considerations dictated an immediate entry into force of the Act: *“It must be assumed that these considerations of social policy can be taken care of via rules on the number of machines as well on the use and placing of the machines.”* In a decision of 28 January 2005, the Court of Appeal decided not to submit a question to the EFTA Court for an advisory opinion.
161. The Court of Appeal rendered its final judgment on the substance on 26 August 2005.¹⁰⁵ Overruling the Tingrett, the Court of Appeal did not find the contested act to be contrary to EEA law.
162. First, the Court of Appeal held that it could not be incompatible with EEA law that a wish to secure income for charities formed part of the total motivation behind the introduction of the monopoly, as long as this was not the only motive behind the monopoly. Based on the preparatory works, the Court of Appeal concluded that the primary objective of the contested act was to reduce gambling addiction. Admittedly, the wish to secure income for charity had been part of the underlying considerations for establishing a monopoly. However, it constituted only a secondary aim that could legally form part of the decision.

¹⁰⁵ **Annex 36**, judgment of the Borgarting Lagmannsrett (Court of Appeal), annexed in an English translation provided by the Norwegian Gaming Board.

163. Second, the Court of Appeal found the monopoly suitable: *“When Norsk Tipping is awarded a monopoly for the operation of pay-out machines, this means that the number of machines can be reduced and that private profits from gambling activities will be reduced, while at the same time revenues to the supported organisations is maintained at an acceptable level. ... Even though it can be said that control and management of the gaming machine market can also be achieved – at least in part – through other measures, a state monopoly arrangement must, in the opinion of the Court of Appeal, be deemed to be able to exercise better control.”*
164. Third, the Court of Appeal disagreed with the Tingrett that the Norwegian legislator had acted in an inconsistent and non-systematic manner in its gaming policy. As a mere formal point, Norwegian legislation would appear more logical if the rules on gaming were to be transferred from the Lottery Act to the Gaming Act. The considerable marketing activities of Norsk Tipping did not render the gaming policy inconsistent: *“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.”*
165. Fourth and finally, the Court of Appeal turned to the question of proportionality. The court held that the national legislator had particularly wide discretionary powers under the proportionality test in this field of business. In this respect, the court found that the judgment of the Court of Justice in *Gambelli* had to be seen in light of the particular facts of that case, and that proportionality considerations had a less prominent place within the area of gaming. The Court continued by accepting that there was a real problem with gaming addiction in Norway, and found, with reference to the description of the gaming market given in the preparatory works, that normal measures of control would not suffice.

c) The appeal to the Supreme Court

166. The judgment of the Borgarting lagmannsrett was appealed by NLD and NOAF to the Supreme Court which agreed to hear the case in a plenary session. However, upon the decision of the Authority to bring the case before the EFTA Court, NOAF and NLD invited to the Supreme Court to suspend its proceedings in order to await the outcome of the judgment of the EFTA Court. The Norwegian Government disagreed and argued that the procedure before the EFTA Court was less elaborate and adequate than the one before Norwegian courts, and that the EFTA Court would be less suited to decide the case. By decision of 5 December 2005, the Supreme Court decided to suspend its proceeding, as it found that that, in line with the system of enforcement under the EEA Agreement, the “authoritative answer” would in any event be given by the EFTA Court.

V. STATISTICS ON GAMING IN NORWAY

167. In the following, the Authority will briefly summarise certain developments relating to the gaming market in Norway.¹⁰⁶ In order to understand the real

¹⁰⁶ Annex 37, the Gaming Board’s annual statistics for 2001-2004. The figures below related to these years are all based on the reports.

development on the Norwegian market, a distinction needs to be drawn between, on the one hand, gross turnover of the gaming market and net turnover, on the other hand. The gross turnover is the total amount wagered on games. For gaming machines, the gross turnover thus corresponds to the amount of notes and coins put into the machines, without taking into account that app. 80% of the wagered amount is paid back in prizes. In contrast, the net turnover (revenue) is the money lost on gaming i.e. that is not paid back in winnings and thus goes to the charities and the operators. As will be shown, the turnover of the market has increased over the last few years, especially as regards gaming machines. However, the rise in gross turnover has both in nominal figures and in percentage been substantially larger than the rise in net turnover.

168. In 2000 the total *gross turnover* from money games was NOK 20 697 (all numbers in million unless otherwise indicated): NOK 7 836 from gaming machines, NOK 7562 from Norsk Tipping's games and NOK 2 575 from Norsk Rikstoto's games.¹⁰⁷ The corresponding figures from 2001 were NOK 22 411 in gross turnover, with NOK 8 598 from gaming machines, NOK 7 861 from Norsk Tipping and NOK 2 626 from Norsk Rikstoto. In 2002 all games increased their turnover up to a total of NOK 30 149. The growth for gaming machines was particularly high: NOK 15 426. Also Norsk Tipping's gross turnover also continued to rise, from NOK 7 861 to NOK 8 940. In particular, the turnover from the game Oddsens increased considerably, going up by 62.3%.¹⁰⁸ In 2003 the total turnover once rose again, to NOK 37 509 and again the gaming machines saw a considerable increase, with the gross turnover rising to NOK 22 789. Finally, in 2004 the gross turnover from all money games was NOK 40 800 generated by the different games as follows; NOK 26 034 million from gaming machines (14% increase), NOK 8 805 from Norsk Tipping's games (1% decrease), and NOK 2 623 from Norsk Rikstoto's games (9% increase).¹⁰⁹
169. The *net turnover* of the Norwegian gaming market was NOK 8 520 in 2001. It has risen every year since then: NOK 9 664 in 2002; NOK 10 926 in 2003 and NOK 11 511 in 2004. As already indicated, the increase in the net turnover has not matched the increase in the gross turnover. This is explained by the fact the amount of prizes, *i.e.* the pay-out percentage differs between the different money games and that the greatest "input" increase has been on games which also pay out a high percentage in winnings. Looking *e.g.*, at the figures for 2004, of the gross turnover for gaming machines, NOK 26 034, NOK 21 074 (81%) was paid back in prizes. Of Norsk Tipping's gross turnover of NOK 8 805, NOK 4 604 (52%) was paid back in prizes. For Norsk Rikstoto the figures were NOK 2 623 in gross turnover and NOK 1 721 in prizes (66%).
170. In 2004, 137 different entrepreneurs operated approximately 15 624 gaming machines, a decrease of 950 machines compared with 2003. The net revenue generated by those machines was NOK 4 961 of which NOK 2 008 (40,5%) was distributed to charities. In accordance with the provisions in the Lottery Act, 20% of the net revenue (NOK 988 million) was paid out to the owner of the premises

¹⁰⁷ Ot. prp. No. 44 (2002-2003) page 13, **Annex 9**. Official figures are not available from before 2000. NLD has presented the Authority with an estimate of the gross turnover of the gaming machine market in 1995-1999, which breaks down, in millions, as follows: 1995, NOK 2 600; 1996, NOK 3 400; 1997, NOK 4 500; 1998, NOK 5 300; 1999, NOK 5 100.

¹⁰⁸ Innst. O. No. 124 (2002-2003), page 14, **Annex 11**.

¹⁰⁹ The Authority is not in possession of the figures for 2005.

where the machines were located and the remaining 39,5%, NOK 1965 million, went to the gaming machine operators.

171. In 2004, the net revenue for Norsk Tipping was NOK 4 200 of which NOK 2 334 (56%) was distributed to Norsk Tipping's beneficiaries. NOK 1 866 (29%) covered the company's administrative costs and NOK 639 (15%) went to Norsk Tipping's commissioners.
172. For Norsk Rikstoto, the net revenue was NOK 902 of which NOK 453 (50%) was distributed to Norsk Rikstoto's beneficiaries. NOK 154 (17%) went to Norsk Rikstoto's commissionaires.

VI. RESEARCH ON PROBLEM GAMBLING

173. In the following, the Authority will briefly summarise different findings from the research on problem gambling. The Authority will focus on two main topics that have been the subject of discussion in the administrative procedure, namely a) the risk of problem gambling connected to different types of games and b) the possibility of distinguishing clearly between "high risk" and "low risk" forms of gambling.

a) Problem gambling and different types of games

174. Studies in problem gambling indicate that gaming machines present a genuine risk of gambling addiction. They, moreover, show that the risk connected to this particular form of gambling is either the highest or one of the highest of the games operated in Norway. The same studies, however, also demonstrate that gaming machines are far from being the only source of gambling problems. Notably horse-racing, casinos and games offered by bookmakers (odds) have been identified as games frequently played by problem gamblers.¹¹⁰
175. The number of problem gamblers in Norway has been analysed in a countrywide survey of gaming and gambling that was undertaken by the Norwegian institute SIRUS in 2003.¹¹¹ The extent of problem gambling is dealt with in Chapter 4 of that report. Table 4.8 shows the prevalence of problem gamblers (including former problem gamblers) among all participants in different games during the preceding 12 months. It follows from this table that 4.7% of all players on gaming machines were identified as problem gamblers, compared to 5.1% on Oddsen, 6.7% on horse race betting and 9.2% on Internet games. Table 4.2 shows the percentage of problem gamblers who have participated in different games either daily or weekly. According to that table, 78% of all problem gamblers played on gaming machines daily or weekly, while 67% participated in Oddsen games, 60% on football bets and 51% on lotteries (like Lotto). The complexity of the problem is further illustrated by Table 4.9, showing how many different types of games the problem gamblers participated in. This table shows that 30.6% of problem gamblers had

¹¹⁰ Three easily accessible overviews over the different studies can be found: SOU 2006: 11, *Spel i en föränderlig värld*, page 93, **Annex 34**; The Swedish Lotteriinspektionens Report of 21 February 2005, *Effekter av Statens Folkhälsinstitutets förslag till begränsningar för spel på värdeautomater*, page 21, **Annex 38**; and the Gaming Board's, *Proposal for an Action Plan* pages 32-35, **Annex 21**.

¹¹¹ Lund og Nordlund, *Pengespill og pengespillproblemer i Norge*, SIRUS (Statens institutt for rusmiddelforskning) Rapport 2/2003. The Survey is available at <http://www.lotteritilsynet.no/dav/253168CBD8F347519A2D5CCCC5D91AE96.doc>.

participated in 0-3 types of games during the previous year, whereas 47.2% had participated in 4-6 types of games during the same period and 22.2% had participated in 7-9 types of games during the preceding 12 months.

176. A study from the Norwegian Social Research Institute (NOVA) called “*Entertainment with an aftertaste*” examined gambling among young people in Norway. According to the study, gaming machines were the most popular form of game among young people in Norway and accounted for a third of youth gambling. Of those considered to be problem gamblers, 64% played weekly on gaming machines. However, they also played on a variety of other games with 44% playing on Lotto or football betting (Odds) and 27% playing poker.¹¹²
177. According to the work of Gøtesam and Johansson on gambling among Norwegian young people, gaming machines was the most popular of gambling. Still, young people also participated in a number of other forms of gambling.¹¹³ Among the problematic gamblers, the state lotteries were the favorite means of gambling, gaming machines were second and football betting third. The study found that “...slot machines rank as number one of the games, but as number two in potential for problematic gambling. The lotteries were ranked as the most potentially dangerous game. Lottery playing is often the first step in learning how to gamble. They are popular, often shown on TV and socially accepted.”¹¹⁴
178. A recent study by MMI¹¹⁵ points to the use of gaming machines as the single most addictive behaviour. It also concludes that Lotto is the most popular game with problem gamblers (33.3% participating) as well as the most popular game overall (39.5% participating). Gaming machines, Odds, Internet gaming, Tipping, VikingLotto and horse betting are more popular among problem gamblers than others, and the difference is statistically significant. The difference is the greatest with regard to gaming machines with 1 of 3 problem gamblers playing on the machines at least once a week. Odds is played by 1 in 5 every week, the figure for Internet gaming is almost 1 in 5 and 1 in 4 participate in Tipping.¹¹⁶
179. The MMI report divides the participants in the research into three groups; a) participants without gambling problems, b) low risk participants and c) risk and problem gamblers. In the report there are calculations as to the extent to which each group contributes to the turnover of each form of gambling. On the gaming machines, 90% of the turnover comes from risk and problem gamblers. However, the study also shows that other games are far from being unproblematic in this respect. As regards gaming on the Internet, 62% of the turnover comes from risk and problem gamblers and 57% of the turnover on Bingo comes from that group. The group accounts for 44% of the turnover for Odds with 43% coming from low risk participants. The corresponding figures for horse racing are 25% and 55%.¹¹⁷

¹¹² Rossow og Hansen, *Underholdning med bismak Ungdom og pengespill*, NOVA Rapport 1/03, page 28. The study can be found at: <http://www.nova.no/publis/rapport/2003/1.htm>.

¹¹³ Annex 39, Gøtesam and Johansson, *Gambling and problematic gambling with money among Norwegian youth (12-18 years)* Nordic Journal of Psychiatry 57, 2003.

¹¹⁴ Annex 39, page 320.

¹¹⁵ Annex 40, Kavli og Berntsen, *Undersøkelse om pengespill Spillevaner og spilleproblemer i befolkningen*, Oslo 15 September 2005.(MMI report). The document is submitted in Norwegian as well as in an English translation provided by NLD.

¹¹⁶ Annex 40, pages 33-34.

¹¹⁷ Annex 40, page 38.

180. Finally, the Authority would like to note that there are several methods of measuring problem gambling.¹¹⁸ Different measurements may yield different results, which may not be directly comparable. As regards Norway, the prevalence rate of problem gamblers was comparatively low in the SIRUS study, whereas it was very high in the MMI report. This does not necessarily reflect a different situation *de facto*, but might simply be due to the fact that the two studies used different measurements. Volberg and Abbot observe:

*“At face value, the problem gambling findings [of the MMI report] appear to be at marked variance with those of previous Norwegian general population studies. The two previous studies, conducted by different research teams in 1997 and 2002, obtained problem gambling prevalence rates that are very low by international standards. In marked contrast, the present study – using a different problem gambling measure – obtained the highest rate recorded to date anywhere in the world. The report’s authors appropriately caution that the use of different measures and methodologies may account for the differences in prevalence estimates. We agree that it cannot be concluded, on the basis of the survey findings per se, whether or not problem gambling prevalence has changed significantly from 1997 or 2002 to 2005.”*¹¹⁹

b) High risk – low risk

181. During the administrative proceedings, the question was raised as to whether one can establish an operable distinction between “high risk” and “low risk” forms of gambling. For the Authority, it seems as if most researchers in the field of problem gambling agree that while some games are indeed normally more addictive than others, it is not possible to divide the different types of games into a black and white categorisation of high or low risk.¹²⁰
182. First, problem gamblers tend to play several types of games.¹²¹ Second, the relative risk connected with a particular type of game depends to a large extent on how the game is more precisely construed with regard to *e.g.* light and colour effects, the level of prizes, whether they are paid in coins or by receipt, the speed of a game and the existence of announcements like “you nearly won”.¹²² For instance, it seems as if the relative risk of addictiveness to gaming machines is influenced by *e.g.* the frequency of opportunities to gamble, and thereby of the length of each game and the existence of a maximum time in which the person can play several games continuously.
183. Third, many other factors also influence the relative risk, such as how easy access a potential player has to the game (including how easily a potential player will

¹¹⁸ **Annex 41**, Volberg and Abbot, *Report Concerning the Regulation of VLT’s in Norway*, page 8.

¹¹⁹ **Annex 42**, Volberg and Abbot, *Review of Kavli & Berntsen, Study on Gambling Habits and Gambling Problems in the Population* (2005), 28 February 2006, page 18.

¹²⁰ Volberg, *When the Chips Are Down - Problem Gambling in America 2001*, page 91, **Annex 31**, reply to the letter of formal notice, enclosure 2 thereto. In the above-mentioned Proposal for an action plan, page 31, the Gaming Board seems to agree with Volberg’s findings, **Annex 21**. See also, albeit more careful, Griffiths, *Gambling Technologies*, pages 268-270, **Annex 31** reply to the letter of formal notice, enclosure 4 thereto.

¹²¹ Cf. the studies mentioned above under point VI.a).

¹²² Cf. *e.g.* the Gaming Board’s letter of 1 November 2004, page 3, (summarised above in point II.4.e) in which the new machines of Norsk Tipping are criticized for using such factors to attract players, **Annex 33**, reply to the reasoned opinion dated 19 November 2004, enclosure 2 thereto. See also the Gaming Board’s Proposal for an action plan, pages 26-35, with further references, **Annex 21**.

encounter a machine without actively seeking to do so),¹²³ whether the game is played in a socially controlled location or alone,¹²⁴ and whether it is connected with consumption of alcohol.¹²⁵ Also the way in which the player interacts with a game can, by itself, influence the risk for problem gambling. For example, recent studies have concluded that internet gambling might be relatively more addictive than identical games played by other means. In the Bill behind the contested act, the Norwegian Government seems to subscribe to the same view, as it argues that “*it must be taken into account that the Internet makes it easy to play from "your own living room", which can make it easy to fall into unfortunate gambling behaviour.*”¹²⁶ Moreover, gambling on the internet can open up possibilities for much greater event frequency than was previously possible and thus create games which are potentially more addictive.

184. Finally, some researchers argue that games which in isolation are viewed as less addictive might actually be more potentially dangerous as they can constitute that first step in “learning” how to gamble and as they are socially accepted and often promoted via public TV channels.¹²⁷ As other factors, some researchers mention the total availability of all games in the State concerned¹²⁸ and marketing is also believed to have an influence.¹²⁹ It is also a general characteristic that many scholars emphasise how little is known about the different factors influencing the relative danger of a game.¹³⁰

VII. THE AUTHORITY’S SUBMISSIONS

VII.1 The scope of the present action

185. The Court of Justice has on numerous occasions ruled on gaming and gambling legislation.¹³¹ It follows from these cases that operation of gaming machines constitutes provision of services. Legislation which makes it impossible in practice for companies of other Member States to obtain licences for the provision of gambling services is a restriction not only to the freedom to provide services, but also to the freedom of establishment.¹³²

¹²³ **Annex 43**, Johansson and Götesam, *Risk factors for problematic gambling: a critical literature review, Research report from Section for Psychiatry and behavioural medicine*, Norwegian University of Science and Technology, Trondheim, Norway, No 95 Vol. 25 2004, page 27.

¹²⁴ Cf. Griffiths, *Gambling Technologies*, pages 272-273, **Annex 31**, reply to the letter of formal notice, enclosure 4 thereto.

¹²⁵ Cf. e.g. page 29 of the Gaming Board’s Proposal for an action plan, **Annex 21**.

¹²⁶ Cf. point 3.2.2 of Ot.prp. No 44, **Annex 9**. See also Griffiths, *Gambling Technologies*, page 279, who, moreover, underlines that internet games raise particular questions relating to control of under age gambling and the players’ possible intoxication. He also mentions that “*it is very likely that the psychological value of electronic cash will be less than “real” cash.... This might lead to some kind of “suspension of judgment”.*”

¹²⁷ Cf. e.g. the above-mentioned NOVA study, page 17. See similarly **Annex 44**, Fekjær, *Spillegalskap – vår nye landeplage*, Gyldendal 2002, page 44, and **Annex 45**, Griffiths, *Does gambling advertising contribute to problem gambling?* Paper given to the World Lottery Association Conference January 24 2003, page 10.

¹²⁸ Cf. to this effect Götesam and Johansson, page 19, **Annex 43**, and the same scholars in *Nordic Journal of Psychiatry* 2003, 57, **Annex 39**. See also page 26-27 of the Gaming Board’s Proposal for an action plan, **Annex 21**.

¹²⁹ See to that effect below in point VII.3.b.1-2).

¹³⁰ Cf. e.g. Griffiths *Gambling Technologies*, page 281, **Annex 31**, reply to the letter of formal notice, enclosure 4 thereto.

¹³¹ Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-124/97 *Läärü* [1999] ECR I-6067, Case C-67/98 *Zenatti* [1999] ECR I-7289, Case C-6/01 *Anomar* [2003] ECR I-8621, Case C-243/01 *Gambelli*, cited above, and C-42/02 *Lindman* [2003] ECR I-13519.

¹³² Case C-243/01 *Gambelli*, cited above, at paragraph 48.

186. The Norwegian Government has acknowledged that the introduction of a monopoly constitutes a restriction to the freedom of establishment and the freedom to provide services within the meaning of Articles 31 and 36 EEA. Conversely, the Authority does not dispute that the objectives invoked to reduce gambling addiction, prevent underage gambling and combat crime are laudable aims which may, potentially, justify a restriction to a fundamental freedom. Neither is the Authority calling into question the competence of the Norwegian Government to regulate the market for gaming machines in order to achieve those aims, by for instance requiring a reduction of the number of gaming machines, or by adopting stricter regulations concerning the machines and their location.
187. In other words, the present action is not about whether gaming machines should be legal in Norway. Nor is it about the range of specific measures that the Norwegian Government has adopted in connection with the contested Act in order to control and, possibly, reduce gambling. As will be demonstrated below, such measures (reduction in the number of machines, operational methods, interconnection in networks etc.) could all have been adopted under the old licensing system. Thus, the present action relates exclusively to the necessity of establishing a model with exclusive rights for a State undertaking and not to the Norwegian gaming machines reform in its totality. The Authority would like to stress this point, as 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. However, a monopoly solution does not become legal simply because it is being enacted at the same time as other measures that are not necessarily linked to the monopoly. The assessment of the legality of the monopoly should, therefore, be carried out without looking at these parallel but separable measures, however beneficial they might be for the resolution of problem gambling.
188. As will be developed further below, the Authority respectfully submits that the introduction of the monopoly is contrary to the EEA Agreement for several reasons. First, the monopoly solution was chosen because the Government saw it as the only means of achieving the double aim of reducing the number of machines and maintaining the revenue to charities, see point VII.2 below. Second, the Norwegian Government's gaming policy is inconsistent within the meaning of the case law of the Court of Justice, see point VII.3 below. Third, the introduction of exclusive rights for Norsk Tipping to operate gaming machines is not necessary in order to obtain better control of the gaming machine market and prevent gaming addiction and crime, see below under point VII.4.

VII.2 Financial considerations

189. In the following, the Authority will demonstrate that the choice of a monopoly model was to a considerable extent motivated by the wish to maintain the level of revenue that charities had hitherto received from gaming machines. It will also be shown that such an aim may not be pursued under Articles 31 and 36 of the EEA Agreement.

a) The test

190. In the administrative proceedings before the Authority, there were discussions as to whether and to what extent the wish to secure revenue for charities can legally be taken into account as one among several factors when assessing the legality of the monopoly.¹³³

191. In this respect, the Norwegian Government has referred to the judgment in *Schindler*, according to which the possibility of exploiting certain forms of gambling to finance public interest activities could not be regarded as an objective justification of a restriction on a fundamental freedom, but was “*not without relevance*”.¹³⁴ Moreover, in its reply to the Authority’s letter of formal notice, the Government argued that the case law of the Court of Justice:

“... *does not imply that account cannot be taken of the financial consequences of the restrictions to be introduced provided that the financial interests do not have an inhibitory effect on the concerns the restrictions are intended to address. ...[T]he phrase incidental beneficial consequence in this context should be construed in the sense of benefits that are subordinate in nature, and cannot be taken to mean that only accidental beneficial consequences are acceptable.*”

192. The Authority understands the Norwegian Government to argue that the wish to create or maintain revenue for charities can be part of the justification for a monopoly, as long as it is not the primary aim of the monopoly. The Authority disagrees with that. As the Authority will demonstrate in the following, the statement in *Schindler* can be given only limited weight in light of the developments in later case law. Moreover, it follows from the most recent case law of the Court of Justice that the financing of social activities is not a legitimate aim as such. If only for that reason, such an aim cannot serve as subordinate justification for the restriction either.¹³⁵

193. As stated by Advocate General Fennelly in his Opinion in *Zenatti*:

“*The Court stated in Schindler that the possibility of exploiting certain forms of gambling to finance public interest activities could not, in itself, be regarded as an objective justification of a restriction on a fundamental freedom, although it also remarked, cryptically, that it was 'not without relevance'. It was not mentioned in the operative part of the judgment, which referred only to social policy and the prevention of fraud. I share the reservations expressed by Advocate General La Pergola in his Opinion in Läärä that such a ground of justification of a restriction is of an essentially economic character and consequently unacceptable.*”¹³⁶

194. The relevance of economic considerations was subsequently summarised as follows by Advocate General Alber in his Opinion in *Gambelli*:

¹³³ Cf. for instance the Norwegian Government’s reply to the letter of formal notice pages 20, 26, 30 and 31, **Annex 31**.

¹³⁴ Case C-275/92 *Schindler*, cited above, at paragraph 60.

¹³⁵ For the same reason, the Authority disagrees with the legal test suggested by the Norwegian Court of Appeal, cf. above in point IV.b).

¹³⁶ Case C-67/98 *Zenatti*, cited above, opinion of Advocate General Fennelly paragraph 27, underlined by the Authority. See also paragraphs 87-91 of the opinion of Advocate General Stix-Hackl in Case C-42/02 *Lindmann* [2003] ECR I-13519, according to whom the need to avoid a fall in revenue from taxes on lottery income cannot justify a restriction on the freedom to provide services.

“In paragraph 60 of its judgment in Schindler, the Court held it to be not without relevance - although incapable of being regarded as justification - 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. Although that finding might support the assumption in certain circumstances that economic grounds - at least when combined with other grounds - are recognised as reasons in the general interest, the Court dispelled such speculation in its judgment in Zenatti, which was consistent with its previous case-law to the effect that economic grounds are incapable of justifying restrictive measures. The Court held in paragraph 36 of that judgment that the financing of social activities through a levy on the proceeds of authorised games [may constitute] only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.”¹³⁷

195. This understanding of the case law was confirmed by the Court:

*“As stated in paragraph 36 of the judgment in Zenatti, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted”.*¹³⁸

196. Hence, the Court did not just conclude that the economic aim of financing social activities was in itself incapable of justifying a restriction. It went further and stated that this aim may “only” be an incidental consequence of the restrictions. The same approach was taken in *Zenatti* in which the Court emphasised the fact that the national legislation, unlike the one at issue in *Schindler*, did not prohibit the gaming activities in question but reserved them for certain bodies. The Court found that such a partial limitation was not in itself sufficient to show that the legislation at issue was not in reality intended to achieve the public interest objectives at which it was purportedly aimed. However, to counterbalance that conclusion, the Court indicated that the national court should carry out a careful control of whether the legislation was *genuinely* directed at attaining the objectives potentially capable of justifying it.¹³⁹

197. In conclusion, in the area of gaming, the EEA States’ restrictive policies consisting of reserving certain gaming activities for certain state-controlled bodies shall be based exclusively on public interest objectives such as diminishing the socially harmful consequences of such activities. The test according to recent case law is strict, holding that economic aims cannot legally be pursued in the context of the introduction of such exclusive rights. An EEA State may not, therefore, introduce a monopoly when an important objective behind the monopoly is securing revenue for charities. That a restriction might have such an effect, can, in the Court’s own words, only constitute “*an incidental beneficial consequence*” of the restriction.

¹³⁷ Cf. paragraph 125 of the opinion.

¹³⁸ Cf. paragraph 62 of the judgment.

¹³⁹ Case C-67/98 *Zenatti*, cited above, at paragraphs 32-36. See also Advocate General Alber in *Gambelli* at paragraphs 114-116 where he explains the special circumstance where a Member State, instead of prohibiting gambling, uses its margin of appreciation to allow gambling to a certain extent. In such cases, the objects pursued and the means employed to attain them should be subject to closer assessment and 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.

198. Against this background, the Court in *Gambelli* went on to balance the strict test concerning legitimate aims by reiterating that

*“[o]n the other hand, ... 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.”*¹⁴⁰

b) The objectives underlying the introduction of the monopoly

199. In the following, the Authority will demonstrate that the restriction concerning ownership and operation of the gambling machines, consisting of the introduction of a monopoly for Norsk Tipping to own and operate 10 000 machines, did, at least partially, rest on the economic objective of securing a level of income for charities corresponding to the level in 2001. Within the adopted framework of 10 000 machines, installed in the four categories of pre-defined premises, it would only be possible to achieve that level of revenue using the model of Norsk Tipping as sole operator of the machines. This is because that model would imply that a higher portion of the revenue generated would be transferred to charities.
200. Indeed, as mentioned above, this has already been concluded by the two Norwegian courts that have examined the matter, both on the basis of the written documents and after hearing several witnesses, including the Minister responsible for the Bill. According to the Oslo City Court, *“ensuring the income - however big or small it may turn out to be – was an intended, expressed and important part of the reasoning behind the monopoly.”* According to the Court of Appeal, *“there is also a desire behind the monopoly model to minimise the reduction of revenues to socially beneficial and humanitarian organisations. The Court of Appeal does not consider this to be the decisive ground for the restriction, but a supplementary objective...”* Moreover, when discussing the aims behind the monopoly, the Court of Appeal saw the monopoly as suitable because it would imply *“that the number of machines can be reduced and that private profits from gambling activities will be reduced, while at the same time revenues to the supported organisations is maintained at an acceptable level.”*¹⁴¹
201. In general, in order to assess the underlying objectives behind the legislative measure, a natural starting point is to look into what was expressed by the Storting when it adopted the Bill.

b.1) Innst. O. No. 124 (2002-2003)

202. In its report of 6 June 2003 to the Odelsting,¹⁴² the Family, Culture and Administrative Committee of the Storting pointed out that the Norwegian gaming market *“has represented highly significant revenues for voluntary and humanitarian organisations for many years”* and that the extent of gaming should be

¹⁴⁰ Case C-243/01 *Gambelli*, cited above at paragraph 63.

¹⁴¹ Hence the only difference in the two courts' respective assessments goes to the *relative* importance of the financial aim and the legal significance thereof. Furthermore, the Authority notes that in its pleadings before the Court of Appeal the Government stated that *“one of the considerations is that this must be achieved in the best possible manner to ensure the lowest possible reduction in the transfer of funds to the voluntary organisations that currently hold permits to operate machines.”*

¹⁴² Cf. point II.3.f) above and **Annex 11**.

assessed in connection with its negative effects. In its further discussions, the Committee was split into a majority and a minority. According to the majority of the committee, *“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 minority stated it somewhat clearer: *“These members agree with the main intention of the proposition to ensure income for the humanitarian and socially beneficial causes, as well as to minimise the unfortunate consequences that gambling addiction represents.”*

203. The majority of the Committee expressed in support of the proposal as one of the advantages of an exclusive right model that *“[t]hrough 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.”* Moreover, it held that *“[t]hrough 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.”*
204. From these statements it appears that the Committee, together with social concerns, attached considerable importance to the financial consideration of maintaining the revenues for the charities when it supported the proposed amendments.

b.2) Ot. prp. No. 44 (2002-2003)

205. In comparison with the Committee's remarks, the Bill made fewer references to financial considerations and did not mention this aim as a chief objective underlying the Bill.¹⁴³ Moreover, in chapter 4.5.3 concerning the proposal's compliance with the EEA Agreement, the Government characterised it as a *“positive side-effect of the proposal”* that *“the proposal also entails a more effective organisation of the available machines so that the philanthropic causes are assured a larger proportion of turnover of the machines that are permitted to be deployed”*.
206. However, the Ministry also stated in chapter 1 that it *“would like to emphasise the social benefits of the work carried out by the organisations that currently receive funds from the machine enterprise. It is therefore a fundamental principle that at this stage it is not intended to make any major change in the division of the gaming income to these organisations with regard to the development of the machine income up until 2001.”*¹⁴⁴ Moreover, the Ministry found it relevant to mention in chapter 4.5.1 that *“[c]alculations 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 if the total machine turnover falls by up to 40%”*. It also argued in chapter 4.3.2 that *“the current rules do not effectively ensure that the genuine profits from the machine business benefit the philanthropic organisations”*, just as the proposal in chapter 3.2.2 contained tables demonstrating that *“there is a big difference between private lotteries and state games with regards to the percentage of profits given to good causes. ... This*

¹⁴³ Cf. point II.3.e) above and **Annex 9**.

¹⁴⁴ Underlined by the Authority.

is also the case if a comparison is made only between the traditional private lotteries (machines and bingo are excluded) with the traditional state games.”

207. Given that the statements in the Bill are few and somewhat contradictory, the Authority submits that the full extent of the genuine objectives behind the restriction can only be established by looking into the entire legislative history and background to the contested act. This is especially so in the circumstances of this particular case, where the restriction stems directly from a proposal put forward by Norsk Tipping and where that proposal was adopted by the Government and later the Storting without any significant amendments. The need to see the Bill in light of the Government’s statements leading up to its adoption is even stronger when one considers that the Government has never argued that it should have changed its mind as to what aims it wished to pursue in the time between its second hearing paper in October 2002 and the adoption of the final Bill in March 2003. In fact, the only new element raised in that period was contained in the private gaming operators’ response to the second hearing paper, in which they drew the Government’s attention to the fact that it was highly doubtful whether the wish to secure revenue for charities was a legal aim under EEA law.¹⁴⁵ To look merely at the exact words used in the bill behind the contested act, rather than view the Bill in a broader context, would mean that the judicial control of what aims an EEA State can legally pursue would be dependent on the drafting skills of the national authorities. That one should not take such a narrow approach, but instead apply a broader assessment, is demonstrated by *Gambelli*, where the Court of Justice did not only assess the legitimate aims presented by the Italian government, but also looked at inconsistent conduct of national authorities, other legislative measures etc.

b.3) The Ministry’s first proposal of 21 June 2002

208. The proposal from 21 June 2002¹⁴⁶ was based on the continuation of the system with private operators, but suggested that gaming machines should only be allowed in areas with access control, as such a measure was considered to improve the enforcement of the 18 year age limit. In other words, in June 2002, the Government was ready to propose legislative amendments in which the negative developments in the gaming machine market could be dealt with within the framework of the licensing system with private operators. There was no mention of the private operators’ lack of compliance with regulations. Nor was it argued that the market was difficult to regulate or that competition in the market was at the root of the problems. On the contrary, it seems that the Government was of the opinion that the root of the social problems was the *location* of the machines in shops, petrol stations and shopping centres leading to high exposure for minors and problem gamblers.
209. As regards the proposal’s effect on machine turnover, the Government referred only generally to the fact that *“the proposed restrictions with regard to where the machines can be deployed may reduce machine turnover somewhat, and that access to deployment locations will be reduced. It is difficult to predict the scale of the reduction in turnover in advance.”*
210. The charitable organisations were, however, strongly opposed to the proposal. In their joint response, dated 20 September 2002, they observed that the proposal

¹⁴⁵ Cf. above in point II.3.c).

¹⁴⁶ Cf. point II.2.f) above and **Annex 31**, reply to the letter of formal notice, enclosure 10 thereto.

would lead to a reduction of gaming locations in the range of 75-80% and a diminution in revenue of approximately NOK 500 million. This would in turn have a very negative impact on a large proportion of the work carried out by voluntary organisations. The organisations also referred to the instructions of the Justice Committee of the Storting not to introduce rules that limited the revenue for charity, given only two years earlier.¹⁴⁷

211. Shortly thereafter, Norsk Tipping presented, on the invitation of the Ministry, an alternative model on the operation of gaming machines.

b.4) Norsk Tipping's proposal of 1 July 2002

212. When Norsk Tipping presented its proposal for a monopoly model to the Ministry on 1 July 2002, it explicitly stated that “[t]he main reason for Norsk Tipping to be the sole operator is that this will secure maximum revenue to the charities with a lower number of machines... Norsk Tipping will, based on its model and the preliminary calculations it has made, ... create a revenue to be distributed of the same amount as today, i.e. app. NOK 800 million.”¹⁴⁸ Norsk Tipping also explained that unless it was granted a monopoly, the desired stricter rules would imply reduced income to charity “It should also be taken into consideration that without the actions by Norsk Tipping, these good causes will have to expect a reduction in their future income as a consequence of the more strict rules that is expected to be introduced by the authorities.” Norsk Tipping could, moreover, assure the Ministry that the new model would gain support from the charitable organisations. Indeed, the revenue generated by Norsk Tipping’s model would be between two and three times higher than the Government’s own June 2002 proposal.

213. That the issue of securing revenue for charities was important, not only for Norsk Tipping but also for the Ministry, is illustrated by the questions and answers concerning the potential profit distribution under the monopoly and Norsk Tipping’s suggestion for a so-called “*Stjernekiost*” concept. That concept entailed that gaming machines would be deployed in locations such as kiosks and petrol stations, the very locations that the Ministry had, just a few months earlier, proposed to prohibit since they entailed an unfortunate exposure of minors and people with gambling problems to gaming machines. When the Ministry was presented with the *Stjernekiost* concept, it asked Norsk Tipping the following question:

*“Profit estimate Norsk Tipping has provisionally estimated that the company will be able to bring in just as many millions for profit distribution as today, i.e. approximately 800 million Kroner even with 40% lower turnover (approximately 5 billion). Can this estimate be used in further consideration of NT's model (e.g. in the r-memo)?”*¹⁴⁹

¹⁴⁷ Cf. above at point II.2.b.

¹⁴⁸ Cf. **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 1 thereto. Similarly, in its letter of 19 September 2002 Norsk Tipping once again reiterated the economic advantages the monopoly would ensure, cf. **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 2 thereto

¹⁴⁹ To the Authority, the fact that the Ministry asked specifically whether it could rely on Norsk Tipping’s estimation of expected return for charities in the note that would form the basis of the Government’s decision whether or not to present the monopoly solution to the Storting illustrates the importance that was attached to this element.

214. Norsk Tipping's reply to that question was that “[o]ur estimates show that when we have reached one full year of operation with 10.000 machines, the profits will be in the region of 830 million. This is based on the conditions that are now part of the NT-model.” The company also underlined that “[t]he Stjernekiost concept is a condition of NT's model and makes up 25% of contributions”. Finally, it highlighted that the economic consequences of not allowing machines to be placed in kiosks and petrol stations would be a reduction in the annual income from 2007 “of more than NOK 200 million”.¹⁵⁰ Norsk Tipping did not provide any explanation for the chosen number of machines other than maintaining 2001 levels of revenue.

b.5) The Ministry's second proposal of 25 October 2002

215. Shortly thereafter, on 25 October 2002, the Ministry put forward the proposal for a gaming machine monopoly for Norsk Tipping. In that proposal, the Ministry chose to highlight the financial side in the opening lines of the hearing paper, where it was stated that the proposal entailed that “revenues for socially beneficial and humanitarian organisations be secured by these being incorporated as recipients of profits from Norsk Tipping AS in the same way as sports and culture, and that public authorities are responsible for allocation of profits.” Similarly, when summarising the advantages of the monopoly model, the very first consideration that the Ministry found reason to mention was that “[t]he organisations' income are secured”. Moreover, in point 4, “Financial and administrative consequences”, the Ministry argued that a monopoly for Norsk Tipping would be “the best way to be able to reduce the number of machines at the same time as maintaining the financial levels for good causes. In total, socially beneficial and humanitarian organisations will be able to maintain their basis of income from today's prize machines due to the fact that the organisations will receive a fixed share of NT's profits in coming years.” In addition, when refuting an alternative whereby Norsk Tipping would merely be allowed to operate as any other licensee, the Government emphasised that “this alternative will not ensure that the organisations receive revenues through a statutory share of Norsk Tipping's profits”.
216. As described above in point II.3.c), in the second hearing paper, the Ministry now presented several arguments as to why the licensing system (that it had recently proposed be continued) should be replaced by a monopoly for Norsk Tipping. Private operators did not comply with the regulations and resisted introduction of new rules, it was difficult to regulate the market, gaming machines were the main cause of gambling addiction in Norway, and too small a portion of the revenue went to charities.
217. Just as importantly, the Ministry explained that one of the reasons for the new proposal was that the June proposal had met mass opposition in the market since it would entail major reduction in the revenues for the charities on app. NOK 500 million, i.e. between 75 and 80%. In this respect, the Ministry referred to Norsk Tipping's estimates of how the monopoly would secure an equally big surplus from the machines as today, even though the total gross revenue would be reduced by 40%. The result would thus be that the number of machines could be reduced to 10 000 without a substantial reduction in income to charities. In contrast “[t]he feedback received from the current operators in the machine market following the Ministry's consultation document of 21.6.2002 suggests that such tightening of

¹⁵⁰ Letter of 19 December 2002, **Annex 27** letter from the Norwegian Government of 1 September 2003, enclosure 5 thereto

deployment policy could not be implemented under the current model without a significant reduction in profits to the socially beneficial and humanitarian organisations.”

218. With regard to the content of the Ministry’s proposal, it corresponded on all major points to the proposal put forward by Norsk Tipping, including the two basic factors for the revenue calculation, namely, on the one hand, 10 000 machines and, on the other hand, the deployment policy following Norsk Tipping’s four categories in the *Stjernekiost* concept. The Government explicitly stated that this number of machines would secure an income level to charities corresponding to that of 2001. There was no material, scientific or otherwise, supporting the inference that such a number of machines was acceptable when measured against the social aims behind the monopoly. Indeed, the Norwegian Government has not at any time presented any explanation for the chosen number of 10 000 machines, other than what follows from Norsk Tipping’s initial proposal of 1 July 2002. Moreover, the only explanation for why the Ministry had given up on its original proposal for a ban on the placing of machines in shops, petrol stations and shopping centres was that the location restrictions in the June 2002 proposal could not be enacted without a significant reduction of the surplus revenues destined for social and humanitarian organisations.

b.6) Subsequent developments in the gaming machine market

219. In its reply to the letter of formal notice, the Government referred to the substantial increase in turnover on the machines from NOK 8.5 billion in 2001 to NOK 22 billion in 2003 and argued that a continuation of the current system would have resulted in substantial financial gains for the charitable organisations. Thus, the Government failed to see how Norsk Tipping’s involvement in the process could imply that the financial interests were not subordinate to the social policy concerns at issue.¹⁵¹
220. With the benefit of hindsight, it is easy to agree with the Government that an implementation of the monopoly model today would reduce revenue to charities. Now it is known that the gross turnover from the gaming machines has increased considerably since the Storting took the decision to enact a monopoly model. Moreover, it is known that the net revenue from gaming machines to charities has more than doubled from 2001 to 2004.
221. That is, however, of no relevance to the issue of economic aims in the present dispute. First, developments *after* the decision to introduce the monopoly cannot be taken as a proof of what the legislator wished to achieve with the monopoly.¹⁵² Second, as already mentioned, the Authority does not submit that the Government’s financial aim consisted of securing maximum revenue to charities. What the Authority submits is that securing revenue corresponding to the level in 2001 was an important objective behind the choice of a monopoly model. As follows from the legislative proposals referred to above, the Government presented two different options to limit the problems related to gaming machines. The first option would have entailed a revenue decrease from around NOK 850 million to somewhere between 200 and 400 million. The second option would, provided Norsk Tipping was the only operator of the machines, secure revenue in the range

¹⁵¹ Reply to the letter of formal notice, page 34, **Annex 31**.

¹⁵² Both when Norsk Tipping presented its proposal to the Ministry, and when the Government put forward its proposal of 25 October 2002, the annual statistics for 2002 had not yet been presented.

of NOK 800 to 850 million. These were the options at the time and the Government chose to go forward with the second alternative.

b.7) Conclusion

222. Shortly before the monopoly was introduced, the Ministry was apparently of the opinion that the social problems connected to gaming machines could be handled within the framework of the licensing system by tightening the location rules for the machines. However, it soon became clear that an adoption of this first proposal would have entailed a significant decrease in revenue for charities, something that would be contrary to the prerequisites expressed by the Storting just two years earlier. When Norsk Tipping was asked by the Ministry to propose a new model, the state-owned company developed, in a dialogue with the Ministry, the monopoly model that was later enacted by the Government and the Storting without any substantive changes. Norsk Tipping presented as the main objective for its proposal the securing of the 2001 level of revenue with a lower number of machines. Moreover, it was on this basis that both the operator and the number of 10 000 machines was chosen. The number of machines was never, in the documentation available to the Authority, questioned or reassessed on any basis other than it being the number needed for generating approximately NOK 850 million to charities. Nor did any such questioning or reassessment take in relation to the location of the machines proposed by Norsk Tipping.
223. These circumstances are highly relevant when determining whether the restrictive policy was introduced solely in order to fulfil social objectives. If the national authorities, in circumstances such as those described above, could adopt Norsk Tipping's proposal without any further assessment and then justify the severe restriction simply by characterising the (previously fundamental) aim of securing revenue as merely "*a side effect*" in the Bill, the judicial control described in *Gambelli* would be stripped of all meaning.
224. Based on the factual circumstances described above, the Authority, therefore, submits that the choice of the monopoly model for Norsk Tipping was motivated by the economic aim of securing at least the 2001 level of revenue to charity. That objective cannot be characterised as simply an incidental beneficial consequence of the monopoly. On the contrary, the economic aim formed an important basis for the monopoly model and was thus relied on to such an extent that the monopoly is incapable of being justified.

VII.3 The consistency of the Norwegian gaming policy

225. In the following, the Authority will demonstrate that the Norwegian gaming policy is inconsistent and that the Norwegian Government, therefore, cannot justify the monopoly.

a) The test

226. As underlined above at point VII.2.a), it follows from the case law of the Court of Justice that a restriction on gaming services must reflect a concern to bring about a *genuine diminution* of gambling opportunities.¹⁵³ In *Gambelli*, the Court of Justice

¹⁵³ Cf. Case C-243/01 *Gambelli*, cited above, at paragraph 62, in which reference is made to case C-67/98 *Zenatti*, cited above, at paragraph 36, which in turn refers to paragraph 32 of the Advocate General's Opinion in that case.

stated that although earlier case law accepted restrictions based on imperative interests such as consumer protection, the risk of fraud and the incitement to squander on gambling:

“... 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. ... 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.”¹⁵⁴

227. The same point was elaborated in more detail in Advocate General Alber’s opinion in *Gambelli*:

“As regards the dangers feared to be posed by the diversification and extension of gaming opportunities, it must be examined whether the Member State has a coherent policy on the subject, particularly where the prohibition in question is not absolute but is qualified by a reservation of authorisation. A total prohibition on a particular branch of the gambling sector clearly has the effect of limiting those gambling opportunities. However, where gambling - in this case sports betting - is permitted, albeit within clear limits laid down by law, the stated objective of producing a limiting effect must be examined much more closely. ... [S]uch regulation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities.

However, whether that is the case can be determined only by an overall assessment taking into account the image and conduct of gambling operators in the Member State...

It has been submitted in these proceedings that sports betting operators trading under a concession make themselves known by means of aggressive advertising. Such conduct is intended to instil and foster a desire to gamble. That is not all, however. 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.”¹⁵⁵

228. Hence, where, as in the present case, the restriction consists in reserving the provision of gambling services for certain bodies, the restriction should be examined closely in order to determine whether the operation of the different money games can be said to reflect a coherent policy to limit gambling opportunities in a consistent and systematic manner.
229. It is not disputed that the gaming policy in Norway limits gaming opportunities. Only certain bodies are allowed to operate such services. Moreover, to the extent that the number of machines will be reduced, the proposed amendments to the

¹⁵⁴ Case C-243/01 *Gambelli*, cited above, at paragraphs 67 and 69, underlined by the Authority.

¹⁵⁵ Cf. paragraphs 119-121 of the Opinion, underlined by the Authority.

- gaming and lottery legislation represent a limitation on the possibilities to squander on gaming machines.
230. Indeed, the national legislation at issue in *Gambelli* also had the clear effect of limiting gaming opportunities. Gaming services were, in principle, prohibited. The organisation of betting was permitted for concession holders, pursuant to a call for tenders and within a regulatory framework, only in respect of events organised by the National Olympic Committee (CONI) or the National Union for the Betterment of Horse Breeds (UNIRE).¹⁵⁶
231. However, those general limitations were not, in themselves, capable of satisfying the consistency test described above. Instead, the Court called for an assessment of how the gaming operators, within their framework of exclusive rights, operated on the national market and whether the State, by regulatory measures on a general level, had expanded games and gaming opportunities.
232. The consistency test does not therefore concern an EEA State's powers to introduce or maintain general limitations for the provision of gaming services. It is, with respect to the consistency test, irrelevant that the national gaming policy, by prohibiting gaming activities with certain limited exceptions, provides for an overall limitation of available gaming services. In fact, if that were the relevant test, it would render the consistency test meaningless since most if not all EEA States have limitations in place with respect to the provision of gaming services. Rather, the consistency test requires the State to ensure that operators with exclusive rights exercise those rights consistently with the social objectives that allowed for the granting of exclusive rights in the first place. In other words, the test concerns whether the underlying objective of limiting gaming activities can justify an exclusive right being awarded for the operation of such services. If the holder of the exclusive rights is allowed to operate in the same way as any other economic operator, and extensively advertise their services and develop their products in order to attract new customers and increase their market shares, the basic rationale for granting of the exclusive rights – the genuine diminution of gaming services in a consistent and systematic manner – is no longer present.
233. The test requires a consistent and systematic approach with respect to gaming services in general. That is why the Court in *Gambelli* referred to whether an EEA State incites and encourages consumers to participate in lotteries, games of chance and betting. It is therefore relevant to assess the image and conduct of all the gaming operators holding exclusive rights in Norway, just as the way in which the Norwegian State has regulated the provision of such gaming services in order to ensure that operators contribute to a genuine diminution of gambling opportunities must be assessed.
234. The need for a consistent approach is self-evident in relation to gambling companies that the State itself owns and manages, *in casu* Norsk Tipping. The Authority, moreover, submits that it follows from *Gambelli* that the consistency test goes further and also encompasses non state-owned gaming undertakings which have been granted exclusive or special rights under national law, *in casu* Norsk Rikstoto and Norske Spill AS. Indeed, whether the State is engaged directly,

¹⁵⁶ For a more detailed description of the Italian gaming legislation, see Case C-67/98 *Zenatti*, cited above, at paragraph 3-5, and the Advocate General's Opinion in that case, at paragraph 4-8. It appears that at the time of the *Zenatti* proceedings, CONI bets were administered by some 15 000 newsagents and UNIRE had granted between 300 and 350 concessions for totalisator betting on horse races.

via ownership of a provider of gaming services, or merely grants certain bodies the right to operate such services, should be immaterial since the operators in both situations have been expressly authorised by the State to operate gaming services.

235. Finally, the Authority would like to stress that a national gaming policy does not become consistent within the meaning of *Gambelli* simply because all games are operated via a state operator. The consistency test relates to the State's approach to providing possibilities for gambling and not to the choice of service provider. This is especially so when the objective behind all the authorised gaming services, whether they are state-owned or not, is to finance public interest activities. In this respect, it is immaterial whether the profits go into the coffers of the State and are subsequently channelled to good causes or, as is the case in Norway with respect to Norsk Rikstoto and Norsk Tipping, whether the operators themselves directly finance the said activities.¹⁵⁷ In both cases the revenue is created for the financial benefit of the public purse.
236. In the Authority's opinion, the Norwegian authorities' approach to gaming addiction is inconsistent in two respects. First, consumers have, as a result of intense marketing, been actively encouraged to engage in a broad range of gaming activities. Second, the Norwegian State has itself, via its ownership and control of Norsk Tipping, substantially expanded the range of games and gaming opportunities in Norway. Moreover, it has, through the granting of exclusive rights to other gambling undertakings, made similar expansion possible in relation to the gaming activities operated by those bodies.

b) Marketing of gaming activities

237. In the following, the Authority will demonstrate that the Norwegian gaming policy is inconsistent as it either allows, or in the case of Norsk Tipping itself performs, extensive marketing of gambling services.

b.1) Marketing of money games

238. According to the Gaming Board's "*Proposal for an Action Plan*":

*"It has essentially been Norsk Tipping and Norsk Rikstoto who have made use of marketing possibilities. Traditional marketing methods have so far not been used for gaming machines, probably because the operators have so far not seen any need for this, as the machines in a way are "self marketing". Other private lotteries, such as national lotteries in the form of scratch cards, have also largely marketed their own gaming products, then generally in the form of DM and telephone sales."*¹⁵⁸

¹⁵⁷ In Italy, the national provisions required the licence holders to pay a levy on the gross betting receipts to CONI (the national Olympic Committee) and UNIRE (the national equine organisation) for investment in sporting infrastructure and training, particularly in poorer areas, and for the support of horse racing and horse breeding, cf. Case C-67/98 *Zenatti*, cited above, at paragraph 4.

¹⁵⁸ Cf. page 43 of the Proposal for action plan, **Annex 21**. According to a Report from Nielsen Media Research of all expenses relating to marketing of money games in Norway in the period 2002-2004, Norsk Tipping accounted for 88,13% and Norsk Rikstoto for 7,74%. **Annex 46**, figures from Nielsen Media Research. Also annexed are figures made by the applicants in the national proceedings. It is the understanding of the Authority that the year 2005 has been marked by a more intense marketing campaign from Norsk Rikstoto due to an increase in the marketing budget of 30%.

b.1.1) Norsk Tipping

239. Throughout the last decade, Norsk Tipping has consistently been among the largest advertisers in Norway, irrespective of the kind of product or services being offered. Sometimes the company has been the largest advertiser in the whole of Norway, at other times “only” among the top five. Over a ten year perspective, the amount that Norsk Tipping has spent on advertising has been on the rise. Moreover, it is the Authority’s understanding that both in the period when the contested legislation was being discussed in the Storting and in the months that followed, Norsk Tipping spending on advertising increased significantly. According to an overview of the entire Norwegian advertising market in 2004 made by AC Nielsen, Norsk Tipping spent 181 million NOK on marketing, thereby raising its advertising expenditure by 9%.
240. In addition, Norsk Tipping is the sponsor of the premier league of Norwegian football, and it obtains exposure via direct transmission on the (otherwise publicity-free) national television channel NRK of the draws relating to the company’s games, Lotto and Viking Lotto. According to the Norwegian Mass Media Surveillance Board, statements made during the draw have been directly encouraging purchase.¹⁵⁹ Moreover, Norsk Tipping has publicly stated that its total turnover would fall by 30% without the TV spots.¹⁶⁰

b.1.2) Norsk Rikstoto

241. Norsk Rikstoto frequently advertises its games via a number of Norwegian media. In its Annual Report for 2004, Norsk Rikstoto stated that its marketing activities were increasing and that marketing was an important factor behind increased sales and the attainment of the second highest turnover ever.¹⁶¹
242. The same was confirmed by Johan Kvarme, responsible for sales and marketing in Norsk Rikstoto, in an interview in 2005:

“[W]e had an increase last year of 300 million on V75. That is 58% higher than in 2003. This year we are already 60 million ahead of last year so it is obvious that we earn on this... Norsk Rikstoto has been unusually visible in the market over the last year, due to a clear marketing strategy of the company. The Jackpot is heavily marketed on TV, in newspapers and in public transport. – We have increased our marketing budget by 30% he says, but he is not willing to reveal how much this is... - But for each Kroner spent we have received two or three back. That must be characterised as effective marketing... - We know that we have gotten many new players because of Lyntoto and the jackpot says Kvarme. – Lyntoto has become a huge hit; it is the key to gaining new customers. – We are reasonably sure that some hundred thousand have joined.”¹⁶²

¹⁵⁹ In December 2004, the Norwegian Mass Media Surveillance Board concluded that the marketing was illegal under the rules pertaining to NRK.

¹⁶⁰ Statements from Norsk Tipping’s director for information cited in “Dagens Næringsliv” on 24 July 2001. In an article in Dagsavisen on 20 January 2000, it was estimated that the draw represented a value of 475 million NOK, and that Norsk Tipping would have lost app. 2.5 billion NOK in turnover had the draw not been televised.

¹⁶¹ Annex 47, Norsk Rikstoto’s Annual Report for 2004, page 3.

¹⁶² Interview in Kapital nr. 2/2005. The Authority’s translation. The original text reads as follows: “Vi hadde en økning i fjor på 300 millioner på V75. Det er 58 prosent opp fra 2003. For inneværende år ligger vi allerede 60 millioner foran fjoråret, så det er klart vi tjener på dette... Norsk Rikstoto har vært unormalt synlig i markedet det siste året, noe som har vært en klar markedsføringsstrategi fra selskapets side.

b.2) The intended effect

243. During the administrative procedure, the Norwegian Government has argued that Norsk Tipping's extensive marketing is a natural counterpart to the size of the company and that *“an increase in Norsk Tipping's marketing budget will not necessarily mean an increase in the turnover and profit”*.¹⁶³ It has also been stated that the results of marketing are uncertain and have only an incidental effect on the popularity of each game. Moreover, the Government has claimed that the marketing has a *“socio-political aim”* and is essentially aimed at brand building.
244. In the Authority's opinion, these arguments are both irrelevant and implausible.
245. First, whether or not the marketing activities of the gaming operators will actually have a greater or lesser degree of success is not conclusive regarding the consistency of the approach taken by Norway as long as the *intended* effect of the marketing activities is to encourage consumers to participate in gaming activities.
246. Second, all marketing activity, regardless of whether it is labelled as “branding” or “sales promotion”, has the purpose of increasing sales by creating attention and interest for the products offered and by affecting decisions in the form of preference for the promoted product. In both cases, marketing is an investment the purpose of which is to create a return. Indeed, according to Norsk Tipping's own brochure *“Ansvarlig spilleglede”*, published in 2004:

*“The task of Norsk Tipping is to create the highest possible revenue for good causes... The most important means to achieve the aim of maximum revenue is good product development, creative marketing and a continuous effort to maintain an excellent relationship of trust between the company and the society. ... Good marketing is necessary in order to get people to choose Norsk Tipping's games in competition with other entertainment offers – so that the surplus to beneficial causes can be maintained.”*¹⁶⁴

247. The company's managing director expressed the same view in Norsk Tipping's 2003 Annual Report:

“Even with our exclusive rights in parts of the games market, we are subject to fierce competition. We have to be present in people's minds to make sure that a little of their surplus money benefits society, and does not end up in the pockets of private businessmen. In my view, effective marketing is not only a necessity to keep up turnover, but also to maintain a good dialogue with our real principals, the Norwegian people.

...Market communication is required to make people choose Norsk Tipping's games in competition with other entertainment offerings. This is why Norsk Tipping is, today, one of the country's major advertisers, present in Norwegian media such as TV, radio, printed media and the Internet. We also run results and

Jackpotten markedsføres kraftig i TV, aviser og på kollektive transportmidler... - Selv har vi økt markedsføringsbudsjettet med 30 prosent, sier han, men vil ikke ut med hvor mye i kroner og øre. – Men for hver krone har vi fått to eller tre tilbake. Det må jo kalles effektiv markedsføring?... – Vi vet at vi har fått mange nye spillere grunnet Lyntoto og jackpoten, sier Kvarme. – Lyntoto har blitt den store slageren, den er inngangsbilletten for å få nye kunder. Vi er rimelig trygge på at noen hundretusener er kommet til.”

¹⁶³ Reference is made to the Norwegian Government's letter of 16 February 2004, summarised in point III.c) above, **Annex 29**.

¹⁶⁴ The Authority's translation. The document can be found at: <http://www.norsk-tipping.no/binary?id=1140>.

news services through the press, and produce TV draws in accordance with established editorial principles. The objective of all our communication activities is to promote the games and the company as advocates of joy and entertainment, in a socially responsible context.”¹⁶⁵

248. Finally, Norsk Tipping stated in a memo of 12 February 2004 to the Ministry of Culture and Church Affairs:

“Marketing is a natural part of the activities which we perform within the framework of the law and our ethical guidelines in order to live up to the task of giving stable and predictable revenue for good causes. ... If providers of games without a licence in Norway had been able to market their games in direct competition with Norsk Tipping in order to reach the same target-group, it is our evaluation that our marketing budget would have to have increased several-fold in order to get through the “interference” and keep Norwegians gathered around our gaming offers and at the same time defend the same bottom-line.”¹⁶⁶

249. These statements clearly demonstrate that the aim of Norsk Tipping’s marketing is to increase the company’s revenue. Indeed, if it pursued any other objective, spending huge sums on advertising would not be consistent with Norsk Tipping’s often stated aim to create the highest possible revenue for charitable causes.¹⁶⁷

b.3) Channelling existing demand

250. The Norwegian Government has also argued that Norsk Tipping’s marketing is merely “a reasonable aspect of Norwegian gaming policy to increase the visibility of the Norwegian gaming opportunities, at the expense of more aggressive international gaming propositions.”¹⁶⁸ In other words, Norsk Tipping’s massive marketing does not have as its primary aim to increase gaming turnover, but rather to ensure:

“... that Norwegian players do not, through the agency of unregulated international gaming opportunities, change their gaming habits in a way that leads to more problems over time. ... Norsk Tipping’s marketing strategy is not primary a means of retaining revenues for worthy causes in Norway but, to a large extent, a means of making clear to Norwegian players the advantage of the Norwegian gaming tradition as an alternative to more aggressive international gaming opportunities. The fact that Norsk Tipping’s gaming turnover in recent years has not shown a growth that corresponds with the growth in marketing costs is therefore not a question of success or lack thereof ... but a result of a socio-political aim for Norwegian gamblers who want to participate in money games to select moderate offerings that do not increase the incidence of problem gambling”.¹⁶⁹

251. The same argument can be found in the Gaming Board’s “*Proposal for an Action Plan*”:

¹⁶⁵ Norsk Tipping’s Annual Report 2003, pages 5, 19-20, **Annex 15**.

¹⁶⁶ Memo from Norsk Tipping dated 12 February 2004, **Annex 29**, letter from the Norwegian Government of 16 February 2004, enclosure 1 thereto. The Authority’s translation.

¹⁶⁷ That the same objective is pursued by Norsk Rikstoto appears clear in the light of the statements referred to above at point VII.3.b.1).

¹⁶⁸ Reply to the letter of formal notice, page 53, **Annex 31**.

¹⁶⁹ Cf. pages 53-56 of the reply.

“Objections have been raised in the media to the use of resources on marketing monopolized gambling. The authorities refer, among other things, to the fact that marketing is necessary as there is a genuine competitive situation seen in relation to foreign gaming in the form of remote gambling. In such a situation it is considered a responsible move to increase the visibility of more traditional and moderate Norwegian gaming.”¹⁷⁰

252. However, the Norwegian Government has not presented any evidence to the effect that foreign games *per se* or, at the very least in general, are more dangerous than national games. No available evidence permits drawing a conclusion as to the relative gravity of the risk associated with playing games operated by Norwegian companies as opposed to by companies in other EEA States.¹⁷¹ On this basis, the Authority respectfully submits that publicly endorsed, and, albeit indirectly, state-financed, marketing with the explicit purpose of having its citizens choose national services instead of foreign ones, in itself, raises questions in relation to the EEA Agreement.¹⁷²
253. In the Authority’s opinion, this conclusion cannot be altered by the “channelling argument” invoked by the Norwegian Government. In essence, the Government argues that it is forced by foreign competition to advertise its games extensively in order to protect citizens *against* the effects of gambling. The Authority cannot accept such an argument.
254. First, the fact that a whole new range of foreign gaming products are now available over the Internet cannot entail that national gaming providers should be given a free hand with respect to advertising in order to meet that competition. Under EEA law, operators are only allowed to enjoy exclusive rights in so far as national gaming policy wishes to ensure a *genuine limitation* of money games. To the extent that the authorities allow those companies to act and respond to competition by aggressive marketing, the very foundation for their exclusive rights ceases to exist. As confirmed by both Norsk Tipping and Norsk Rikstoto, their marketing activities entail an expansion of gambling in the national market. Thus, expanding the gambling via marketing, even if the objective is to meet competition from abroad, cannot be considered to be part of a consistent gaming policy to limit gaming opportunities. If the Government should consider it necessary to try to prevent Norwegian consumers from requesting services from gaming operators abroad, it would, as long as it has based its gaming policy on exclusive rights to

¹⁷⁰ Cf. Proposal for an action plan, page 36, **Annex 21**.

¹⁷¹ Indeed, many of the operators from other EEA States have been approved by their home state authorities, and some have even been granted exclusive rights exactly because games from other EEA States are supposed to be dangerous. If only for that reason, these games cannot be labelled as, or compared to, unregulated games. That the competition with foreign service-providers also has a financial aspect is implicitly confirmed in point 3.2.3 of the Bill, **Annex 9**, according to which “*No country has yet managed to find an effective protection for national money games in the face of competition from the Internet. ... This competition entails a danger that the lottery definition becomes diluted and this may over time weaken the privileges that until now have been the preserve of the socially beneficial and humanitarian causes. ... In a number of European countries, the attitude seems to be that the safest strategy against money game competition from the Internet is to build up safe, national services with secure payment processing. The aim is that such safe, national services shall minimise the loss of gaming activities to foreign countries through the Internet.*”

¹⁷² Cf. Case C-42/02 *Lindman*, cited above, at paragraphs 24-26, compared with Case 249/81 *Commission v Ireland* [1982] ECR I-4005. See also Straetmans, Case note, CMLRev 2004, page 1409 (1421), according to whom “*it goes without saying that it will be difficult for a Member State to demonstrate the existence of a particular causal relationship between the gravity of the risks connected to playing games of chance and participation by nationals of the Member States concerned in lotteries organized in other Member States.*”

- limit money games, have to utilise other measures than allowing national gaming operators to pursue aggressive commercial strategies.
255. This is confirmed in *Gambelli* where the court, in paragraph 69, held that in so far as a Member State *“incite[s] and encourage[s] 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.”*
256. Second, the channelling argument rests on a presumption that both the intention and effect of the marketing in question is only to affect a consumer’s decision of which service provider to choose. In order for that to be the case, the marketing must be directed at people who are either already playing more dangerous foreign games or likely to participate in such particularly addictive and perhaps illegal games. At the very least, the focus should be on informing potential players not familiar with Norsk Tipping’s products about their (hopefully) non-addictive effects. However, far from having been conducted in this vein, Norsk Tipping’s marketing relates to products known to the entire Norwegian population and which, according to the company’s own statements, have a much broader target group, most of which would probably never consider participating in internet games offered by foreign service providers. Nor can one, from the advertisements themselves, see any indications that the advertising campaigns have been designed to fulfil the particular purpose of warning the population against more dangerous games. No commercial by Norsk Tipping presented to the Authority has made a point of Norsk Tipping’s products being less addictive than those provided by other undertakings. All they have done is to incite people to play more on Norsk Tipping’s games. The same is true for publicity materials produced by Norsk Rikstoto.
257. Indeed, had the purpose of the marketing been first and foremost to steer the consumers away from other games, Norsk Tipping would hardly have invested large sums of money on marketing its games before they were genuinely subject to competition from foreign internet games. And yet, to the Authority’s knowledge, Norsk Tipping was already heavily engaged in massive advertising campaigns long before that time.¹⁷³
258. Third, if the purpose of spending these huge sums on marketing was merely to deter the use of allegedly more dangerous games, one would have imagined that it would have been more effective to spend an equal amount on e.g. campaigns concerning the risk connected to gambling rather than on enticing the Norwegian population to gamble. However, based on information available to the Authority, it appears that Norsk Tipping allocates more than 15 times more money on marketing its own products than on information relating to gambling problems. Moreover, even if one includes the amount that the Norwegian State has set aside in its Action Plan against problem gambling, this figure does not change dramatically. To incite people to spend money on Norsk Tipping hardly seems a particularly adequate means of informing the consumers about the misfortunes that addictive gambling can lead to. If the Norwegian Government really wanted to

¹⁷³ According to information presented by the Applicants in the national proceedings, based on information from Nielsen Media Research and Mediacom, it seems as if Norsk Tipping spent app. 94 million NOK on advertising in 1996, when the internet was barely known among ordinary consumers, **Annex 46** .

reduce gaming, regardless of whether the service provider is Norwegian or foreign, then it would have been more logical to prohibit marketing altogether.

259. Indeed, that is the approach the Government has taken in relation to alcohol. Thus, in the follow-up to the *Pedice* judgment of the EFTA Court,¹⁷⁴ the Government argued the following before the Market Council (*Markedsrådet*):

“In the Norwegian authorities’ estimation, there is no doubt that the prohibition of advertising also viewed in isolation has a considerable effect and this fact is at the basis of the legislation. ... [A]lready the European Court of Justice, in the Gourmet case and earlier cases, found that a prohibition of alcohol advertising can help to reduce consumption and thereby protect public health. This can, therefore, hardly be contested in court. ... [R]esearch supports the assumption that the responsible Norwegian authorities have long held that repeated exposure to alcohol advertising influences attitudes to the use of alcohol and increases the probability of more use. .. The absence of alcohol advertising will, therefore, influence the alcohol policy climate with relation to the public’s attitude to the use of alcohol, especially that of children and young people. With this in mind, the alcohol industry’s argument that advertising is, first and foremost, an element in the fight for market shares and does not influence use, is hardly credible.”¹⁷⁵

260. Similarly, according to the Expert Report SOU 2006:11 on the Swedish gaming policy, it is

“... obvious that commercials for gaming affect the volume of gaming. It is inherent that advertising entices consumers to buy a certain product. Even if it is possible that part of the advertising entails that gamblers alternate between different forms of gambling, and not only recruits new players or leads experienced gamblers to increase their gambling, it must be presumed that advertising does indeed increase the gambling, partly because more people will play, and partly because those who already play increase the extent to which they gamble. The [authors of the] Report also find that it is natural that increased gambling leads to increased gambling problems, inter alia because there is now a larger base from which problem gamblers may be “recruited”. Even if the research does not clearly demonstrate a particularly strong link between advertising for games and problem gambling, the Committee finds that it would be naïve not to consider such a link... “.¹⁷⁶

¹⁷⁴ Cf. Case E-4/04 *Pedice*, judgment of 25 February 2005. According to point 34 of the Report for the Hearing in that case, the Norwegian Government emphasised that the prohibition on alcohol advertising was a “core element” in its policy to reduce alcohol problems.

¹⁷⁵ Cf. page 35 in the Norwegian Government’s submissions to the Market Council. The original Norwegian text reads as follows: [E]tter de ansvarlige norske fagmyndigheters vurdering er det ikke tvil om at reklameforbudet også isolert sett spiller en betydelig rolle, og det samme er lagt til grunn av lovgiver. ... [A]llerede EF-domstolen både i Gourmet saken og tidligere saker har lagt til grunn at et forbud mot alkoholreklame kan bidra til å dempe forbruket og derigjennom beskytte folkehelsen. Dette kan følgelig neppe bestrides rettslig. ... [F]orskningen støtter den antagelse de ansvarlige norske myndigheter lenge har hatt om at gjentatt eksponering for alkoholreklame påvirker holdningen til bruk av alkohol og øker sannsynligheten for merforbruk. ... Fraværet av alkoholreklame vil dermed påvirke det alkoholpolitiske klimaet i folkets, og da spesielt barns og ungdommers, holdning til alkoholbruk. På denne bakgrunn er alkoholindustriens argument om at reklame først og fremst er et virkemiddel i kampen om markedsandeler og ikke påvirker forbruket, lite troverdig.

¹⁷⁶ Cf. SOU 2006:11, page 344, **Annex 34** (the Authority’s translation). See also Niels Wahl *Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten?*, Europarättslig Tidskrift 2005, page 125-126.

261. That the effect of Norsk Tipping’s marketing is to increase the overall gambling, rather than simply redirect existing demand towards allegedly less addictive games, becomes even more apparent when one bears in mind that Norsk Tipping already has a substantial share of the total market and, moreover, spends much more on marketing than any other Norwegian provider of gaming services. One should also remember that advertising for national lotteries has been considered a non-negligible factor in persuading people that gambling is normal and socially acceptable.¹⁷⁷ It has also been argued that because lotteries are popular and socially acceptable they are often the first step in learning how to gamble.¹⁷⁸
262. On that basis, the Authority submits that Norsk Tipping’s advertisement of gaming opportunities has the general effect of encouraging consumers to gamble, also by the use of other games than the one being advertised. This issue is especially relevant with regard to those afflicted by problem gambling, as the Norwegian Government has recognised that marketing may increase the risk of problems arising from gambling. For instance, in the above-mentioned “*Proposal for Action Plan*”, the Gaming Board holds that “*the introduction of new games, advertising and events on the gambling market have a greater impact on those with gambling problems than on those with no problems. Those with gambling problems are also more influenced by hearing about those who have won.*”¹⁷⁹
263. Finally, if Norway is right that Norsk Tipping’s advertisements first and foremost have the effect of strengthening Norsk Tipping’s brand, the Authority would assume that the extensive advertising of Norsk Tipping in general also would attract players to the gaming machines operated by Norsk Tipping. All kinds of commercials by Norsk Tipping must be expected to have an influence on how consumers perceive products marketed by Norsk Tipping just as it probably paints a positive and non-harmful picture of gambling in general. The fact that Norsk Tipping seeks to brand itself as a particularly reliable service provider only underscores this indirect effect.
264. Thus, the Authority cannot see that it matters that Norsk Tipping will not advertise their gaming machines. This is all the more so as the consistency test laid down in *Gambelli* requires not just consistency within one, narrowly defined, type of game, but rather a consistent over-all policy in the field of gaming.¹⁸⁰ The inconsistency in the marketing of other gaming products becomes no less significant simply because the marketing is not directed at the particular gaming services on which the restriction is imposed.

b.4) Character and style

265. In the Authority’s opinion, the advertisements of Norsk Tipping have been designed to tempt and encourage, with slogans as “*the possibility to become a Lotto millionaire is never further away than a mouse click*”, and, with regard to the gaming product “*Oddsbomben*”, “*very high prizes in relation to the bets*” and “*very high maximum bets*”. Similarly, an ad concerning “*Flax*” stated “*Flax for any occasion – with high top prizes and big chances of winning*”.¹⁸¹

¹⁷⁷ Cf. point VI.b) above.

¹⁷⁸ Cf. point VI.a) above.

¹⁷⁹ See page 29 of the Proposal for action plan, **Annex 21**. See also the reply to the letter of formal notice page 56, **Annex 31**.

¹⁸⁰ Cf. above in point VII.3.a).

¹⁸¹ A range of other commercials taken from newspapers and the websites of the gaming companies are presented in **Annex 48**.

266. Moreover, the Norwegian gaming legislation enables Norsk Rikstoto to publish ads concerning horse-betting with wording such as “*Saturday, you can win 36 mill [NOK] do you dare not to play?*” and “*Join “Double of the day” [Dagens Dobbel] competition – win thousands of kroner every day!*” The website www.rikstoto.no contains extensive promotion for, among other things, Norsk Rikstoto’s internet gaming possibilities, using slogans like “*Quick – Safe – Easy*” and “*Play until the races begin – from your own living room*”.¹⁸²

267. As mentioned above, the Gaming Board has, like several independent scholars, found that those with gambling problems are more influenced by hearing about those who have won. Such ads are not unusual for Norsk Tipping. An example could be found on the company’s web-site home page on 22 February 2006:

*“Linda Askeland from Dølemo in Aust-Adger had breathing difficulties when we rang her Tuesday night. She also had difficulty finding her card, but after some scrabbling in her hand bag, it turned up. “Am I the evening’s Extra candidate? My goodness! I can hardly breathe”, the 31-year old winner twittered. Not only had she bought the ticket in the shop where she is manager, but she bought it in Dølemo Colonial today, Tuesday. “And we who are going to Mauritius with a couple of friends next week. Even though none of the numbers were picked out, I’m completely amazed” she finished by saying before going back to packing her luggage. We wish her a good trip with 270 100 Extra kroner in her account.”*¹⁸³

268. Hans Olav Fekjær, an expert frequently cited by the Government, commented in the following terms on Norsk Tipping’s marketing techniques:

*“The aggressive marketing of the games does not exactly contain incorrect information, but does one-sidedly highlight the extremely seldom big wins. Unrealistic expectations of the chances of winning are created. ... Norsk Tipping creates illusions about the chances of winning.”*¹⁸⁴

“If one believes Norsk Tipping’s role is only to earn the most profit at any price, the company has been clever, much cleverer than its sister companies in Sweden and Denmark. On the other hand, if one thinks that advertising should satisfy ethical requirements by giving a correct, businesslike impression of the product, serious questions could be asked about the marketing. The State-owned company uses modern marketing techniques to the extreme. The marketing has, as its goal, to maximise expectations as to the chances of winning. The method is to balance on the edge of truth. The exceedingly selective presentation of Lotto-millionaires before the TV-draw shows this, the same is true of the Flax-advert which says ‘20 kroner can soon become 500 000’. This marketing is not untrue, but so extremely

¹⁸² Through the website the players may also join a “V75” competition selecting the best “V75” player in Norway, involving the opportunity of winning “thousands of NOK”. The website, moreover, introduces a “Norsk Rikstoto gaming school”, giving tips and advices to inexperienced players about which types of games are more or less suited for beginners, and which games involve the highest prize.

¹⁸³ The Authority’s translation. The original Norwegian text reads as follows: “*Linda Askeland fra Dølemo i Aust-Agder fikk pusteproblemer da vi ringte henne opp tirsdag kveld. Hun hadde også problemer med å finne brettet sitt, men etter litt roting i veska dukket den opp. - Er jeg kveldens Extrakandidat? Herregud! Jeg får nesten ikke puste, kvitret det fra den 31 år gamle vinneren. Ikke nok med at hun hadde kjøpt spillet i butikken der hun er daglig leder. Den ble også kjøpt hos Dølemo Dagligvare i dag, tirsdag. - Tenk vi som skal til Mauritius i neste uke, sammen med ett vennepar. Selv om ingen av tallene traff, så er jeg helt himmelfallen, avsluttet Linda før hun går tilbake til pakkingen. Vi ønsker god tur med 270.100 Extra-kroner på kontoen.”*

¹⁸⁴ Article from Vårt Land 22 July 2004, **Annex 49**. The Authority’s translation.

unbalanced that there can be no doubt it aims at creating an incorrect understanding of the chances of winning. .. Turnover in all Norsk Tipping's games, with Lotto at the head, is boosted by the incorrect impression of the winning chances the advertising has created. What is most worrying is that Norsk Tipping's colossal marketing has probably been the driving force behind games of chance generally in Norway.”¹⁸⁵

269. In the Authority's opinion, this conclusion is not altered by the fact that Norway, as a follow-up to the Authority's reasoned opinion and the ruling of the Oslo City Court, has issued guidelines prohibiting Norsk Tipping and Norsk Rikstoto from engaging in misleading and overtly aggressive advertising.¹⁸⁶ First, that advertising may not be misleading or overtly aggressive follows already to a large extent from general Norwegian consumer protection legislation. Second, the condition in *Gambelli* that the State may not “*incite and encourage consumers to participate in*” professionally offered games is not in any way restricted to misleading marketing.

c) Expansion of games and gaming opportunities

270. At the same time as the Norwegian authorities prohibited all existing gaming machine operators from providing such services, other gaming operators in Norway have been allowed to expand games and gaming opportunities in Norway. Since this is either carried out by the state-owned gaming company Norsk Tipping, or made possible by regulatory measures of the Norwegian authorities, the Authority considers it to constitute yet another element of an inconsistent gaming policy.¹⁸⁷
271. As will be shown in the following, the Norwegian Government has via its ownership of Norsk Tipping increased the number of games and allowed available games to undergo constant changes and variations in order to make them more tempting for consumers. The same applies to the other major holder of exclusive rights to operate gambling services, Norsk Rikstoto and the new market operator Norske Spill AS. Moreover, as will also be described below, the Norwegian gaming operators have utilised new technology, including the internet, mobile phone and digital TV, in order to increase availability of their games. In its reply to the letter of formal notice, the Norwegian Government described these new gaming modalities as being trial products which would be evaluated in the course of 2004. The Government has subsequently given permanent authorisation for Norsk Tipping and Norsk Rikstoto to offer their games via the Internet and mobile phone.¹⁸⁸

c.1) Development of money games in Norway

272. There are today a wide variety of games available on the Norwegian market. In the following the Authority will briefly describe the games offered by Norsk Tipping, Norsk Rikstoto and Norske Spill AS.

¹⁸⁵Fekjær, *Spillegalskap – vår nye landeplage*, pages 132-133, **Annex 44**. Admittedly, today one can find information concerning winning-chances of each type of game on the company's home page. Yet, to the Authority's knowledge no such information can be found in any add for Norsk Tipping.

¹⁸⁶ Guidelines for marketing of state controlled games, **Annex 50**.

¹⁸⁷ For the relevance of non-state owned bodies under the consistency test, see point VII.a).

¹⁸⁸ Letter from the Ministry of 11 February 2005, **Annex 51**. In that letter, the authorisation for Norske Spill's internet games on tivili.no and the so-called SMS jackpot, mentioned in the Authority's reasoned opinion, were withdrawn.

c.1.1) Norsk Tipping

273. As mentioned above under point II.1.a), Norsk Tipping was founded in 1946 and until 1986, when Lotto was introduced, offered only football betting (“Tipping”). Annex 1 to Ot. prp No. 44 (2002-2003)¹⁸⁹ provides a summary of Norwegian money games and lotteries available in 2002.¹⁹⁰ According to the information there, Norsk Tipping operates seven main games: “Tipping” (football betting), “Oddsen”, “Lotto”, “Viking Lotto”, “Joker”, “Extra” and “Flax”.¹⁹¹
274. Traditional football betting was introduced in 1948 and this game has since been subject to a continuous development. In 1997, for instance, “half-time betting” was introduced, giving the players the opportunity to place bets also on the half-time result of football matches. In 1998, specific betting coupons for matches on Saturdays and Sundays were introduced, and in 1999 also a “Mid week coupon” was introduced. Later the game “Bonuspotten” was launched in 2001. At the same time the time limit to deliver the bet was reduced to 5 minutes.
275. In the game “Oddsen” the player, based on his knowledge, estimates the probability of a certain result in a sports match. “Oddsen” can be divided into three separate games, “Langoddsen”, “Vinneroddsen” and “Oddsbomben”, the latter introduced in 2002. “Lotto” and “Viking Lotto” both involve picking the seven or six numbers, respectively, to be drawn out as the winning numbers. Since 1987, the “Lotto” draws have been regularly transmitted on the state owned television channel NRK, a factor that has greatly contributed to the game’s success.¹⁹² Moreover, the Lotto game has often been supplemented by additional games, such as additional prize draws for extra numbers, latest in 2005. In 1993 the Nordic game “Viking Lotto” was introduced and can now be played in all of the five Nordic countries plus Estonia, with a common first prize for those countries that participate.
276. “Flax” is based on scratch lottery tickets, requiring a certain number of symbols, amounts or figures to be revealed to win a prize. Since 1995, different types of “Flax” tickets with different types of games have regularly been launched,¹⁹³ including the concept “MånedsFlax” in which the player, instead of winning a one-off payment, is paid a smaller amount each month for a period of up to 10 years.¹⁹⁴ In 2004 the first prize was raised to NOK 1 million.
277. Introduced in 2000, “Joker” is a game in which the registration number on the player’s playing card participates one or more times in the draw in one, five or ten playing rounds. The “Joker” prize draws are transmitted on NRK1 together with the “Lotto” and “Viking Lotto” draws. In addition, since 1996, Norsk Tipping has operated the game “Extra”, in which the player picks 19 out of 75 figures. The “Extra” draws are also transmitted on NRK1. In 2000 the game “Extrasjansen” was launched, with a fixed price pot of NOK 100 000, and in 2005 came a new

¹⁸⁹ See **Annex 9**.

¹⁹⁰ **Annex 52**, Norsk Tipping historical overview.

¹⁹¹ Information about these games can be found at <http://www.norsk-tipping.no/page?id=35>.

¹⁹² Cf. also above under point VII.3.b.1).

¹⁹³ For a brief account of the different games, see www.norsk-tipping.no, under the headings “Produktinfo” and “Spillenes historikk”.

¹⁹⁴ The predecessor to “Månedsflax” was the game “Kjempeflax”, introduced in 1999 and involving the possibility of being paid NOK 20 000 a month for a period of 20 years. “Kjempeflax” was removed from the market in June 2000.

additional prize draw called “lukelønn”. In Norsk Tipping’s own description of the game it states that “*the game was especially developed in order to reach new groups through TV entertainment*”.

c.1.2) Norsk Rikstoto

278. Norsk Rikstoto, founded in 1982, today operates eight main games: “Vinner”, “Duo”, “Plass”, “Trippel”, “Dagens Dobbel”, “V5”, “V75” and “V65”, this last having been introduced after the gaming machine reform. It, moreover, on 1 March 2006, introduced yet another new game called “SuperTrippel”.¹⁹⁵ The first four games involve gambling on a specific horse winning a race or being one of the two or three best horses. In comparison, “Dagens Dobbel”, “V5”, “V65” and “V75” all involve gambling on the winning horse in two, five, six or seven races respectively, the specific races being determined in advance. In “V75” it is also possible to gamble “across” venues. In addition, Norsk Rikstoto cooperates with companies in Sweden and Denmark in arranging common gambling on selected horse races.¹⁹⁶ Norsk Rikstoto also offers so-called “Lyn” games, which involve automatically filled-in betting coupons ready for the player to hand in. “Lyntoto” is for those “*who don’t know anything about horses*”, while “Lynbanker” gives the player the opportunity to make some choices himself and leave the rest to the automatic system.¹⁹⁷
279. As with the Lotto games, horse racing is also well covered on Norwegian television. There are weekly transmissions of “V75” and “V65” on NRK2, as well as transmissions from the “Dagens Dobbel” races five days a week. In addition, some of the bigger races are broadcast on NRK1. Furthermore, Norwegian horse racing has its own television channel, “Rikstoto Direkte”, which transmits through both TV and the internet. Consumers may take out both a TV and, provided they have already registered as an internet player, an internet subscription.¹⁹⁸ By the end of 2004, “Rikstoto Direkte” was also being offered to customers by just over 450 of Norsk Rikstoto’s commissioners.¹⁹⁹

c.1.3) Norske Spill AS

280. As regards games regulated by the Lottery Act there are, in addition to the gaming machines, a number of smaller lotteries offered. A newcomer, the company Norske Spill AS, has, since February 2005, been authorised by the Government to operate the scratch card game Yezz.²⁰⁰ Norske Spill is owned by Red Cross and Reitan Servicehandel AS.²⁰¹ Yezz is marketed in different media. Norske Spill is, moreover, the sponsor of a new quiz show on Saturday night on TV2 in which the participants are chosen from those having bought and won in the Yezz scratch card lottery. Norsk Rikstoto has negotiated an agreement to buy 33% of Norske Spill

¹⁹⁵ Annex 53, transcript from www.rikstoto.no regarding “Super Trippel”.

¹⁹⁶ See www.rikstoto.no, under the heading “Våre produkter”, and Ot. prp. No. 44 (2002-2003) page 55-56, Annex 9.

¹⁹⁷ See www.rikstoto.no, under the heading “Lynspill”.

¹⁹⁸ See www.rikstoto.no, under the heading “About Rikstoto” and the subheading “Rikstoto Direkte”.

¹⁹⁹ Cf. Annual Report 2004 for Norsk Rikstoto, page 4, Annex 47.

²⁰⁰ See http://www.yezz.no/om_norske_spill.php

²⁰¹ See <http://www.reitangruppen.no/> The Reitan Group is a leading Scandinavian franchise based retail company with an annual turnover of NOK 28,4 billion, and a NOK 1.4 billion cash flow (EBITDA). The Reitan Group and its affiliates have 15 000 employees and 1 900 sales points in 5 countries. The group consists of REMA 1000, Narvesen/Pressbyran, Easy 24 and 7-Eleven in Norway, Sweden and Denmark. The game Yezz is currently sold in the following places; Narvesen (460 outlets), Mix (250 outlets), 7-Eleven (80 outlets) and almost all of Rikstoto’s commissioners (1200).

which, according to its Annual Report for 2004, is being considered by the Ministry of Agriculture.

c.2) Expansion of gaming opportunities

281. Norsk Tipping, Norsk Rikstoto and Norske Spill have substantially expanded gaming opportunities in Norway in recent years by increasing the number of commissioners and sales agents and in particular by utilising new technology. Whereas previously, consumers had to actively seek a commissioner of the gaming companies in order to participate in money games, it is now possible to have access to most of the gaming services provided by Norsk Tipping and Norsk Rikstoto via electronic means.

c.2.1) Norsk Tipping

282. In January 1999, the launching of Norsk Tipping's internet site took place. From May 2002, it has been possible for all persons above the age of 18 to participate in the above mentioned games over the Internet.²⁰² As a relatively new concept, the players can now also participate in the games using their mobile phones.²⁰³ Norsk Tipping, moreover, continues to develop additional services such as "ODDSEN live"²⁰⁴ in which the gambler, for the chosen football matches, will be continuously updated about the developments in the games, the odds at any time etc. via mobile phone. In 2003 Norsk Tipping also launched a project offering games over digital TV.

c.2.2) Norsk Rikstoto

283. In 1983, Norsk Rikstoto started using on-line technology. Thus, so called "totomates", connected to the foundation's computer system, were gradually installed at the different race courses and on the premises of some of Norsk Rikstoto's private agents. In 1994, this network was built out to include all the agents. At the end of 2004, Norsk Rikstoto had about 1 200 private agents spread around Norway.²⁰⁵ Since 2002, it has also been possible to play Norsk Rikstoto's games on the foundation's internet pages.
284. Furthermore, Norsk Rikstoto's games "Vinner" and "Trippel" are also available through the player's mobile phone.²⁰⁶ In 2004, it was also arranged that players could buy "Lyntoto" coupons at grocery stores belonging to the "ICA" grocery chain, and Norsk Rikstoto is continuously working to achieve a similar agreement with some of the other bigger chains.²⁰⁷ Norsk Rikstoto explained that: *"In addition to race tracks, commissioners and Internet, one can also gamble on horse racing via mobile phone – or buy Lyntoto in grocery shops. Games via mobile phone more than doubled in 2004, to almost 4.2 million kroner, but for the moment only Lynspill is available through this channel. At the end of the year it was*

²⁰² See www.norsk-tipping.no. All games except the scratch card game "Flax" are offered on the Internet.

²⁰³ See "Tilleggstjenester" at <http://www.norsk-tipping.no/page?id=93&key=24303>

²⁰⁴ See <http://www.norsk-tipping.no/page?id=301>

²⁰⁵ Cf. Annual Report 2004 for Norsk Rikstoto, page 4, **Annex 47**.

²⁰⁶ See www.rikstoto.no, under the heading "Mobil spill".

²⁰⁷ See the contribution of Norsk Rikstoto's managing director, Arne Herberg, on page 3 of the Annual Report 2004 for Norsk Rikstoto.

*arranged that Lyntoto coupons in V65, V75 and Dagens Dobbel could be bought in all ICA shops...*²⁰⁸

c.2.3) The effect

285. As shown above, the Norwegian Government has itself expanded and developed the games of Norsk Tipping in order to reach new consumers, including by offering existing games on the Internet, by mobile phone and via other channels. The result is that Norsk Tipping, until last year, has increased its annual profits every year since it began operating on the Norwegian gaming market in 1948. In fact Norsk Tipping has nearly doubled its annual turnover in the last 10 years.²⁰⁹

286. Moreover, the Government has allowed a similar expansion to take part in relation to Norsk Rikstoto. In its Annual Report for 2004,²¹⁰ Norsk Rikstoto commented on its expanding market strategy in the following terms:

*“The turnaround in 2004 can mainly be attributed to the flag ship of the equestrian sports, V75. Well assisted by a larger bonus prize amount, Jokerpotten and an increased degree of marketing... The fight for customers will still be hard... There is no reason to believe that the competition from Norwegian and foreign operators will decrease next year. For that reason, Norsk Rikstoto must continue to keep the pace. This both with respect to keeping existing customers, but also recruiting new ones. In that respect, NR is working on a whole new product the market launch of which is planned for next year, and in which the main target group is ‘games of chance’ participants.”*²¹¹

287. The same was confirmed by Johan Kvarme, responsible for sales and marketing in Norsk Rikstoto, in an interview in 2005: *“We had an increase last year of 300 million on V75. That is 58% higher than in 2003. This year we are already 60 million over last year so it is obvious that we earn on this... Lyntoto has become a huge hit, it is the admission ticket to have new customers. – We are reasonably sure that some hundred thousand has joined.”*²¹² Thus, after decreasing turnovers in 2002 and 2003, Norsk Rikstoto managed to reverse this trend in 2004, reaching the second highest gross turnover in the history of the foundation. This development continued in 2005, which ended with Norsk Rikstoto posting a record high gross turnover of almost NOK 2.8 billions.²¹³

288. As regards internet gambling, the annual statistics for 2004 provided by the Gaming Board show a strong increase. From 2002 to 2003 the extent of internet gambling more than doubled for Norsk Tipping and Norsk Rikstoto to NOK 367 million. From 2003 to 2004 there was a 48% increase for Norsk Tipping and 42% increase for Norsk Rikstoto, taking the total to NOK 530 million. As far as the

²⁰⁸ Annual Report 2004 for Norsk Rikstoto page 4. The ICA group consists of approximately 700 different shops all over Norway, see <http://www.ica.no/FrontServlet>.

²⁰⁹ Cf. overview in Annual Report of Norsk Tipping 2003, **Annex 15**. Moreover, see “Spillmarkedet” at <http://www.norsk-tipping.no/page?id=52>.

²¹⁰ Annual Report 2004 for Norsk Rikstoto.

²¹¹ The Authority’s translation.

²¹² Interview in Kapital nr. 2/2005. The Authority’s translation. The original text states: *“Vi hadde en økning i fjor på 300 millioner på V75. Det er 58 prosent opp fra 2003. For inneværende år ligger vi allerede 60 millioner foran fjoråret, så det er klart vi tjener på dette... Lyntoto har blitt den store slageren, den er inngangsbilletten for å få nye kunder. Vi er rimelig trygge på at noen hundretusener er kommet til.”*

²¹³ **Annex 54**, news article on www.rikstoto.no, published 9 January 2006.

Authority is aware, the amount has continued to increase strongly in 2005, reaching NOK 730 million.²¹⁴

289. The success of internet gambling is for instance confirmed by Norsk Rikstoto in its Annual Report for 2004:

*“In a gaming market that becomes ever more heated we register with pleasure that the increased profit is due to that we have gotten many new players within the luck segment in addition to the regular customers... It is important that we can offer products that are attractive... We register with pleasure that our internet portal has continued to grow. Games offered at www.rikstoto.no have increased by a magnificent 90 million – to 303 million in 2004 –, something that illustrates that the reliance on a flexible, customer friendly and safe electronic delivery platform has been very successful.”*²¹⁵

290. It cannot be questioned that the result of allowing all of the above mentioned games to be offered by electronic channels is that the availability of money games in Norway is significantly increased. Before, consumers had to make an active effort in that they had to go to a commissioner in order to participate in Norsk Tipping’s and Norsk Rikstoto’s games. Today the situation is very different since the whole range of money games are now directly available from potential players’ homes, workplaces, from abroad etc. In the Authority’s view, this development is indeed a substantial expansion of gaming opportunities which is inconsistent with a gaming policy genuinely aimed at reducing gaming opportunities.

291. The Norwegian Government has earlier stated that the internet game segment is very small in Norway compared to other countries and that to the extent new games are allowed via modern electronic technology it is in a controlled and regulated manner. The exclusive rights model has been said to provide a guarantee that the financial interests of the gaming company are not the overriding factor in the design of the games and the information provided in relation to them.²¹⁶ In response, the Authority observes that independently of whether the approach is regulated and careful and whether it is carried out in an exclusive rights model or not, the fact remains that the Norwegian State has expanded availability of money games and made games more accessible to Norwegian consumers. It is, in that respect, irrelevant that these games are offered by exclusive rights holders such as Norsk Tipping and Norsk Rikstoto. Indeed, independently of who operates them, such games are nevertheless considered capable of triggering problematic gaming behaviour.

292. The Norwegian authorities have, moreover, argued that they allowed Norsk Tipping and other national operators to expand in this way in order to meet competition from foreign gaming services. The Authority cannot accept such an argument and refers to the arguments set out above in point VII.3.b.3).

²¹⁴ Annual statistics of the Gaming Board for 2004 page 26, **Annex 37**. The numbers for 2005 have not yet been published. The Gaming Board has however in a press release reported that the total gross turnover for Norsk Tipping’s and Norsk Rikstoto’s internet games in 2005 increased to NOK 730 million. See <http://www.lotteritilsynet.no>. In the same press release the Gaming Board also reported that the bets placed at internet games provided by service providers abroad doubled to NOK 4 billion. The numbers do not however contain any estimate as to how much Norwegians actually spent on internet games since they don’t take into account how much was paid back in prizes.

²¹⁵ Annual Report 2004 for Norsk Rikstoto page 3, **Annex 47**. The Authority’s translation.

²¹⁶ Reply to the letter of formal notice page 57-59, **Annex 31**.

293. Finally, the Norwegian Government has claimed that the situation in Norway is not comparable to that in *Gambelli* as the Italian State pursued a different policy in expanding games and gaming opportunities. However, in *Gambelli* the Court of Justice held that in so far as a Member State incites and encourages consumers to participate in money games, that Member State could not justify a restriction consisting of granting exclusive rights for betting services. According to the Advocate General's opinion, exclusive rights holders aggressively marketed their games, and "... *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.*"
294. When describing how the Italian State itself through the legislation it had adopted had made it possible for the range of gambling opportunities on the Italian market to be substantially extended, the Advocate General referred to the fact that such games as *Lotto, Totocalcio, Totip, betting on horse racing, Totogol, Corsa tris, Totosei, Superenalotto, bingo, Totobingol, Gratta e vinci, etc.*, had been introduced in recent years.²¹⁷ The Authority cannot see that the situation with respect to introduction of new games in Norway has been very different.
295. Moreover, if one compares the expansion of the gambling infrastructure under scrutiny in *Gambelli*, the Authority submits that the expansion in Norway is significantly more extensive. In *Gambelli* the number of commissioners for CONI was increased by 1 000.²¹⁸ The system in Italy appeared to be strictly regulated in the sense that also the commissioners receiving bets needed a concession. That seems not to be the case in Norway. For instance, when Norsk Rikstoto entered into an agreement with the ICA chain of grocery stores, the number of sales outlets for Norsk Rikstoto was increased by approximately 700. Another example is the scratch card *Yezz* operated by Norske Spill, which is partly owned by Reitangruppen with 1900 sales outlets in 5 countries. The Authority would assume that such scratch cards are now sold in a considerable number of grocery shops and kiosks in Norway. Moreover, it is the understanding of the Authority that Norsk Tipping has increased the number of commissioners from approximately 3350 in 1997 to 3850 in 2004. Indeed, every time Norsk Tipping or Norsk Rikstoto have introduced new games, the immediate effect has been that the games have been offered by Norsk Tipping's nearly 4 000 and Norsk Rikstoto's 1 200 commissioners. The expansion of the infrastructure in Norway therefore appears to be no less significant than that at stake in *Gambelli*. Of course, in addition to the increase in sales outlets, the introduction of the above mentioned electronic channels results in games being accessible from nearly everywhere. In the Authority's view that is a considerable expansion of gaming infrastructure, even compared to *Gambelli*.
296. As regards other examples of the inconsistent conduct of national gaming operators, the Authority will mention two examples of how Norsk Tipping has operated in order to increase gaming in Norway.

²¹⁷ Advocate General Alber at paragraph 121 with further reference to paragraph 23.

²¹⁸ In paragraph 6 of the Advocate General's opinion in Case C-67/98 *Zenatti*, cited above, it appears that CONI had approximately 15 000 commissioners (newsagents), while UNIRE had granted between 300 and 350 concessions for on- and off-course totalisator betting on horse races.

297. According to the web-page of the Norwegian State Educational Loan Fund (“Statens Lånekasse”), students may choose to indicate their acceptance of the loan agreement by using a so called Smart Card, which provides for an electronic signature.²¹⁹ The loan will then be paid directly to a student’s bank account. There are two possible Smart Cards compatible with Statens Lånekasse’s solution, both being provided by the company BuyPass AS, which is jointly owned by Norsk Tipping and the Norwegian Post. The first card is Norsk Tipping’s ordinary “Spillerkortet”, which costs NOK 60. That card is the same card as that required to utilise Norsk Tipping’s gaming services on the internet and over mobile phone. The second alternative is a Smart card that cannot be used for Norsk Tipping’s services, “BuyPasset”, which costs NOK 249. Without speculating as to the motives for offering “Spillerkortet” to some 150 000 Norwegian students, the Authority considers it inconsistent to connect internet gambling services to the financial needs of students.²²⁰ Although there is now an alternative card available, there is a strong incentive for choosing “Spillerkortet” at a quarter of the price. This active connection between the provision of internet gambling services and students cannot, in the opinion of the Authority, be considered as consistent with a gaming policy on limiting gaming opportunities.²²¹
298. Finally, the Authority’s recalls that the explicitly stated aim of Norsk Tipping for a long time was to double the number of gaming machines players from 500 000 to 1 million.²²² The Authority appreciates that the Norwegian Government, as a consequence of the Authority’s reasoned opinion and the judgment of the Oslo Tingrett, has instructed Norsk Tipping that it is not an aim that the number of gaming machine players should exceed “*today’s level*”. Moreover, Norsk Tipping will be required to enact measures to ensure a responsible development in the gaming market if there are signs that the number of players exceeds this level.²²³ However, to the best of the Authority’s knowledge, all elements concerning Norsk Tipping’s gaming machines were already in place in November 2004. The machines had been purchased and the machine functionality had already been decided upon. Furthermore, the games had been developed and even inspected by the Gaming Board in connection with the commercial pilot testing of the games. Other than the deviations addressed by the Gaming Board before the pilot testing,²²⁴ the Authority is not aware of any move by the Government to require amendments to the games in order to change the desired effect of the machines. Nor is the Authority aware of any intervention by the Government concerning Norsk Tipping’s ordering of machines and software, or the shaping of the whole gaming machine concept, in order to hinder the implementation of a significantly more aggressive policy than that which, in subsequent statements, the Government has declared to be desirable. Unless there has been such direct involvement from the Government, the Authority would assume that not just the new machines, but

²¹⁹ **Annex 55**, transcripts from www.lanekassen.no.

²²⁰ The matter was subject to much attention in the Norwegian press. In 2005 Norsk Tipping’s “Spillerkortet” was the only available option which meant that students had to register as internet gamblers in order to have their loans paid directly into their bank account. Statens Lånekasse stated that Norsk Tipping’s Smartcard solution was the best and safest option. The Minister of Culture and Church Affairs, Mrs. Valgerd Svarstad Haugland, characterised the connection as unfortunate and indicated that she did not want this to continue. Yet it did.

²²¹ According to a press release from Norsk Tipping concerning the report published by MMI on problem gambling, the report indicates that there are 133 000 persons that are in danger of developing gambling problems and that many of them are “*single, students and trainees*”. Cf.; www.norsk-tipping.no/page?id=100&key=22004

²²² Cf. above in points II.3.g), II.4.a) and III.d).

²²³ See **Annex 33**, reply to the reasoned opinion dated 19 November, enclosure 1 thereto.

²²⁴ Cf. point II.4.e) above.

the shaping by Norsk Tipping of the whole new gaming concept remains tailored to attract new players to gaming machines. Since it was never the intention that Norsk Tipping should market the gaming machines, the Authority would assume that the factors capable of attracting large numbers of new players were first and foremost related to the machines, the games and the game functionality. Given that all those factors were in place before the Government took steps, in a letter of 17 November 2004, to address Norsk Tipping's aggressive recruitment policy, the Authority cannot see how such a letter can have the desired effect of ensuring that the new gaming machines will not attract large numbers of new players.

299. In conclusion, the Authority submits that the Norwegian State, via its ownership and control over Norsk Tipping, itself incites and encourages consumers to participate in money games within the meaning of *Gambelli*. In addition, the Government, through the legislation it has adopted, has also made it possible for other gambling opportunities in Norway to be substantially expanded. Hence, the Norwegian gaming policy is inconsistent and the Norwegian Government is therefore not in a position to invoke otherwise legitimate public order concerns in order to justify the monopoly.

d) High risk – low risk

300. In order to justify the apparent inconsistency in the Norwegian Gaming policy that the Authority has demonstrated above in point III.e), the Norwegian Government has, in the administrative phase before the Authority, invoked a distinction between so-called “high risk” and “low risk” games. In the view of the Government, it is not inconsistent to restrict the freedom to provide some gambling services while actively encouraging consumers to participate in other types of games because the restrictions apply to high risk games and the marketing and expansion of gaming opportunities relate to low risk games.²²⁵ In the Government's view, modern gaming machines are particularly dangerous as they permit the operator to offer numerous games in rapid succession in which the player often wins a prize.²²⁶
301. The Authority submits that the Norwegian Government's argumentation cannot be upheld for three reasons.
302. First, the Authority would suggest that the distinction is not compatible with the approach taken by the Court of Justice in the *Gambelli* judgment. At issue in *Gambelli* was a monopoly on sporting bets. The Court nevertheless listed different gaming activities and required a consistent approach with respect to games being restricted and games in which the state encouraged participation. More specifically, the Court required a consistent approach to games as different as “soft” lotteries and “hard” betting. Hence, the stance taken by the Norwegian Government does not comply with the test laid down in the case law.
303. Second, on the basis of the research summarised above in point VI.b), the Authority submits that a clear-cut distinction between high and low risk games cannot be made. As the Norwegian Government itself stated in the administrative proceedings: “[O]ne and the same game type can ...be designed and presented in

²²⁵ This argument seems to overlook the fact that Norsk Tipping also has a monopoly on a range of games that Government considers as being of a low risk nature. However, as this circumstance is not relevant for the present case, the Authority will not develop the point further.

²²⁶ Cf. page 38 of the reply to the letter of formal notice, **Annex 31**.

many different ways and pose different risks in terms of gambling addiction. A particular type of game may therefore be either soft or hard depending on the playing conditions and the way the game actually works.” This is especially so after the introduction of games on the internet. As demonstrated above in point VI.b), it seems to be relatively commonly accepted that internet gambling might be addictive and that this is so even if the games might not pose a major risk of being addictive if they were played other than on the internet. Moreover, in the Bill behind the contested act, the Norwegian Government acknowledged the risk connected to internet games.²²⁷

304. Yet, as explained above in point VII.3.c.2), the Government has allowed Norsk Tipping and Norsk Rikstoto to offer a range of their games over the internet, digital TV and mobile phones. Considering that the Norwegian Government has argued that there was a need to bring gaming into controlled rooms and to prevent persons with gambling problems from unwillingly coming across gaming machines, the Authority submits that it is inconsistent that Norway, at the same time, enables potential gambling addicts to sit at home and participate in the money games they choose for as long as they like. This is reinforced by the possibility to gamble by SMS. Such games have been made extremely accessible and have been introduced via channels that hardly are controllable. It is a paradox that at the same time as gaming machines had to be removed from for instance grocery shops in order to shelter gaming addicts from unwillingly coming across such machines, the Norwegian Government has made it possible for people with such problems to come across money games every time they log onto the Internet, turn on their digital TV or even pick up their mobile phones.
305. Third, the Norwegian Government has encouraged or, at least, allowed both Norsk Tipping and other operators to offer and market “high risk” games.
306. As explained above in point VII.c), Norsk Tipping has, for many years, offered and advertised the game “Oddsen”. This is so although both the Norwegian Government and Norsk Tipping have conceded that the game is potentially addictive. In the preparatory documents to the contested Act, the Government stated that *“also games offered by Oddsen (Odds games) seem to represent an increasing danger of developing problematic gambling”*.²²⁸ Observations in the same vein may also be found in Norsk Tipping’s Annual Report for 2002, in which the company concludes:

“The growth with regard to Oddsen is gratifying, but, at the same time, there are particular challenges linked to that game. Oddsen is the game which attracts the largest number of players outside Norsk Tipping’s main target groups, i.e. professional players who place high stakes, and hence, might be at risk of gambling addiction and other undesirable, social side effects”.²²⁹

²²⁷ Cf. Ot.prp. No 44 (2002-2003) point 3.2.3, **Annex 9**.

²²⁸ Ot. prp. No. 44 (2002-2003), section 5.4. Furthermore, the Authority notes that in relevant Parliamentary Committee’s report to the Storting it was stated: *“It is a serious concern that the greatest increase has been on the most addictive games. These are, for example, odds, internet gaming and gaming machines.”* Innst. O. No. 124, (2002-2003) page 16, **Annex 11**.

²²⁹ Norsk Tipping 2002 Annual Report page 23, **Annex 29**, letter from the Norwegian Government of 16 February 2004, enclosure 3 thereto. The Authority’s translation. See similarly Norsk Tipping brochure *Spørsmål og svar om spilleavhengighet* Chapter 9, where the company lists as dangerous: gaming machines, casino games such as roulette, cards and games of dice, horse race betting and Oddsen. Even traditional bingo can lead to addiction. The brochure can be found at: <http://www.norsk-tipping.no/binary?id=12506>.

307. The Authority is aware that changes have been made to the functionality of the game to render it less hazardous, such as the lowering of the maximum stake per person, per terminal from 30 000 NOK to NOK 5 000 during the course of 2003. That notwithstanding, Oddsen is still considered to be an addictive game by Hans Olav Fekjær.²³⁰ Similarly, according to the recent Norwegian MMI study of September 2005:

*“1 in 5 at-risk and problem gamblers play the Oddsen weekly or more often. Problem gamblers account for much larger share of the players of Oddsen than the population as a whole. The difference is 16.8% and that is statistically significant. The Oddsen has an 18-year age limit and is estimated "of Norsk Tipping's games to contain the greatest risk in relation to unfortunate gaming behavior" (Norsk Tipping's Annual Report 04, p. 35). This estimation corresponds to the findings in our research. The Oddsen is a game where competence is an important element. Knowledge about the teams playing is very highly stressed by big players and gambling addicts.”*²³¹

308. Moreover, Oddsen can be played on the internet and the pay-out percentage has been increased from 80% to 85%, which might, at least to a certain extent, counter-balance the lowering of the maximum stake. There was a slight increase in turnover on Oddsen in 2005 (0.9%), whereas on average the turnover of the games offered by Norsk Tipping went down by 4.3%. Consequently, the Authority considers that the changes to Oddsen do not alter the main issue, i.e. that the game is a potentially addictive one.
309. As demonstrated above in point VI.a), horse-betting is also generally considered to be a “high risk” game, and in the preparatory works to the contested act both the Government and the Storting acknowledged this to be the case.²³² Yet, the Norwegian Government has allowed Norsk Rikstoto to extensively market its games and furthermore offer its games on the internet and via mobile phones. As explained above in point VII.3.c.2.3), the result has been a major increase of horse betting on the Norwegian market.
310. Finally the Norwegian Government accepts Norske Spill’s extensive marketing of the scratch cards called Yezz. Professor Mark Griffiths has argued that scratch cards are a “hard” form of gambling. In his opinion: *“At the very least, the characteristics of scratchcards have the potential to induce excessive gambling regardless of the gambler’s personality, environment or genetic make-up.”*²³³
311. In conclusion, the Authority respectfully submits that the suggested distinction between “high risk” and “low risk” games is not capable of rendering the gaming policy of the Norwegian Government consistent. Even, if the distinction were as clear as the Government claims, the justification fails on the facts, as the Government has not been consistent in its regulation of games that might be classified as “high risk”.

See also the interview “*Ingen kunne stoppe meg*” about gaming addiction triggered by Tipping and Oddsen in *Tipperne & Vi* 05, 2005 pages 16-17 at <http://www.norsk-tipping.no/page?id=213>.

²³⁰ See article in *Vårt Land* 22 July 2004, **Annex 49**.

²³¹ Cf. page 34 of the MMI Study, **Annex 40**.

²³² Griffiths Gambling Technologies: Prospects For Problem Gambling, *Journal Of Gambling Studies*, 15(3) Fall 1999 page 268, **Annex 31**, reply to the letter of formal notice dated 28 June 2004, enclosure 4 thereto.

²³³ **Annex 56**, Griffiths, *Are lottery scratchcards a “hard” form of gambling?* *Gambling, the Electronic Journal of Gambling Issues*, Issue 7 December 2002.

312. Hence, the Authority submits that the chosen monopoly solution is incompatible with EEA law because the Norwegian State does not consistently limit gambling possibilities and marketing of gaming services.
313. In the following, the Authority will demonstrate why the monopoly is, in any event, a disproportionate measure and therefore also for that reason, contrary for Articles 31 and 36 EEA.

VII.4 Proportionality of the Norwegian legislation

a) An outline of Norway's justification

314. According to the Norwegian Government, the contested Act seeks to achieve four objectives, namely to combat 1) gambling addiction and 2) crime more effectively, 3) to achieve greater control over irregularities in the gaming sector, and 4) to be able to enforce the minimum 18 year age limit more stringently. In the Government's opinion, a monopoly for Norsk Tipping is necessary to obtain these aims because only a monopoly model provides for a restrictive gaming policy and better control of the market.
315. The Authority agrees that these stated aims are legitimate under EEA law. Moreover, with the exception of the award of an exclusive right to Norsk Tipping, the Authority has never disputed the concrete measures taken to prevent gaming addiction, *i.e.* the reduction of the number of machines or the introduction of new rules on machine software and machine placement. Most of these steps seem to be suitable means of combating gaming addiction. Moreover, the appropriateness of the measures are related, first and foremost, to the level of protection that the Norwegian State wishes to attain and therefore falls under the discretion of the Norwegian authorities.
316. However, as demonstrated below, exclusive rights for Norsk Tipping is not a precondition for achieving the aims that Norway seeks to attain. Moreover, nearly all the arguments brought forward by Norway as to the beneficial effects of the monopoly are, in reality, not related to the monopoly solution itself, but rather to the objectives and effects of other measures that have been envisaged as part of the framework rules for the monopoly. Indeed, the Government has itself stated that *"there is reason to believe that basically all kinds of regulations concerning the location of gaming machines could be implemented within both a competition/concession market and a state owned monopoly."*²³⁴ Similarly, with regard to machine functionality, the Government has acknowledged that *"[p]ositive effects by different types of machines, paper receipts, and network connection could also be achieved with private operators"*.²³⁵ Thus, the Government acknowledges, at least partially, that similar restrictions could have been introduced under a licensing system.
317. Before embarking on a discussion of the different arguments invoked by the Norwegian Government in order to justify the monopoly for Norsk Tipping, the Authority would like to highlight the following: In the Authority's opinion, the relevant test for the proportionality assessment is not whether the contested monopoly solution must be deemed more effective as a means to achieve the

²³⁴ Cf. point IV.1.2 of the Norwegian Government's letter to the Authority of 1 September 2003, **Annex 27**.

²³⁵ Cf. paragraph 4.5 of Ot. prp. No. 44 (2002-2003), **Annex 9**.

Government's aims than is the case for the old licensing system. What is decisive is whether the monopoly is in fact necessary for the achievement of these aims, or whether they could also have been achieved by *changes* to the licensing system.

318. In this respect, the Norwegian Government has argued that national models with “*exclusive rights and incidental financial interests in themselves lead to less gambling addiction and crime*”.²³⁶ In the Authority's opinion, such a suggestion is unsubstantiated. In fact, as the national proceedings have shown, some researchers even argue that the mixing of economic and regulatory interests entail an inherent conflict that reduces the incentive for the regulator to take steps that could reduce gambling addiction.²³⁷ As far as the Authority is aware, no studies show any causal relation between the existence of a monopoly right and the level of gambling addiction in the country concerned. Moreover, it can hardly be disputed that it is the functionality and the location of a gaming machine, and not the ownership thereof, that determines the degree to which playing on the machine may lead to problem gambling.²³⁸
319. As already stated, the Norwegian Government has acknowledged that most of the concrete measures connected to the reform could also have been introduced without a monopoly. Hence, the Government's argumentation has hitherto been focused on structural arguments seeking to show that the monopoly solution is the only feasible way to control the development of the market. In this respect, one of the main reasons advanced by the Norwegian Government as a justification for the monopoly is that a traditional regulation of private activity by means of generally applicable legislation cannot effectively steer the behaviour of the operators of the gaming machines. The Norwegian Government invokes a number of arguments which are closely interlinked:
- The private operators' economic incentive to maximise their profit and the ensuing element of competition between the operators render the market difficult to control. This is especially so as the operators are adept at finding loopholes in the regulatory framework and use creative interpretations in relation to the specifications on machine functionality.
 - The operators' opposition to more stringent rules makes it impossible, in practice, for the Government to introduce such rules.
 - In any event, the Government is not able to change the rules with the necessary speed under a licence model.
 - The operators violate the conditions under which their licences are granted. The normal rules for corrections and enforcement do not suffice.
 - The monopoly is necessary in order to ensure expeditious enforcement.
 - The monopoly will reduce crime related to gambling.
 - The monopoly will help to ensure that the 18 year age restriction is better respected.

²³⁶ Cf. pages 30 and 39–40 of the reply to the letter of formal notice, **Annex 31**. Underlined by the Authority.

²³⁷ Cf. R Volberg and M Abbot, *Report Concerning the Regulation of VLTs in Norway*, 23 August 2005, page 15, **Annex 41**.

²³⁸ In point 4.3.2 of the Bill behind the contested Act, **Annex 9**, the Government stated that “*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. ... Of the app. 19.000 machines that were deployed in 2001 it can be presumed that the vast majority were placed and are still placed in premises that are not subject to restricted areas ... There are grounds to assume that ... [the rise in turnover since 2000] is due to reasons including the development of new types of machines after the changes in the technical requirements from the 1st October 2000...*”.

320. The Authority will address these arguments in turn. However, in order to place the discussion in the correct legal framework, the Authority will first comment on the proportionality test as it applies to the particular field of national regulation of gambling activities.

b) The test

321. In *Zenatti*, the Court of Justice held that measures taken to protect the recipients of a gambling service as well as the maintenance of order in society rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest. However, as the Court continued, such measures will only be acceptable if they are suitable for securing the attainment of the said objectives and do not go beyond what is necessary to attain them.²³⁹ In this respect, the Norwegian Government and the Authority disagree to a certain extent as to the applicable standard.

322. The Norwegian Government accepts that the case law entails that the exclusive rights may not go beyond what is *necessary* in order to comply with the principle of proportionality. Similarly, it is not disputed that Norway is required to demonstrate the objectives on which the restriction is based. The Government, however, argues that it should be accorded a wide margin of discretion in its choice of measures for achieving the objectives that lie behind the introduction of the monopoly.²⁴⁰

323. The Authority concurs that the case law of the Court of Justice gives the Member States a certain, although not unlimited, margin of appreciation in the field of gaming activities. It also concedes that this margin is somewhat broader than in most other fields of economic activity. In *Gambelli*, the Court of Justice made reference to its earlier case law and stated that “*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.*”²⁴¹ Thus, the level of protection against gambling addiction that a State wishes to ensure is first and foremost a political question for each State. Moreover, as held on a number of occasions by the Court, the fact that other States might have chosen a different model of protection does not in itself imply that the measure is disproportionate.²⁴²

324. However, to accord a State a margin of discretion in setting the *level* of protection by no means entails that the supervisory bodies should refrain from reviewing whether the measure is not only motivated by legitimate concerns but is both suitable and necessary to address those concerns.²⁴³ In *Gambelli*, the Court of Justice stated that the discretion accorded to the Member States in the field of gambling activities had nevertheless to be exercised within the limits of the classical justification test pertaining to restrictions on freedom of establishment

²³⁹ Case C-67/98 *Zenatti*, cited above, at paragraph 31.

²⁴⁰ Reply to the letter of formal notice, page 25-27, **Annex 31**.

²⁴¹ Case C-243/01 *Gambelli*, cited above, at paragraph 63. Cf. also Advocate General Alber in *Gambelli*, at paragraph 114, according to whom a State can “*determine the objectives and the level of protection*”.

²⁴² Case C-124/97 *Läärä*, cited above, at paragraph 35-37 and Case C-67/98 *Zenatti*, cited above, at paragraph 33-35. This approach is by no means specific to the field of gaming services, but is applied in all areas of free movement.

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

and freedom to provide services.²⁴⁴ Thus, even if the national authorities have a certain margin of appreciation, it is still so that:

“...in any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37).

According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.”²⁴⁵

325. In addressing the specific situation in Italy, the Court stated:

“...[T]he 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 (see Case C-193/94 Skanavi and Chryssanthakopoulos [1996] ECR I-929, paragraphs 34 to 39, and Case C-459/99 MRAX [2002] ECR I-6591, paragraphs 89 to 91), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies. [...]

The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events. [...]

It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.”²⁴⁶

326. It should be noted that the Court of Justice does not apply wording suggesting a mild proportionality test. On the contrary, it underlines several times the need for genuine judicial control. It stresses that it is up to the scrutinising court – and not just the State itself – to assess whether the measure is in fact “*necessary in order to attain*” the aim behind it. Moreover, the Court clarifies that this would not be the case if the means went “*beyond what is necessary*”. In this respect, it is noteworthy that the plenum judgment in *Gambelli* not once refers to the lax test

²⁴⁴ Case C-243/01 *Gambelli*, cited above, at paragraph 64.

²⁴⁵ Case C-243/01 *Gambelli*, cited above, at paragraphs 64-65.

²⁴⁶ Case C-243/01 *Gambelli*, cited above, at paragraphs 72-73 and 75. Underlined by the Authority.

previously suggested in the judgment of the third chamber (3 judges) in *Anomar*.²⁴⁷ Instead, the Court of Justice chose to refer to the often cited cases in other fields of economic activity; cases that are generally associated with a classical, stringent assessment of whether a measure is indeed objectively necessary, as opposed to just beneficial for the fulfilment of the invoked aims.

327. The Court of Justice thereby confirmed the following statement by Advocate General Alber in his opinion in *Gambelli*:

“Even though the Court has held that certain restrictions of the fundamental freedoms are in theory compatible with Community law, nevertheless, measures to reinforce legislation which run counter to the spirit of the fundamental freedoms cannot be justified under any circumstances ...

It therefore seems entirely consistent with the case-law of the Court to subject the objectives pursued and the means employed to attain them to closer inspection, even though the Court has hitherto left that task to the national courts. ...

As regards the dangers feared to be posed by the diversification and extension of gaming opportunities, it must be examined whether the Member State has a coherent policy on the subject, particularly where the prohibition in question is not absolute but is qualified by a reservation of authorisation. A total prohibition on a particular branch of the gambling sector clearly has the effect of limiting those gambling opportunities. However, where gambling - in this case sports betting - is permitted, albeit within clear limits laid down by law, the stated objective of producing a limiting effect must be examined much more closely.”²⁴⁸

328. It should also be underlined that the Court of Justice in *Gambelli* did not view the question of necessity as merely a part of the assessment of whether a measure is suitable to achieve its aim. On the contrary, the necessity test works as an additional and independent requirement under the proportionality analysis, in line with the usual approach of the Court of Justice in fields other than gaming activities. In this respect, the judgment in *Gambelli* merely reiterates what was said in *Zenatti*, namely that it is for the competent “*court to verify whether ... the restrictions which [the national legislation] imposes do not appear disproportionate in the light of these objectives*”.²⁴⁹

329. The present case distinguishes itself from the earlier cases before the Court of Justice (and resembles the *Gambelli* judgment) insofar as it concerns not the maintenance, but the introduction of a monopoly. In the opinion of the Norwegian Government, the assessment of the necessity of exclusive rights should be the same regardless of whether the question arises in the context of an existing monopoly or in relation to the introduction of a monopoly.²⁵⁰ As a matter of law, the Authority agrees that the substantive test might, by and large, coincide in these two situations, although it can hardly be denied that an act prohibiting activities that hitherto been legal has a severe negative effect on existing operators whereas the continuation of an existing monopoly does not interfere with ongoing economic activities.

²⁴⁷ Cf. Case C-6/01 *Anomar* [2003] ECR I-8621.

²⁴⁸ Cf. paragraphs 61, 116 and 119 of the opinion. Underlined by the Authority. See also paragraph 98 according to which the justification is subject to “*stringent conditions*”.

²⁴⁹ Case C-67/98 *Zenatti*, cited above, at paragraph 37.

²⁵⁰ Reply to the letter of formal notice, page 24, **Annex 31**.

330. However, from a factual perspective, the two situations are quite different. In relation to an existing monopoly, the supervisory organs have no option but to assess the measure in the abstract since they have no information about how the situation would be in a liberalised system. In contrast, in cases where a monopoly is being introduced, the supervisory organs are in the altogether different position of being able to perform a genuine and specific assessment of the need for the particular monopoly. In this respect, the supervisory organs can take account of *e.g.* market behaviour leading up to the introduction of the monopoly and possible attempts to regulate the market by way of less draconian measures. In the same vein, the courts can, in this latter situation, verify that the State only took the restrictive measure after having thoroughly investigated possible alternatives and that it based itself on sufficient and relevant data.²⁵¹ In the present case, the evidence must relate to particular experiences in the Norwegian gaming market justifying the introduction of the monopoly.
331. Shortly after the judgment in *Gambelli*, the Court of Justice took the same approach in *Lindman*. In that case, the Norwegian Government argued that a restriction on foreign gambling activities was justified by “*the need to combat the damaging consequences of gambling addiction, which is a matter of public health. Thus, there are rehabilitation centres and other infrastructures for treating gamblers; gambling creates social problems, such as depriving the families of gambling addicts of resources, divorce, and suicide*”. The Court of Justice did not accept that it was sufficient that the Government invoked those laudable aims and held that “*the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State*”.²⁵² Moreover, after having carried out this analysis, the Court showed no hesitation in finding that the measure was, in fact, disproportionate and hence contrary to Article 49 of the EC Treaty. Thus, the Authority would submit that the Court of Justice has, in its most recent case law, considerably limited the discretion which its earlier judgments seemed to accord to the Member States.²⁵³
332. In the Authority’s opinion, the judgment of the Norwegian Court of Appeal applied a limited and overly cautious proportionality test. From the formulation of point 3.2.2 of the judgment, it is apparent that the Court of Appeal did not embark on a substantive verification of the factual basis for the Norwegian Government’s claims concerning the need for a monopoly solution. Instead, the court merely referred to the Government’s own assessment of the need to abolish the licensing system, without discussing whether this assessment had been substantiated or refuted by the evidence presented during the court proceedings.
333. However, under EEA law the competent courts must, also in an area like gambling, verify whether the assumptions on which the national legislator has

²⁵¹ Case E-3/00 *EFTA Surveillance Authority v. Kingdom of Norway*, cited above, at paragraph 42.

²⁵² Case C-42/02 *Lindman*, cited above, at paragraphs 24-25. Again, the Court of Justice chose not to refer to cases in the particular field of gaming activities, but instead to the normally cited cases concerning free movement in other economic fields. Therefore, the Court of Justice can hardly be said to indicate that a particularly lax proportionality test should apply.

²⁵³ Cf. Ulf Bernitz, *Nationella Spelmonopol i Ljuset av Gambellimålet*, *Europarättslig Tidskrift* 2004, page 451 (458), and Gert Straetmans, *op.cit.*, pages 1420-1423. According to the latter, “*instead of taking refuge behind the empty rhetoric of Member States, as in the past, the Court now emphasizes that restrictions must serve to limit betting activities in a consistent and systematic manner...[T]he Court of Justice is finally prepared to exercise a more than marginal control if Member States tip the balance.*”

based its restrictive measure are factually correct and whether the measure is objectively necessary on the basis of all the relevant facts established before the courts. Moreover, this must be done regardless of whether, and if so how, these facts were discussed in the preparatory documents that formed part of the bill leading to the restriction. The acceptance of a certain discretion with regard to the *level* of protection should not be confused with the altogether different question of whether a restriction is actually *required* to achieve the desired level of protection.

334. It remains to be discussed whether it falls to the Authority or the Norwegian Government to prove whether the measure in question actually is suitable and necessary in order to secure the level of protection that the Government wishes to obtain. In the administrative phase the Norwegian Government seemed to suggest that the burden of proof in this regard lay with the Authority.²⁵⁴ However, the case law of both the EFTA Court and the Court of Justice makes clear that the burden of proof is on the Authority (or the Commission) only insofar as the existence of a restriction is concerned. Where a restriction has been established, it is then for the Government concerned to show that the measure is both suitable and necessary to obtain the aims that motivated it.²⁵⁵
335. The Authority will now turn to the Norwegian Government's different arguments for justifying the monopoly.

c) The operators' incentive to maximise their profit renders the market difficult to control

c.1) Norway's argument

336. In the Bill behind the contested act, the Government has argued that there is a need to

“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 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.

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,

²⁵⁴ Reply to the letter of formal notice, page 15-16, **Annex 31**.

²⁵⁵ Case E-1/03 *EFTA Surveillance Authority v. Iceland* [2003] EFTA Court Report, page 143 at paragraphs 34-35, and Case C-270/02 *Commission v. Italy* [2004] ECR I-1559, at paragraph 22. The rule on the burden of proof applies generally with regard to restrictions to the four freedoms, see Case C-414/97 *Commission v. Spain* [1999] ECR I-5589, at paragraph 22, and Case E-1/94 *Restamark* [1994-1995] EFTA Court Report, page 15, at paragraph 60.

shopping centres etc. This entails the unfortunate exposure of minors and people with problematic gaming behaviour to money games.”

337. In comparison:

“A non-profit state owned operator has no incentive to push the limits of prevailing regulations in order to improve profits or strategic position in relation to competitors. ...In contrast to the present model, a monopoly system will minimise manufacturers’ attempts to find loopholes and bend the framework of current regulations in order to improve market shares through aggressive elements in the machines.”²⁵⁶ This is an important difference for Norway, as past experience “indicate[s] that continuous updates to technical requirements in a competition or profit-based licensing model would normally result in the regulatory authorities consistently lagging behind in relation to the risk of gaming addiction. ... This suggests that the failed attempts in recent years to impose restrictions on the Norwegian gaming machine market are not due to inefficiency on the part of the Norwegian authorities”.²⁵⁷ Indeed, the machines operated by private operators have become steadily more aggressive “in spite of more detailed regulation on type approval and improved supervision of the functionality of gaming machines”.²⁵⁸

c.2) The Authority’s submission

c.2.1. General points

338. The Authority understands the Government to argue that the existence of profit-seeking undertakings in the gaming market is inherently undesirable and that the negative effects thereof should be countered by a monopoly exercising the very same economic activity. To accept such argument is fraught with danger. Unless very tightly circumscribed, the EEA States would be given a blank cheque to introduce state monopolies in basically all sectors subject to public regulation and scrutiny. Indeed, most undertakings seek to maximise their profits to the fullest extent possible under the applicable regulations. Quite often businesses do “attempt to find loopholes” in, for instance, tax legislation or legislation regulating what products and services they may put on the market. Moreover, they do that precisely “in order to improve market shares”.

339. The Court of Justice has acknowledged that the gaming sector is characterised by particular circumstances not present in most other sectors of the economy. However, it cannot follow that eliminating competition in the gaming market may serve as a justification for a monopoly. That would in fact entail that monopolising the provision of gaming services would be justifiable *per se* since only a monopoly can ensure the absence of competitors in the market. There would then be no need for the Court of Justice or the EFTA Court to ever consider the proportionality of a monopoly in this area. Yet, the Court of Justice has repeatedly concluded that gaming services fall within the scope of the EC Treaty and that restrictions must be justified. It is not disputed that the same must be true in relation to the EEA Agreement. On that basis, the Authority submits that a desire to stop competition cannot, as such, be a legitimate aim under EEA law, and that the EFTA Court should take a close look at whether the different alleged negative effects ensuing

²⁵⁶ Cf. the Government’s letter of 1 September 2003, **Annex 27**.

²⁵⁷ Reply to the letter of formal notice, pages 39-40, **Annex 31**.

²⁵⁸ Reply to the letter of formal notice, page 39.

from a competitive market can be remedied only by way of the chosen restriction, or whether less restrictive means exist.

340. According to Norway, the unfortunate and uncontrollable elements of competition relate to the operators' attempts to obtain "*the best machines and access to the most profitable locations.*" However, that an economic operator e.g. seeks to find the most attractive spot to place his machine within the limits set by the Norwegian state can hardly be something which is objectionable *per se*. If Norway finds that a machine should not be allowed on a particular type of location, it needs only change the rules concerning where a gaming machine can legally be situated.
341. Similarly, to the extent that economic operators find loopholes in the current legislation concerning machine functionality and thereby legally exploit an unfortunately drafted law or administrative act, the problem should be addressed by redrafting the legislation. To react instead against legal but politically undesirable behaviour by prohibiting all private economic activity is clearly not proportionate. This is especially so when the Government had drafted the hitherto applicable rules with the explicit aim that the "*regulations and market structure shall create good conditions for competition between the market's different sectors and players*"²⁵⁹ and that the rules shall "*stimulate competition on development of new gaming concepts.*"²⁶⁰
342. In order for such a severe step to be proportionate under Article 36 EEA, the State concerned must adduce hard evidence that it cannot regulate the market by way of generally applicable laws and regulations. Moreover, the State must demonstrate that it is indeed objectively difficult to regulate the relevant subject matter. Neither of these conditions are fulfilled in the present case. It cannot be argued that the Norwegian Government has repeatedly sought to regulate machine functionality and rules for the location of the machines.²⁶¹ Furthermore, especially with regard to the rules on location of gaming machines, the Authority cannot see why it should be impossible to establish clear criteria as to where machines can or cannot be installed. Not only are the criteria laid down in a regulation but each machine instalment is subject to prior assessment and authorisation.²⁶² Nor does the Authority understand why it is impossible to establish clear, precise criteria with regard to machine functionality. On the contrary, as already stated, the Gaming Board wrote in its 2001 Annual Report that "[w]hen it comes to type approval of gaming machines, we can now conclude that the Norwegian Gaming Board is foremost in Europe".²⁶³ If the problems were really as imminent as the Government suggests, then one would have imagined that the Government could refer to a range of cases where the authorities had examined a given type of machine, come to the conclusion that the machine was indeed legal but with undesirable effects and then changed the applicable rules. Yet, no such examples have been brought forward.

²⁵⁹ Cf. Ot prp. No. 84, (1998-1999) chapter 3.2, referred to above under point II.2.b).

²⁶⁰ Cf. Chapter 3.2 of the Ministry's Proposal of 29 June 2000, **Annex 3**, referred to above under point II.2.c). The rules in the proposal reflect the present rules on machine functionality under the licence system.

²⁶¹ See below in point VII.4.d.2).

²⁶² Cf. above in point II.2.a).

²⁶³ Cf. above in point II.2.d). Similarly, the Norwegian Gaming Board's detailed comments of 1 November 2004, **Annex 33**, reply to the reasoned opinion dated 19 November 2004, enclosure 2 thereto, on the functionality of Norsk Tipping's own machines show that the authorities do have the means to perform an effective supervision with regard to machines functionality, cf. in this respect point II.4.e) above.

c.2.2) The market's reaction to the Government's rules

343. As a matter of fact, an analysis of the few changes made so far to the rules concerning machine functionality suggests that the market has responded to the amendments made by the Government, and that the market thus can be regulated by way of generally applicable legislation. As previously outlined, in 1998 the Government adopted regulatory amendments which imposed more stringent requirements on machine functionality. The effect was that a number of machines had to be replaced with less aggressive ones. According to figures presented to the Authority, the effect of these amendments was a significant decrease in turnover. For instance, in October 1998, the turnover of the new machines was 68% below the turnover of machines placed on the market before the restrictions were enacted.²⁶⁴
344. Moreover, turnover increased significantly as a result of the changes in 2000, by which the Government introduced more *liberal* regulations (allowing for 10 times higher prizes and diminishing the minimum sequence time between games), in order to “*maintain the turnover in the gaming machine market and avoid economic losses for the charities*”.²⁶⁵ In the Authority's opinion, this regulatory change must be also regarded as an important factor behind the increase in turnover on the gaming machines market that has taken place after the adoption of the gaming reform. The Authority submits that the Government could have reversed this trend simply by reverting back to more stringent rules, comparable to those laid down in the 1998 regime.²⁶⁶ Yet, even after it became clear that the contested act would not enter into force until the question of the monopoly's legality had been resolved, the Government has refrained from taking measures to impose stricter rules on machine functionality with the sole exception of its decision of 25 January 2006 according to which the machines, as of 1 June 2006, will no longer be permitted to accept bills.
345. In conclusion, the Authority respectfully concludes that the Government's claim that it has, in vain, steadily tried to counteract undesired elements of fierce competition is simply not tenable. No proof has been submitted that more stringent rules have been introduced without the desired effect. The increase in turnover on the gaming machines that has taken place on the Norwegian market in recent years does not indicate that the market cannot be controlled by way of changing the rules regulating privately operated machines in a licensing system. Rather, it merely reflects the Government's choice not to amend the present rules, which it now considers too liberal, and replace them with more stringent rules concerning *e.g.* machine functionality and location. In other words, it is actually to a large extent the Government's own regulatory changes or lack thereof that have led the market to where it is today.²⁶⁷

²⁶⁴ Information provided by NLD. The information was submitted in the proceedings before the Norwegian courts.

²⁶⁵ Reference is made to the Norwegian Government's letter to the Authority of 24 February 2003, page 2, **Annex 25**. See also above in point II.2.b-c).

²⁶⁶ It might not be wholly without interest that the 1998-rules were not only stricter than the ones applicable today, but also, in several important respects, than the ones envisaged to apply for Norsk Tipping's gaming machines. For instance was the maximum prize considerably lower, NOK 200, cf. above in point II.2.a).

²⁶⁷ In the Gaming Board's Annual Reports from 2002 (page 13), **Annex 10** and 2003, **Annex 57** (page 13) it is confirmed that the strong increase in turnover followed from the installation of new machines following from the new regulation in 2000. Although the total number of machines decreased, the introduction of the more liberal rules made the operators start to replace the old machines with new and more aggressive ones. Whereas only 1% of the machines had been approved according to the new liberal rules in 2000, 75% had been installed according to the new rules the year after.

c.2.3) A competitive structure will still exist under a monopoly solution

346. As shown above, the Authority disagrees, as a matter of principle, with the Norwegian Government's opinion that a competitive structure is so undesirable that the elimination thereof can justify a national law where the very same activity is continued in a monopoly. That being said, in order to be exhaustive, the Authority will demonstrate in the following that the undesired competitive elements will, in any event, not disappear under the chosen monopoly model.
347. First, the fact that a market is run by a monopolist does not in itself imply that the monopolist has no incentive to maximise his net earnings. Nothing indicates that Norsk Tipping does not view itself as an economic operator with the purpose of creating revenue.²⁶⁸ Indeed, just the year before the Government presented the monopoly Bill, it stated the following to the Storting: "*Norsk Tipping AS is as a state owned undertaking the largest actor on the gambling market. The commercial aim of the company is to create maximum revenue to the causes, sports, culture and research.*"²⁶⁹ Moreover, Norsk Tipping has emphasised on numerous occasions that it perceives itself to be in competition with other undertakings providing gambling services, including games that are not identical to the ones run by Norsk Tipping.²⁷⁰
348. The fact that this revenue is paid out to good causes rather than shareholders does not imply that the wish to create revenue is any less. As an example, it can be mentioned that Norsk Tipping has arranged competitions between its commissioners to increase turnover. As explained by Norsk Tipping itself:
- "That one can get far with energy, creativity and a good dose of competitive instinct is Dag Kåshagen i Mix Moelv a living example of. When Norsk Tipping holds competitions between the commissioners, the enterprising shopkeeper starts to plan his sales activities with one objective in mind: TO WIN!"*²⁷¹
349. Second, Norsk Tipping has entered into a royalty agreement with the chosen producer of gaming machines under which the latter will receive part of the income that each game generates in the market. One would presume that this implies that also the producer of the new machines will have an incentive to make the machines appealing. In this respect, it may be noted that Norsk Tipping's so-called Multix machines and games were developed at a time when the company had as its explicit intention to double the total number of players and that no revision of the machines seems to have taken place after the Government's order of 17 November 2004 that Norsk Tipping should not seek to increase the total number of players.²⁷²

²⁶⁸ As an example one can mention that Norsk Tipping on page 3 of its 2002 Annual Report, **Annex 29**, letter from the Norwegian Government of 16 February 2004, enclosure 3 thereto, stated that "[t]he objective of Norsk Tipping is to generate the highest possible profit for the benefit of good causes in society." Reference is also made to the statements cited above in point VII.b.2). Lately, the statutes for Norsk Tipping have been changed so that this aim is to be reconciled with the need to promote responsible gambling.

²⁶⁹ Chapter 8 in St. meld. no. 22 (2001-2002) "*Et mindre og bedre statlig eierskap*" The Authority's translation. The document can be found at: <http://odin.dep.no/nhd/norsk/dok/regpubl/stmeld/024001-040006/hov008-bn.html>.

²⁷⁰ Cf. the quotations given above in point VII.b.2).

²⁷¹ *Tipperne & Vi* No 03-05 to be found at <http://www.norsk-tipping.no/page?id=213>. The article is moreover found in **Annex 48**. The Authority's translation.

²⁷² Cf. above in point VII.3.c.2.3).

350. Third and finally, the monopoly will not remove the existing competition between the location owners. Gaming machines will still be placed in the premises of private location owners who, in return for having a machine on their premises, continue to receive a percentage of the revenue generated by the machine. Hence, there is no reason to believe that the incentives for the location owners to place the machines at the most appealing places will be reduced. Indeed, Norsk Tipping has several times encountered problems with location owners clearly acting contrary to any reasonable standard in relation to problem gamblers.²⁷³

d) The operators' opposition to more stringent rules makes it impossible, in practice, to regulate the market.

d.1) Norway's argument

351. The Norwegian Government has repeatedly claimed that the monopoly for Norsk Tipping is necessary in order to ensure that the State can introduce measures that are positive for the protection of the players even if that would result in less revenue from the machines. According to the Bill behind the contested act, it has proven difficult to introduce restrictions on the machine functionality since:

“[B]oth philanthropic organisations and private enterprises that are directly affected by such a proposal use considerable resources to resist the proposal out of the fear of a decline in machine earnings.”

352. To illustrate this point, the Bill refers, first, to the “*liberalisation of the requirements concerning the machines' mode of operation that was passed with effect from 1st October 2000*” and, second, to the negative comments to the Government's first hearing paper of June 2002:

“The machine industry's attitude to the Ministry's proposal illustrated how difficult it is to achieve support for the decisions deemed necessary to ensure a defensible development of available money games, as long as the enterprises of the affected operators are directly connected to machine earnings. The Ministry is of the opinion that the lack of understanding for such stricter requirements that quickly occur with operators having a direct interest in the earnings from money games, would occur whether there is one or several operators and regardless of whether the operator is run by commercial owners or by philanthropic organisations. This makes a case for exclusive rights for a state-owned non-profit based operator.”

353. The same argument is expressed in the Government's reply to the Authority's letter of formal notice in which the Government questions whether it is at all

²⁷³ In one case, a commissioner for Norsk Tipping allowed a gambling addicted person to spend 31 million NOK on “Langoddsen” over 7 months. On a particular day, the player paid 350.000 NOK to the commissioner who apparently helped him circumvent the rules on maximum stakes. In another case, a commissioner let a gambler use more than 4 million NOK on “Oddsen”. Both cases were apparently closed by settlement of claims between Norsk Tipping and the involved person. In the present context, it is immaterial whether Norsk Tipping acted incorrectly or not in those cases. Regardless of whether that is the case, the cases illustrate that the potentially unfortunate element with private owners of gaming machine locations will be basically the same under the old and the contested scheme. According to a letter of 18 October 2004 from the Gaming Board to the Ministry, page 2, **Annex 58**, “*there can be reason to believe that an environment exists between a few commissioners in which prizes from Norsk Tipping and Rikstoto are traded. There is a battle between the commissioners to secure the big gamblers as the payment of the commissioners are based on a percentage of the turnover*” The Authority's translation. That commissioners' granting of credit remains a problem is illustrated by an article in *Tipperne & Vi* 05, 2005 pages 18-19.

possible to introduce more stringent rules in a licensing system since “*private financial interests in relation to any tightening of the rules on game design, monitoring and enforcement [have] a stronger incentive for lobbying for the best possible financial operating conditions than a non-profit state-owned gaming enterprise.*”²⁷⁴ As the operators, moreover, had hitherto been successful in persuading the Storting not to change the rules, the Government believes that “*the difference between a state-controlled exclusive rights operator and a licence-based market is therefore that new, preventive regulations are consistently implemented later in a licence-based market*”.²⁷⁵

354. Finally, the Government states that private operators have hitherto taken “*numerous*” legal proceedings against new rules introducing more stringent regulations.²⁷⁶ In the Government’s view such legal proceedings are unfortunate as they imply that the amendments cannot focus exclusively on social policy issues. In contrast, with a monopoly solution there will be fewer attempts to seek legal redress: “*By eliminating private operators from high-risk gaming opportunities, one may also remove the financial basis for making the question of amendments to regulations, as the Government has experienced several times, a judicial issue*”.²⁷⁷

d.2) The Authority’s submission

355. Before turning to the general question of whether this argument can form the justification for the chosen monopoly solution, the Authority finds it important to reiterate that it fails to see the basis for the Government’s claim that it has in vain tried to introduce more detailed regulation and restrictions on the market.
356. Neither a bill nor a regulation has been put forward by the Government in the period between the introduction of the present regulation in autumn 2000 and the two proposals of June and October 2002. Moreover, the 2000 Regulation followed the wishes of the Storting and deliberately introduced a *less* stringent system than the one previously in place. As for the measures that the Government took in 2002, it can hardly be argued that the opposition of private commercial interests made it impossible to enact new rules. On the contrary, despite the negative reaction from the operators, the Government managed to enact rules that completely removed them from the market. In fact, it might even be argued that Norsk Tipping has been more successful in persuading the authorities not to enact rules that damage the possibility to generate revenue than private operators.
357. In any event, the Authority submits that the Government’s argument should not be accepted as a valid justification.

²⁷⁴ Reply to the letter of formal notice, page 42-43, **Annex 31**.

²⁷⁵ Reply to the letter of formal notice, pages 41 and 43. The Government also sees it as problematic that private operators suggested that further studies should be conducted before more stringent rules were introduced, cf. page 32 of the reply. In fact, the operators thereby only reflected what the relevant parliamentary committees themselves had underlined several times, cf. *e.g.* Innst. O. No. 33 (1999-2000), page 19, Innst. O. No. 12 (2000-2001) and Innst. S. No. 153 (2001-2002), summarized above in point II.2.b) and point II.2.e).

²⁷⁶ Reply to the letter of formal notice, page 43. It is not clear to the Authority what legal proceedings the Government refers to. The Authority is not aware of any legal action relating to changes to generally applicable rules concerning gaming machines initiated before the introduction of the monopoly.

²⁷⁷ Reply to the letter of formal notice, page 43. Again, the Authority questions, on a purely factual basis, what legal proceedings the Government have in mind.

358. The Government, neither formally, nor in practice, needs any agreement from private parties in order to introduce more stringent rules. Nor is the introduction of such rules dependent on any appreciation on the part of the regulated business that the suggested rules would be more beneficial than the existing ones.
359. In the Authority's opinion, the exercise by economic operators of their democratic rights to influence the decision-making of the national legislator cannot form the basis for the justification of a monopoly. That an economic operator actively seeks to persuade the legislator to take a position that is in conformity with his best interests is not in itself objectionable. An economic operator shall not risk being denied his right to continue his business simply because he does not, in the national authorities' opinion, express sufficient understanding and support for a proposed regulation of his trade that would incur him a substantial loss. Similarly, that the affected operators might suggest that the rules be amended only after scientific proof concerning the need for tighter rules is adduced is fully legitimate and cannot be taken as proof that the operators will not adhere to new rules, should the Government choose to introduce them as a precautionary measure.
360. Private economic operators and charities do have political influence. However, even if the Government could only achieve its gaming policy by introducing a model that made it unnecessary to involve the Storting, the desire to avoid the public discussion and political pressure which flows from a normal democratic process cannot be seen as a legitimate aim. This is so even if that aim is construed as a means to react swiftly in order to combat gambling addiction. If, as a result of the political process, the legislation which is enacted attributes a lower priority to the prevention of gambling addiction than that suggested by the Government, that outcome merely indicates that other issues enjoy a stronger political following. Similarly, if the Storting agrees with the economic operators that more scientific studies should be presented before the rules are changed, the introduction of a system which excludes the Storting from the process can hardly be considered an appropriate reaction.
361. Finally, in a legal order such as the EEA, built on the protection of fundamental rights, including the right to judicial review,²⁷⁸ the Authority fails to see how a desire to avoid legal proceedings concerning the validity of new rules enacted by the Government or the Storting can form the basis for a valid justification of a monopoly. While it may be more convenient for a government, when enacting new rules, to focus exclusively on social policy issues without taking into consideration the risk that those rules might be challenged before the courts, such an objective cannot serve as a reason to limit the fundamental freedoms guaranteed under EEA law.

e) The rules cannot be changed with the necessary speed under a license model

e.1) Norway's argument

362. As a related argument, the Norwegian Government has argued that the monopoly solution is necessary as it purportedly makes it possible to change the way the machines are run and located without "*extensive procedures*"²⁷⁹ and thereby with less delay than under a normal public law system with generally applicable rules. It also claims that this need for a possibility for rapid changes is necessary in order

²⁷⁸ Cf. most notably Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report, page 185, at paragraph 23.

²⁷⁹ Cf. point 4.5.3 in Ot. prp. No. 44 (2002-2003), **Annex 9**.

to react swiftly to new knowledge about gambling problems and thus ultimately in order to protect the players. The argument can be divided into two sub-arguments: that the process for changing generally applicable public law rules is too time-consuming; and that changes will, in any event, not affect machines approved under the existing rules.

363. The first point is expressed as follows in the Norwegian Government's letter of 1 September 2003:

“Unforeseeable defects will easily be remedied by withdrawing machines quickly from the market so that they do not expose players to unpredictable risks of problem gambling. ... In the present model, such changes must be implemented on the basis of hearings and transitional periods, instituted to secure predictability for private operators.”

364. The second point concerning the problems with steering the market in relation to machines which have already been approved has been expressed as follows:

“One of the problems in Norway's current regulations on gaming machines is that software which is type-approved for machines that are to be installed in Norway cannot easily be withdrawn from the market, even if it is later concluded that machines with this software function in a way which is likely to cause an undesirable degree of gambling addiction.”²⁸⁰

365. Furthermore, the Government has stated, in relation to the several thousand machines of suspect functionality currently on the market:

“Seen from an enforcement and control perspective, the problem is that they are not in direct conflict with the technical requirements which were valid when the machines were type approved. They are therefore not illegal and cannot be removed from the market. In a state monopoly such machines would never have been placed on the market. In cases where machines put in place by Norsk Tipping might be shown to contain unfortunate functionality they could be immediately withdrawn or the functionality could be altered. When the Gaming Board's controls show that there are fewer unlawful machines than is feared, this is positive. One main problem with the way the present market is organized is, however, that the market operators perform disloyally within the legislation in force. This problem can only be solved by a monopoly under full state control.”²⁸¹

e.2.) The Authority's submission

366. In the opinion of the Authority, this alleged need for swift regulatory changes cannot justify the monopoly solution.

367. First, the Authority questions the need for overnight changes. It is the Authority's understanding that the Norwegian Government has changed machine specifications three times in the last 10 years. Moreover, it is the impression of the Authority, that the findings of studies concerning gambling addiction are general in nature and do not relate to particular features concerning the functionality of

²⁸⁰ Cf. the Government's letter of 16 February 2004, **Annex 29**.

²⁸¹ Cf. memo of 23 May 2003 from the Ministry to the relevant Parliamentary Committee of the Storting in connection with the Storting's discussion on the Bill, **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 6 thereto. The Authority's translation.

individual games offered on gaming machines. Rather, the research has merely tried to prove scientifically what has already been the general impression for years, namely that the risk connected to a particular game depends on a range of factors such as the speed of the game, the size of the prize and the location of the machine.²⁸² Furthermore, studies take a long time to carry out and are rarely unambiguous. It is, therefore, quite unlikely that new research will reveal specific, new high-risk elements in machine software such as to require immediate withdrawal of the programme in order to avoid imminent harm to players.

368. Second, even assuming a factual need to take decisions within a very short time frame, the normal rules in Norwegian law ensure that swift decisions can be taken. As demonstrated in the Authority's letter of formal notice, the Norwegian legal order allows for the delegation of regulatory powers to the relevant ministry. A public hearing can normally be carried out within 6 weeks and even faster if objectively necessary, for instance if it is clear that under the existing rules, serious harm is imminent. Moreover, the applicable legislation can include an authorisation to dispense with a hearing if the responsible authorities consider the danger to be particularly acute. This has not been disputed by the Government, who only seems to argue that this avenue might not be *politically* open due to lobbying from the affected operators and the charities.
369. Nor does the Authority see the basis for the argument relating to transitional periods. The licenses to operate gaming machines are limited in time. If necessary, it could also be specified in the licences that requirements for machine functionality can be changed at any time. Moreover, the planned system for an on-line network of licensed machines would have made it possible for the Government to "lock" certain functions in the machines, such as prize level and sound.²⁸³ To argue, as the Government does, that it would not be fair to operators to continue with a normal licensing system, in which they will have to accept regulatory changes without transitional periods, seems rather far-fetched considering the monopoly solution's effect on those very same operators.
370. Third, and finally, the Authority draws the Court's attention to the danger of accepting that the Government's argument could justify a monopoly solution. In many other fields of economic activity it might similarly, and often with much more force, be argued that there is need for the national authorities to be able to act quickly. As prominent examples, one may mention legislation concerning food safety or medicinal products. In none of these sectors has it been suggested that it is practically impossible to regulate the market via general legislation and administrative orders and that there is a need to monopolise the sector concerned in order to be able to steer the market with the required speed.

f) The private operators violate the conditions under which their licences are granted. The normal rules for corrections and enforcement do not suffice

f.1) Norway's argument

371. In its reply to the Authority's letter of formal notice, the Norwegian Government acknowledges that "*supervision is essentially a question of resources*". The Government, however, maintains that "*it would not be possible to assign resources to comprehensive monitoring of compliance with the requirements in a licence-*

²⁸² Cf. above at point V.

²⁸³ Cf. above in point II.2.d).

*based market. The possibilities of monitoring an exclusive rights operator are far greater.*²⁸⁴ Similarly, in the Bill leading to the contested act the Government argued that extensive control of gaming machines in order to prevent the existence of illegal software is very expensive.

372. The Government has identified a number of different types of requirements the respect of which it finds that it cannot monitor sufficiently: In the Bill, the Government referred to “*indications of a number of breaches of the terms for the deployment of prize machines, including unregistered turnover and the purchase of the most profitable deployment sites*”. Moreover, the Government has argued that “*it has repeatedly been found to be difficult to document the machine's genuine mode of operation with regard to the approval of different types of machine, and to thereafter check that the approval requirements are maintained. This problem has been a recurrent one and difficult to deal with even following the establishment of the Norwegian Gaming Board as a technically competent professional authority and after the approval of new technical requirements for machines in 2000.*”²⁸⁵ Yet, when asked to document the problems, the Government acknowledged that “*[i]n Norway the problem is not the presence of unlicensed software. The problem is, however, the presence of aggressive machines in locations that are not considered as natural gaming environments with regard to social consideration*”.²⁸⁶

f.2) The Authority's submission

373. The Authority agrees that monitoring of the market might be easier in a monopoly model, but contests that this consideration can justify the introduction of a monopoly. Indeed, if one were to accept such an approach, monopolies would automatically be justified in relation to most sectors of the economy without any real proportionality assessment. It is settled case law that disadvantages of a purely administrative nature are not sufficient to justify a restriction on the freedom to provide services.²⁸⁷ What is decisive is whether it is possible to establish an efficient supervision.

²⁸⁴ Cf. page 41 of Norway's reply to the Authority's letter of formal notice, **Annex 31**.

²⁸⁵ Cf. the Government's letter of 24 February 2003, **Annex 25**.

²⁸⁶ Section IV.3 of the Government's letter of 1 September 2003, **Annex 27**. Underlined by the Authority. The Authority agrees with this latter statement and finds it, therefore, all the more surprising that the Norwegian Government, after originally stating its intention to change the rules for the location of the machines, in the end decided not to do so. For the Authority, it is difficult to see how a system that is ostensibly justified by the need to protect consumers against gaming addiction is combined with a plan to place approximately half of the new machines in bars, restaurants and nightclubs where alcohol is being served. As far as the Authority understands, the correlation between gaming and alcohol is commonly accepted as unfortunate, cf. above under point VI. That being said, the Authority would like to emphasise that it sees the legality of the monopoly as a matter distinct from an assessment of the other measures that the Norwegian Government took within its gaming reform. It will, therefore, not develop this argument further.

²⁸⁷ Cf. e.g. Case C-334/02 *Commission v. France* [2004] ECR I-2229, at paragraphs 27-29, with reference to the following statement of Advocate General Ruiz-Jarabo Colomer: “A restriction on freedom to provide services and the free movement of capital of the type laid down in the disputed French legislation cannot be justified on the ground that the replacement of a simple system, based on prior, overall supervision and entailing no risk of fraud, by a system of subsequent, unsystematic supervision would give rise to difficulties in the administration of taxes. Once it has been established that the objective pursued can be fulfilled by other means, the principle of proportionality precludes mere administrative difficulties from being cited as absolute grounds justifying discriminatory treatment which, because it is contrary to the fundamental freedoms, must be based on strong reasons in order to be lawful.”

374. In the Authority's opinion, the Government's suggestion that comprehensive monitoring cannot be performed under a licensing system is incorrect. First, it runs contrary to the fact that the Gaming Board could report, in its 2001 Annual Report, published only a couple of months before the Ministry's second hearing paper, that it managed to control the vast majority of all machines located in Norway. Second, already before the Government's two hearing papers were presented, the Gaming Board was in the process of preparing an online monitoring system that, according to the Board's expectations, could have been implemented by 2004 and thus before the one developed in relation to Norsk Tipping's machines. According to the Gaming Board this system would have constituted an important step in reducing the risk of manipulation of the machines.²⁸⁸
375. The Authority would not dispute that a substantial number of breaches of the applicable rules have occurred in the Norwegian gaming machines sector. However, it is important to emphasise that nearly all of these concerned minor infringements that related neither to the machine functionality nor to the location of the machine and therefore could not, in any way, lead to problem gambling.²⁸⁹ In other words, the main problem was once again not the presence of illegal machines, since the machines were indeed approved, but merely the lack of labels assuring the consumers (and controllers) it had been approved. Such violations are comparable to the infringement of the law that takes place when a driver having a valid driving license omits to bring it with him whenever he drives his legally registered car. Breaches of that sort can hardly justify a monopoly solution.
376. More interesting, therefore, is the number of violations that could, potentially, lead to gambling problems. In this respect, the Authority concludes from the material submitted by Norway that violations of the rules concerning machine functionality is not a substantial problem. In its 2001 Annual Report, the Gaming Board explained that it had examined the functionality of 238 gaming machines, but that it had discovered no illegal machines, nor faults or manipulation of software. In 2002, the Gaming Board made a check of 16 533 machines. As a result, it confiscated 96 gaming machines of which 48 were due to lack of installation permits, 13 to lack of type approval and 35 to lack of both. In percentage terms, 0.58% of the examined machines were confiscated. For the years 2003 and 2004, respectively 56 and 71 machines were shut down because previously granted permits were no longer applicable. Moreover, in both years, five machines were confiscated by the police due to lack of installation permits or type approval. On that basis, the Authority can only agree with the Government when it states that "*...inspections carried out by the Gaming Board have not uncovered many breaches of the regulations as regards non-type-approved software in type-*

²⁸⁸ Cf. "Norske Pengespel i ei digital framtid". The Report is described above in point II.2.d) and can be found at: <http://www.lottstift.no/dav/777B6D675EB34C4FB083227A8C3C639D.pdf>.

²⁸⁹ In 2002, the Gaming Board only issued 2 rectification orders directed against gaming machines. This low figure is due to the original policy of the Board to commence its work with guidance and information rather than by making formally binding decisions, **Annex 10**, the Gaming Board's Annual Report for 2002. In 2003, the Board began taking more formal decisions and issued in total 1 242 rectification orders in relation to gaming machines. **Annex 57**, the Gaming Board's Annual Report for 2003. In 2004, the number was 1 792 for both gaming machines and amusement machines. The Gaming Board's Annual Reports for these years contains no further information about what these rectification orders were about, except that they concerned different, formal shortcomings connected to the authorisation. **Annex 59**, the Gaming Board's Annual Report for 2004. Yet, according to information available to the Authority, the bulk of the orders were issued due to lack of proper *labels* showing that the machine in question had been approved by the Gaming Board. Similarly, it is the Authority's understanding that 92% of the breaches discovered in 2004 related to rules of a purely formal nature, such as the label requirement, cf. in this respect point II.2.a) above.

approved gaming machines”²⁹⁰ and “[i]n Norway the problem is not the presence of unlicensed software.”²⁹¹

377. In conclusion, the Authority submits that the monopoly cannot be justified by recourse to an argument that the normal rules for corrections and enforcement of generally applicable laws and regulations pertaining to the gambling operators do not suffice.

g) The monopoly is necessary in order to ensure expeditious enforcement

g.1) Norway’s argument

378. In the view of the Norwegian Government, the monopoly model is necessary because the present licensing system does not allow for expeditious enforcement and thereby for a swift protection of the gamblers against illegally aggressive machines:

*“The fact is that when a breach of a licence has been detected in a licence-based model, this does not necessarily mean that the offender can be required to remedy the breach immediately, which is the case in a state-controlled exclusive rights model. As opposed to what the Authority seems to believe ... [in its letter of formal notice], the ordinary mechanisms of public law cannot be summarily dispensed with in a rights-based licensing model in the same way as when the Government holds the rights for itself, as a private licensee is free to dispute any governmental action according to a licence through the court system. In a governmental exclusive rights model, on the other hand, the dispute will not occur since the Ministry has competence to instruct the board directly”.*²⁹²

379. In a memorandum from the Ministry of Culture & Church Affairs to the Culture Committee of the Storting it was stated:

*“That the Gaming Board, within the present gaming machine market, is forced to comply with the same administrative guarantees of legal protection as other administrative organizations, is an important argument in relation to the establishment of a monopoly for Norsk Tipping, because Norsk Tipping’s activities are controlled directly by the Ministry and, therefore, not regulated by the same administrative, and therefore time-consuming, procedures for determining and amending regulations and practices in connection with the company’s activities.”*²⁹³

380. As an example of the problems the Government perceives with the licensing system, the Bill mentions that

“[i]n the spring of 2002 the Norwegian Gaming Board approved the withdrawal of the technical approvals for three approved types of machine based on new information regarding the mode of operation of the machines. The grounds for this decision were that, in the opinion of the Norwegian Gaming Board, the machines’ software was in breach of the principle that the payout of winnings

²⁹⁰ Cf. the Government’s letter of 16 February 2004, summarised above in point III.c), **Annex 29**.

²⁹¹ Cf. the Government’s letter of 1 September 2003, summarised above in point III.b) **Annex 27**.

²⁹² Reply to the letter of formal notice, page 41, **Annex 31**.

²⁹³ Cf. the Ministry’s memo of 23 May 2003 to the Storting’s Culture Committee, **Annex 27**, letter from the Norwegian Government of 1 September 2003, enclosure 6 thereto.

from machines must be random in its manner. The decision was appealed to the Lottery Appeals Board to clarify the authorities' right to withdraw previously issued licences as well as clarify the technical questions raised. In January 2003 the Lottery Appeals Board decided that in this case the withdrawal of previously granted licences could not be implemented. The respective machines can therefore remain deployed in the Norwegian market with a mode of operation regarded by the professional authorities as in breach of the rules.”

g.2) The Authority's submission

381. The Authority fails to see the particular difficulties advanced by the Norwegian Government. Moreover, the Authority in any event disputes that such delays in enforcement could justify the dramatic step of introducing a monopoly. According to Norwegian administrative law, the general rule is that neither an administrative complaint nor instigation of judicial proceedings has suspensive effect. Therefore, a decision to revoke an operator's licence for infringing gaming regulations would normally have immediate effect. Moreover, nothing would prevent the Government from inserting an explicit provision to that effect in the legislation regulating gaming services. New licences could be issued under the express condition that an operator undertakes to follow the instruction of the Gaming Board until that instruction might be quashed by a court or higher administrative body.
382. Finally, the Authority would like to comment on the case quoted above concerning withdrawal of type approval for a certain type of gaming machine. Following the annulment of the Gaming Board's decision by the Lottery Appeals Board, the manufacturer sought damages from the Norwegian Government. By a judgment of 21 November 2005, the Oslo City Court found in favour of the Government as it considered the decision of the Gaming Board to have been legal.²⁹⁴ In the Authority's opinion, this case indicated that the surveillance of the Gaming Board is indeed effective and likely to catch those machines it considers to be in breach of the applicable rules.

h) The monopoly will reduce crime related to money gambling

h.1) Norway's argument

383. In the Bill behind the contested act, the Norwegian Government mentioned the desire to be able to combat crime more effectively as one of the main reasons for introducing the monopoly. According to the Government:

“Despite the increasing focus from the machine operators on the prevention of enforced entry, vandalism and theft from the machines, crime statistics from the Central Statistics Office do not show any clear decline in crime connected with prize machines. ... Today there is a significant crime problem related to game 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

²⁹⁴ Judgment of 21 November 2005, *Errel Industries BV and Europlay AS mot Staten v/ Kultur- og kirkedepartementet*, **Annex 60**.

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 responsible manner possible.”²⁹⁵

384. Moreover, the Government mentioned that the OECD had commissioned a special group to examine the problem of money laundering. In this respect, the gaming industry was defined as a potential sector in which money laundering could take place.²⁹⁶
385. Similarly, throughout the administrative proceedings, the Norwegian Government invoked the need to combat crime as a justification for introducing the monopoly. Thus, for example, in its reply to the letter of formal notice, the Government stated that various types of crime were linked to the current system of gaming machines, namely thefts, embezzlement/fraud, bribes from licensee/operator and money laundering. According to the Government, these types of crimes are either known, or supposed to be an unwanted but significant part of the gaming market. Subsequently, the Government has toned down this justification argument. According to the judgment of the Oslo City Court, the Government acknowledged during the proceedings that the consideration with regard to crime was not an important part of the case.

h.2) The Authority's submission

386. As held by the Court of Justice in *Gambelli*, it is not sufficient that the State invokes the need to combat crime related to gambling in order to justify a restriction on gaming activities. The State has to show not only its good intentions, but also that the restriction is objectively necessary:

“As to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.”²⁹⁷

387. The Norwegian Government's arguments partly relate to crime by persons unconnected with the industry, such as theft and vandalism against the machines, and partly to crime connected with the actual running of the machines, such as money laundering. With regard to both sets of crimes, the Authority does not dispute that the concrete measures envisaged by Norway in the form of e.g. vouchers might potentially lead to a reduction in crime. However, as will be shown in the following, the introduction of these measures is not dependent upon a monopoly.
388. With regard to crime committed by persons unconnected with the industry, the Norwegian Government has argued that the envisaged “network solution” will have a positive effect. Not disputing that this might be the case, the Authority maintains that this does not create any causal link between the possible crime

²⁹⁵ Cf. respectively point 4.3 and point 4.5 in Ot. prp. No. 44 (2002-2003), **Annex 9**.

²⁹⁶ Cf. point 4.3 in Ot. prp. No. 44 (2002-2003), **Annex 9**.

²⁹⁷ Case C-243/01 *Gambelli*, cited above, paragraph 74.

reduction and the monopoly. As recognised by the Government itself in the administrative procedure, these measures could just as easily have been enacted under a licensing system.²⁹⁸ Indeed, as stated in the Bill, “[T]he *positive effects of different types of machines, paper receipts and network connectivity can also be achieved by private operators*”. As already highlighted, a similar online system was in the process of being developed by the Gaming Board in collaboration with private operators when the Government chose to come forward with its proposal for an exclusive rights model. According to the Gaming Board this system would have given an early warning of theft from the machines; in other words the very same advantage that the Government now highlights in relation to the similar system in the monopoly model.²⁹⁹

389. Furthermore, the fact that the Government wants to introduce paper receipts for prizes does not in itself make the gaming machines less attractive for theft and burglary. Norsk Tipping’s machines also require the player to introduce cash into the machine in order to play. The fact that the player receives a receipt instead of cash payment if he wins a prize does therefore not reduce the amount of cash in a machine. On the contrary, as 78% of the sum inserted into the current machines is to be paid out in cash in the form of winnings, one would assume that those machines, all things equal, contain less cash than the ones introduced by Norsk Tipping. If that assumption is not correct, then it is only due to the requirement in the current regulations that the machines shall contain a minimum of 20 000 NOK in cash in order to provide for prizes. Consequently, the system of receipts does not in itself diminish the incentive to break into the machine. Indeed, according to Norsk Tipping itself, the important new element in this respect is merely that the location owner will have to empty the machine every day.³⁰⁰ The Authority would assume that the Norwegian Government would not dispute that this requirement could equally well be introduced without an exclusive right for Norsk Tipping. Similarly, that the system with receipts and a reduction in the requirement of a minimum amount in cash in each machines could be introduced with effect for privately owned machines.³⁰¹
390. With regard to crime related to private persons or undertakings involved in the gaming sector, the Authority submits the following:
391. According to statistics available from the Gaming Board, in 2003 the Board referred a total of five cases to the police, in each case because the machine did not have a type approval. The Authority is not in possession of figures for 2004 and 2005, but the figures for 2003 do not indicate that the number of illegal machines is higher than in countries where the sector is subject to a monopoly *de jure*. In 2004, only five out of app. 15 000 machines were confiscated by the police due to serious violations. The Government has claimed that, in more than one case, a bribe has been offered to location owners to secure the most attractive sites. However, no documents have been submitted to substantiate these assertions and

²⁹⁸ Cf. the Government’s letter to the Authority of 1 September 2003 summarised above in point III.b), **Annex 27**.

²⁹⁹ Cf. above in point II.2.d).

³⁰⁰ Letter of 15 January 2004 from Norsk Tipping to the Ministry of Culture and Church Affairs, page 4, **Annex 17**.

³⁰¹ In any event, the Authority would suggest that there is something fundamentally unreasonable in prohibiting a private economic activity because the undertakings concerned are the victims of crime from persons not connected to them. This is especially so since the rules under the licensing system are construed so that the loss incurred as a consequence of theft is fully borne by the operators and the locations owners, and not by the charities.

only two cases have been mentioned explicitly. Similarly, despite the Authority's invitations to do so, the Norwegian Government has not substantiated the suggestion that private operators have been involved in other forms of crime. More importantly, the advantages of the monopoly model that the Norwegian Government presents in relation to combating embezzlement are all related to the online system that the Government acknowledges could equally have been implemented under the old licensing system.

392. Especially with regard to the risk of money laundering that the Government referred to in the Bill behind the contested act, the Gaming Board has stated the following:

“The Gaming Board is aware that it is especially the State-owned games (Norsk Tipping and Rikstoto) that are connected with the problem of money laundering. The reason for this, apart from turnover and the sizes of winnings, is the possibility for unregistered playing and that gaming receipts/proof of winning are given. This is different from, for example, gaming machines where an upper limit for prizes is in place and the fact that, at present, no receipt is given.

Gambling on horse and sulky racing is probably the type of game that is most often connected with money laundering. Some of the gambling takes place with unregistered vouchers, the gaming takes place within a limited time and location and eventual winners will be on the spot there and then. There is reason to believe that networks and environments have been developed around some of these gaming locations to ensure the turnover of unregistered winning receipts.”³⁰²

393. With this assessment, the Gaming Board confirms a similar opinion expressed by the Ministry of Justice in 1999 according to which: “*money laundering through gaming is at present mostly connected to totalisator (Toto) gaming*”.³⁰³
394. In the Authority's opinion, the fact that the Norwegian Government has found that a range of other forms of gambling can be controlled reasonably well without the need for an exclusive right for Norsk Tipping in itself casts doubt on the argument relating to crime prevention.³⁰⁴ It is particularly difficult to see why the Government needs to have a state monopoly to prevent crime connected to gaming machines when it has, at the same time, given a non-state operator a licence to run horse betting activities, the area in which the Government's own control body has found the potential for money laundering to be most present. No action has been taken to stop unregistered horse race gambling.
395. In conclusion, the Authority respectfully submits that the prevention of crime does not necessitate the introduction of a monopoly.

³⁰² Cf. letter of 18 October 2004 to the Ministry of Culture and Church Affairs, **Annex 58**. Underlined and translated by the Authority.

³⁰³ Cf. Ot. prp. No. 84 (1998-1999), point 10.1.4, translated by the Authority. The original Norwegian text reads as follows: “*hvitvaskning av penger gjennom spill er i dag mest aktuelt i tilknytning til totalisatorspill.*”

³⁰⁴ Cf., for a broadly similar reasoning, paragraph 29 of Advocate General Fennelly's Opinion in Case C-67/98 *Zenatti*, cited above.

i) The monopoly will help to ensure that the 18 year age restriction is better respected

i.1) Norway's argument

396. When introducing the proposal for a monopoly for Norsk Tipping, the Norwegian Government stated that one of its major aims was to obtain a more effective enforcement of the 18 year age restriction on playing gaming machines. Moreover, during the administrative procedure, the Norwegian Government has argued that less aggressive machines and better control through prize vouchers will enable Norsk Tipping to place gaming machines in areas accessible to minors such as gas stations, kiosks, public waiting rooms, etc., without damaging the effectiveness of the enforcement of the age restriction. In the view of the Ministry, *“the benefits from the monopoly model itself make it possible to allow machines into locations without absolute access control”*.³⁰⁵

i.2) The Authority's submission

397. On the basis of the Annual Reports of the Gaming Board, documented violations of the age restriction are fairly limited in number.³⁰⁶ Scientific research, however, suggests otherwise as it finds that also youths less than 18 years of age play on gaming machines.³⁰⁷
398. To the Authority, it is evident that the monopoly model does not, as such, have any impact on whether the 18 year age restriction on gaming machines is effectively enforced. Both under the former and under the new regime, the main responsibility for enforcement rests with the local operator.³⁰⁸ Moreover, the contested Act does not in any way change the fact that the local operator continues to have the same economic interest in high turnover from the machines placed on his premises, his commission remaining proportionate to the earnings from these machines. As Norway itself has stated in the Government's action plan to prevent problem gambling from April 2005:

*“For age limits to function as an effective regulatory measure, it is important that they are observed and respected by the operators. A weakness with this scheme is that it is the local operators who are responsible for ensuring age limits are complied with. Operators however, also and simultaneously, have an interest in ensuring that revenues are high, as their commission is normally based on a fixed percent of the total revenues.”*³⁰⁹

³⁰⁵ Cf. point IV.1.3 of the Norwegian Government's letter to the Authority of 1 September 2003, **Annex 27**. See also the Government's reply to the letter of formal notice pages 34-35, **Annex 31**.

³⁰⁶ The Gaming Board's inspections in 2004 revealed 24 cases of violations of the 18 year age restriction. In 2003 the number was 48.

³⁰⁷ Cf. point VI.a) above. Similarly, both the 2003 and the 2004 Annual Report of the Gaming Board underline that the amount of players who are violating the age limit is probably much higher than what has been revealed.

³⁰⁸ Cf. the 2004 Annual Report of the Gaming Board according to which a heavy responsibility is placed on the location owners of the premises to secure observance of the age restriction.

³⁰⁹ **Annex 22**. Cf. also page 55 of the Gaming Board's Proposal for action plan, **Annex 21**. Considering the seriousness with which the Norwegian Government views under age gambling, it is in the Authority's view worth noting that the possible sanctions against the responsible location owner appear to be fairly mild. According to the Gaming Board's 2004 Annual Report, the owner is ordered to improve the control, and only after several breaches have been discovered by the Board can his authorisation be withdrawn. No authorisations were withdrawn in 2004.

399. One way to address this issue would be to fix the local operator's fee for each machine, instead of linking it to the turnover of the machines. Other possible measures to ensure compliance with the 18 year age restriction could, for example, be to pay winnings out in vouchers that had a short redemption period and which could only be exchanged at the same location and only to the extent that the person concerned submits proof that he or she is more than 18 years old.³¹⁰ Such measures could be introduced equally well in a monopoly model as under a licensing system. The Authority, therefore, submits that the monopoly cannot be regarded as an effective means to secure enforcement of the age restriction.
400. Finally, the Authority recalls that under the Government's first proposal of June 2002, it was argued that, in order to reduce exposure of young persons to gaming machines, the installation of the machines should be confined to premises to which minors were denied access. Consequently, they should not be allowed in, for example, shops and service stations. Yet no such limitations were to be found in the final Act introducing the monopoly.

ON THESE GROUNDS

Which it reserves the right to supplement or develop should this prove to be necessary, the Authority respectfully requests that the EFTA Court declares:

That the Kingdom of Norway, by amending the Norwegian gaming and lottery legislation in “*Lov av 29. august 2003 om endringer i pengespill- og lotteri-lovgivningen*”, which introduces a monopoly with regard to the operation of gaming machines, has infringed Articles 31 and 36 of the EEA Agreement

and

That the Kingdom of Norway be ordered to bear the costs.

For the EFTA Surveillance Authority

Niels Fenger
Director

Per Andreas Bjørgan
Senior Officer

³¹⁰ Conversely, if the period is set at several days, the possibility for circumvention would probably be quite high as an under-aged player can then ask an older person to cash in the voucher.