REPORT FOR THE HEARING
in Case E-1/06

APPLICATION to the Court 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 in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway

supported by the **Kingdom of Belgium** and the **Republic of Iceland**, as interveners,

seeking a declaration from the Court that the Kingdom of Norway (hereinafter "the Defendant"), by adopting the Act No 90 of 29 August 2003 Relating to Amendments to the Gaming and Lottery Legislation (*Lov av 29. august 2003 nr 90 om endringer i pengespill- og lotterilovgivningen*, hereinafter "the contested legislation") which introduced a monopoly for the State-owned undertaking Norsk Tipping AS to operate gaming machines in Norway, has infringed Articles 31 and 36 of the EEA Agreement.

I Introduction

1. The case concerns legislation transforming the current regulation of the gaming machine market in Norway from a licensing system into a State monopoly. By its application, the EFTA Surveillance Authority (hereinafter "the Applicant") seeks to obtain an order from the Court that this legislation violates the EEA law provisions on the freedom of establishment and the freedom to provide services, in particular as it fails to reflect a systematic and coherent approach to the gaming market in general and to comply with the principle of proportionality.

II Legal background

The gaming market in Norway and its regulation

2. Under Norwegian penal law,[1] operating games not permitted by special legislation constitutes a criminal offence. Exemptions from the prohibition against gaming operations are to be found in the Totalisator Act,[2] the Gaming Act,[3] and the Lottery Act.[4]

3. Under the Totalisator Act, as amended, the foundation Norsk Rikstoto is given exclusive rights to operate horse-race betting under the supervision of the Ministry of Agriculture. Norsk Rikstoto is obliged to financially support horse racing and Norwegian horse breeding.

4. The Gaming Act applies exclusively to Norsk Tipping AS, a company established by law in 1946 in connection with football betting which was later converted into a fully State-owned public company supervised by the Ministry of Culture and Church Affairs (hereinafter "the Ministry"). The Gaming Act gives Norsk Tipping sole rights to operate gaming activities related to sports competitions and other competitions not regulated in the Lottery Act, the game Lotto, and other games as decided by the King (i.e. the Government). The profits of Norsk Tipping's activities are to be equally divided between sports objectives and cultural objectives. Within that scale, the exact distributions are decided partly by the Ministry and partly by Storting (the Norwegian Parliament).

5. The Lottery Act covers all gaming activities involving money which are neither regulated by the Totalisator Act nor the Gaming Act. Under the Lottery Act, a lottery may only be held for the benefit of humanitarian or socially beneficial causes. Moreover, a lottery may only (with certain limited exceptions) be operated on the basis of a prior permit on behalf of a charitable organisation.

6. Since 1995, gaming machines have been treated as lotteries pursuant to Section 1(e) of the Lottery Act. The biggest license-holders for gaming machines, the Norwegian Red Cross, the Sea Rescue Association and the Norwegian Association for the Disabled, also operate their own machines. The other organisations employ commercial companies to operate games for them, against a price or fixed percentage of revenues. Thus, private persons and commercial enterprises can – after having received authorisation – arrange lotteries on behalf of a socially beneficial or humanitarian organization or association, provided that a minimum of 35% (later 40%) of the profits goes to these causes.

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1 Sections 298 and 299 of the Norwegian Penal Code (*Straffeloven §298 og 299*) .

2 Act of 1 July 1927 No 3 (*lov av 1. juli 1927 Nr.3 om veddemål ved totalisator*).

3 Act of 28 August 1992 No 103 (*lov av 28. august 1992 Nr.103 om pengespill mv)*.

4 Act of 24 February 1995 No 11 (*lov av 24. februar 1995 Nr.11 om lotterier mv)*.

7. In 2004, 138 different companies operated a total of approximately 15,600 gaming machines. The biggest of those companies, Norsk Lotteridrift AS, owned by a Dutch subsidiary of the Swiss bank UBS, operates approximately 4200 gaming machines. The gross turnover (before prizes are deducted) from all gaming machines in 2004 was NOK 26 billion and has been constantly increasing over the last years.[5] The net turnover/revenue (after deduction of prizes) generated by gaming machines in 2004 was NOK 4.96 billion. The minimum payback ratio for gaming machines in Norway is 78%. In 2004, 40,5% of the revenue generated by gaming machines was distributed to charities, 20% was paid out to the owners of the premises where the machines were located, and the remaining 39,5% went to the gaming machine operators. By contrast, the gross turnover from Norsk Tipping's games in 2004 was NOK 8.8 billion The company's revenue in 2004 was NOK 4.2 billion of which 56% was distributed to Norsk Tipping's beneficiaries, 29% covered the company's administrative costs and 15% went to Norsk Tipping's commission agents.

8. The Norwegian Gaming Board, established in 2001, has the administrative responsibility for private lottery activities in Norway. All organisations wishing to operate lotteries must apply to the Gaming Board for a licence. The Gaming Board also has the authority to make decisions on applications for installation of gaming machines. When granting approval, a maximum limit may be set for the number of machines that may be installed. 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. In the event of provisions laid down in, or pursuant to, the Lottery Act being violated, the Gaming Board may revoke authorisations and licences. The Gaming Board's surveillance also applies to the games of Norsk Tipping and Norsk Rikstoto.

The reform of the regulation of gaming machines

9. In 1998, Regulation No 853[6] made gaming machines subject to obligatory type approval, following inspection by a test institute. Regulation No 853 prescribes – among other criteria for approval - 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 phasing-out of older machines.

10. In 1999, Storting's Justice Committee[7] rejected a bill by the then competent Ministry of Justice which included changes to the rules on where machines could be installed, banning places like shops, shopping centres, kiosks, petrol stations etc, and mainly confining the machines to especially reserved

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5 By 14% in 2001, 72% in 2002, 48% in 2003, 14% in 2004 and 3-5% in 2005.

6 Regulation of 28 August 1998 No 853 on type approval of gaming machines (*Forskrift om typegodkjenning av gevinstautomater*).

7 Innst. O. No 33 (1999-2000) of 9 December 1999.

areas (arcades).[8] The Committee concluded that the Ministry should reassess its proposal based on the premise that the charity organisations' income must be secured.

11. Following a new proposal by the Ministry, Regulation No 982 was adopted in 2000,[9] changing the requirements on type approval in Regulation No 853. The new Regulation inter alia increased maximum prizes from NOK 200 to NOK 2000, and reduced the minimum sequence time of a game from 3 to 1.5 seconds. At the same time, an age limit of 18 years was introduced.

12. In April 2002, individual members of Storting called for a drastic reduction in the number of authorisations to operate gaming machines as well as in bets and prizes. The competent Storting Committee called on the Ministry for proposal for new rules.[10] The Ministry's subsequent consultation paper of 21 June 2002 was based on a continuation of the licensing system for private operators, but with stricter regulation of where gaming machines could be deployed. Instead of locations entailing exposure of minors and people with problematic gambling behaviour, the Ministry proposed that gaming machines should only be allowed in areas where minors would not have access. The Ministry further envisaged an increase of the charities' fraction of the revenues from 35% to 45% to the detriment of the machine operators. The Gaming Board, in its comments, agreed with the Ministry's approach, especially on the need to have a more restrictive policy on the placement of machines in order to satisfactorily enforcing age-control. The operators and charitable organisations, on their parts, opposed the proposal since it allegedly would lead to a reduction of gaming locations in the range of 75-80% and a diminution in revenue of approximately NOK 500 million per year.

13. In the meantime, Norsk Tipping, upon invitation from the Ministry, presented on 2 July 2002 and in a letter of 19 September 2002 a model showing how Norsk Tipping could take over the operation of gaming machines (the number of which is to be reduced to approximately 10,000 and placed in restaurant/pubs/bars, Bingo halls and race tracks, so-called "stjernekiosks", and gaming halls/arcades/cafés) on the basis of an exclusive right. Ensuring that the maximum profits go to the charities with fewer machines was stated as the main reason for introducing a monopoly. Norsk Tipping assumed that without its entry into the market, these charitable causes would probably have to expect a reduction in future earnings due to the measures expected from the authorities. Despite the expected 40% loss in turnover with a smaller number of machines, their lesser aggressiveness and a more effective enforcement of the age limit, Norsk Tipping estimated that it would bring in about the same amount in

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8 Ot. prp. No 84 (1998-1999) on the Lottery Act and the Gaming Board.

9 Regulation of 27 September 2000 No 982 on changes in the Regulation on type approval of gaming machines (*Forskrift om endring I forskrift om typegodkjenning av gevinstautomater*).

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

revenues to be distributed to charities, thanks to lower operational costs. The company, among other things, also announced strategies such as "build up an organisation with 'guts'", to "develop brand names (Jack Vegas – Miss Vegas)", to "focus on products with good earnings" and to "emphasise the importance of finding games that attract 'non-gamers'."

14. Subsequently, on 25 October 2002, the Ministry sent out a (second) consultation paper, based on Norsk Tipping's exclusive rights model. Having pointed to breaches of the terms for deployment, enforcement of the age limit, problems with addiction connected with gaming machines, and the will to increase the proportion of profits paid out to charities, the Ministry summarised the advantages of the proposed model as follows: The organisations' incomes are secured, 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, and the authorities obtain full control over the mode of operation of the machines. A monopoly for Norsk Tipping was described as the best way to be able to reduce the number of machines at the same time as maintaining the financial level for charitable causes. By contrast, the Ministry now assumed that the tightening of deployment policy envisaged in its former proposal could not be implemented under the current model without a significant reduction in profits to the socially beneficial and humanitarian organisations. In reaction to this proposal, Norsk Tipping confirmed that it intended to run the machine enterprise 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.

15. On the basis of the model presented in the Ministry's second proposal, on 14 March 2003, the Government adopted a bill to be put forward to Storting.[11] The Ministry stated that the main reasons for the proposal "for a clean-up of the prize machine market" was 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 years more strongly. It was further assumed that an exclusive rights model based on a non-profit company will result in lower operational costs than in today's market. Competition on the gaming machine market for the most attractive prize machines at the most exposed deployment sites was identified as the main factor in exposing minors and people with problematic gambling behaviour to money games. In the Ministry's experience, it has proved particularly difficult to introduce stricter rules within the existing licensing system due to massive resistance in the form of lobbying campaigns from the private game operators. It was expected that in a model based on an exclusive right, the Ministry would be able to change the machines' mode of operation or the deployment rules without extensive procedures and long transitional periods. To remedy the lack of understanding for such stricter requirements that quickly occur with operators

[11] Ot. prp. No 44 (2002-2003), also referred to as the White Paper.

having a direct interest in the earnings from money games made a case for exclusive rights for a State-owned non-profit based operator in the Ministry's view. The Ministry also considered alternatives to a State-owned monopoly operator of gaming machines, such as giving an exclusive right to a private concessionaire which it dropped because in its assessment, they would not or not as efficiently achieve the objectives of the reform or the required direct possibility for control and inspection.

16. The majority of Storting's Family, Culture and Administrative Committee recommended that Storting adopt the bill.[12] The Committee assumed that by giving Norsk Tipping a monopoly for the operation of gaming machines, the State will have full control over the gaming company's enterprise, and all income will be given to the prevailing applicable causes for games and lotteries. The majority also pointed out that this arrangement makes clear the responsibility the Government has at all times with regard to gaming enterprises being operated within a defensible framework, and that the exclusive rights model is a prerequisite for the most socially defensible organisation of the gaming machine market in Norway.

17. After Storting adopted the contested legislation, it was sanctioned by the Norwegian Government on 29 August 2003. The contested legislation was intended to enter into force as of 1 January 2005. This has not happened so far, as the Government awaits the decision of the Court.

The implementation of the monopoly

18. The amendments transfer the administration of gaming machines from the Lottery Act to the Gaming Act. By doing so, they abolish the hitherto existing licensing system for the operation of gaming machines and replace it by a monopoly granted to Norsk Tipping. The machine operations are to be organised as a wholly-owned subsidiary of Norsk Tipping. The company has already procured so-called "Multix" gaming machines from a Swedish producer. The revenues generated by the gaming machines will comprise a part of Norsk Tipping's total revenues.

19. Along with the introduction of an exclusive right for Norsk Tipping, the number of machines is to be reduced to 10,000. At the same time, the revenues to the charitable causes so far benefiting from gaming machines are to be maintained at the 2001 level. The Ministry thus determined that the equivalent of the organisations' net income from gaming machines in 2001 shall, for the greater part,[13] be given to social and humanitarian organisations as a third charitable cause (following sports and culture) in the form of a fixed share of 18% of Norsk Tipping's overall profits from gaming.

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12 Recommendation of 6 June 2003, Innst. O. No 124 (2002-2003).

13 The smaller part of that equivalent shall be continued to be given to sports.

20. Furthermore, according to the bill, all deployed machines are to be connected together in an electronic network that gives continuous access to information concerning cash flow and the mode of operation of the machine. The payout of winnings will be in the form of a paper receipt that must be exchanged with the owner of the premises instead of direct cash payouts from the machine. Therefore the enforcement of the 18 years rule is expected to be significantly easier in the new model. The owner of the premises also has the opportunity of denying players access to the premises if they cannot prove that they are 18 or older. Although it is conceded that the positive effects of different types of machines, paper receipts and network connectivity can also be achieved by private operators, the monopoly model is deemed superior. Finally, the proposal is conditional on the machines being deployed in controllable premises with an emphasis on large kiosks as well as establishments such as restaurants pubs and bars. In addition machines will be deployed in connection with bingo halls/race tracks, in gaming cafes and in a small number of larger gaming halls. Deployment in grocery stores and shopping centres will cease.

21. While the Government's bill was still pending before Storting, Norsk Tipping, in its "*Concept for a basic solution for Norsk Tipping's gaming machine business*"[14] under the heading "*Target groups*" expressed its intention to "create a new market for gaming machines – a market with a positive reputation." Through branding, choice of channels and a tailored offer of games, the company intends to address different kind of players than today's machine users. In that respect, Norsk Tipping regarded as essential that the turnover in all machines be increased quickly in order to fulfil the economic plans, based on the current 500,000 gaming machine players. To reach that goal, the company announced its intent to increase the number of players (who will bet for lower amounts as compared to the current situation) by recruiting new players. The explicit goal was to at least double, within three years, the number of players on gaming machines. The intention to recruit more gaming machine players and decrease the turnover per player at the same time was confirmed in Norsk Tipping's 2003 Annual Report. As to the parameters to be implemented to prevent and combat gambling addiction, Norsk Tipping spoke out in favour of an increase in the minimum game sequence from 1.5 to 3 seconds, to slightly lower the lowest return percentage from 78% to 75%, and to reduce the maximum prize per game from 2000 to 1500. Whereas the Gaming Board had proposed maximum prizes of only NOK 750, the Ministry endorsed Norsk Tipping's view to keep the maximum prize at NOK 1500.

22. On 25 May 2004, the Ministry issued both the terms applicable to the installation of gaming machines and the gaming rules for gaming machines to be applied by Norsk Tipping. On 1 September 2004, it also issued provisions regarding technical control requirements for the gaming platform. According to

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[14] The Defendant objects to the relevance of Norsk Tipping's proposals to the extent that such proposals were not followed up by the Ministry, in particular the proposal to double the number of players.

the latter, all games for Norsk Tipping's gaming machines should be checked by the Gaming Board prior to their launch on the market.

23. Reacting to the judgment by the Oslo City Court (see below), the Ministry on 17 November 2004 wrote a letter to Norsk Tipping where it called upon the latter make the following presumptions its basis in future activities: (1) The purpose behind providing Norsk Tipping with a sole right to operate gaming machines is to combat gambling addiction and prevent crime more effectively, improve the control of irregularities connected to machine operation and better enforce the 18-year age restriction; (2) Active marketing of Norsk Tipping's gaming machines shall not take place, beyond what follows from the machines' bare presence at the location; (3) 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; (4) 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 (approximately 9 billion). If the turnover shows sign of exceeding this level, then Norsk Tipping shall initiate measures to correct the trend.

EEA law

24. Article 31(1) EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

25. Article 36(1) EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

The proceedings before national courts

26. On 18 August 2003, the Norsk Lotteri- og Automatbransje Forbund (NOAF), later joined by Norsk Lotteridrift (NLD), brought an action against the Government before Oslo byrett (Oslo City Court), claiming that the introduction of the monopoly was contrary to EEA law. In its judgment of 27 October 2004, the City Court sustained the application and concluded that the contested legislation was contrary to Articles 31 and 36 EEA.

27. On appeal by the Government, the Borgarting lagmannsrett (Borgarting Court of Appeal) overruled the City Court's judgment on 26 August 2005 by reaching the conclusion that the contested legislation did not infringe EEA law.

28. Norges Høyesterett (The Norwegian Supreme Court), concerned with the case on appeal against the Court of Appeal's judgment, decided on 5 December 2005 to suspend its proceedings in order to await the outcome of the proceedings of this Court.

III Pre-litigation procedure

29. By a letter of 22 January 2003, the Applicant informed the Defendant of the receipt of a complaint concerning the proposal to grant Norsk Tipping the exclusive right to operate gaming machines in Norway. In its reply of 24 February 2003, the Defendant justified that move by pointing to the technical development of gaming machines which had made it increasingly cumbersome to control machine functionality, and to private operators pushing the limits of what may be allowed in a machine and striving for exposed locations easily accessible to the public. These effects were to be ascribed to competition within the market. Also, massive lobbying against governmental proposals made it difficult to introduce more stringent rules within the prevailing system whereas an exclusive right model would allow for fast and effective amendments. Moreover, the Ministry referred to benefits accruing from the envisaged incorporation of machine revenues to the total profit from all of Norsk Tipping's gaming activities, namely that the charities' revenues will to a lesser extent be dependent on alternations in earnings from machines, thus enabling the Ministry to adopt a more suitable and effective gaming policy with regard to necessary amendments to regulations.

30. In replying to questions by the Applicant in September 2003, the Defendant referred to prevention of gambling addiction as the main objective of the establishment of the monopoly, and the reduction of crime (such as illegal use of charity revenues, robbery from machines, theft of machines and money laundering) as an additional objective. By enabling the Ministry to exercise direct influence on the operation of gaming machines, the monopoly will ensure a substantial reduction in the total number of machines, more satisfactory machine

functionality and the installation of machines in more appropriate gaming environments. The Defendant acknowledged, however, 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, violations to the regulations were deemed less likely to occur within a monopoly model, since 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. As to enforcement of the age control, the Defendant conceded that granting a sole right to Norsk Tipping does not include the same strict limitations on the location of machines as outlined in the Ministry's proposal of 21 June 2002. However, the Ministry considered that the benefits from the monopoly model itself make it possible to allow machines into locations without absolute access control.

31. In its reply dating 16 February 2004 to a second letter by the Applicant, the Defendant confirmed that Norsk Tipping was currently offering on a trial basis money games via electronic platforms such as the Internet, digital television and mobile phones (SMS). With the exception of one game, however, these were classified as low risk games in terms of gambling addiction. As to the marketing of Norsk Tipping's games, the Defendant stated that licensed money games and lotteries may be marketed within the framework of the general marketing rules and quoted the Minister of Culture and Church Affairs saying that "Norway's gaming policy aims for a moderate expansion of gambling opportunities." The Defendant emphasized that Norsk Tipping's marketing was essentially connected with brand building and the promotion of low risk games such as Lotto, and that an increase in Norsk Tipping's marketing budget will not necessarily mean an increase in the company's turnover and profit. As to the alleged problem of breaches of the rules applicable to gaming machines, the Defendant conceded that the main problem in Norway was not that the machines contain software which is not type approved. The problem with the licensing system was rather that it lacked the flexibility allowing quick alterations and implementation of desired measures in connection with problematic games. The Defendant further acknowledged that the statistics show no noticeable increase in recent years in crime linked with gaming machines.

32. On 23 April 2004, the Applicant sent the Defendant a letter of formal notice, contending 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. To support this, the Applicant referred to, inter alia, a statement made by the then Minister of Culture and Church Affairs, 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." Besides, the Applicant found fault in alleged inconsistencies in the Norwegian gaming policy, namely that Norsk Tipping has been among the three largest advertisers in Norway, that it had introduced several new games and developed new ways of gambling, and

that its explicit aim was to double the number of game machine players from 500,000 to 1 million. Moreover, the Applicant suggested that the aims of preventing gambling addiction and crime could be fulfilled by less restrictive measures, i.e. within the licensing system. Finally, the Applicant refuted the argument that it was easier to regulate the gaming sector through ownership control rather than through regulation of a public law nature.

33. In its reply by letter dated 28 June 2004, the Defendant denied that the introduction of exclusive rights was based on financial interests. In any event, the financial consequences could be legally taken account of as long as the financial interests do not have an inhibitory effect on the main objectives of the reform. According to the Defendant, its gaming policy was not inconsistent as it was based on a distinction between "low risk" and "high risk" games. As to Norsk Tipping's marketing, the Defendant maintained that its 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. As regards Norsk Tipping's pledge to double the number of machine players, the Defendant countered that letters and media statements of Norsk Tipping were the company's own opinion and did not lie within the Government's responsibility. Finally, the Defendant denied that there were less restrictive alternatives to a monopoly solution since in any case they would not give the authorities the required possibilities of direct control and supervision.

34. On 20 October 2004, the Applicant delivered a reasoned opinion on the case where it expressed its disbelief as to the Defendant's remarks on the motivation for the introduction of a monopoly. Furthermore, the Applicant disapproved of the Defendant's arguments concerning the consistency of its gaming policy, in particular as regards advertising, the introduction of new games and sales channels, and the objective of doubling the number of machine players as pronounced by Norsk Tipping. Finally, the Applicant rejected all of the Defendant's arguments with regard to the proportionality of the monopolization of the market for gaming machines.

35. Having received the Defendant's reply letter dated 19 November 2004, the Applicant decided to bring the case to the Court on 17 November 2005.

IV Forms of order sought by the parties

36. The Applicant claims that the Court should:

> *(i) declare that the Defendant, by amending the Norwegian gaming and lottery legislation in "lov av 29. august 2003 om endringer i pengespill- og lotterilovgivningen", which introduces a monopoly with regard to the operation of*

gaming machines, has infringed Articles 31 and 36 of the EEA Agreement; and,

(ii) order the Defendant to bear the costs of the proceedings.

37. The Defendant contends that the Court should:

(i) dismiss the application as unfounded; and,

(ii) order the Applicant to bear the costs of the proceedings.

38. The Kingdom of Belgium, as intervener, contends that the Court should:

(i) dismiss the application; and,

(ii) order the Applicant to bear the costs of the proceedings.

39. The Republic of Iceland, as intervener, contends that the Court should:

(i) dismiss the application; and,

(ii) order the Applicant to bear the costs of the proceedings.

V Written procedure

40. Written arguments have been received from the parties:

- The Applicant, represented by Niels Fenger, Director, and Per Andreas Bjørgan, Senior Officer, in the Department of Legal & Executive Affairs, acting as agents, assisted by Ólafur Jóhannes Einarsson, Officer, Internal Market Affairs Directorate;

- the Defendant, represented by Fredrik Sejersted, Advokat, the Attorney General for Civil Affairs and Hanne Ørpen, Adviser, the Ministry for Foreign Affairs, acting as agents.

41. Pursuant to Article 36 of the Statute, statements in intervention have been received from:

- the Kingdom of Belgium, represented by Annick Hubert, Attaché, Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as agent, assisted by Philippe Vlaemminck, advocaat;

- the Republic of Iceland, represented by Páll Hreinsson, and Finnur Þór Birgisson, First Legal Secretary and Legal Officer, Ministry of

Foreign Affairs, acting as agents, assisted by Steven Verhulst, advocaat.

42. Pursuant to Article 20 of the Statute, written observations have been received from:

- the Republic of Finland, represented by Johanna Himmanen, Legal Officer, Ministry for Foreign Affairs, acting as agent;

- The Hellenic Republic, represented by Caterina Samoni, Legal Advisor, and Nana Dafniou, Deputy Legal Advisor, Special Legal Service for EU Matters, Ministry of Foreign Affairs, acting as agents;

- the Republic of Hungary, represented by Judit Fazekas, State Secretary, Ministry of Justice and Law Enforcement, acting as agent;

- the Kingdom of the Netherlands, represented by Hanna Sevenster, Head, and Martijn de Grave, Member, European Law Division, of the Legal Affairs Department, Ministry of Foreign Affairs, acting as agents;

- the Portuguese Republic, represented by Luís Inez Fernandes, Director, Legal Affairs Service of the General Directorate of European Affairs, Ministry of Foreign Affairs, and Ana Paula Barros, Director, Legal Office of the Games Department, Santa Casa de Misericórdia de Lisboa, acting as agents;

- the Kingdom of Sweden, represented by Karin Wistrand, Legal Adviser, ministry for Foreign Affairs, acting as agent;

- the Commission of the European Communities (hereinafter “the Commission”), represented by Frank Benyon, Principal Legal Adviser, and Enrico Traversa, Legal Adviser, acting as agents.

VI Summary of the pleas in law and arguments

The Applicant

43. At the outset, the Applicant submits that services are covered by Articles 31 and 36 EEA. The contested legislation entails that existing operators will be removed from the market and makes it impossible in the future for companies of other Member States to obtain licenses for the provision of gambling services

and hence restricts both the freedom to provide services and the freedom of establishment[15].

44. As concerns possible justification, the Applicant acknowledges that gaming services, according to the case law of the Court of Justice of the European Communities (hereinafter "the ECJ"), constitutes a field where Member States enjoy a certain margin of discretion to impose restrictions on grounds relating to the protection of consumers and maintenance of order in society. Neither does the Applicant dispute that the objectives invoked to reduce gambling addiction, prevent underage gambling and combat crime are laudable aims. The Applicant also agrees with the Defendant that the present rules on gaming machines in Norway have resulted in a boom in turnover and have caused lamentable gambling problems. That said, the Applicant puts forward three main claims to support its conclusion that the introduction of a monopoly is contrary to EEA law.

45. Firstly, the restriction concerned must not be motivated by financial objectives. The Applicant infers from jurisprudence that an EEA State may not introduce a monopoly when an important objective behind the monopoly is securing revenue for charities. That a restriction might have such an effect can only constitute "an incidental beneficial consequence" and must not be "the real justification for the restrictive policy adopted."[16]

46. Breaching these prerequisites, the introduction of a monopoly was, in the view of the Applicant, motivated to a considerable extent by an economic aim. The Applicant infers from the legislative history[17] and subsequent developments in the gaming machine market that the Ministry, in dialogue with Norsk Tipping, saw the monopoly model as the only solution that could at the same time reduce the aggressiveness and number of gaming machines in Norway to 10,000 while maintaining the level of revenues to charities corresponding to the level in 2001. The number of machines was chosen to attain that level, and not on the basis of scientific research as to what was socially acceptable. The Applicant opines that a desire to maintain a given income or to reduce the loss thereof is no less financial aim than a wish to increase the income. The objective of securing a given level of revenue cannot be regarded as a mere side effect or an "incidental beneficial consequence" of the contested legislation, but must be seen as an economic aim forming an important and acknowledged basis for the monopoly model.

47. On the Defendant's submission that combating gambling addiction was the only dominating requirement of the reform, the Applicant comments that

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15 Reference is made to Case C-243/01 *Gambelli* [2003] ECR I-13031 at paragraph 48.

16 Reference is made to Case C-243/01, *Gambelli* at paragraph 62.

17 In particular the Ministry's two proposals of 21 June 2002 and 25 October 2002 respectively, Norsk Tipping's proposal of 1 July 2002, the bill in Ot. prp. No 44 (2002-2003), and Storting's Committee's report in Innst. O. No 124 (2002-2003).

assessment of the financial motive relates to the introduction of a monopoly and not the other elements of the reform that could have been enacted under a license system as well. As regards the Defendant's reference to the *Finalarte* judgment,[18] the Applicant disputes that this judgment establishes a general principle that the legislative intent is irrelevant for the legality of a national measure and in turn refers to the judgment in *Portugaia Construcoes*.[19]

48. Secondly, the Applicant maintains that justification of the introduction of a monopoly must fail because of the inconsistency of the Norwegian gaming policy. According to the Applicant, it follows from *Gambelli* that a restriction must reflect a systematic and coherent approach, with the overall objective of genuine diminution of those services.[20] In the Applicant's view, the relevance of the consistency test cannot be denied with reference to earlier judgments such as *Läärä*.[21] Furthermore, that test must not be limited to machine gaming only but must take account of other types of gaming as well, as was done in *Gambelli*. The Applicant essentially argues that the Defendant's approach to gambling addiction is inconsistent in two respects, namely that (1) consumers have, as a result of intense marketing, been actively encouraged to participate in money games, and (2) the Defendant has itself, via its ownership and control of Norsk Tipping, substantially expanded the range of games and gaming opportunities in Norway. Moreover, the Defendant has allowed, and continues to allow, similar measures by other providers of gaming services.

49. The submission that the Defendant allows and performs extensive marketing of gambling services is substantiated by reference to the marketing budget of Norsk Tipping and Norsk Rikstoto.[22] Norsk Tipping is among the largest advertisers in Norway, with the amount of money spent on the rise. It spent NOK 125 million on advertising in 2004 and NOK 145 million in 2005. Norsk Tipping is also the sponsor of the premier league of Norwegian football and enjoys free TV publicity on the national television channel in connection with the draws relating to its games Lotto and Viking Lotto. In the Applicant's opinion, whether or not the marketing activities will actually have a greater or

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18 Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831, see below.

19 Case C-164/99 *Portugaia Construcoes* [2002] ECR I-787 in the operative part. Further reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Court Report 11, at paragraph 33.

20 Case C-243/01 *Gambelli* at paragraphs 67 and 69, and the Advocate General's Opinion in that case, at paragraphs 119-121.

21 Further reference is made to Case E-3/00 *EFTA Surveillance Authority* v *Norway* [2001] EFTA Court Report 75, at paragraph 41, and Case C-212/97 *Centros* [1999] I-1459 and Case 215/87 *Schumacker* [1989] ECR 617.

22 According to a press interview with its sales and marketing manager in 2005 referred to by the Applicant, Norsk Rikstoto increased its marketing budget by 30% to NOK 73 million and "has been unusually visible in the market over the last year, due to a clear marketing strategy." According to the foundation's Annual Report for 2005 "… the number of customers has substantially increased. ... Almost the entire increase in turnover stems from gaming by new customers. Much of the reason to this growth is explained by increased marketing."

lesser degree of success is not conclusive regarding the consistency of the Norwegian approach as long as the intended effect of the marketing is to encourage consumers to participate in gaming activities. That said, the Applicant underlines that Norsk Tipping actually uses marketing as an instrument to create a return, namely the highest possible revenue for charitable causes.[23] In that context, the Applicant mentions that the annual turnover of Norsk Tipping has nearly doubled in the last 10 years and increased by 2,9% in the first half of 2006. Notably, the turnover of "high risk" game Oddsen has increased by 9,8% compared to 2005.

50. That the advertisements of Norsk Tipping and Norsk Rikstoto have been designed to tempt and to encourage gambling is, according to the Applicant, further supported by the character and style of the slogans used. That the Defendant has, in the meantime, issued guidelines prohibiting the two companies from engaging in misleading or overtly aggressive advertising does, in the view of the Applicant, not alter the conclusions drawn. The ban of misleading or overtly aggressive advertising already follows to a large extent from general consumer protection legislation, and the condition in *Gambelli* that the State may not "incite and encourage consumers to participate in" professionally offered games is not restricted to misleading marketing.[24]

51. As to the argument made by the Defendant that Norsk Tipping's marketing does not have as its primary aim to increase the overall gaming turnover, but to channel existing demand towards Norwegian games allegedly less addictive than certain more aggressive international games, the Applicant submits that no evidence has been presented demonstrating that foreign games per se or in general are more dangerous. In that respect, it refers to the *Lindman* judgment where the ECJ did not accept similar arguments put forward by the Norwegian Government.[25] Moreover, the Applicant maintains that Norsk Tipping was already heavily engaged in marketing before its games were subject to competition from games on the Internet. Furthermore, a majority among the Norwegians targeted by Norsk Tipping's marketing would probably never consider participating in internet games offered by foreign providers. The Applicant also questions the legitimacy of publicly endorsed and (indirectly) State-financed marketing with the explicit purpose of having its citizen choose

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23 In that respect, the Applicant refers, inter alia, to statements made by Norsk Tipping's managing director in the 2003 Annual Report: "Even with our exclusive rights in parts of the games market …. [w]e 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… Marketing 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. … 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."

24 Reference is made to German Federal Constitutional Court of 28 March 2006 in Case 1 BvR 1054/01 *Sportwetten*, at paragraphs 131, 134 and 136.

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

national services instead of foreign ones. In any case, allowing national companies to act and respond to competition by aggressive marketing removes the very foundation for their exclusive rights under EEA law.[26] The Applicant also submits that Norsk Tipping allocates 15 times more money to marketing its own products than to informing the public on gambling problems. If the Defendant really wanted to reduce gaming, regardless of whether the service provider is Norwegian or foreign, it would have been more logical to prohibit marketing altogether, an approach taken in relation to alcohol.[27] Instead, according to the Applicant, Norsk Tipping's advertisement of gaming opportunities has the general effect of encouraging consumers to gamble, not only on the games advertised, but also by using other available games and thereby increasing overall demand. Thus, the existing extensive advertising of Norsk Tipping in general would attract players also to the gaming machines even if they are not advertised specifically following the implementation of the contested legislation.

52. The second element of the inconsistency of Norway's gaming policy consists, in the opinion of the Applicant, in the steady expansion of games and gaming opportunities offered by the operators Norsk Tipping, Norsk Rikstoto and Norske Spill which contributed to a substantial increase in their annual profits. For instance, the Applicant reports on a pilot project by Norsk Tipping called "Spill ved kasse" where flat screens are installed in front of the cashiers in grocery shops, appealing to impulse gamblers waiting in line to pay. Whilst increasing the number and variety of games is intended to make them more tempting for consumers, raising the numbers of commission agents and sales agents as well as the use of new technology such as Internet, mobile phones and digital TV increases their availability.[28] In the Applicant's view, whether games that have been redesigned rather than specifically developed for the Internet or mobile phones, are labelled as new or existing games is a purely semantic question.

53. The Applicant also comments on the Defendant's argument that it is not inconsistent to restrict the freedom to provide "high risk" gaming services while actively encouraging consumers to participate in "low risk" games. Whilst acknowledging that in terms of addiction, the risk connected to machine gambling is either the highest, or one of the highest, of the games operated in Norway, the Applicant maintains that the approach chosen by the Defendant is not consistent with *Gambelli*. Furthermore, it denies the existence of a clear-cut distinction between high and low risk games, especially after the introduction of Internet (and SMS) games. Considering the Defendant's intention to bring

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[26] Reference is made to Case C-243/01 *Gambelli* at paragraph 69.

[27] Reference is made to the submissions of the Norwegian Government in Case E-4/04 *Pedicel* [2005] EFTA Court Report 1, and to the Expert Report SOU 2006:11 on the Swedish gaming policy.

[28] In that context, reference is made to the Advocate General in Case C-243/01 *Gambelli* at paragraph 121 of the Opinion.

gaming into controlled rooms, and to prevent persons with gambling problems from unwillingly coming across gaming machines, the Applicant finds it inconsistent that, at the same time, potential gambling addicts are now in a position to sit at home and participate in the money games they choose, for as long as they like. Finally, the Applicant maintains that Norsk Tipping and other operators have been allowed to offer and market games recognized as "high risk", such as Oddsen (sports-betting), Yezz (scratch-cards) or horse-betting. In particular, the Applicant questions the effectiveness of the measures introduced with regard to limiting problematic aspects of Oddsen since the turnover started to increase again in 2005 and 2006 after a brief decrease in 2004.

54. Thirdly, the Applicant contends that, in any event, establishing a monopoly is a disproportionate measure. Under the proportionality test, restrictive measures in pursuit of objectives of overriding interest such as combating gambling addiction are only permissible if they are suitable for securing the attainment of the said objectives and do not go beyond what is necessary to attain them.[29] In this respect, the burden of proof is on the State concerned.[30] A mere explanation in the bill as to why the proposed measures comply with obligations under EEA law is not sufficient to turn around the burden of proof. In the view of the Applicant, the case law according Member States a margin of discretion in the field of gambling activities refers only to the level of protection and does not discharge them from exercising that discretion within the limits of the classical proportionality test, not a "mild" version of one. The Applicant also disputes that the yardstick of "manifest inappropriateness" developed for judicial review of EC legislation can be applied to the review of national measures interfering with the fundamental freedoms.[31] Instead, the Applicant's approach to proportionality is based on the *Gambelli* judgment in particular.[32] The Applicant further refers to the *Lindman* judgment, where the ECJ 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."[33] At the same time, the Applicant objects to the view that the *Läärä* judgment settled that monopolies in the field of gaming machines are per se compatible with the EEA

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29 Reference is made to Case C-67/98 *Zenatti* [1999] ECR I-7289, at paragraph 31.

30 Reference is made, inter alia, to Case E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Court Report 143, at paragraphs 34-35, and Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, at paragraph 22.

31 Reference is made to Case C-299/02 *Commission* v *the Netherlands* [2004] ECR I-9761, at paragraph 24. On the other side, the Defendant objects to the alleged relevance of Case C-491/01 *British American Tobacco* [2002] ECR I-11453 for the present case.

32 Case C-243/01 *Gambelli* at paragraphs 64-65, 72-73 and 75, as well as the Advocate General's opinion at paragraphs 61, 116 and 119, Case C-67/98 *Zenatti* at paragraph 34 and the Advocate General's Opinion 16 May 2006 in the pending Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica*, at paragraphs 128 to 132. The Applicant also points out that the plenum judgment in *Gambelli* does not refer to the lax test previously suggested in the judgment given by a three-judges-chamber in Case C-6/01 *Anomar* [2003] ECR I-8621.

33 Case C-42/02 *Lindman* at paragraphs 24-25.

Agreement. It also points out the factual differences in comparison to the case at hand, e.g. as to the aim of preventing serious crime and fraud. Finally, the Applicant disagrees with the rejection by the Defendant of its approach to proportionality for being "both wide and narrow at the same time", arguing that the latter's criticism confuses necessity and consistency.

55. The Applicant essentially maintains that the monopoly was not necessary in order to achieve the aim of reducing problem gambling. While not raising objections to the concrete measures that Norway has taken in addition to the introduction of the monopoly, the Applicant contends that these measures could have been introduced under the old licensing system. The level of consumer protection sought with the creation of a monopoly could equally have been obtained by normal public law regulation of such a system.

56. As regards the argument that unlike private operators, a non-profit State-owned operator has no incentive to push the limits of prevailing regulations in order to maximise their profit, the Applicant fears that accepting it would give EEA States a blank cheque to introduce State monopolies in basically all sectors subject to public regulation and scrutiny. If eliminating competition in the gaming market may serve as a justification for a monopoly, monopolising that market would be justifiable per se. On that basis, the Applicant submits that a desire to stop competition cannot, as such, be a legitimate aim under EEA law. Aspects of a market driven by competition such as the quest for the most attractive spots to place machines or taking advantage of loopholes in the current legislation concerning machine functionality could be addressed in a proportionate way by changing the applicable legislation. There is no link between a monopoly and tight substantive rules. In the Applicant's opinion, the Defendant has not shown that the market cannot be regulated by way of generally applicable laws and regulations, and that regulation of the relevant subject matter is indeed objectively difficult. On the contrary, the Applicant concludes from the general acceptance of the 1998 regulatory amendments imposing more stringent rules on machine functionality and the subsequent decrease in turnover that the market can in fact be regulated.[34] Correspondingly, the amendments in 2000 introducing more liberal rules led to a significant increase in turnover. In the Applicant's view, the status quo reflects the Defendant's choice not to replace the present rules with more stringent rules concerning e.g. machine functionality and location. In that respect, the Applicant submits that 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.

57. In any event, the Applicant estimates that the undesired competitive elements will not disappear under a monopoly model. In its view, the Defendant has not demonstrated that monopolies generally and genuinely are better at

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[34] Another example mentioned concerns the introduction of a prohibition on the use of banknotes in the gaming machines, with effect from 1 July 2006, which had the significant effect of reducing machine turnover by 20-30%.

controlling and combating gambling problems. On the contrary, Norsk Tipping, in the Applicant's opinion, is to be regarded and views itself as an economic operator with the purpose of creating revenue, as can be seen, inter alia, from the competitions it arranges between its commission agents to increase turnover. By entering into royalty agreements with the chosen producers of gaming machines under which the latter will receive part of the income generated by each game, Norsk Tipping gives the producer of the new machines an incentive to make the machines appealing. Also, the monopoly will not remove the existing competition between the location owners.

58. As to the claim that the operators' opposition to more stringent rules makes it impossible, in practice, to regulate the market, the Applicant maintains that 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. Likewise, the desire to avoid legal proceedings cannot justify the establishment of a monopoly in the EEA legal order which is built on the protection of fundamental rights, including the right to judicial review.[35] Reacting to the argument that a monopoly solution is necessary as it makes it possible to change the way the machines are run and located with less delay than under the old system, the Applicant questions the need for overnight changes and considers the normal rules in Norwegian law capable of allowing for swift regulatory changes. The Applicant also warns of basing the legality of a monopoly on such an argument, since a need for swift changes may be felt in other areas as well, such as food safety, where nobody seriously advocates monopolisation.

59. Correspondingly, the Applicant does not accept facilitation of monitoring of the market as possible justification for a monopoly. Disadvantages of a purely administrative nature are not sufficient to justify a restriction on the freedom to provide services.[36] Furthermore, the Applicant holds the view that comprehensive monitoring can actually be performed under a licensing system, and that nearly all of the breaches concern minor infringements (as opposed to the existence of illegal machines) which could not lead to problem gambling. Basing itself on the numbers of violations reported, the Applicant considers infringements of the rules concerning machine functionality not to be a substantial problem. It is therefore of the opinion that the normal rules for corrections and enforcement of generally applicable laws and regulations pertaining to the gambling operators are sufficient. In the same vein, the Applicant disapproves of the argument that the monopoly is necessary in order to ensure expeditious enforcement.

60. The Applicant also deals with the assumption that the monopoly will reduce crime related to gambling and submits that the introduction of crime

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35 Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Court Report 185, at paragraph 23.

36 Reference is made to Case C-334/02 *Commission v France* [2004] ECR I-2229, at paragraphs 27-29, and the opinion of the Advocate General in that case.

combating measures is not dependent on a monopoly.[37] Quoting the bill leading to the contested legislation,[38] the Applicant seeks to support its claim that measures to fight crimes such as theft and vandalism could have been introduced under the licensing system and were actually already in preparation. Furthermore, the system of receipts does not in itself diminish the incentive to break into machines, as they will continue to require dropping cash into the slot. As regards criminal behaviour such as operating illegal machines, bribery for attractive locations or embezzlement, the Applicant submits the figures are either negligible[39] and/or have not been substantiated, and that measures fighting them could in any case have been equally effectively implemented under the old system. As regards money laundering, the Applicant additionally refers to a letter from the Gaming Board to the Ministry.[40]

61. Finally, the Applicant refutes the presumption that the monopoly will help to ensure that the 18 year age restriction is better respected. In its view, the monopoly model does not, as such, have any impact on whether that restriction is effectively enforced. This is reinforced by the argument that the local operator continues to have the same economic interest in high turnover from the machines placed on his premises.[41] The Applicant finishes by suggesting alternative measures to combat the use of gaming machines by minors which could just as well have been introduced under the licensing system.[42]

The Defendant

62. The Defendant perceives the application essentially as a full attack on the basic principles and structures of Norwegian gambling regulation and policy, as the contested legislation merely transfers machine gaming from the regime of the Lottery Act to Norsk Tipping's preexisting monopoly under the Gaming Act. According to the Defendant, the key question in the present case is whether one acknowledges the *raison d'être* of having public monopolies in the field of lotteries and gaming, which is to curb gambling opportunities through the inherent limitations in such systems (as compared to market forces), to channel

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37 Reference is made to Case C-243/01 *Gambelli* at paragraph 74 and to the Advocate General's Opinion 16 May 2006 in the pending Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica*, at paragraphs 113 to 114.

38 "[T]he positive effects of different types of machines, paper receipts and network connectivity can also be achieved by private operators."

39 Five confiscations out of approximately 15,000 machines in 2004; for 2005, the Gaming Board, out of the gaming machines checked, reported 1,7% breaches of the license requirements and 0,35% machines closed down because of lack of permit or type approval.

40 Where the Gaming Board states that it "is aware that it is especially the State-owned games (Norsk Tipping and Rikstoto) that are connected with the problem of money laundering."

41 The Applicant quotes press articles whereby a recent inspection by Norsk Tipping revealed that eight out of ten of its commission agents did not check the age of their "Oddsen" gamblers.

42 Eg paying winnings out in vouchers with short redemption period and only exchangeable on proof that the person is more than 18 years old.

gaming desire to the least harmful outlets, and to gain a level of public control and responsibility which is not attainable under a private market regime.

63. As to relevant judgments on national gambling restrictions, the Defendant argues that that ECJ's case law must be read and interpreted as a whole. As none of the relevant cases involved a dynamic element of diminishing gambling opportunities and reducing revenue as compared to earlier levels, the Defendant is of the view that the contested legislation in Norway is even easier to justify under EC and EEA law than that of any of the cases considered so far. Whilst the *Gambelli* judgment of particular interest as the most recent so far, it can not be interpreted in isolation from previous rulings. In the Defendant's view, it marks not a shift of paradigm, but rather a correction of the course, marking the outer limits, but otherwise not limiting the margin of appreciation of national legislators in this sector. In particular, the Defendant opines that the *Läärä* judgment[43] still applies as concerns national exclusive-right systems for the operation of gaming machines, and the ECJ's other rulings[44] are also still of relevance. Besides the case law of the ECJ, the Defendant considers relevant jurisprudence from Supreme Courts in Finland,[45] Germany,[46] Italy[47], the Netherlands[48] and Sweden.[49] In the Defendant's view, the unique system of co-operation between national and supranational courts in the EEA suggests that judgments of national courts, in particular courts of last instance, are relevant and should be given due consideration.

64. As regards the substance of the case, the Defendant does not contest that the operation and offering of gambling is an economic activity, which as such falls within the scope of EEA law on the four freedoms. However, gambling services are not to be considered normal services, as the principle behind purchasing them is that one party will always lose money in the long term without getting anything in return except the entertainment derived from participating and will, especially in the case of gaming machine services, often buy nothing but delusion. The Defendant further acknowledges that the contested legislation constitutes a restriction within the meaning of Articles 31 and 36

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43 Case C-124/97 *Läärä*.

44 Case C-275/92 *Schindler*, Case C-67/98 *Zenatti*, and Case C-6/01 *Anomar*. Further reference is made to Case C-42/02 *Lindman*.

45 Decision of the Finnish Supreme Court of 24 February 2005, *Attorney General* v *Åland Penningautomatförening*.

46 German Federal Constitutional Court, *Sportwetten*.

47 Decision of the Italian Supreme Court of Appeals of 26 April 2004, *Corsi*.

48 Ruling in an interlocutory procedure by the Supreme Court of the Netherlands of 18 February 2005 *De Lotto Foundation* v *Ladbrokes*, and judgment of the Court of Arnhem, Civil law section, of 31 August 2005.

49 Judgments of the Swedish Supreme Administrative Court of 26 October 2004, *Wermdö Krog AB* v *the National Gaming Board* and of 20 June 2005, *Ladbrokes Worldwide Betting* v *the National Gaming Board*; Decision of the Swedish Supreme Court of 8 December 2004, *Attorney General* v *Ms Runesson, Mr Rees and SSP Overseas Betting Ltd*.

EEA. However, it holds the view that the restriction is non-discriminatory and only constitutes a rather minor and indirect restriction with no actual and only limited potential impact on cross-border economic activity within the EEA. There has not been a free for all, normal market before, and the reform constitutes a rather small new market restriction. Furthermore, the Defendant points out that with the exception of Norsk Lotteridrift owned by UBS, all 138 private companies presently active in operating gaming machines are Norwegian,[50] and are all registered in Norway. According to the Defendant, it is an open question whether under the former gaming machine regime it would have been possible for a foreign company to obtain an authorisation under the Lottery Act without some kind of residence requirement. In the Defendant's opinion, the case at hand therefore does not involve a restriction on the cross-border offering of services which are legally operated in other EEA States within the meaning of Article 36 EEA. As concerns Article 31 EEA, the Defendant does not consider it likely that a foreign company would have entered an already saturated market.

65. As to possible justifications, the Defendant claims that the contested legislation is based on legitimate and mandatory legislative requirements, forms an integrated and coherent part of national gaming policy, and is proportional as well as necessary in order to obtain the level of protection against problem gambling and gambling problems sought by the legislator.

66. The Defendant commences by pronouncing itself on the burden of proof. It accepts that the national authorities have an obligation to prove that the contested restriction is legitimate, suitable and proportional. However, it alleges that in a situation where the national legislator has explained *prima facie* why the new measures are legitimate, suitable and necessary, the burden of proof shifts onto the Applicant to establish that there are nevertheless less restrictive means which can achieve the same effective level of protection in relation to all the legitimate aims pursued.[51] In the Defendant's view there is particularly strong burden of proof on the Applicant in a situation where the ECJ has found a system identical to the contested one to be proportionate, as it did in *Läärä*. With regard to legitimacy of the aim pursued, the Defendant advances the opinion that the main rule must be that the reasons given by the national legislator are in fact the real justification for the restriction. As regards suitability, the Defendant claims that it is not incumbent on the Member States to prove that the intended effect will materialize in full.[52] With regard to proportionality and necessity, the

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50 The Defendant mentions, however, that a few companies claim to have foreign majority owners.

51 Reference is, inter alia, made to Case C-96/81 *Commission* v *Netherlands* [1982] ECR 1791, at paragraph 6; Case C-159/94 *Commission* v *France* [1997] ECR I-5815, at paragraphs 101-102; Case E-3/05 *EFTA Surveillance Authority* v *Norway*, judgment of 3 May 2006, at paragraph 61; Case 188/84 *Commission* v *France* [1980] ECR 419, at paragraphs 18 and 20; Case C-262/02 *Commission* v *France* [2004] ECR 6569, at paragraphs 31 et seq.

52 Reference is made, inter alia, to case law on measuring Community legislation against the precautionary principle, Case C-491/01 *British American Tobacco* at paragraphs 129, 130, 137 and 139.

Defendant submits that judicial review is limited to whether the national authorities have provided the Court a satisfactory explanation for the plausibility of its claim to necessity.

67. As regards the legitimacy of the restriction, the Defendant specifies seven public requirements, to be assessed as a whole, namely fighting gambling addiction, reducing machine gambling to a socially defensible level, strengthening public control and responsibility, reducing crime and malpractice, enforcing the 18 year age limit, eliminating private profit as market incentive, and limiting the reduction in revenue to socially beneficial and humanitarian causes.

68. According to the Defendant, the main legislative aim of the reform is to fight gambling addiction, which in recent years has become a huge issue in Norway. The Defendant estimates that some 71,000 persons (1,9% of the population) have problems with compulsive gambling, and that 90% of the net turnover is spent by compulsive or high risk problem gamblers, many of whom are minors and/or unemployed. Compulsive gambling in that sense covers both problem gambling, characterised by the fact that the gambler is unable to adjust his gambling to his own finances, and pathological gambling, which involves a state of frequent recurrent episodes of gambling that dominate a person's life at the expense of social, occupational and family values and commitments. According to the Defendant, compulsive gambling in Norway is almost entirely caused by an exponential increase in the gambling on machines, which is the most addictive form of gambling legally operated in Norway today.[53] In that sense, gaming machines in general carry a higher potential risk of compulsive gambling than most other games, and therefore are a "hard" form of gambling.[54] Whereas the Defendant considers Lotto, scratch-cards and traditional football betting as softer forms of gambling, the sports betting game Oddsen offered by Norsk Tipping and casino games such as poker are referred to as other gaming forms with high potential of dependency besides gaming machines.[55]

69. Although overall reduction of machine gaming is mainly seen as a means to fight gambling addiction, the Defendant holds that this is also an objective of the reform in itself for moral and socio-economic reasons. Strengthening public control and responsibility through exclusive rights for the State-owned Norsk

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53 To support its scientific and statistical statements in connection with compulsive gambling, the Defendant refers, inter alia, to the publications of the psychiatrist Dr Hans Olav Fekjær, a report published by the Gaming Board in December 2004, a report published by the MMI institute in September 2005 and various newspaper articles. Dr Fekjær, writing as expert on behalf of the Defendant, calls into question some of the conclusions drawn by the Applicant in the "Research on problem gambling" section of the application.

54 Reference is made, inter alia, to the written testimony of professor Mark Griffiths before the Borgarting Court of Appeal, and to the judgment of the German Federal Constitutional Court, *Sportwetten*.

55 Casinos, however, are not allowed in Norway, and restrictions as to the amount of bets and the minimum participation age were imposed on Oddsen in recent years.

Tipping was noted as an objective of the reform by the majority of the Parliamentary Committee.

70. The Defendant is also convinced that the contested legislation will serve to reduce crime and malpractice related to gaming machines, partly because the volume of gaming will be dramatically diminished, and partly because some of the types of crime and malpractice will be impossible or much harder to perpetrate under an exclusive rights system. The Defendant reports, first, between 3000 and 4000 burglaries into gaming machines annually. Second, it submits that there has been a growing problem with gaming machine addicts resorting to crime in order to finance their gambling, or to pay off gambling debts. Third, it suspects that gaming machines are used to launder money. This has so far not been proven, but, according to the Defendant, the authorities have reason to believe that it happens to some extent. Another suspected problem is related to embezzlement of machine revenue. Fourth, the Defendant claims that there have been problems with illegal selling of particularly lucrative installation sites. Fifth, the Defendant maintains that cases in which the technical requirements are violated by operators who want to offer more aggressive machines are rather widespread. A final malpractice is seen in the circumstance that in many places there is little or no supervision and control of the 18-year age limit for playing the machines, making it easy for minors to gain access to gaming machines. One of the ways to combat this is to diminish gambling opportunities for minors by reducing in the future the number of machines available in places minors may frequent, and locating a larger proportion in places with effective age controls, such as bars and restaurants. Acknowledging that in principle, increased enforcement of the 18-year limit may also be envisaged within a more liberal regulatory framework, the Defendant asserts that the monopoly solution is likely to be more efficient. This assumption is based on Norsk Tipping's allegedly superior procedures for supervision and control, and the expectation that Norsk Tipping will apply much harder pressure on the location owners and will have no incentive of its own to break the rules.

71. The Defendant acknowledges that to maintain a certain minimum level of revenue was part of the legislative considerations behind the reform. However, it disagrees with the Applicant that this is an illegitimate financial consideration. In the Defendant's opinion, this becomes clear from the government's desire to limit not only the volume of machine gaming, but also to reduce the revenue of charitable organisations. In its view, the contested legislation firstly will not affect State finances at all, as future revenues will go directly to organisations belonging to civil society, for which the State has not taken economic responsibility. Secondly, the future revenues will go to the same charitable organisations which today hold the machine licenses. Maintaining a certain revenue level meant that the organisations would not oppose the reform, something which was important for the minority government in order to get any substantial reform enacted. And thirdly, the reform will mean that these beneficiaries will receive substantially smaller revenues than they did when the contested legislation was adopted in 2003, and radically smaller revenues than

what they have been getting in 2004 and 2005.[56] Thus, according to the Defendant, the economic legislative consideration was not to increase (or even maintain) revenue to benevolent or public interest activities, but rather to ensure that a larger share of the reduced future revenue will go to such activities and not to private profit.[57]

72. In any event, financial considerations were not the decisive reason for the reform as such, but merely an incidental consequence within the meaning of the *Zenatti* judgment.[58] The Defendant interprets *Zenatti* to the effect that economic considerations cannot in themselves be part of the legal justification. They may only be accessory advantages. As such they are legitimate. But when assessing whether a national restriction is based on recognised public interest considerations, they have to be subtracted. The test is then whether the remaining considerations behind the legislation are enough to objectively justify the restriction.[59]

73. With regard to suitability and consistency of the restriction, the Defendant acknowledges that in *Gambelli*, the ECJ increased the level of judicial review by holding that in order to be suitable, a restriction on gaming must "serve to limit betting activities in a consistent and systematic manner". However, in the Defendant's view, it does not in general limit the wide discretion of national authorities to decide which measures are most suitable for protecting legitimate public concerns in the gaming sector. The approach taken by the Applicant is described as selective and biased which is at the same time wide (covers general Norwegian gaming policy), limited (covers only two elements of that policy, namely marketing and development of games) and detached (does neither relate to gaming machines nor to the reform).

74. In the Defendant's opinion, the *Gambelli* test of consistency should not apply to the case at hand and should be reserved for cases where there is reason to suspect arbitrary or discriminatory features. Alternatively, a consistency test according to *Gambelli* applies, but should be confined to testing the consistency of the contested legislation in relation only to the gaming machine sector. In the second alternative, a wide and general consistency test would have to take account of the Norwegian gaming policy as a whole and in all its aspects, not only the two elements selected by the Applicant. In that case, further elements,

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56 As regards the present situation, the Defendant refers, inter alia, to recent estimates according to which the Norwegian Red Cross is now looking at a reduction in income of close to 90%, as compared to present levels, when the reform is implemented.

57 The Defendant refers to the bill of 14 March 2003, the proposal of 6 June 2003 by the Storting Committee and the minutes from the parliamentary debate. In its view, the Ministry's earlier papers of June and October 2002 are not relevant when evaluating legislative intent under EEA law. In that context, reference is made to Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* at paragraphs 37-42.

58 Case C-67/98 *Zenatti* at paragraph 36.

59 Reference is made, inter alia, to Case 72/83 *Campus Oil* [1984] ECR 2727, at paragraph 36 and Case 118/86 *Nertsvoederfabriek* [1987] ECR 3883, at paragraph 15.

such as the other policy initiatives presented in the same 2003 proposition as the gaming machine reform, would be of relevance. Although arguing for the first option, the Defendant asserts that the contested legislation passes all three tests.

75. The Defendant not only disputes the allegation of inconsistency, but argues that the contested legislation is actually the single most consistent measure taken by the national legislator in the field of gaming in recent years. Publicly controlled gaming has always been a foundation of national gaming policy in Norway (under the Gaming Act and the Totalisator Act), as in most other European countries. Only the smaller and more harmless games have been regulated by the Lottery Act, which allows for concessions to be given to charitable organisations and for these organisations to employ commercial operators to run their games. Within this system, the regulation on gaming machines has, according to the Defendant, been a deeply incoherent part of national gaming legislation in recent years. Gaming machines were until the mid-1990s a small and harmless sector, but have since developed into by far the largest and most problematic form of gaming in Norway. In hindsight, the Defendant considers regulating gaming machines under the relatively liberal regime of the Lottery Act a miscalculation which did not foresee their imminent technical development and market potential. Thus, in the Defendant's view, the transferral of gaming machines from the Lottery Act to the Gaming Act means restoring the fundamental consistency and coherency of national gaming legislation, rather than introducing a new kind of public monopoly.

76. A basic principle behind the Norwegian system, as described by the Defendant, is to ensure that revenues generated by gambling should not go to private profit, but should go directly to charitable causes. The argument for this is both of a structural and a moral nature. The structural point is that the absence of private profit will minimize market incentives and function as an inherent limitation on the volume of gaming. In this respect, the Defendant refers to economic monopoly theory whereby monopoly holders have less of an incentive to develop and market new and more attractive products and services and, at the same time, are able to demand higher prices, and thereby obtain greater profit from less turnover. The twofold moral argument is that private commercial operators should not profit from the misfortune of others, and that a certain kind of moral balance in society is preserved. The Defendant finally refers to the experience of Norsk Tipping, which has become an institution in Norwegian society, offering soft and stable gaming within a responsible and moderate framework that has not led to problem gambling of any scale.[60]

77. The Defendant further submits that the contested legislation forms part of a consistent and systematic review of gambling policy in recent years including the establishment and strengthening of the Gaming Board; the establishment of a helpline; an action plan against gambling addiction; increased research on

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[60] The Defendant submits that this holds true even for the potentially problematic Oddsen sports betting game.

problem gambling; a decree with instructions for the marketing of Norsk Tipping and Norsk Rikstoto; revised and tightened control of Norsk Tipping; the refusal to allow for interactive internet gambling in Norway; the refusal to allow for development of interactive SMS-gambling; the refusal to allow for a proposed "bottle deposit lottery"; new regulations on network marketing companies ('pyramidespill'); the refusal to allow casinos; the refusal to allow for gaming on credit and the continuous assessments on how to meet gaming on the Internet.

78. The Defendant acknowledges that Norsk Tipping as well as Norsk Rikstoto have been allowed to market their respective gaming portfolios extensively. It is, however, submitted that this is without relevance to the present case, since there has never been any plan to allow for marketing of gaming machines. In the Defendant's opinion, it is logically and legally untenable to argue that the legislator should be constrained from introducing new restrictions on one form of gambling because the marketing of other games is too liberal. In any case, Norsk Tipping's marketing is said to be not inconsistent or illegitimate since it does not produce problem gambling nor does it even produce any great growth. A private commercial operator would have spent more on marketing, and the marketing would have been of a different and more aggressive nature. The Defendant opines that a certain development and marketing of the responsible game portfolio offered under the public monopoly is legitimate and necessary in order to sustain the system, and channel gambling desire to the least problematic and addictive games. This is why it is primarily the soft variants of gambling that are marketed – in particular the number games Lotto and Extra. Moreover, the Defendant argues that whilst Norsk Tipping's marketing is extensive, in style and content it is moderate and conservative. The main emphasis is on promoting the company and its gaming propositions to a wide segment of the population in the form of moderate entertainment. In the Defendant's view, a certain level of marketing is particularly necessary in order to compete with the far more aggressive and addictive forms of gambling offered today over the Internet from abroad. Based on the assumption that some degree of gambling will always prevail in society, it is better to channel the demand into moderate and responsible formats. Finally, the Defendant refers to a substantial reduction in marketing expenses since 2003 as a reaction to, inter alia, the *Gambelli* judgment.[61]

79. The Defendant disputes the Applicant's allegation that Norsk Tipping is substantially expanding the range of games and gaming opportunities. Rather, one must speak of a gradual and moderate development of the gaming portfolio of Norsk Tipping, which has taken place under responsible public control. Whilst the Defendant acknowledges that some of the games offered by Norsk Tipping and by Norsk Rikstoto are now offered on the Internet as well, this concerns only traditional number games and lighter forms of sports betting, for which the Internet is merely a new alternative distribution channel. No interactive games

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[61] It is inter alia submitted that the volume of Norsk Tipping's marketing expenses fell by 21% in 2005.

with direct response between the operator and the player are allowed on the Internet. Norsk Tipping has had a few test games through digital TV for a short period of time, but this have been limited and non commercial approaches to gain experience with new techniques and new forms of games. Licenses for ordinary activity with such interactive games have never been granted.

80. As regards the future situation prevailing after the implementation of the contested legislation, the Defendant furthermore submits that it remains to be seen whether the designated structure of the monopoly is precisely the one that may eventually enter into force. Rather, it will be natural for the Ministry on the basis of the Court's judgment to undertake a fresh, general review, and make any adjustments needed prior to final commencement. As to the "Multix" gaming machines already procured by Norsk Tipping, the Defendant emphasises the high flexibility of their computers, in which the functionality and gaming features can easily be reprogrammed.

81. With regard to the proportionality and necessity of the contested legislation, the Defendant asserts that if a national gambling restriction is found to be legitimate and suitable, then, as a consequence of the margin of appreciation conferred on them, it is for the national authorities to assess whether it is also necessary.[62] That the Court should defer to the discretion of the Member States is also backed up by reference to the EC legislature's decision to exclude gaming services from the scope of the proposed directive on services. Necessity should therefore not be subject to substantive judicial review, but should be limited to an examination of misuse of powers. The review appropriate under these circumstances would thus be limited to verifying that the national authorities had a complete and correct set of facts necessary to conduct a proper assessment of proportionality, and that it has actually carried out this assessment.

82. According to the Defendant's alternative argument, the review of necessity should be moderate, and confined to examining whether there has been a manifest error of assessment, in the sense that the assessment by the national authorities was wrong or manifestly inappropriate.[63] For the purposes of review, the Court should not assess the facts in any detail, but limit itself to examine

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62 Reference is made to Case C-275/92 *Schindler* at paragraph 61, Case C-67/98 *Zenatti* at paragraph 33, Case C-124/97 *Läärä*, at paragraph 35, and Case C-6/01 *Anomar* at paragraph 87. In the Defendant's view, *Lindman* is to be distinguished since it concerned discriminatory tax rules, and *Gambelli* does not depart from the previous case law, but simply provides for an exception in cases where the facts of the case presents a clear indication that the national measures are discriminatory and promote protectionist aims.

63 Reference is made, inter alia, to Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, at paragraphs 45 and 47; Case C-120/97 *Upjohn* [1999] ECR I-223, at paragraphs 34-35; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, at paragraph 61; Case C-491/01 *British American Tobacco* at paragraphs 123, 130, 139, 140; Case C-210/03 *Swedish Match* [2004] ECR I-11893, at paragraph 48; Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, at paragraphs 85 and 87; Case C-508/03 *Commission* v *UK*, judgment of 4 May 2006, not yet reported, at paragraph 91; and to the AG's Opinion in Case C-491/01 *British American Tobacco* at paragraphs 120, 225, 230, 251.

whether, *ex hypothesi*, it was possible for the legislature to take the view that the contested legislation is more efficient in ensuring the requisite level of protection than an alternative measure which has less restrictive effects. As a second alternative, the Defendant submits that the contested legislation would have to be considered necessary and proportionate as well under a strict and complete review, even though, in the Defendant's opinion, such review would not be reconcilable with the case law in the gambling sector.

83. In the view of the Defendant, the contested legislation passes all possible proportionality tests. The Defendant further maintains that transferring the machines from a market regime to the existing publicly controlled monopoly is the most efficient and flexible way of fighting gambling addiction. A State-owned monopoly is the only model which makes it possible for the authorities to directly control and to assume responsibility for the volume and character of this activity, and thereby to diminish it to an acceptable level and ensure that it is moderate in character. A monopolist is in a position to operate with less attractive and addictive games and a lower payout rate in winnings, whereas fighting gambling addiction within a license-based system would always lead to competition for profit through the most aggressive and addictive machines. Other, less interventionary measures within the present market-driven regime would only amount to patching up a system which is inherently deficient and inconsistent. A publicly owned non-profit monopolist may also be expected to behave in more sluggish ways than a private commercial monopolist. Furthermore, under the private regime of the Lottery Act, introduction of all new and more restrictive regulations will take time and will be challenged by one or more of the operators through lobbying and legal actions. Finally, even if prevention of crime and malpractice as well as enforcement of the 18-year limit may also be attained under a regulated market regime, the exclusive rights model is, in the Defendant's opinion, better suited also in this regard.

The Kingdom of Belgium

84. In the Kingdom of Belgium's view, the contested legislation does not infringe EEA law. Against the Applicant's allegation that it was motivated by an economic aim, namely financing social activities, the Kingdom of Belgium submits that it should be the prerogative of governments to determine whether and how the revenues of gaming should be allocated.[64] Given the margin of discretion conferred on Member States, a State-owned monopoly gaming activities is said to be the best guarantee to control efficiently how and to whom the revenues will be attributed.[65] The Kingdom of Belgium furthermore maintains that the contested legislation fulfills the requirement of consistency within the meaning of *Gambelli*, since that legislation forms part of a global gaming policy

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64 Reference is made to Case C-275/92 *Schindler* at paragraph 61.

65 Reference is made to Case C-124/97 *Läärä* at paragraph 41 and Case C-6/01 *Anomar* at paragraphs 87 and 88.

in Norway, and the Norwegian government has set up a legal framework under which Norsk Tipping cannot disregard the government's policy.

As regards the proportionality test, the Kingdom of Belgium contends, firstly, that the national governments remain largely sovereign whenever the measures genuinely aim to reduce requirements in the general interest such as the reduction of gambling addiction.[66] It is secondly submitted that the contested legislation is suitable to attain the defined objectives, without being manifestly unnecessary or disproportionate in the view of their objectives.[67] It is one of the main pillars in an ongoing reform process of the Norwegian gaming and lotteries sector aiming at legitimate objectives. Furthermore, the contested legislation is also necessary for securing the attainment of these objectives. Following *Schindler*, and because it is impossible for a court to outweigh all the possible alternatives, the Court should apply only a marginal review,[68] and restrict itself to verifying whether the Defendant has complied with the suitability principle. The Kingdom of Belgium supports this call for judicial self-restraint by pointing out that the grounds put forward in justification of the contested legislation do not as such constitute policy areas in which the EU and/or EFTA could take regulatory action.

The Republic of Iceland

85. The Republic of Iceland contends that the Applicant has not been successful in demonstrating that the contested legislation infringes Articles 31 and 36 EEA, as it is consistent with the jurisprudence of the ECJ on the compatibility of national gambling regulation with the principles of the internal market. In the Republic of Iceland's view, the Court should consider that gambling is not a simple economic activity. The Republic of Iceland submits six reasons for this: (1) the risk of addiction that necessitates limitation or at least control of the offer of gaming opportunities, as well as (2) a regulatory approach with the purpose not to optimise the offer in relation to demand, but to restrict the offer in order to contain the demand; (3) a particular vulnerability for the infiltration of criminal organisations and fraudulent activities, especially money laundering; (4) an apparent psychological need of the individual to play, to which the State must react by creating an offer for gambling that is sufficiently large to prevent players from being attracted by illegal gambling and at the same time make sure that the offer is limited enough to prevent adverse effects; (5) particularities in civil law such as the general legal principle that wagering contracts are null and void; (6) competition based on constant increase in aggressiveness of machines, whereas a monopoly allows for using less aggressive machines and at the same time generates more revenues.

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66 Reference is made to Case C-124/97 *Läärä* at paragraph 39, and to the decision by the WTO Appellate Body WT/DS285/AB/R of 7 April 2005 *United States* v *Antigua*.

67 Reference is made to Case C-124/97 *Läärä* at paragraphs 37, 41 and 42.

68 Case C-275/92 *Schindler* at paragraph 32; WTO Appellate Body WT/DS285/AB/R *United States* v *Antigua* at paragraphs 309 to 310.

86. The Republic of Iceland objects to the Applicant's claim that the contested legislation is motivated by economic aims. In its view, the issue of maintaining the level of revenues for charitable causes was irrelevant when the decision to change the legislation was taken, and only introduced into the political debate at a later stage. The fact that the revenue aspect was a central issue in the debate is to be explained by its importance for various stakeholders, and by the fact that the viability of charitable organisations was indeed of concern to the Defendant. In any event, the Republic of Iceland asserts that it is the prerogative of governments to determine that the revenues of gambling should be exclusively allocated to the support of charitable causes and should not go to private profit.[69] If case law suggests that maintaining the revenue level cannot in itself serve as objective justification, it must be concluded *e contrario* that this argument can be accepted in addition to, or in support of, other arguments.

87. The first and foremost motivation to adopt the contested legislation was to increase effective control and to reduce gambling addiction.[70] The aspect of revenues for charitable causes only played a secondary and subordinate role. The latter is also to be considered as an incidental benefit within the meaning of *Gambelli*. The essence of *Gambelli* in that respect lies in the question of whether it is manifestly clear that the Defendant, in the absence of financial considerations, could have chosen another, less restrictive alternative that could guarantee attaining the legitimate objectives. This question is to be answered in the negative in the Republic of Iceland's opinion. This conclusion notwithstanding, the Republic of Iceland wants the present case to be distinguished from *Gambelli* on the facts, since the major underlying objective of the Italian legislation at stake there was to create more income for the State, not maintaining the level of revenue as in the case at hand.

88. With regard to the proportionality test, the Republic of Iceland argues that it should be up to the individual Member State to determine not only the level of protection but also the means and the modalities that are required in order to attain the defined level.[71] Thus, it suggests that the proportionality test should not be applied to the full extent with regard to gaming regulation. With regard to the necessity and the proportionality requirement, only a marginal review should be applied and confined to cases where restrictions are manifestly unnecessary or disproportionate.[72] The choice between different suitable alternatives should be regarded as the prerogative of Member States, unless it can be proven that there were alternatives available which were manifestly less

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

70 Reference is made to the bill, Ot. Prp. No 44 (2002-2003), at points 4.1 and 4.4.4.

71 Reference is made to Case C-275/92 *Schindler* at paragraphs 60 and 61 and Case C-124/97 *Läärä* at paragraph 43.

72 Reference is made to the decision by the WTO Appellate Body WT/DS285/AB/R *United States* v *Antigua*, at paragraphs 309 and 310.

restrictive and at the same time equally suitable to attain the objectives. Thus, the focus of judicial review should be on suitability of the contested legislation.

89. According to the Republic of Iceland, a monopoly is indeed a suitable model to organise the market and to confine gaming addiction,[73] in particular as micro-economic theory suggests that a monopoly leads to a reduced offer compared to competitive models and an alternative model such as a concession model would not be equally effective. The monopoly has rightly been considered by the Defendant as the model providing the best guarantees to fulfil the main objectives of reduced gaming addiction and increased control while at the same time it offered the advantage to allow the maintenance of revenues for charitable causes at 2001 level.

90. As regards the requirement of consistency in particular, the Republic of Iceland argues for taking into consideration the gaming market as a whole, and not only the market for gaming machines. Seen from the perspective of Norwegian gaming policy, the contested legislation is to be deemed consistent in the view of the Republic of Iceland. As to the Applicant's objection against publicity and marketing, the Republic of Iceland notes that marketing is indeed a tool to attract players and thereby encourages gambling. However, there is a need for the State to allow authorized operators to make publicity in order to attract (more) players to the "legal circuit" and to keep them away from the "illegal circuit" generally offering the more addictive types of games. The same goes for the expansion of the range of games by the State operator. Furthermore, the State-owned operator should be allowed, within the framework set by the government, to act as a normal economic player, i.e. to pursue maximum profit, to make publicity, to attract new customers etc. In the opinion of the Republic of Iceland, the Court should address whether the actions of the Norwegian government are compatible with EEA law, and not evaluate the ambitions of Norsk Tipping. The Republic of Iceland recalls that the Norwegian government assured that it would supervise Norsk Tipping and, if necessary, prevent it from realising ambitions that are incompatible with the government's policy, and already put in place measures such as the establishment of the Gaming Board. The Republic of Iceland further emphasises that the aim of securing revenue at the 2001 level is pursued in combination with a considerable reduction in the number of machines.

The Republic of Finland

91. The Republic of Finland submits that Articles 31 and 36 EEA do not preclude legislation such as the one contested in the application, provided that it involves no discrimination on grounds of nationality and applies without distinction, that it guarantees the achievement of the intended aims and that it does not go beyond what is necessary in order to achieve them.

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[73] Reference is made to Case C-124/97 *Läärä* at paragraphs 37 and 41-42.

92. In the opinion of the Republic of Finland, the reasons put forward by the Defendant in order to justify the contested legislation are overriding reasons relating to public interest in the light of the case law in the field of gaming and lotteries and, more specifically, in the light of the *Läärä* judgment.[74]. The Republic of Finland takes the view that the conditions for exclusive rights concerning the operation of gaming machines laid down in *Läärä* have not been altered in the more recent *Gambelli* judgment, where the ECJ has merely specified the requirements which the restrictions for operation of gaming machines must satisfy in order to comply with EC law. As *Gambelli* did not concern the operation of gaming machines, it does not warrant a conclusion that the provisions relating to freedom to provide services and the right of establishment would no longer allow for an exclusive rights regime for operating gaming machines. In the view of the Republic of Finland, it therefore appears that the Defendant has not infringed Articles 31 and 36 EEA.

The Hellenic Republic

93. The Hellenic Republic reports social and socio-economic problems related to gambling such as addiction and related crime and malpractice in Greece. Public control in Greece was inadequate, which made it easy for players in gaming machines to violate the technical requirements by converting the soft slot machines into gambling ones. Taking drastic measures towards fighting gambling addiction, reducing machine gaming to a socially defensible level and strengthening public control is, in the view of the Hellenic Republic, the only resort for national authorities. The Hellenic Republic submits that a possible restriction of Articles 31 and 36 EEA is in any case non-discriminatory and based on legitimate and mandatory legislative requirements. It forms an integrated and coherent part of national gaming policy and is proportional as well as necessary in order to obtain the desired level of protection against gambling and the problems arising therein. The Hellenic Republic also refers to special latitude enjoyed by the Member States according to the case law of the ECJ, [75] as well as the fact that the EC legislature has not managed to harmonise national rules in the field of gaming. In the view of the Hellenic Republic, the Defendant did not have any other alternatives to protect the imperative principles of public order, public morality and social order in a very sensitive sector as the one of machine gambling.

The Republic of Hungary

94. The Republic of Hungary submits that under EEA law, Member States have a considerable margin of appreciation concerning the regulation of gaming services, as long as restrictive rules follow legitimate social objectives, apply in a

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74 Case C-124/97 *Läärä*, in particular at paragraphs 41-42.

75 Reference is made to Case 30/77 *Boucherau* [1977] ECR 1999, at paragraph 34; Case 34/79 *Henn and Darby* [1979] ECR 3795; Case C-275/92 *Schindler* at paragraph 61 and Case C-124/97 *Läärä* at paragraph 13.

non-discriminatory way, are suitable to attain the said objectives and are not disproportionate compared to what is necessary to achieve them. Gambling addiction constitutes the most threatening risk associated with gaming activities. Other harmful effects arise from the black economy flourishing around legal gaming, and may also require restrictive measures in order to protect consumers and society. The Republic of Hungary considers that the attainment of the objectives sought by the restriction do not appear to be possible unless gaming operators remain under strict supervision of the legislature. Less strict measures may be appropriate to deal with harmful social effects which present a lower risk, whereas other gaming activities may require more rigorous supervision. A Member State which finds that the expansion of gaming services gives rise to harmful effects must ultimately be in possession of the means to fight these harmful effects by introducing a monopoly or even by prohibiting the gaming activity concerned.

95. In any event, the courts should leave the Member States a larger margin of appreciation in this respect than is common in other areas concerning the freedom to provide services in view of the complexity of the circumstances, the significance of the social objectives at stake and the need to ensure the effectiveness of the measures. The Republic of Hungary is of the opinion that the assessment of restrictions applied by Member States in the field of gaming services continues to be governed by the *Schindler* judgment. It is to be inferred from this and the subsequent judgments in the area of gaming that within the limits set by the ECJ, it is primarily the national legislature, being in possession of the knowledge of the facts and circumstances calling for the introduction or the maintenance of restrictions, who is best placed to assess whether the restriction is suitable to attain the aimed objectives. The moral, cultural and religious considerations particular to a Member State are to be respected. Analysing the *Gambelli* judgment in particular, the Republic of Hungary doubts that all aspects of the legislation concerning gaming activities should be assessed in the light of necessity and proportionality as such requirements would radically reduce the margin of appreciation and the legislative powers of the States in this area.

The Kingdom of the Netherlands

96. The Kingdom of the Netherlands suggests the application should be dismissed. In its view, the Applicant one-sidedly referred to the *Gambelli* judgment, in particular as regards the suitability of the contested legislation. By contrast, the Kingdom of the Netherlands emphasizes the importance of the *Läärä* and *Anomar* judgments for the present case. From these cases it infers that Member States have a large degree of latitude in determining how to regulate gaming; that Member States are free to assess the level of protection they wish to have; that Member States may in this context impose a total ban or may opt to regulate gaming providers; and that Member States may create monopolies to this end if this is not disproportionate to the aim pursued. The *Gambelli* judgment, on the other hand, is said not to represent a significant change of

direction compared with earlier case law, and should be seen against the background of the factual situation in Italy at the time. The Kingdom of the Netherlands infers from *Gambelli* that the assessment must be limited to the question of whether the approach in its totality is so imbalanced that it can no longer reasonably be considered "consistent and systematic". As concerns the *Lindman* judgment, the Kingdom of the Netherlands disputes that this is relevant at all to the present case. In sum, the Kingdom of the Netherlands infers from the relevant precedents that a monopoly for gaming machines is a legitimate and consistent way of attaining the objectives invoked by the Defendant to reduce gambling addiction.

97. Furthermore, the Kingdom of the Netherlands submits that granting the application would have major repercussions for the way gaming is currently organized in the EU if the ECJ were to follow the judgment of the Court, since a large number of EU Member States have opted to regulate gaming by granting exclusive public rights. Neither has there been harmonisation on a Community level, nor has the Commission ever taken a position similar to that of the Applicant to the effect that an exclusive right arrangement on gaming machines is incompatible with EC law.

The Portuguese Republic

98. The Portuguese Republic maintains that the contested legislation, to the extent that it prevents operators from other Member States, directly or indirectly, from making their own gaming machines available to the public for use against a fee, constitutes a barrier to the free provisions of services, however non-discriminatory. Under prevailing case law,[76], the Defendant has the power, to determine on grounds of compelling public interests (such as protection of public health against the risk of gambling addiction), the volume and type of gaming it wishes to see operated on its territory, including the possibility of fully prohibiting gaming activity. The Portuguese Republic submits that the contested legislation is justified in particular by the fact that less restrictive arrangements did not prove sufficient to control, limit and prevent the health risks, protect consumers and maintain order in society. A limited authorization of machine games under an exclusivity arrangement – as opposed to a complete ban – contributes to such objectives by channeling the desire to gamble and the operation of games into a controlled system, avoiding the risks of fraudulent and criminal operation and using the proceeds to the public good. According to the Portuguese Republic, the contested legislation is not disproportionate in the pursuit of its objectives.

99. The Portuguese Republic asserts that its conclusions are in line with the *Gambelli* judgment. *Gambelli* does not break substantially with previous case law. While far from recognising the need to liberalise gaming in the EU, it indicated to the Member States that their decisions in the area of gaming may not

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[76] Reference is made, inter alia, to the power of discretion recognised by the ECJ in *Schindler*.

be arbitrary or principally motivated by the State's financial interests. Rather, such a decision would have to represent a genuine will to control gaming within its territory, pursuing no actions contrary to its stated principles and values. This is, in the Portuguese Republic's view, the situation in the present case. *Gambelli* should thus not be interpreted to the effect that the Defendant may not prevent operators in other Member States from operating gaming machines or internet games in its territory. The Portuguese Republic concludes that the contested legislation, taking into account the public interest objectives justifying it and the fact that a less restrictive licensing system proved unable to prevent the damaging consequences that generic prohibition of the operation of gambling is intended to achieve, does not conflict with the freedom to provide services and free establishment.

The Kingdom of Sweden

100. In the Kingdom of Sweden's opinion, the application is unfounded. As regards the question of whether the contested legislation is motivated by a legitimate objective rather than by economic reasons, the Kingdom of Sweden disagrees with the Applicant insofar as the test defined by the ECJ requires assessing if the measure is genuinely aimed at attaining a legitimate objective other than economic ones. The fact that a Member State seeks a measure that will satisfy a legitimate objective without reducing revenue does not alter the objective as such, namely to protect consumers by introducing stricter rules in order to reduce gambling addiction. Even though the economic issue was one of the factors considered in the policy choice, it was not the decisive one. Moreover, unlike the situation in *Gambelli*, the contested legislation has come about within the framework of an overall restrictive gaming policy. In the Kingdom of Sweden's view, the fact that the Defendant wished to maintain the same level of revenue as in 2001 cannot be characterized as an action to incite or encourage gaming as a whole. Rather, the maintaining of the revenues at the same level as 2001 would break the trend of increased revenues of machine gaming.

101. As to the alleged inconsistency of the contested legislation, the Kingdom of Sweden argues that even State-owned undertakings which have been granted exclusive rights in one Member State operate on a competitive market. This market has become a global one, most notably on account of the Internet. In order to uphold the efficiency of the national legislation, it must be considered justified to channel gaming opportunities to the nationally operated and controlled games through reasonable marketing. The same holds true with regard to modifying games and introducing new games. If the games offered are not sufficiently attractive to consumers, they may turn to the market of illegal games. Finally, the Kingdom of Sweden disputes that there is a direct link between the contested legislation and the marketing/development of games and gaming opportunities with regard to other forms of gaming.

102. In the Kingdom of Sweden's opinion, the contested legislation is also proportionate. It points out that, as the policy choices of a Member State must be

considered as a whole, due consideration will have to be given to the overall regulatory framework of lotteries and gaming in Norway. Within the Norwegian regulatory context it seems consistent to transfer machine gaming from the regime under the Lottery Act to the stricter regime under the Gaming Act, if and when machine gaming turns into a major form of game. In this respect, it is submitted that consistency of a national gaming policy is a continuous assessment where all the relevant factors must be considered. Moreover, the Kingdom of Sweden puts forward that the gaming and lotteries sector differs from other sectors, which is why Member States enjoy a wider margin of appreciation in this area than in other sectors.[77] Arguing that the Defendant could, in a justifiable way, impose a total ban on machine gaming but at the same time contending that the choice between a more or less strict regime is not a question of determining the scope of protection seems contradictory to the Kingdom of Sweden.

The Commission of the European Communities

103. In the view of the Commission, the essence of the present case is to establish the appropriate test to measure the legality of the (restrictive) introduction of the exclusive right in relation to the various objectives put forward. Analysing the six judgments delivered by the ECJ, the Commission concludes that in pursuing legitimate public interest objectives, Member States authorities have very wide discretion as to the legal framework they intend to enact for protecting the players of games of chance against addiction and fraud, in particular both as to the level and to the kind of protection national authorities aim at ensuring and as to the legal instrument which appears to be the most appropriate in relation to such a policy option.[78] In the opinion of the Commission, the assessment of the compatibility of the contested legislation with the EEA rules thus cannot involve a challenge either of the public-interest objectives pursued by the national authorities, or of the level of protection against gambling addiction which such national authorities intend to provide to their own citizens, or the choice in itself of the measures of protection of such "overriding reasons of public interest", such as the exclusive right conferred upon a body controlled by the State.

104. The Commission maintains that, in any event, four conditions need to be fulfilled in order to justify a restrictive measure as summarised in *Gambelli*.[79] Firstly, the restrictive measure must be of a non-discriminatory nature, which is not an issue in the present case since none of the parties claims that the contested legislation is of a discriminatory nature. Secondly, imperative requirements in the public interest must be identified. These are to be established by the Member

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77 Reference is made to Case C-275/92 *Schindler*, Case C-124/97 *Läärä* and Case C-67/98 *Zenatti*.

78 Reference is made, inter alia, to Case C-275/92 *Schindler*, at paragraph 61 and Case C-6/01 *Anomar* at paragraphs 74, 87 and 88.

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

States within their margin of appreciation and be taken together for the purpose of the assessment.[80] In the view of the Commission, the grounds invoked by the Defendant are non-economic objectives, except for what has been referred to as "limiting the reduction in revenue to socially beneficial and humanitarian causes". If this were to be considered only an incidental beneficial consequence of the contested legislation, the focus of the present case should be on the following two requirements of suitability and necessity according to the Commission.

105. As for the assessment of suitability, the Commission starts out by recalling that in infringement action proceedings, while it bears the burden of proof to show that the disputed national measure entails a restriction, it is for the concerned Member State to prove that such a measure is designed and appropriate to attain a legitimate objective of public interest.[81] As the Commission understands the case law of the ECJ, a finding of unsuitability is to be based on apparent contradictions or absurdities resulting from the Member State's legislation.[82] This consideration leads the Commission to conclude that the consistency test mentioned in *Gambelli* is nothing else than an essential part of the traditional suitability test, and that the peculiarity of the *Gambelli* case lies in the ECJ's strong suspicion of inconsistency caused by the "policy" pursued by the Italian State "of substantially expanding betting and gaming at national level with a view to obtaining funds."[83] The novelty of *Gambelli* consists in the requirement to assess a policy pursued by national authorities. In that respect, the Commission raises the question of whether the appraisal of consistency of a national policy action should refer only to the specific sector of gaming which is the object of the dispute or to other or potentially all the sectors and/or subsectors which constitute the gaming business altogether.[84] In any event, a restrictive national policy aimed at deterring (actual or potential) players from high risk games of chance (such as gaming machines) appears more consistent with the objective of fighting against gambling addiction to the Commission than imposing restrictions on low risk games (such as sports betting) while tolerating, or even worse promoting, mass participation of players in manifestly more dangerous gambling activities.

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80 Reference is made to Case C-275/92 *Schindler* at paragraph 58, Case C-124/97 *Läärä* at paragraph 33, Case C-67/98 *Zenatti* at paragraph 31 and Case C-6/01 *Anomar* at paragraph 73.

81 In that context, the Commission of the European Communities disputes the applicability to the present case of the requirement established in Case C-42/02 *Lindman* at paragraph 25, a case referred under Article 234 EC.

82 Reference is made to Case C-390/99 *Canal Satélite* [2002] ECR I-607, at paragraphs 36 and 42; Case C-79/01 *Payroll Data Services* [2002] ECR I-4881, at paragraphs 34 and 35; Case C-153/02 *Neri* [2003] ECR I-13555, at paragraphs 45 to 47; Case C-451/03 *Servizi Ausiliari*, judgment of 30 March 2006, not yet reported, at paragraphs 41 to 43.

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

84 The Commission finds support for the first alternative in Case C-124/97 *Läärä* at paragraph 36, Case C-67/98 *Zenatti* at paragraph 34, and Case C-6/01 *Anomar* at paragraph 80, and for the second alternative in Case C-243/01 *Gambelli* at paragraphs 67, 68 and 69.

106. As to suitability in the case at issue, the Commission suggests examining carefully the relations which exist in law and practice between the Norwegian government and Norsk Tipping. In the Commission's view, a Member State's government is entitled to expect from a public non-profit body both no economic incentive to breach the rules regulating the sector of games of chance operated by the monopolist and no aggressive marketing strategy aimed at expanding gambling activities and/or at maximising profits. The decisive question should be whether the granting of an exclusive right to a State-owned non-profit company is an appropriate means for ensuring the attainment of legitimate objectives in the public interest.

107. As concerns the necessity test, the burden of proof of indicating to the Court what less restrictive measures could be and the reasons why such less restrictive measures would enable the pursuit of the same objective with an equivalent degree of effectiveness rests on the applicant in an infringement action in the view of the Commission. It considers the necessity test, in the sense of a "strict and complete review", to be the decisive element in the legal assessment of the ECJ. The Commission quotes numerous examples to demonstrate that that Court examines very thoroughly whether other alternative measures had been possible and/or whether the disputed restrictions were actually proportionate in respect to the objectives pursued. Thus, the Commission infers from consistent case law that in circumstances similar to the ones of the present case, the ECJ would scrutinize any alternative and allegedly less restrictive solution suggested by the applicant and would explain the reasons for which the exclusive right conferred to a State-owned operator "goes beyond" or "does not go beyond" what is necessary for effectively fighting gambling addiction and attaining the other objectives presented by the Defendant.[85] In making that assessment, the Court should verify in particular whether, from the point of view of social order, the situation in Norway was so serious in this specific sector that no alternative regulatory model other than the exclusive right conferred upon a State-owned body was possible for reducing gambling opportunities offered by gaming machines. Furthermore, the Commission suggests checking if the submissions put forward by the Defendant with respect to the alleged superiority of the monopoly model can be substantiated.[86]

Carl Baudenbacher
Judge Rapporteur

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85 Particular reference is made to Case C-243/01 *Gambelli* at paragraph 75, and Case C-124/97 *Läärä* at paragraph 41.

86 Reference is made to points 1005, 1006, and 1007 of the Statement of Defence.