THE ATTORNEY GENERAL (CIVIL AFFAIRS)

To the EFTA Court   Oslo, 6 November 2006

WRITTEN OBSERVATIONS

BY

THE NORWEGIAN GOVERNMENT

represented by Fredrik Sejersted, advocate, Office of the Attorney General (Civil Affairs) acting as agent, submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, in

Case E-3/06,

Ladbrokes Ltd

v

The Government of Norway

in which the Oslo District Court has requested an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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1. INTRODUCTION

1.1 The questions

1. Oslo tingrett (the Oslo District Court) has, by a reference dated 18 August 2006, requested the EFTA Court (hereinafter "the Court") to give an Advisory Opinion in Case E-3/06 (*Ladbrokes Ltd v the Ministry of Culture and Church*) on the following questions:

   1. *Do EEA Articles 31 and/or 36 preclude national legislation which establishes that certain forms of gaming can only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes?*

   2. *Do EEA Articles 31 and/or 36 preclude national legislation which establishes that licences to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding?*

   3. *Do EEA articles 31 and/or 36 preclude national legislation which establishes that licenses to certain forms of gaming may only be granted to non-profit organisations and associates with a humanitarian or socially beneficial purpose?*

   4. *Under EEA law, is it legitimate for national legislation to emphasise that the profit from gaming should go to humanitarian an socially beneficial purposes (including sports and culture), and not to be a source of private profit?*

   5. *Does EEA Article 36 preclude a national statutory provision which forbids the providing and marketing of gaming which is not permitted in Norway, but which is approved under national law in another EEA State?*

1.2. The position of the Norwegian Government

2. The Norwegian Government holds that the EFTA Court should answer the questions in accordance with the present state of development of Community law as regards the limits and latitude for national restrictions on gambling. This is laid down in the case law of the European Court of Justice (ECJ), in particular in cases C-275/95 Schindler, C-124/97 Läärä, C-67/98 Zenatti, C-6/01 Anomar and C-243/01 Gambelli, which should be read and interpreted as a whole. The EFTA Court should not attempt to develop EEA law on gambling restrictions beyond the present stage of Community law, neither in one nor the other direction.

3. In particular, the EFTA Court should be careful not to impose stricter limits on national gambling restrictions than under Community law, in a more liberalistic direction, since this would not only go against current legal and legislative developments in the gambling sector in the EU, but also be inappropriate and unwise within an EEA context.

4. In other words, the basic position of the Government is that the EFTA Court should not be tempted to go forward in the wrong direction, and to suggest interpretations which would imply a step towards liberalisation or privatization of gambling within the EEA.

5. If the EFTA Court adheres to the present case law of the ECJ in the field of gambling, then it is clear that the first three questions should be answered by stating that EEA Articles 31 and 36 do *not* preclude restrictive national gambling arrangements such as the three examples specified in the questions (relating to the three relevant Norwegian statutes on gaming and lotteries), as long as these are non-discriminate, based on legitimate public interest objectives, and suitable in order to achieve these objectives.

6. The Court should also emphasize in this regard that the national legislator and authorities have a wide latitude in the field of gambling to determine not only the proper level of restriction and protection but also which measures and legal instruments are appropriate and necessary in order to achieve such a level.

7. As regards the fourth question, the Court should answer this in the affirmative, as this has repeatedly been held by the ECJ. As regards the fifth question the Court should again confirm the position of the ECJ, that national authorities should be allowed to prohibit the marketing of gaming and lotteries which do not have license to legally operate in the domestic market, even if this gaming has permission to operate in other EEA countries.

8. The Government would advise the Court in this case to be particularly aware of the context in which the pending lawsuit has been raised. There is at the moment a broad struggle going on over the future of gambling in Europe which is being waged at many levels – legislative, political and judicial. This is a highly complex and sensitive sector at the moment, as described in detail in section 5.4. On of the current trends is that several large traditionally UK-based bookmaking and betting firms are trying to pry open new markets through lawsuits in the national courts, in which they invoke and misinterpret the case law of the ECJ to try to dismantle traditional national gambling restrictions in order to open up for privatization and liberalisation.

9. The probably most aggressive of these firms, at least in Northern Europe, is Ladbrokes Inc, which has taken out parallel legal actions in Denmark, Finland, Norway and Sweden, and also have similar lawsuits pending in the Netherlands. The case at hand is thus part of a coordinated and planned legal attack on the traditionally restrictive and responsible Northern European gaming and lottery policy.

10. The core of the present case before the Oslo District Court is the fact that Ladbrokes is a commercial company, while under Norwegian law licenses for gaming or lotteries can not, under any circumstances, be given to any private commercial entity. Under the restrictive threefold Norwegian gaming and lotteries legislation, licenses are either given (i) to charitable organisations under the Lottery Act, (ii) to the state-owned entity Norsk Tipping which transfers the whole of its revenue to socially beneficial causes (culture and sports) under the Gaming Act, or (iii) as regards horseracing to a non-profit Foundation devoted to the development of the equine sector under the Totalisator Act.

11. The background for the case is the application of Ladbrokes in the summer of 2004 for licenses to operate different kinds of gaming and lotteries under all the three legal

arrangements – the Lottery Act, the Gaming Act and the Totalisator Act. All parts of the application was denied, on the ground that under national statutory law there is no legal possibility for the authorities to grant any such licenses to a private commercial company (domestic or foreign).

12. By challenging before the courts the validity of the administrative decisions rejecting the application, Ladbrokes is in effect not only arguing that the basic principles of the three current Acts regulating gaming and lotteries in Norway must be set aside, but also more fundamentally that the general national ban on commercial gambling, which has been consistently applied for centuries, is in breach of EEA law.

13. The general legal position of the Norwegian Government is that it is clearly within the requirements of EEA law to hold that the national authorities have a right to reserve parts or the whole of the national gaming and lotteries sector to charitable and socially beneficial non-profit organisations and entities, whether operated publicly or privately, and to deny licenses to all private commercial companies, domestic and foreign. Such arrangements will not only serve a range of legitimate and imperative public requirements, but they will also serve to limit, confine and moderate the extent and nature of the national gaming sector. This is in fact today more important than ever, given technological developments and the explosive rise of highly aggressive Internet gambling often offered from jurisdictions with very few legal constraints or guarantees.

14. There are also a number of other, secondary, legal arguments under EEA law why it was legitimate and correct of the authorities to reject the applications of Ladbrokes, but the above mentioned argument is the core of the case, which it should be sufficient for the EFTA Court to pronounce upon in order to provide the national court with an advisory opinion on EEA law which will enable it to give a correct judgment in the case.

2. BACKGROUND FOR THE REQUEST

2.1 General background

15. The request for an Advisory Opinion from the EFTA Court from the Oslo District Court arises out of a national lawsuit under which the UK based bookmaking and betting firm Ladbrokes Inc challenges almost the *entire* traditional Norwegian gaming legislation, in all sectors – lotteries, number games, football betting, horseracing, scratch cards, Internet gaming, etc. The action is based entirely on assertions of EEA law, as there is no basis in national law for challenging the traditional legislation.

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

17. This type of lottery and gaming legislation is common in most European countries, although in somewhat different forms, with certain differences in scope and details. Common to all, however, is that lottery and gaming is regarded as a distinct sector, subject to special political, cultural and moral considerations, in which ordinary market mechanisms are not desirable, and to which commercial operators have only very restricted access, if at all. It is also usual for segments of the gaming market to be reserved for public exclusive rights entities, and for profits to be channelled directly to charitable and socially benevolent causes. Another wide-spread arrangement is that licenses, especially for small and medium-sized forms of lotteries, are given directly to charitable or socially beneficial non-profit organisations – but not to commercial entities.

18. Under Norwegian law, the gaming and lottery sector is in principle closed to private commercial actors, in the sense that they themselves can not obtain any kind of lottery or gaming license. The whole sector is in principle "non-profit" and exempted from ordinary market forces and competition. This has always been so. The only opening for private commercial profit has been at the periphery, from derived supporting services, for the betting agents of Norsk Tipping and Rikstoto, the owners of the premises on which certain games are operated, and for the commercial companies employed by charitable and benevolent organisations to operate their games for them. This derived private commercial element of the gaming sector has by tradition been modest.[1]

[1] The only exception is the slot machine sector, were private commercial companies operating such machines on behalf of the charitable license-holders in recent years have made enormous profits due to an explosion in slot machine gambling – which thus for the first time in Norwegian history has created a major commercial gambling business.

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

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

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

22. The lawsuit filed by Ladbrokes Inc before the Oslo District Court in the summer of 2004 challenges the basic structure of this traditional system, as well as the three statutory acts which regulates it. Ladbrokes Inc is according to its own description in the application "the world's biggest bookmaker and gaming company". It owns more than 2200 retail betting shops in the UK, Ireland and Belgium and operates several online gambling websites offering sports betting, online poker and online casino games. Ladbrokes is a purely commercial operation, part of the Hilton Group Plc, which is listed on the London Stock Exchange. In order for such a company to operate in countries like Norway and most of the EU Member States this would require fundamental liberalisation and privatization of the traditionally restrictive national gaming and lotteries legislation.

23. The legal core of the case is therefore whether EEA law demands that the gambling sector must be reviewed as an "ordinary" economic sector, which must be subject to normal commercial access and competition, or whether the Member States have the right to uphold traditional national restrictions, based on the specific and sensitive nature of the gambling sector, including a total or partial ban against allowing for licenses to be given to purely commercial private companies.

24. In the view of the Government, it is obvious that EEA law does not require such a dismantling of national restrictions, and such a liberalisation and privatization of European gambling, as the present action in effect calls for. Gambling is a very particular form of activity, which is traditionally regulated strictly in almost all the Member States (with a few exceptions), and which is subject to specific social, cultural,

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This deeply inconsistent and undesirable part of the national gaming and lotteries sector was abolished by Parliament in the summer of 2003, but the reform is still awaiting implementation due to pending legal actions brought by the commercial operators partly before the national courts and partly by complaints to the EFTA Surveillance Authority, which led to Case E-1/06 before the EFTA Court ("the Slot Machine Case"), see section 4.3

moral and religious considerations – which are as relevant and important today as ever. This is clearly recognized by the European Court of Justice in its case law, and should be recognized in the same way by the EFTA Court in the present case.

2.2 The case before the Oslo District Court

25. The case before the national courts started on 24 June 2004 when Ladbrokes applied to the Norwegian authorities for permission to operate and provide sports gaming, gaming on horse and dog racing, gaming on special events, and random number games with set odds in Norway, and to establish "gaming outlets" in Norway to operate this, subject to supervision by Norwegian authorities.[2] The application also concerned permission to actively provide and market the games on the Ladbrokes.com Internet portal, which today are offered from abroad, but with specific web pages targeted especially at the Norwegian market.

26. The application from Ladbrokes was sent to three public authorities, since it concerned gaming activities which are regulated by three different acts. The application for a licence to act as a gaming company on par with the state gaming company Norsk Tipping was sent to the Ministry of Culture and Church Affairs. The application for a license to offer horserace betting was sent to the Ministry of Agriculture. The application for a license, under the Lottery Law, to offer other lotteries was sent to The Lottery Gaming Board.

27. The application to the Ministry of Culture and Church Affairs was rejected in a decision of 27 September 2004. The basis for the rejection was that the gaming schemes regulated by the Gaming Act may only be operated by a State gaming company (Norsk Tipping), and that the Act does not allow for the granting of such licenses to others.[3]

28. The application to the Ministry of Agriculture was rejected in a decision of 15 November 2004. The basis for the rejection was that Ladbrokes does not fulfil the Totalisator Act's requirement that licenses may only be granted to companies or organisations whose purpose is to support horse breeding.[4]

29. The application to the Lottery Gaming Board was rejected on 30 June 2004. This was appealed to the Lottery Council, which upheld the decision on 7 March 2005.[5] The basis for the rejection was that Ladbrokes is a commercial company, and therefore does not fulfil the Act's requirement that licenses may only be given to organisations or associations which have humanitarian or socially beneficial purposes. Further, the Lottery Council pointed out that under the Lottery Act § 11, Ladbrokes may not be granted the right to market gaming schemes which are not authorized to be operated in Norway.

30. Ladbrokes filed a lawsuit before Oslo District Court on 2 December 2004. The claim is, first, that the three decisions be declared void. Second, a declaratory judgment is sought

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[2] An English translation of the application (provided by the Government) is enclosed as **Annex 6**.
[3] An English translation of the Ministry's decision is enclosed as **Annex 7.**
[4] An English translation of the Ministry's decision is enclosed as **Annex 8.**
[5] English translations of the two decisions are enclosed as **Annexes 9 and 10.**

to declare that Ladbrokes can not be denied the right to establish itself in Norway and offer the gaming schemes in question. Third, a declaratory judgment is sought to declare that Ladbrokes may not be denied the right to provide and market gaming schemes on the Norwegian market which are offered on the Internet from other EEA countries.

31. The State lodged its defence on 14 February 2005. First, it submitted that Norwegian laws on gaming schemes and lotteries are clear, and that there is no authority to grant Ladbrokes the licences which it has applied for. Further, the State argued that the present restrictions are not in conflict with EEA law.

32. Following the exchange of written observations by the parties before the Oslo District Court, it is clear that Ladbrokes is in effect claiming that the following four national rules on gaming and lotteries are in breach of EEA law:

- The rule that the numbers game Lotto and sports betting (except horses) may only be provided by a State gaming company (Norsk Tipping) whose profits go to cultural and sports purposes.
- The rule that licences to offer horserace betting may only be granted to non-profit organisations or companies whose purpose is to support horse breeding.
- The rule that licences to offer other gaming schemes and lotteries may only be given to organisations or associations which have a humanitarian or socially beneficial purpose.
- The rule that it is prohibited to provide and market gaming schemes and lotteries in Norway which do not have permission to operate on the Norwegian market.

33. In effect this means that Ladbrokes Ltd is challenging the basic principles on which the *whole* of the traditional Norwegian gaming and lotteries legislation is founded.

I. FACTS

3. THE NORWEGIAN GAMING AND LOTTERY SECTOR

3.1 The regulation of gaming and lotteries in Norway

34. The basic premise under Norwegian Law is that all forms of gaming are prohibited, except where permission to operate such activities is granted under the authority of a legal statute. According to §§ 298 and 299 of the Penal Code of 1902, it is a punishable offence to operate activities in the form of "games of chance" not sanctioned by special legislation.[6] "Games of chance" include all types of betting and other types of gaming in which the element of winning is the key. This is a very old principle, and is based on a commitment to protect citizens from "the depravity induced by games of chance", as stated in early preparatory works.

35. There have long been statutory exceptions from the general prohibition. These are currently laid down in three legal acts, which on detailed terms allow certain operators to be granted permits. These are the 1927 Totalisator Act (horse race betting), the 1992 Gaming Act, and the 1995 Lottery Act. These three acts constitute a coherent and exhaustive regulation of all forms of lottery and gaming legally operated in Norway.[7]

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

On the Lottery Act of 1995

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

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6 The two relevant provisions of the Penal Code are enclosed as **Annex 2**, with an English translation.

7 The three acts are enclosed, as **Annex 3** (the 1927 Totalisator Act), **Annex 4** (the 1992 Gaming Act), and **Annex 5** (the 1995 Lottery Act), with English translations.

38. Up until the late 1990s, the Lottery Act applied in practice only to a limited segment of the lottery and gaming market – mainly bingo, scratch cards, and the small and medium size lottery schemes allowed for charitable and socially beneficial purposes. It is only following the explosive and unpredicted increase in slot machine gambling in recent years that the Lottery Act has been applicable to gaming of any substantial volume. This inconsistency was rectified by the 2003 parliamentary slot machine reform.

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

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

41. In other words, the system embodied in the Lottery Act means that commercial operators cannot obtain a permit to operate lotteries or betting of any description. Such permits can be granted only to non-profit organisations or associations. However, as most such organisations are small, idealistic and of a non-professional nature, the Act permits them to employ private commercial companies to operate their games for them, against a price or a fixed percentage of revenues. Under § 4c of the Act such operators must be authorised by the Gaming and Foundation Authority.

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

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

44. There is no way in which the Lottery Act could have been interpreted under national law so as to accommodate the application of Ladbrokes for a general lottery licence, since it is not a humanitarian or socially beneficial non-profit organisation, but an ordinary commercial company.[8] The only way to give Ladbrokes such a licence would be to completely set aside §§ 5 and 6 – something which would in effect also require the whole Act to be rewritten. The pending action is thus a full challenge to the whole structure and contents of the 1995 Act, and thereby a challenge to system which has been consistently regulated and upheld sine 1851.

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[8] Note that Ladbrokes did not apply for an authorization under Article 4c to operate gaming on behalf of charitable organisations, but for an independent lottery licence under Article 6.

On the Gaming Act of 1992

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

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

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

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

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

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

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

52. The way in which Norsk Tipping functions as a public exclusive rights enterprise will be described below (section 3.4).

53. The action brought by Ladbrokes in effect challenges the whole of the Gaming Act, by demanding to be given the right to operate the same games as do Norsk Tipping. There is no way under this Act in which licenses to operate the kind of games regulated by it may be given to other entities than Norsk Tipping. This Act is not construed in order to regulate private commercial gambling, and would have to be abolished and complete rewritten in order to accommodate this claim.

On the Totalisator Act of 1927

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

55. Under § 1 of the Act licences to arrange betting on horse races can only be given to organisations or companies whose objective is to support the breeding and rearing of horses ("å støtte hesteavlen"). This is interpreted as to mean that the licensee has to be a non-profit entity, which does not operate for private profit or commercial reasons, but solely for the development and maintenance of the equine sector. In principle several licences may be issued, and this was the earlier system, when each racetrack operated as a separate entity. In 1982, however, Det Norske Travselskap (Norwegian Trotting Association) and Norsk Jockeyklubb (Norwegian Jockey Club) established an independent non-profit foundation called Norsk Rikstoto. This foundation gradually became more important, and in 1996 amendments were made to the Act which, among other things, entailed that it was given overall responsibility for totalisator betting. Since then only one license has been issued under the Act, to the Norsk Rikstoto Foundation.

56. The system of the Totalisator Act is similar to that of the Gaming Act in that it regulates what is in effect a restrictive exclusive-right system, operated by a non-commercial agent for idealistic purposes. One difference is that the revenues from Norsk Tipping are channelled to socially beneficial purposes with no direct link to gaming, while the revenue from horse race betting goes back into the equine sector itself.[9] Another difference is that Norsk Tipping is a state-owned company, while Norsk Rikstoto is an independent foundation, originally established by the trotting and jockey associations. The foundation is subject to instruction and control by the Ministry of Agriculture in several respects, and also (after 2000) to control by the Gaming Authority, but it is true to say that so far it has operated somewhat more independently than Norsk Tipping.

57. Since the Totalisator Act in principle allows for several licenses to be issued, the action launched by Ladbrokes in this sector does not formally challenge an "exclusive right".

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

What is under attack here, is the principle laid down in § 1 that licenses may only be given to organisations or companies devoted to the breeding and rearing of horses, which is understood to mean non-profit entities. Since Ladbrokes is not such an organisation, there is no way in which it can be given a licence under the current Act, and the Act would indeed have to be complete rewritten from scratch if it were to open up for licenses to be given to ordinary commercial gambling companies.

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

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

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

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

61. The fundamental premises on which the gaming legislation is based are so long-standing and self-evident that one has to go back very far in order to seek the original legislative intent behind the prohibitions and restrictions. One such source is a royal decree from 1753 in which the King of Denmark and Norway prohibited "all Kinds of so-called Games of Hazard". The royal reason given was that gambling had recently become a major problem in the realm, and that a prohibition was necessary "out of particular Concern for the Subjects, and in Order to remove from the Weak amongst them the Opportunity to waste what they have earned".[10] This decree was kept in force after the

[10] The 1753 Decree is enclosed (in Danish original) as **Annex 1**.

Norwegian independence of 1814, and not revoked until the Lottery Act of 1851, which reiterated the general prohibition with only a few exemptions.

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

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

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

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

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

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

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

68. Neither the new Lottery Act of 1995 nor other minor amendments to the regulations in the 1990s were regarded as meriting any new overall revision of the gaming sector as a whole, and not until the unintended boom in slot machine gambling did the need for a new, consolidated review become apparent. However, when the time came, this was done thoroughly, and in March 2003 in the Bill to the Odelsting no. 44 (2002-2003), the Ministry of Culture and Church Affairs presented not only the new slot machine reform, but also gave a full account of the fundamental principles, system and challenges in the lottery and gaming sector. [11]

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

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

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

> The lottery and money game field in Norway is a market with limited competition. As far back as the establishment of the state Lottery in 1912, state-controlled money games have been the authorities' most important tool in shaping its lottery and money game policy. The positive demarcation of licensed money games comes from the desire for a defensible money game policy, and creates a market with highly restricted competition. This particular consideration is also reflected in the reason for money games being exempt from the principles of free competition within the EU/EEA area.
>
> Even though the private lotteries are generally regulated through legislation and regulations, in recent years the emergence of commercial enterprises and the increased competition between the various organisations' lotteries has made it more difficult to operate direct political control of market development. The tug-of-war concerning the shaping and interpretation of the terms for lotteries that has been held with regard to prize machines illustrates that Acts and regulations do not always ensure political control of the development of money games. Together with the increased availability of electronic money games across national boundaries this entails that national and political control of the development of available money games must be seen as weakened despite an increased control focus from the Norwegian Gaming Board.
>
> Against this background it will be a huge political challenge to ensure the maintenance of a defensible and controlled development of Norwegian money games in response to the aggressive development of an increasingly market and technology based control of the availability of money games.

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

- to prevent and protect the citizens against compulsive problem gambling

[11] Relevant parts of the Bill (a White Paper) are enclosed in English translation as **Annex 11.**

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

72. These are the general objectives of Norwegian gaming and lottery legislation and policy, which have always applied, but which were also reiterated and reemphasized in the 2003 Bill, meeting with broad parliamentary approval, and which have since then been applied consistently by the competent authorities on a general level, as compared to their somewhat less coherent application during a period in the 1990s.

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

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

75. The strength of the exclusive rights model rests on several factors. First, it is by far the most appropriate way to ensure a restrictive and publicly responsible framework for the operation of gaming. Such a system provides the competent authorities with the means to conduct close and continuous control with gaming activities which are simply not attainable in a market with a large number of license holders and operators.

76. Second, an exclusive rights system in itself inherently serves to limit the volume of gaming, as compared to a market based competitive system. Third, such a system, especially if publicly owned, is the only way in which to avoid the market incentives created by private profit, to ensure that the operation of gambling does not become a source of private wealth, and to ensure that the revenues are channelled to charitable and socially beneficial causes. Thus, this is not only by the most efficient way in which to

achieve the legitimate legislative objectives, but in some respects the only way and also clearly the morally most consistent.

77. The inherent limitations of an exclusive rights system can be explained using basic economic monopoly theory, according to which a monopoly will always tend to produce less turnover than a competitive market. First, the monopoly holder will have less of an incentive to develop and market new and more attractive products and services. Second, the monopolist will be able to demand higher prices, and thereby obtain greater profit from less turnover.

78. Translated into gaming policy this means that Norsk Tipping can operate with less attractive (and addictive) games, and a lower payout rate in winnings than what is possible for a private operator within a market based regime. This inherently serves to limit both the volume of gaming and the addictiveness of the games offered.

79. In normal sectors of the economy monopolies are ill-regarded and preferably avoided because of these characteristics. In the gaming and lottery sector, where the aim is to control and restrict gambling, it is precisely the same inherent characteristics which make monopolies *the most appropriate* policy instrument.

3.3 The Norwegian gaming market

Market figures for 2004 and 2005 – gross and net turnover

80. The Norwegian gaming market had a total gross turnover in 2004 of 40,8 billion NOK (4,9 billion Euro), of which 26 billion NOK (64 %) came from slot machines. Norsk Tipping had a gross turnover of 8,8 billion (22 %), while Norsk Rikstoto's turnover was 2,6 billion (6 %). The remaining 8 % of the gross market derived from other games offered under the Lottery Act.[12] The key figures (in NOK and EUR) are:

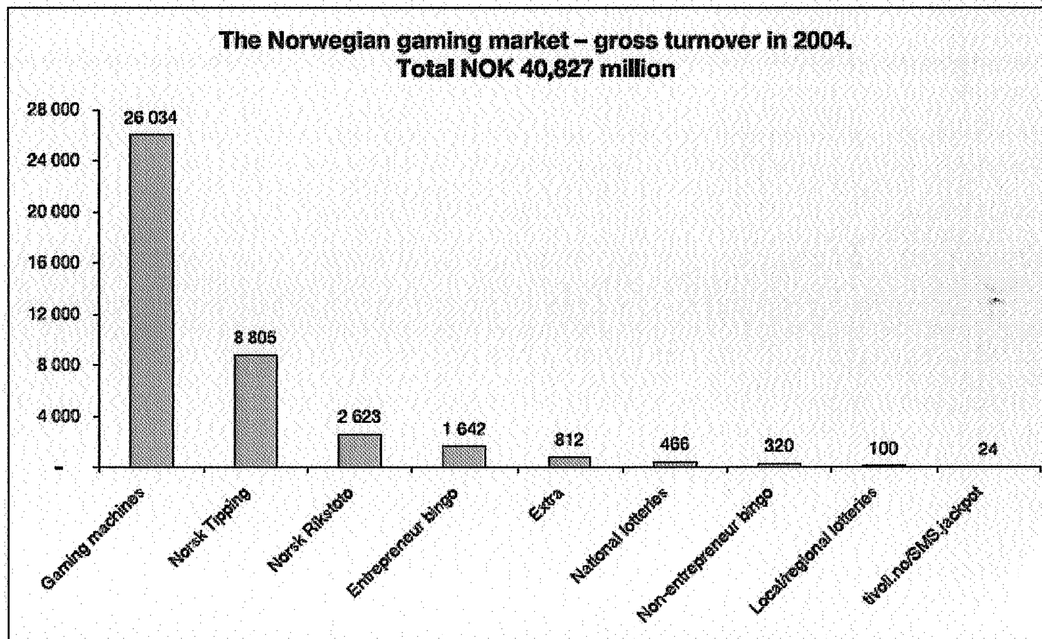
Key figures on the gaming market in Norway

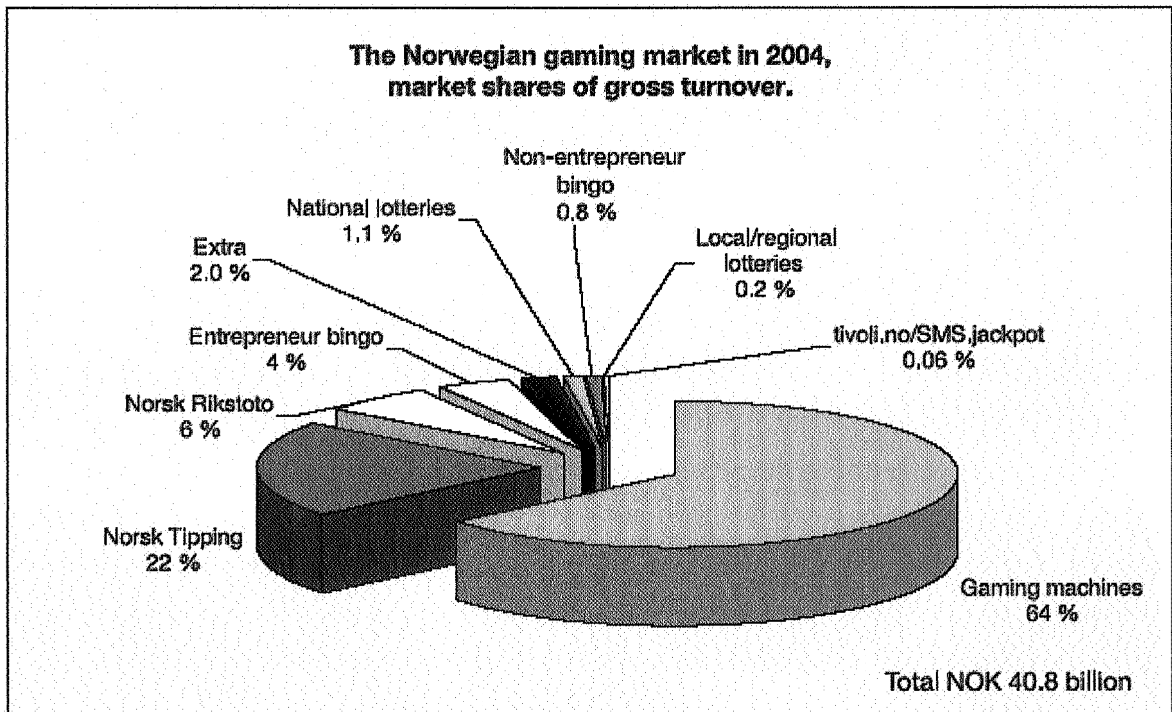
Year 2004	Million NOK	Million EUR[48]
Gross turnover (total wagered)[49]	40,827	4,877
Prizes	29,316	3,502
Net turnover (expenditure/loss)	11,511	1,375

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

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

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



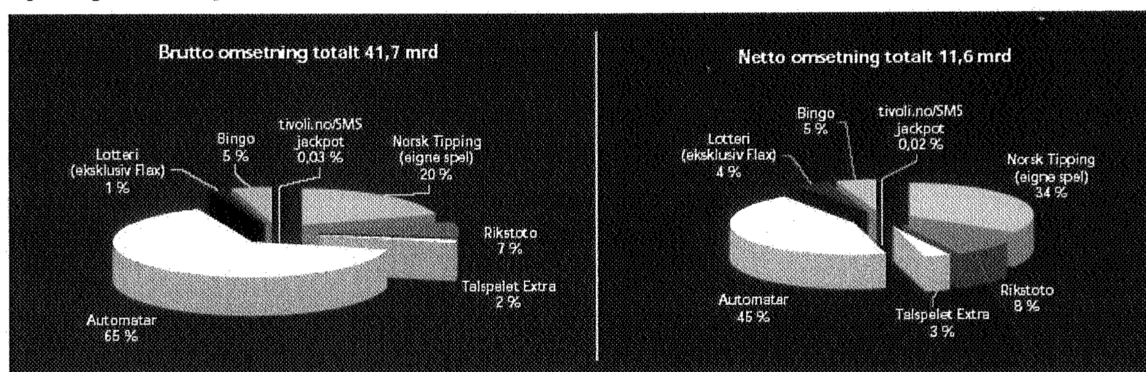


82. The "gross turnover" is the total amount wagered, before prize money is deducted. The "net turnover" is the amount generated after prizes are paid out (the players' loss). The net turnover of the Norwegian gaming market in 2004 was 11,5 billion NOK, of which 4,9 billion (43 %) came from slot machines.[13] Norsk Tipping had a net turnover of 4,2

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

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

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



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

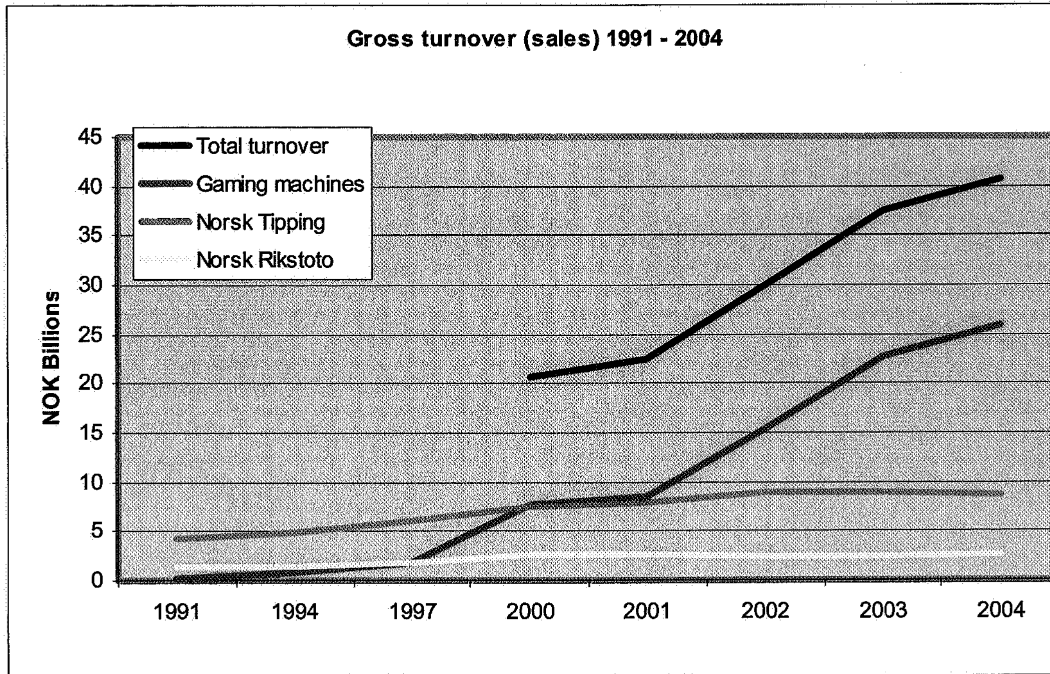
	2004		2005		Endring	
	Brutto oms.	Netto oms.	Brutto oms.	Netto oms.	Brutto oms.	Netto oms.
Norsk Tipping (eigne spel)	8 805	4 200	8 433	3 989	- 4 %	- 5 %
Rikstoto	2 623	902	2 781	959	6 %	6 %
Talspelet Extra	812	406	771	385	- 5 %	- 5 %
Automatar *	26 034	4 961	27 100	5 200	3-5 %	3-5 %
tivoli.no/SMS jackpot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

85. The figures show that the market for gaming legally offered under Norwegian law was leveling out in 2005, with a slight increase for gaming machines and Rikstoto, and a certain decrease for Norsk Tipping.[14] This is in contrast to the intense growth of the market in recent years.

Market developments in recent years

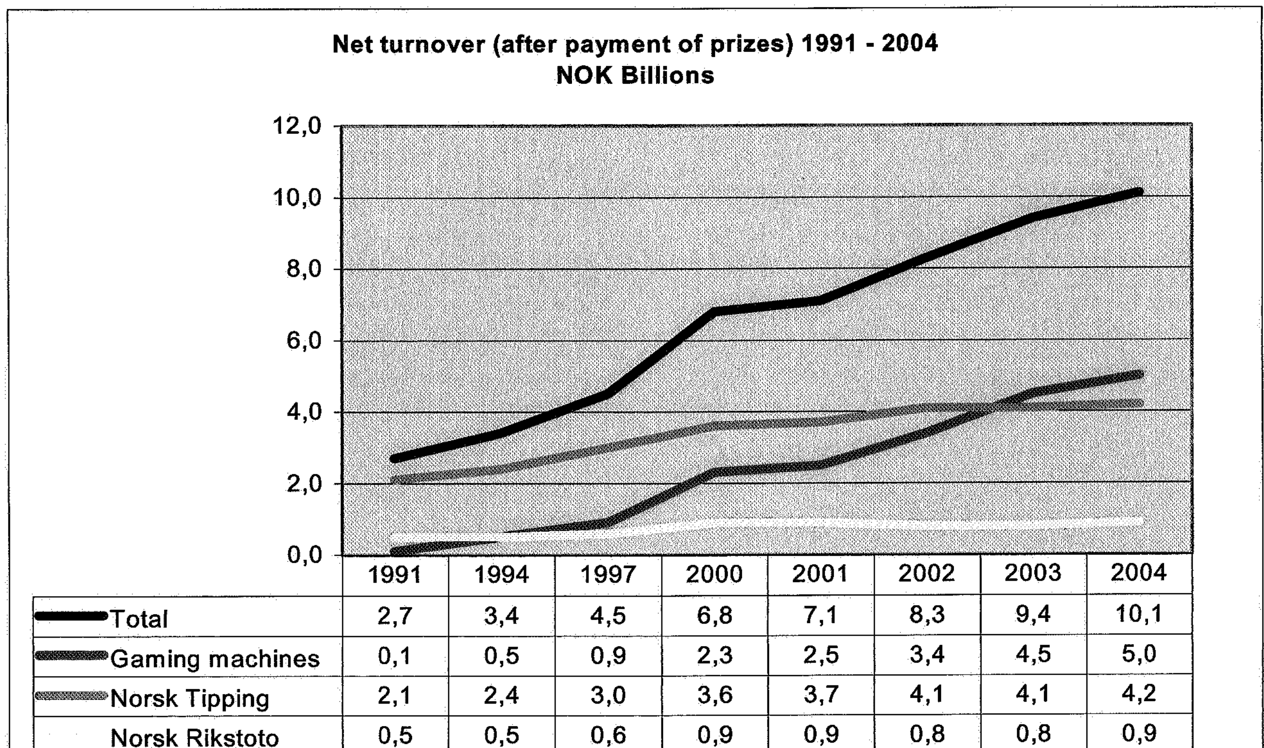
86. The trends in the gaming market from the early 1990s to year-end 2003 are illustrated in the following table from the Gaming Authority (2004), which shows the turnover of Norsk Tipping, the Norsk Rikstoto Foundation, slot machines, as well as the total market:

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



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

88. The previous table showed gross turnover, which is the way the Gaming Authority usually present the market. A similar table for net turnover (gamblers' loss) is:



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

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

The total market

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

Norsk Tipping[15]

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

Norsk Rikstoto

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

Slot machines

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

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

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

The total market

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

92. For the traditional market, excluding the slot machines, developments have been rather different. This part of the market has had an average annual growth in turnover since

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

1990 of roughly 5 % a year. Compared to the growth in national income this is moderate, especially considering that gaming for most people is a surplus activity, which may be expected to increase more than proportionately as prosperity rises.

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

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

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

The traditional main operators – Norsk Tipping and Norsk Rikstoto

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

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

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

98. The Government holds that the figures for the traditional gaming and lottery sector (excluding slot machines) in Norway in the last decade demonstrate:

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

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

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

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

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

3.4 The existing exclusive-rights system (Norsk Tipping)

Basic principles and procedures

99. Norsk Tipping is a fully state-owned enterprise, which was first founded in 1946, and which is now regulated by the Gaming Act of 1992. The company has a corporate structure which is distinct from that of both private and other public companies. It is a non-profit enterprise in the sense that the revenues generated are channeled directly to benevolent causes prescribed by law – with 50 % to sport activities and 50 % to cultural activities. The state does not receive any profit whatsoever from the company (unlike other public enterprises). The revenues are distributed directly to activities for which the authorities have not taken public economic responsibility, and the allocations are not part of the state budgetary system. Within the fixed statutory scale, the exact distributions are decided partly by the Ministry and partly by Parliament.

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

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

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

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

> The Ministry lays down the framework for the company's activities and approves what games the company should be permitted to offer. Determines the game rules.
>
> The Board's task is to organise the company under public control. We also have an obligation to work to counteract negative effects of gambling. We are required to ensure that the company is operated rationally in order thereby – within a socially responsible framework – to generate maximum profit for the causes.
>
> The Ministry exercises its ongoing supervision and control of the company through the annual general meeting. The Ministry appoints the Board of Norsk Tipping. The Ministry receives copies of the minutes from all Board meetings on an ongoing basis. Regular meetings are held between Norsk Tipping and the Ministry. There is a formal meeting with the Minister a couple of times a year. Consultation meetings/contact with civil servants occur relatively frequently. We operate under relatively strict rules, so that there is often a need for clarification.
>
> In the years that I have served as Chairman of the Board [since 1997] the Ministry's ongoing supervision and control have been expanded. This has taken place gradually, but more intensively in recent years. Today our experience is that in many areas the Ministry issues control signals that mean that the Board's and management's discretionary competence is also being limited in respect of purely commercial matters. [16]

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

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[16] This statement was made as a written deposition before the Supreme Court in the Slot Machine Case, and it has earlier been presented to the EFTA Court as an annex in Case E-1/06. It is not enclosed here, as it is not as relevant to the present action. But it might of course be presented if need be.

The Games Portfolio of Norsk Tipping

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

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

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

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

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

109. The largest game provided by Norsk Tipping is by far the Lotto games, which amount to approximately 65 % of the total turnover of Norsk Tipping.[17] These Lotto games are a particularly "soft" and non-aggressive type of gaming which does not offer any significant problems of compulsive gambling.

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

111. In the earlier writings of Ladbrokes before the national court there are attempts at establishing the impression that the number of games from Norsk Tipping increases rapidly and continuously. This is not correct. The amount of games provided Norsk Tipping has at all times been modest compared to what is seen in most other countries.

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

As seen from the list above, Norsk Tipping currently offers only five different types of games, six including the Extra Lottery operated on behalf of a charitable organization.

112. Furthermore, no new games have been introduced by Norsk Tipping since Joker in 2000, which replaced an earlier game ("the cash lottery"). Amongst the games introduced in the 1990s, several were either replacing existing games, or were simply taken over by Norsk Tipping from other administrators. The development of the games portfolio has been described thus by the chairman of the company, Mr Thue, in a deposition before the Supreme Court in the slot machine case:

> Norsk Tipping began its activities with football pools in 1946. This was followed in 1986 by the first numbers game, Lotto, Måltips in 1989, Vikinglotto in 1993, Oddsen in 1994 (replaced Måltips), Flax in 1995 (this was a game that had existed in the market from 1988, and which Norsk Tipping won the licence to (formerly administered by Nordlandsbanken)), Extra in 1996 (the game belongs to the health and rehabilitation foundation Stiftelsen Helse and Rehabilitering, and Norsk Tipping is merely the operator). Joker came in 2000 to replace the cash lottery. The Ministry has not approved any more games for Norsk Tipping after 1993. What has happened since that time has merely been in the nature of adjustments and modernisations of the existing games portfolio.

113. The history of Norsk Tipping thus shows that there has been moderate development and updating in accordance with general technical developments. This has been done in a manner compatible with the consistent general aim of preventing compulsive gambling and other gambling problems.

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

115. Thus, the existing public exclusive right arrangement has in fact served Norwegian society very well as a provider and guarantee of moderate and non-addictive gaming and lottery. And one of the reasons why it has been able to do this is precisely because it has been allowed to make certain adjustments and modernizations in its portfolio.

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

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

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

Marketing of Norsk Tipping's Games

119. It is true, as often pointed out, that Norsk Tipping conducts quite extensive marketing. The overall perspective of this marketing has been described by Mr Thue thus:

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

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

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

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

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

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

125. Even though Norsk Tipping's marketing has not been known to induce problems, it was a natural and consistent part of the general tightening of Norwegian gaming and lottery policy starting in 2002-2003 to subject it to critical assessment. Of some relevance was of course also the November 2003 Gambelli judgment paragraph 69, which in particular questions the consistency of marketing within restricted gambling systems. Another important factor is the growth of compulsive gambling in Norway, which – even though almost exclusively caused by (non-marketed) slot machines – still has contributed to a more general skepticism with gaming and lotteries – which also affect Norsk Tipping and its marketing campaigns.

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

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

127. Furthermore, when the Gaming Authority conducted its thorough review of Norwegian gaming and lottery in order to prepare a proposal for a governmental action plan, marketing was one of the main issues. In the Authority's December 2004 report there were several suggestions in this regard, including that guidelines should be drawn up. This was promptly followed up by the Ministry in its April 2005 Governmental Action Plan to prevent Problem Gambling, and the new "Guidelines for the Marketing of State-Controlled Gaming and Gambling" were adopted by Royal Decree in early June 2005.[18]

[18] Cf. **Annex 13,** Guidelines for the Marketing of State-Controlled Gaming and Gambling, Royal Decree of 10 June 2005, with an English translation enclosed. The guidelines apply to Norsk Tipping and the Norsk Rikstoto Foundation.

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

Norsk Tipping's Approach to Social Responsibility

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

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

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

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

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

133. Starting in the 2004 Annual Report, there is now a "social report" drawn up each year, which reports on social responsibility initiatives and considerations.

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

> In practice this means that at times we are obliged on the basis of these guidelines to make decisions that we know will reduce turnover and thereby the company's profit. Not infrequently we also

refrain from making use of instruments that we know would have positive commercial effects, because we can see that they may have undesirable consequences and thus come into conflict with our responsibility to society

135. The greatest challenge for the social responsibility of Norsk Tipping will come when it assumes responsibility for the slot machines, which is a form of gambling potentially much more problematic than any of the forms presently offered by the company. This is anticipated, and a number of measures have been taken to ensure that under the regime of Norsk Tipping the future machines will be very significantly different from the present, and that they will be operated in such a way as to effectively safeguard against any large scale problem gambling.

3.5 The system for horse race betting (the Rikstoto Foundation)

136. Authorization to arrange bet from horseracing by a totalisator (pool betting) is regulated in the Totalisator Act of 1927. According to section 1 of the act, authorisation can only be granted to an organisation which objective is to support breeding and rearing of horses. In addition, the organisation must be approved by the Ministry of Agriculture and Food. As mentioned in section 3.1 above, the law doesn't provide an exclusive-rights system, but regulates what is in effect a restrictive exclusive-right system.

137. Until 1982, all betting took place at the racetracks. Therefore, the authorisation to arrange pool betting was granted to the operative companies at the racecourses (local race organisations related to the 12 racecourses).

138. In 1982 authorisation to arrange bet through totalisator was also given to Norsk Rikstoto. Norsk Rikstoto was initially established in order to arrange for a nationwide bet, V-6, on horseracing. Norsk Rikstoto is a foundation established in 1982 by Det Norske Travselskap – DNT (Norwegian Trotting Company) and Norsk Jockeyklubb – NJ (Norwegian Jockey club). As for Norsk Tipping, Norsk Rikstoto operates as a professional business company within the legal and policy framework defined by the authorities (Norwegian Ministry of Agriculture and Food).

139. After a reorganisation in the mid-nineties, the authorisation to arrange bet from horse racing was granted to Norsk Rikstoto exclusively. The authorisations given to the operative companies at the racecourses were simultaneously withdrawn. Instead, Norsk Rikstoto makes concluded agreements with the operating companies to arrange pool-betting at the race tracks. The authorisation is laid down in regulation on pool betting stating in section 4 that Norsk Rikstoto shall be given authorisation for all pool betting. Therefore, Norsk Rikstoto's authorisation is in fact exclusive.

140. Today, Norsk Rikstoto has overall responsibility for all pool betting and financial administration of equestrian sports. Its objective is to promote equestrian sports, horse breeding and rearing. The regulation related to Norsk Rikstoto's activities is elaborated with the intention of implementing the (at all times) Norwegian gaming policy.

141. Compared to the system with authorisation granted to the operative companies, this change in licensing practise makes a tighter connection between the authorities and pool

betting activities. In addition, the surveillance activities toward one single participant having the superior responsibility for all pool-betting, is easier to conduct.

142. Norsk Rikstoto is under surveillance by the Ministry of Agriculture and Food. The Ministry exercises its control through regulation based on the Totalisator Act , By conditions in the authorisation, and by directions and guidelines. The statutes of Norsk Rikstoto must be approved by the Ministry. The same applies for the rules of the game. In addition, the ministry designates one member of the board and three members of the board of representatives of Norsk Rikstoto.

143. The supervisory authority is delegated to Lotteri- og stiftelsestilsynet (The Norwegian Gaming and Foundation Authority).

144. The total turnover from the betting activity shall be divided between the winner share, totalisator fee, operating expenses, and promoting equestrian sports, horse breeding and rearing. The fee and the winner share are determined in regulations laid down by the Ministry of Agriculture and Food. Apart from necessary maintenance and development, the revenue is channelled directly back to the (trotting and racehorse organisations) equestrian sports, horse breeding and rearing, namely DNT, NJ and Norsk Hestesenter – NHS (the Norwegian Equine centre). NHS is a foundation made up from 16 nationwide horse- and pony organisations, and has two main sections; education and breeding. The Ministry of Agriculture and Food determines the share for NHS.

The Games Portfolio

145. Norsk Rikstoto offers the following forms of horserace betting:

- V75 (Bet on winner in seven predetermined races)
- V65 (Bet on winner in six predetermined races)
- Daily Double (Bet on winner in two predetermined races)
- V5 (Bet on winner in five predetermined races)
- Place (Bet on first, second and third in one race)
- Win (Bet on winner in one race)
- Duo (Bet on first and second in the right order in one race)
- Triple (Bet on first, second and third in the right order in one race)

146. The total figures of Norsk Rikstoto's turnover are given in section 3.2. Over the last year (2000-2005), Norsk Rikstoto's turnover has been stable, maybe slightly growing. In 2005, the games V75 and V5 contributed with more then half of the turnover. V75 is also the game with the most increasing turnover (14.9% change from 2004). The turnovers for most of the games are growing, more or less. Only Duo and Triple have a decreasing turnover.

147. Several games can be played as part of a system (systemspill, lynsystem), or more or less filled in (lyntoto, lynbanker). The games are also offered at the internet and mobile phones. Such distribution is subject to the guidelines for distribution of games through electronic channels given by the Ministry of Agriculture and Food. Norsk Rikstoto doesn't offer interactive games in their marketing activity.

148. All the games are subject to authorisation under the Act relating to bet by totalisator. As mentioned above. The games related to horse-race betting are known to be moderate and non-addictive games. As it appears from the list above, all the games are merely variations over the same kind of game. They are connected to specific races, and which takes place only once a day and are therefore not quick repeating gaming activities.

Marketing

149. Like Norsk Tipping, Norsk Rikstoto also conducts extensive marketing. However, such marketing is considered necessary in order to be able to uphold public interest for the horserace traditions and to ensure a level of turnover which makes it possible to arrange such games, and to offer a responsible domestic horserace gaming sector. What is said above about marketing games from Norsk Tipping, also applies for marketing games from Norsk Rikstoto.

150. Norsk Rikstoto, is instructed to implement in their marketing activity "guidelines for the marketing of state-controlled gaming and gambling" adopted by the Ministry. These guidelines instruct Norsk Rikstoto to report their marketing activities to the The Norwegian Gaming and Foundation Authority. The Authority then reports to the Ministry their conclusions on whether Norsk Rikstoto's marketing activities is in line with the guidelines. Marketing not according to the guidelines will lead to initiatives (actions, measures) from the Ministry dependent on the extent of infringements.

151. The "guidelines for the marketing of state-controlled gaming and gambling" shall ensure that marketing of pool betting is conducted in a socially proper way in order to avoid marketing that might induce problem gambling.

Social responsibility

152. In order to inter alia avoid money laundering; Norsk Rikstoto wants to have a unique registering of the customers. So far they register all their internet customers (including age). When it comes to registering customers playing through commissaries is, however, a bit more complicated question. Because of legal aspects related to rules for personal information protection, the system is so far voluntary. This has lead to approximately 50 % registering of players overall. All registered players are registered with their Norwegian bank account and a Norwegian Social Security number. This account will be used for transfer of money won on horse betting. Furthermore, Norsk Rikstoto has asked to be covered by the money laundering act, like all the banks in Norway.

153. Concerning temporary licensing the internet solution for horse betting in the first test phase, Norsk Rikstoto has a routine for register gaming patterns among their customers so they might be able to identify potentially addicted players in order to prevent people to develop problem gaming.

154. The gaming pattern for the single non-registered players, is not possible. Norsk Rikstoto has nevertheless a system for a daily surveillance of the turnover for every commission agent (where 70 % of the gambling takes place). A sudden, abnormal, increase in the

turnover at the commission agent will be followed up by Norsk Rikstoto. I addition, every player may choose payment via bank, and all transactions more than NOK 10000,- are transferred through bank.

155. Furthermore, the player may also activate a surveillance-system for themselves to secure not to exceed a fixed limit for single bets and total payments.

156. Since young people are more vulnerable to gaming addiction than older people when heavily exposed to different types of games, Norsk Rikstoto has introduced age limit of 18 years for horse betting on internet and 16 years on the racecourses/horsetracs.

157. According to the Guidelines for distribution of games through electronic channels, Norsk Rikstoto shall have information about gaming addiction, a link to further information. In addition, Norsk Rikstoto shall inform about their policy and measures against gaming addiction.

3.6 Licenses for other games under the Lottery Act

Basic principles and procedures

158. The Lottery Act of 24 February 1995 nr 11 regulates ticket lotteries, bingo and slot machines, succeeding the tradition of the Lottery Acts of 14 June 1851 and 12 May 1939. The 1851 Lottery Act was given to uphold the banning of all hazard games in Danish-Norwegian regulation of 4 December 1767. A general ban is hold as a basic principle in the 1851 Act (as in the later Acts) at the same time as it allows for licensing of minor lottery activities for the benefit of non-profitable charity causes.

159. In the preliminary works of the 1851 Act the public acceptance of the depravation caused by tempting games of chance was held as the main reason for the general ban. In the motives of the 1939 Act it is stated that "society reasons calls for severe public control of the Lottery activity, as such activities in many ways may tempt for misuse of the public confidence".

160. The Brundtland government presented a consolidated review of the lottery and gaming regulation to the Parliament, in the Revised National Budget for 1991, stating that:

> There has been broad political consensus that access to gambling be positively regulated, i.e. that that which is not expressly permitted is prohibited. At the same time, political authorities down the years have recognised that a certain interest in gambling prevails in society. Channelling that interest through a public corporation has been regarded as the most appropriate means of organising gambling, because this is done using satisfactory mechanisms, under full State supervision and with transparent operating conditions within adopted legislation.

161. The Lottery Act of 1995 upholds the tradition of a general ban (§ 6), as well as the tradition of minor lottery activities based on licences, for the benefit of non-profitable causes. This means that the major games of chance such as Lotto and sports betting is provided by single operators and regulated in the Gaming Act of 1992 and the Totalisator Act of 1927, under full state supervision. The minor lotteries in the Lottery

Act are allowed within the limits of each license in competition between different non-profitable organizations.

162. It is the experience of the last decades that the gaming offered under the Lottery Act by charitable and socially beneficial organisations on the whole has developed in a moderate and acceptable manner. This goes for the bingo halls, the scratch cards, and the other minor forms of lotteries. The one exception, which is huge, is the development of the slot machine sector, which within the relative loose regulatory framework of the Lottery Act has exploded in the last decade – causing great and grave problems with gambling addiction. This was the background for the 2003 slot machine reform decided by a broad majority in Parliament, the core of which was to transfer the operation of slot machines from the Lottery Act to the far stricter public exclusive rights system of the Gaming Act. The reform is not yet implemented due to continuous legal actions, first by the commercial operators before the national courts and then by the EFTA Surveillance Authority before the EFTA Court.

Lotteries under the Lottery Act

163. The Lottery Act of 1995 regulates different kinds of lottery activity, all based on the presupposition that the lottery is held for the benefit of a non-profitable organization.

164. For some of the lotteries it is allowed to have a commercial operator in charge of the practical details of the lottery, but also for these lotteries the surplus has to go to a non-profitable cause. License for lottery activity is either given by the police (local lotteries) of by The Gaming and Foundation Authority (larger country-wide lotteries). Today the different activities under the Lottery Act consists of the following kind of games:

- *Bazaar* are minor, local lotteries with limited prices, where the sales of tickets and the drawing is held at the same place under direct supervision of the ticket holders. Bazaars can be held without a license if the lottery is part of an arrangement where the lottery is not the main purpose, and the total prizes all together do not exceed the value of 40000 NOK. The main prize may not exceed the value of 8000 NOK.

- *Bingo* is held in separate bingo premises by either commercial operators or the private organizations themselves, and may include both paper bingo and electronic bingo. Ordinary prizes may not exceed 24 000 NOK and jackpot-prizes may not exceed 48 000 NOK.

- *Extra* is a national number game operated by Norsk Tipping, for the benefit of health care causes, with an annual turnover of approximately 800 mill NOK. The Extra game is licensed under the Lottery Act only for historical and political reasons, for the benefit of several health care organizations. In order to fully uphold the legal system of the national gaming policy the Extra game should have been licensed under the Gaming Act. Still the game is under full state supervision in the same way as all the other games operated by Norsk Tipping. The main prize in the weekly drawing may not exceed 2 mill NOK.

- *Slot Machines* under the current legislation are operated mainly by private operators authorized under § 4c and contracted by the benefiting non-profitable organizations which hold the licenses. The top prize in the machines may not exceed 2000 NOK and each game can not be finished in less than 1,5 second. In 2005 the gross turnover from approximately 15000 machines was more than 27 billon NOK, and net turnover (after deduction of the prizes) was 5,2 billion NOK.

- *Scratch Card Lotteries* and *traditional ticket lotteries* are mainly operated by the organizations themselves. The value of the top prize in a nation-wide scratch card or traditional lottery may not exceed 2 million NOK, and the gross turnover may not exceed 100 million NOK in each lottery.

- *Wheel of Fortune* is only allowed in amusement parks and occasional restaurant arrangement, and with no prizes exceeding the value of 150 NOK.

3.7 Problem gambling in Norway in recent years

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

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

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

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

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

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

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

172. In 2003 a telephone helpline project for problem gamblers was set up. Findings from the project were reported in January 2005, and concluded, inter alia, that 90 % of those calling in for the first time reported slot machines to be the main source of their problems. A table from the report shows the most problematic games (several games could be listed):

7.15 De mest problemfylte spillene (2004)

Her er det anledning til å oppgi flere typer spill

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

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

173. In 2003 the Ministry initiated the drafting of an action plan aimed at preventing problem gambling. The project was assigned to the Gaming Authority, which established a working group and a reference group, and in December 2004 submitted a report. The report is comprehensive, and includes not only the proposal for an action plan, but also a description of the gaming sector in Norway, an extensive summary of findings from recent research on problem gambling abroad and at home, and a description of current

problems and challenges in Norway. On the basis of an earlier survey (SIRUS 2003) the report estimated that some 50.000 Norwegians were either pathological gamblers or problem gamblers. In the summary, the source of the problem is described as follows:

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

174. The report was presented to the Ministry in December 2004, which in April 2005 announced the "Governmental Plan to prevent Problem Gambling".[19]

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

176. In September 2005, the report "Undersøkelse av pengespill", from the MMI institute (in cooperation with Østnorsk kompetansesenter, Sykehuset Innlandet HF, and Mr Thomas Nilsson, Spelinstitutet, Sweden) was published. This is the most recent report on the prevalence of compulsive gambling in Norway. The findings in the report are for the most part in line with earlier findings and estimates, with the notable exception that the number of persons estimated to suffer from gambling problems is increased to some <u>71,000</u>, a distinct increase from the earlier estimate of 50,000. In addition, some 133,000 persons are classified to be in a "moderate-risk" group. The MMI report identified slot machines as the preferred game for problem gamblers.

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

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

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

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[19] Cf. **Annex 18** with an English translation.

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

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

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

182. Although the distinction is often used, it is difficult to draw an exact line between "hard" and "soft" forms of gambling. It is more a question of a relative scale, and the same form of gaming may appear in "harder" and "softer" versions, depending on how it is construed and presented. That said, the distinction does have some merit. It is a fact that different forms of gaming are in general more or less likely to induce delusions or dependency, and the terms "hard" and "soft" are a useful way to distinguish between high-risk and low-risk forms of gaming.

183. Using these terms, it is clear that slot machines in general carry a higher potential risk of compulsive gambling, and therefore are a "hard" form of gambling, in the sense that they are more liable than most other games to promote problem gambling and addictiveness. This is documented in a number of studies, and it is in conformity with the experiences of the competent Norwegian authorities, and with what is known about the actual causes of problem gambling in Norway.

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

185. Irrespectively of whether one uses the terminology of "hard" and "soft", it is clear that different types of gambling have different addiction potential, and that slot machines are usually the most problematic type. This was recently pointed out by the German Constitutional Court in its 28 March 2006 judgment in the "sportwetten" case:[20]

> Nevertheless, different types of games of chance have different addiction potential. According to current knowledge, by far the most players with problematic or pathological gambling behaviour play on machines, which are legal under the Industrial Code. Statistics

[20] Cf. the decision of the German Bundesverfassungsgericht of 28 March 2006 in case 1 BvR 1054/01, enclosed in English translation as **Annex 23**. See section 6.6 for further comments on this case.

> show casino games in second place. All other types of games of chance currently contribute significantly less to problematic and pathological gambling behaviour [...]. (100)

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

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

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

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

4. RECENT DEVELOPMENTS IN NATIONAL GAMBLING POLICY

4.1 New challenges for national gambling policy

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

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

192. The Governmental White Paper was later followed by several measures on different levels. The responsible authorities could perhaps have done even more, especially to meet the challenges of gambling on the Internet, but the time-consuming process with the changes in regulation on the slot machines, and in particular the pending legal actions over the 2003 reform, has slowed down the progress to implement measures related to other forms of gambling.

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

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

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

196. Naturally these challenges and trends impact on Norwegian gaming policy and have made it necessary for the competent authorities (in the first instance the Ministry of

Culture) to rethink policy and adapt it to the new era. The March 2003 White Paper may be seen as the start of this process, which has since continued and is still in progress.

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

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

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

199. The 2003 White Paper (Ot.prp. 44) was the first overall report on gaming and gambling in Norway in nearly a decade, and gives the most comprehensive presentation of Norwegian gaming legislation and policy formulated to date. [21]

200. The main chapters of the Bill are:

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

Proposal for changes to the money game and lottery acts

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

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

203. Chapter 5 deals with "Other amendments to the regulations on gaming and lotteries". First, the proposal for a new objects clause in the Lottery Act that was subsequently adopted as the new § 1 a is presented. Chapter 5.2 goes on to discuss the principles underlying the question of who should have access to revenue from gaming and

[21] Parts of the White Paper are enclosed in English translation as **Annex 11.**

lotteries, including a delimitation of the concepts "humanitarian" and "public-interest" causes, and certain minor amendments to the rules on small-scale lotteries are proposed. Section 5.3 considers questions concerning lottery activities on Norwegian vessels sailing to foreign ports and the need for a harmonisation of the regulations off and on shore.

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

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

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

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

4.3 The 2003 Slot Machine Reform

208. The main pillar of the recent tightening and reaffirmation of national gaming policy is the 2003 slot machine reform, which consisted of a short statutory amendment, transferring the operation of slot machines from the 1995 Lottery Act to the 1992 Gaming Act. In effect this meant abolishing the private commercial gambling market which had mushroomed under the relatively liberal regime of the Lottery Act, and replacing it with the far stricter existing exclusive rights regime of the Gaming Act.

209. The main legislative aim of the reform is to fight gambling addiction, both through a radical reduction in the volume of machine gambling and by placing the machines which will still be permitted under the strict control of Norsk Tipping, with ministerial instructions to operate them in the utmost moderate manner and in a way tailored not to induce addiction. Compared to the volume of slot machine gambling when the amendment was passed in 2003 it aimed at a reduction of more than 50 percent and compared to the increased level in 2005 the aim is for an 80 percent reduction. Compared to 2005 the estimated gross turnover from slot machines will be cut by some 20 billion kroner annually, and the net turnover (gamblers' loss) by some 3 ½ billion.

210. In the Government's view the 2003 slot machine reform was an absolutely necessary measure in order to tackle the exploding new problems of gambling addiction which the

machines have caused in recent years. It was also the single most consistent and coherent measure the national authorities have taken in the field of gambling in recent years – cutting away the new tumor, and restoring legislative and administrative coherency to the gaming and lotteries sector by use of the traditional main model.

211. Unfortunately the 2003 reform, which was to have been implemented by 1 January 2005 has been delayed because of legal actions brought by the commercial operators,[22] partly before the national courts and partly by way of complaint to the EFTA Surveillance Authority, which has also brought the case before the EFTA Court (case E-1/06). A judgment from the EFTA Court is expected in the winter or spring of 2007. If the Court finds that the reform is acceptable under EEA law, it will be implemented in the second part of 2007 and in 2008. If not, the Ministry has come to the conclusion that the only viable alternative will probably be to ban slot machines altogether, even at the risk of thus creating an illegal black market.

4.4 Other public measures tightening gambling policy

The establishment and strengthening of the Gaming Authority

212. The first measure in a more modern and tighter national gambling policy was the establishment of the National Gaming Board in 2001. Since then, this institution has been gradually strengthened, with new tasks assigned and increased resources allocated. Today the Gaming and Foundation Authority conducts reinforced and intensified surveillance and control over all aspects of the Norwegian gaming and lottery sector.

The establishment of the Helpline (Hjelpelinjen)

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

The Government's action plan against gambling addiction

214. Compulsive gambling has because of the increase in slot machine gambling in recent years for the first time become a major problem in Norway, as described above in section 3.7. Public awareness of this grew gradually, and it was not really until 2001-

[22] It is however notable that the charitable and beneficial organisations who were the actual holders of the slot machine licenses did *not* take legal action against the reform. Most of them acknowledged the necessity of the reform, and some of them even explicitly supported it, though they stand to loose greatly in economic terms. The actions were only brought be the new breed of commercial gambling companies which has in the last decade been offering their operational services to the charities.

2002 that the competent authorities really started to take notice. After that, however, it has been a political priority to fight this growing social problem. The March 2003 White Paper includes a description of what was then known about compulsive gambling, and most of this document should be seen as an attempt to tackle it, by different means.

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

216. The December 2004 proposals of the Gaming Authority were quickly transferred into public policy, and in April 2005 the Government presented its "Governmental Action Plan to prevent Problem Gambling",[23] which met with broad public and political approval.

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

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

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

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

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

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[23] Cf. **Annex 18** (English version).

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

222. One of the measures proposed by the Norwegian Gaming Authority in its action plan from December 2004 was the introduction of formal guidelines for the marketing which Norsk Tipping and Norsk Rikstoto should be permitted to carry out. The guidelines are now in force, and are being controlled by the Gaming Authority.[24] The purpose of the guidelines is to secure that the marketing is in line with the restrictive objectives of the regulation. Direct marketing and marketing targeted at adolescence (under 18 years) is prohibited. Also, misleading and certain forms of aggressive marketing will not be tolerated under the new guidelines.

Revised and tightened control of Norsk Tipping

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

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

225. In 2004 the Office of the Auditor General of Norway criticised the Ministry for certain aspects of its governance of Norsk Tipping. Against this background the Ministry has reviewed its control routines. The Ministry responded to the remarks from the Office of Auditor General by proposing new statutes for the company along with changes in the board instructions to ensure that the roles and responsibilities were more clearly defined. The changes were approved by the Government in April 2005. The Ministry maintains a close contact and continuous dialog with the company on how the company fulfils it's obligations in a socially responsible manner in accordance with the regulation.

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

[24] Cf. **Annex 13**, Guidelines for the marketing of state-controlled gaming and gambling, Royal Decree of 10 June 2005, enclosed in English translation.

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

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

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

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

The refusal to allow interactive internet gambling from Norway

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

231. Norway has also dealt with this question, and did in 2005 decide not to allow for the interactive gaming site Tivoli.no to be established as a permanent gaming offer. After a

complaint from the operator of the test-project, Norske Spill, the final decision was taken by the Government on 1 July 2005, partly because "the uncertainty of the future development and the consequences of such gaming offers. Such uncertainty is particularly inconvenient at a time when some of the national gaming offers increase their turnover strongly and the international availability of games is also increasing".

New regulation on network marketing companies

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

Continued prohibition against gambling on credit

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

Continued prohibition against casinos

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

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

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

Meeting the Challenges from Internet Gambling

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

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

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

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

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

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

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

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

4.5 Concluding remarks

245. The Government has included the above presentation in order to give the EFTA Court an understanding of how the national gaming and lottery sector has developed in recent years, as a background for the Court's interpretation of the relevant EEA law.

246. To conclude, national gaming and lottery policy has in recent years been tightened and reaffirmed. Important elements of this include:

- The establishment and strengthening of the Gaming Authority
- The 2003 slot machine reform
- The establishment of the Helpline
- The Government's action plan against gambling addiction
- Increased research on problem gambling
- Royal Decree with instructions for the marketing of Norsk Tipping and the Norsk Rikstoto Foundation
- Revised and tightened control of Norsk Tipping
- The refusal to allow for interactive internet gambling in Norway
- The refusal to allow for development of interactive SMS-gambling
- The new regulations on network marketing companies ("pyramidespill")
- The consistent refusal to allow casinos in spite of frequent proposals
- The consistent refusal to allow for gambling on credit
- Continuous (but difficult) assessments on how to meet Internet gambling

5. THE COMPARATIVE PERSPECTIVE – GAMBLING RESTRICTIONS IN OTHER COUNTRIES

5.1 Introduction

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

248. In the other Nordic countries the regulation is basically similar to the Norwegian model, with most major games organized under public exclusive rights models in order to confine and moderate gaming.

5.2 Gambling restrictions in the other EFTA countries

Iceland

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

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

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

Liechtenstein

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

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

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

Switzerland

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

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

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

258. Both games of chance (including casinos) and lotteries are subject to legal monopolies in Switzerland. The Federal authorities grant a limited number of licenses to operate casinos. The federal law prohibits lotteries in general, leaving room for exemptions by Cantonal authorities. The Cantons exercise their power to grant permits for lotteries to

charitable organisations in a coordinated manner based on two inter-cantonal agreements. According to these inter-cantonal agreements authorizations for lotteries are only granted to the two state-controlled lottery organisations.

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

260. The policy underlying the Swiss gaming regulations is to prevent gambling addiction, money laundering and social harm. The system provides for tight regulations. Nevertheless, as already mentioned, the system was liberalised to some extent in the year 2000 when casinos were allowed under a licensing system. The main reasons behind the liberalisation of the casino industry were tax reasons: The Federal state receives tax income from issuing licenses for casinos. Regulations of the lottery industry were tightened in 2005 by a new inter-cantonal agreement that seeks to coordinate better the Cantonal practices with respect to the granting of authorizations for lotteries and to the prevention of gambling addiction.

5.3 Gambling restrictions in the EU Member States

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

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

263. It is possible to make a tabulation based on these three categories, which comprise the major lotteries, betting on sports and athletics (not including horse-racing), and slot machines. Reservations are made as to possible inaccuracies and simplifications owing to the difficulty of obtaining relevant data. But essentially, a table of the EU's 25 Member States looks as follows:

Country	Major lotteries	Sports betting (horse-racing not included)	Slot machines outside casinos
Austria	Exclusive-rights model	Competition (unrestricted number of licences)	Limited competition (Only allowed in three states)

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

264. As the table indicates, the Norwegian regulatory system for gaming is not unique. What is unusual is in fact for a country to have a gaming market with no special restrictions. The types of gaming subject to regulation and the instruments employed do, however, vary a good deal, which is presumably due to different levels of protection, but also to different national traditions. Some countries are liberal on some things, but tend then to

be restrictive about others. The table below is based on the information in the first table, and indicates the number of countries using each model in the different categories.

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

National restrictions on marketing of unlicensed gaming and lotteries

265. The fifth and last question from the Oslo District Court raises the question of whether it is permitted under EEA law to prohibit the offering and marketing of gaming and lotteries which do not have a domestic license. This is regulated inter alia in § 11 of the Lottery Act, which in effect covers not only domestic unlicensed games, but also games and lotteries which operate under national law in other EEA Member States. The only legal way to market unlicensed gaming opportunities in Norway is through commercials broadcasted from other countries within the scope of the Directive 89/552/EEC on television broadcasting activity.

266. According to the comparative legal study on the gambling area published by the Suisse Institute of Comparative Law in 2006, there are at least 20 countries within the EEA area which have regulations on the marketing of lotteries and gaming activities similar to § 11 in the Norwegian Lottery Act. Based on the draft version of the report (April 2006), the Government has drawn up the following overview:

Country	**Regulations of advertising for lotteries and gaming**
Austria	Law on Games of Chance § 56, 1: Prohibited to solicit foreign games of chance
Belgium	(regulations available in French only)
Cyprus	Lotteries Law, subsection 11: Advertisement for unauthorized lotteries prohibited.
Czech Rep.	Act No 202/1990 of Collect., on lotteries and other like games, § 4/11: The operation of foreign lotteries prohibited.
Denmark	Lottery Prohibition Act art 5: advertising for foreign lotteries prohibited
Estonia	Law on Gambling § 5 sec 6: Advertising of gambling games is forbidden.
Finland	Advertisement for unauthorized lotteries prohibited.
France	(regulations available in French only)
Germany	Criminal Code, sec 284 and 287 Unauthorized Organization of a Game of chance and lotteries: Advertising for unauthorized games and lotteries prohibited

Greece	(regulations available in French only)
Hungary	Act XXXIV of 1991 on the Organization of Gambling sec 1/5: Announcement for soliciting participants for any game of chance is subject to authorization by the Gambling Commission. Sec 2/7: Advertising or sales promotion activities connected to foreign gambling activities prohibited
Iceland	Law on lotteries 38/2005 art 11: to advertise for a lottery without a licence is prohibited
Ireland	Gaming and Lotteries Act 1956 § 1: To i.a. import, expose for sale or invite an offer to buy tickets, coupons etc. for use in a lottery is prohibited. Only one entity may operate National Lottery.
Italy	Law of 13 December 1989 No 401, on measures in the gaming and gambling sectors and protection of the fair operation of sport events, art 4, and Criminal Code art 718: Advertising for unauthorized lotteries and games of chance prohibited.
Latvia	(no specific regulation of advertising found, but gaming activities in Latvia require a licence)
Lichtenstein	(Gaming in Lichtenstein is regulated by Swiss law)
Lithuania	Law on games of 17 May 2001 art 10/9: The advertising of gaming is prohibited, except if it contains only the name of a gaming company, types of gaming etc.
Luxembourg	(regulations available in French only)
Malta	Lotteries and Other Games Act § 5: Promotion for any unauthorized game is prohibited. Remote Gaming Regulations 2004 § 3: Promotion of remote gaming in or from Malta is prohibited unless the entity has a remote gaming licence.
Netherland	Dutch Act on Games of Chance, 10.12.1064, O.J. 1064, 483 art 1: Promotion of unlicensed games of chance prohibited. Games of Chance Act art 1: Promotion of participation in a game of chance organized abroad, but within Europe, prohibited.
Poland	Law of 29 July 1992 on games and mutual wagering art 8: Advertising of lotteries, slot machines, games and wagering is prohibited on the territory of the Republic of Poland.
Portugal	Decreto-Lei no 282/2003 of 8 November: Promotion of games realized in violation of the exclusivity to SCML for exploiting remote gambling is prohibited. Decreto-Lei no 317/2002 27 December art 22: Imposes a fine on those publishing selling or distribution of tickets for foreign betting.
Slovakia	Act of March 16, 2005 on Gambling Games no 171/2005: Mediation of the operation of foreign gambling games is prohibited on the territory of Slovakia.
Slovenia	(no specific regulation of advertising found, but gaming activities in Slovenia require a licence)
Spain	Ley 46/1985 27 December, 18th Disposition: Forbids any support for unauthorized gaming. Decreto de 23 de marzo de 1956 por el que se modifica la Instruccion General de Loterias art 3: Forbids publicity and announcements for foreign lottery tickets
Sweden	Lottery Act 1994:1000 art 38: Prohibited to promote participation in unlawful

	lotteries. Lottery Act art 38: Prohibited to promote participation in lotteries arranged outside the country.
United Kingdom	Gambling Act 2005, sec 258: Unlawful to promote or advertise for unauthorized lotteries. Gambling Act, sec 259: Prohibited to advertise for a foreign lottery, including one authorized in another Member State

267. Based on the above, the Government holds that this kind of restriction is an inherent and normal part of national gambling restrictions in most Member States.

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

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

269. This is a relatively recent process. There have been debates and confrontations on the legal framework of gambling in Europe also in earlier times, but the main overriding principle was that this was clearly a matter for the Member States to decide themselves, based on the particular moral, social and other public aspects of gambling.

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

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

- With increased prosperity there has also been increased popular interest in gaming and lotteries, as well as harder forms of gambling, all over Europe
- Technical innovation has been strong in the gambling sector in the last decade, most notably on the Internet, but also as regards more traditional forms of gambling (casinos, slot machines, bingo, etcetera)
- Traditional public gaming and lottery enterprises in many countries have increased their gaming portfolios and marketing, in a way which questions the basic restrictive principles on which they are founded

- New private and commercial gambling interests have appeared, many of them traditional UK bookmaking companies recently strengthened by Internet revenue, and now actively seeking liberalization in the traditional fields of gaming
- The 2003 Gambelli judgment of the ECJ has created a certain legal uncertainty which is being actively invoked by private companies

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

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

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

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

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

275. In this perspective it is the view of the Norwegian Government that the struggle over the parliamentary slot machine reform, and the present Ladbrokes case, should be rightly seen as two of many on-going battles in this broader struggle. Both cases clearly fit into the general European perspective, in particular the Ladbrokes case. In legal terms, it is the same law which applies as in all the other cases, and the arguments and allegations of the private commercial gambling companies are basically the same in all their legal actions and political campaigns.

276. In this perspective it is of interest to the present case to study how EU law has been interpreted in the gambling sector not only by the ECJ, but also how it has been interpreted and applied by the EU legislator, and by national courts. This is the reason why Part II (section 6) on "The Law" below includes a presentation not only of the relevant articles in the Agreement and the case-law of the ECJ, but also a presentation of the EU legislator's approach, the position of the Commission, and the approach taken so far by national courts in a number of Member States.

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

5.5 Gambling restrictions in the United States

Europe compared to the Anglo-American countries

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

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

The United States

280. In the USA the federal states are responsible for most of the gaming regulations. This tradition has led to a federal prohibition on gaming activity through telephone (The Wire Act from 1961) to avoid cross border gaming activity. The Wire Act was intended to assist the states, territories and possessions of the United States, as well as the District of Columbia, in enforcing their respective laws on gaming and bookmaking and to suppress organized gaming activities. The act has lately also been used trying to stop cross border gaming through internet from foreign countries into USA and between the federal states. Subsection (a) of the Wire Act, a criminal provision, provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the

placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

281. As in Europe the USA have had its liberal waves of gambling during the latest centuries. These waves tends to be followed by more restrictive periods of prohibition as a reaction to the problem gambling and social disorders that follows from the liberalisation. According to one description the latest wave of legalized gambling came in the final quarter of the twentieth century:

> In 1976, at the beginning of the most recent wave of gambling legalization, only thirteen states had lotteries, two states (Nevada and New York) had approved off-track wagering, and there where no casinos outside of Nevada."...... "Today, a person can make a legal wager of some sort in every state except Utah, Tennessee, and Hawaii; thirty-seven states have lotteries, twenty-eight states have casinos, and twenty-two have off-track betting.[25]

282. It still remains to see how the third wave of gambling in the USA will end. The awareness of gaming problems still seem to rise, as it does in Europe. At the same time the federal authorities struggle to enforce the Wire Act Regulation on the new gambling services on then Internet.

283. The most interesting lesson from the USA in relation to the present case is the fact that even in a tightly-knit federation like the USA, with great traditions of free trade in goods and services, the operation of gambling services is indisputably a matter for the *states* to regulate according to their own discretion.

284. The relevance to the present debate on whether the Member States should have a particular margin of appreciation under Community and EEA law is obvious, and the Government holds that the answer should be the same as in the United States.

[25] Cf. Rachel A. Volberg in *When the Chips are Down* (2001). In the same period pathological gambling became one of the new conditions that psychiatrics and other mental health workers could officially identify

II. THE LAW

6. THE GAMBLING SECTOR UNDER EU/EEA LAW

6.1 The legislative framework

285. It has not been contested for some time that the operation and offering of gambling is an economic activity, which as such falls within the scope of EU/EEA law on the four freedoms, in particular the freedom to provide services, and (more recently) freedom of establishment.

286. This means that national restrictions on the operation of gambling must be evaluated according to the basic principles laid down in the EC Treaty Articles 43 and 49, corresponding to Articles 31 and 36 of the EEA Agreement. Furthermore it is not contested that the relevant provisions of the Agreement should be interpreted and applied in this sector in the same way as the original provisions of the EC Treaty. The relevant case-law of the European Court of Justice (the ECJ) in the field of gambling is thus of direct relevance also to the interpretation of EEA law.[26]

287. Apart from the application of the main articles on services and establishment, there is no Community legislation on gambling. Not only has the Community legislator refrained from adopting directives harmonizing gambling activities, but such activities are also specifically excluded from the more general attempts at harmonizing trade in services, such as the e-trade directive and the recent proposal for a general service directive. This means that the national legislator remains free to regulate the gambling sector as seen fit, according to national tradition and requirements, as long as the basic requirements of the general provisions on services and establishment (as interpreted in this specific sector) are respected. The only legal question is whether national legal restrictions on gambling are within the limits set by Community and EEA law.

288. When interpreting the basic articles on services and establishment the main source of law is the case-law of the ECJ. It is clear from this case-law that the operation and offering of gambling must be seen as a particular activity, different in many ways from other forms of ordinary economic activity. The general case-law of the ECJ on services and establishment is thus of lesser direct interest. Most important are those cases in which the ECJ has ruled specifically on national gambling restrictions. There are a limited number of such rulings, of which five are the most important, starting with the 1994 Schindler judgment and so far ending with the 2003 Gambelli judgment. All are preliminary rulings, interpreting Community law in the field of gambling, but not actually applying it to national facts and law.

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[26] Cf. Article 6 of the EEA Agreement and Article 3 (2) of the Surveillance and Court Agreement.

289. These five rulings – Schindler, Läärä, Zenatti, Anomar and Gambelli – will be discussed in section 6.2.[27] Building one upon the other, and studied as a whole, they demonstrate the approach of the ECJ to national restrictions in the gambling field and show the current status of Community (and EEA) law in this specific sector. The interpretation of this case-law in legal doctrine is also of interest, and will be discussed in section 6.3.

290. There has lately been discussion on the EU legislative level as to whether the gambling sector should be to some extent harmonised and liberalised. This has first and foremost been a discussion on the future of the legislative approach to gambling in Europe, but observations have also been made on the present interpretation of Community law in this sector. These processes are of direct legal relevance, and will be described in section 6.4.

291. Even if the present case only calls for the EFTA Court to give an interpretation of EEA law, and not to apply it to the case at hand, the Government holds that it is still of some interest to see how Community law is being applied in the gambling sector. First, it is of interest to study the position taken by the Commission as a supervisory body to national gambling restrictions. This is described in section 6.5. Second, it is of interest to study how national courts in the Member States have interpreted and applied Community law in this sector and the way in which they have assessed national legal restrictions on gambling according to the general requirements which are laid down by the ECJ. This is described in section 6.6.

6.2 The Case-Law of the ECJ – from Schindler to Gambelli

The Schindler judgment

292. The first case in which the ECJ was called upon to consider national restrictions on gambling was the Schindler case, presented by the UK High Court of Justice in April 1992 and ruled upon by the ECJ in March 1994. The case concerned the seizure by UK authorities of advertising material sent by mail from a German lottery, under legislation prohibiting lotteries which were not licensed by UK law.

293. The ECJ considered the case under the freedom of services (then Article 59), and found that the national rules constituted a restriction, but that they were nevertheless legitimate, suitable and proportional. The broad and thorough opinion of Advocate General Gulmann is still of general interest, as this was the first ever evaluation of the application of Community law on the specifics of the gambling sector. Many of his observations are still of relevance. Amongst the most pertinent are the following:

> 1. In the legal systems of all the Member States there is a fundamental prohibition on lotteries and other forms of games of chance. The reasons for the prohibitions are broadly the same. Lotteries and games of chance are activities which, for ethical and social reasons,

[27] Cf. case C-275/92 Schindler, case C-124/97 Läärä, case C-67/98 Zenatti, case C-6/01 Anomar, and C-243/01 Gambelli. Reference will also be made to the 2003 Lindman case (C-42/02), which is of lesser interest to the case at hand, as it concerned an example of actual discrimination with regard to the national taxation of winnings from foreign gambling activities. There are also a few pending cases from Italian national courts, inter alia the Placanica case (joined cases C-338/04, C-359/04 and C-360/04), which appears to be rather similar to the Gambelli case.

should not be permitted. Citizens should be protected against the dangers that may stem from the urge to gamble and there is a significant risk of criminality in this field.
But at the same time in all Member States there are to a greater or lesser extent exceptions from that prohibition. That is because it may be appropriate to permit some measure of gambling, partly to meet the citizens' desire to gamble and partly to prevent unlawful gambling. It is possible to lay down requirements concerning permitted forms of gambling in such a way as to limit the risk of criminality. In addition a significant factor in all the Member States is that it is possible to make authorization subject to conditions whereby the revenue from gambling is used for public-interest purposes or accrues to the State exchequer.
2. The lotteries sector, with which the present case is concerned, is characterized by the fact that in most of the Member States there is one or more large country-wide lottery which is either operated directly by the public authorities or is subject to tight public controls and there are also rules under which small local lotteries are permitted subject to certain conditions, in particular as regards their revenue. Moreover, according to the information given, there are prohibitions or far-reaching restrictions on the activities of foreign lotteries in the Member States.
The internal market has thus not been achieved in the lotteries sector. The large country-wide lotteries have been given exclusive rights and they are to a large extent protected against competition from foreign lotteries.
3. In the present case the Court of Justice is called on to determine whether the rules in the Treaty of Rome are applicable in this sector and if so whether the restrictions which apply to the activities of foreign lottery operators are compatible with the Treaty.
The case is thus of considerable practical and fundamental interest and all the Member States except Italy have submitted their observations.
[...]
31. There can be no doubt that the Member States regulate this sector in an intensive and fairly restrictive manner.
The question is not whether the Member States may undertake such regulation. The Treaty does not affect the Member States' fundamental competence to lay down rules on the access to and exercise of occupations. The only question is what limitations are to be inferred from the Treaty rules for the Member States' regulatory power in this sector.
32. As stated above, the present case concerns the significance in this context of the Treaty rules on services. But it may be useful, before considering the rules on services, to make more general observations regarding the Member States' general competence to regulate the access to and exercise of activities in the lottery sector.
33. The starting point in all the Member States is, as mentioned above, that gambling is prohibited and that legal position cannot be contrary to the Treaty. In practice certain forms of gambling are, however, allowed in all Member States under certain specified conditions. There are quite considerable differences between the Member States as regards the forms of gambling that are permitted and as regards the conditions for such authorization. As a result, one form of gambling may be prohibited in one Member State but permitted in another.
[...]
41. There must be good reasons for not allowing the general mechanisms of the market to function. In an open market economy it is market forces and not public regulation which should in principle determine what supply of certain goods or services there should be.
42. But in this particular field cogent grounds have been put forward for such interference with the mechanisms of the market. All Member States have in any event taken two key measures: first, either no lotteries are allowed at national level at all or only one or a few lotteries are allowed, and secondly, no ordinary commercial undertaking may be operated in this sector.
[...]

> 120. What is more important, however, in my view, is that the Court in the present case is considering a market of a very special nature where the rules of all the Member States show that the general mechanisms of the market cannot and should not apply. So far as I can see, not one of the Member States considers it appropriate to have free competition in this area with the consequences that are detailed above.
> 121. There would be competition that could hardly fail to have far-reaching consequences for a number of lotteries of long-standing which are a major source of finance for important benevolent and public-interest organizations. Acceptance of the competition that would result from the opening of the markets might curtail national diversities and cannot, in my view, be regarded as a necessary consequence of the attainment of the internal market.
> 122. It is hard to point to any effects of the opening of the markets that would merit protection. So far as I can see it would not serve to further any of the aims referred to in Article 2 of the Treaty.

294. The Court of Justice confirmed the position of the Advocate General:

> 57. According to the information provided by the referring court, the United Kingdom legislation, before its amendment by the 1993 Act establishing the national lottery, pursued the following objectives: to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.
> 58. Those considerations, which must be taken together, concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society. The Court has already held that those objectives figure among those which can justify restrictions on freedom to provide services [...].
> 59. Given the peculiar nature of lotteries, which has been stressed by many Member States, those considerations are such as to justify restrictions, as regards Article 59 of the Treaty, which may go so far as to prohibit lotteries in a Member State.
> 60. First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.
> 61. Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

295. The result was that the ECJ not only expressed itself on the general interpretation of Community law, but explicitly stated that legislation such as the UK prohibition on the offering of lotteries from abroad was not precluded.

The Läärä judgment

296. The second gambling case is the 1999 Läärä ruling, on the Finish slot machine monopoly. Under article 1 the Finish gaming act, games of chance may only be organised and offered after authorization by the authorities, and only for charitable and other benevolent non-profit purposes. Under article 3 only one license may be issued for the operation of slot machines, and the authorities may issue this to a public-law enterprise with the view to the collection of funds for various listed public interest purposes. Such an exclusive-right license was issued to the publicly controlled RAY Association.

297. Mr Läärä was the chairman of a private commercial company (TAS) which had illegally operated a number of private "Golden Slot" machines, and which had subsequently been fined and the machines confiscated. The case arose from the criminal proceedings before the national courts, and the Court of Justice was asked to consider whether the Schindler lottery ruling also applied to slot machines, and whether a public exclusive-rights system for such machines was compatible with "Articles 30, 59 or 60 or any other article of the EC Treaty".

298. The argument of the private commercial operator was that Schindler was not applicable, and that the monopoly arrangement was contrary to the rules on the freedom of goods and services both because the national exclusive rights did not in fact pursue the public interest objectives relied upon to justify it, and because it was not necessary, as these objectives "could be attained by less restrictive measures, such as regulations imposing the necessary code of conduct on operators" (11).

299. The Court of Justice did not agree. It started by referring to "the moral, religious and cultural considerations which attach to lotteries, like other forms of gambling", and the national tendency to prevent gambling "from being a source of private profit", as stated in the Schindler judgment, as well as other particular factors which together "justify national authorities having a sufficient degree of latitude" in this sector (13-14). The Court then stated that although Schindler only involved lotteries, the same considerations were equally applicable to "other comparable forms of gambling", including slot machines (15).

300. The Court then went on to analyze the differences between the Schindler case and the Läärä case, the most important being that while the national legislation in Schindler prohibited the offering of lotteries from abroad, in Läärä "the legislation at issue in the present case does not prohibit the use of slot machines but reserves the running of such machines to a public body holding a licence issued by the administrative authorities ('the licensed public body')" (21). In other word, the question in Läärä was the legitimacy of a public exclusive-right system (monopoly) on slot machines, similar to the model chosen by the Norwegian legislator in 2003.

301. The Court found that such an exclusive-right was an impediment to the freedom to provide services (29), and that it could therefore only be justified by overriding reasons relating to the public interest, and only if the exclusive right was "such as to guarantee

the achievement of the intended aim", and if it did not "go beyond what is necessary in order to achieve it" (31).

302. The Court then found that a system such as the Finish public exclusive right on slot machines was in clear compliance with these requirements:

> 32. According to the information contained in the order for reference and in the observations of the Finnish Government, the legislation at issue in the main proceedings responds to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud, to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.
> 33. As the Court acknowledged in paragraph 58 of the Schindler judgment, those considerations must be taken together. They concern the protection of the recipients of the service and, more generally, of consumers, as well as the maintenance of order in society. The Court has already held that those objectives are amongst those which may be regarded as overriding reasons relating to the public interest [...]. However, it is still necessary, as stated in paragraph 31 of this judgment, that measures based on such grounds guarantee the achievement of the intended aims and do not go beyond that which is necessary in order to achieve them.
> 34. As noted in paragraph 21 of this judgment, the Finnish legislation differs in particular from the legislation at issue in Schindler in that it does not prohibit the use of slot machines but reserves the running of them to a licensed public body.
> 35. However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment, recognised by the Court in paragraph 61 of the Schindler judgment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.
> 36. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.
> 37. The fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.
> 38. The position is not affected by the fact that the various establishments in which the slot machines are installed receive from the licensed public body a proportion of the takings.
> 39. The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.
> 40. On that point, it is apparent, particularly from the rules on slot machines, that the RAY, which is the sole body holding a licence to run the operation of those machines, is a public-law association the activities of which are carried on under the control of the State and

> which is required, as noted in paragraph 5 of this judgment, to pay over to the State the amount of the net distributable proceeds received from the operation of the slot machines.
> 41. It is true that the sums thus received by the State for public interest purposes could equally be obtained by other means, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.
> 42. In those circumstances, in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the operation of slot machines do not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue.

303. The Government holds that this line of reasoning as regards the legitimacy, suitability and necessity of public exclusive rights arrangements in the gambling sector – which has *not* been altered in later case law (including Gambelli) – applies equally as regards *all* the existing exclusive rights systems in Norwegian law, that is the Gaming Act and (in effect) the Totalisator Act. In other words, the Läärä ruling by itself provides the answer to the 1st and 2nd questions of the Oslo District Court.

The Zenatti judgment

304. The next gambling case before the ECJ was *Zenatti*, in which the ruling fell only one month after *Läärä*, in October 1999. This case concerned Italian legislative restrictions on the operation of sports betting. Such betting in Italy is restricted by law under a system by which the agents offering betting have to operate on behalf of the National Olympic Committee (CONI) or the National Union for the Betterment of Horse Breeding (UNIRE). Mr Zenatti was an agent in Italy for the London based company SSP Overseas Betting Ltd, who ran an information exchange for Italian betters wanting to place bets with SSP. He was ordered by the authorities of Verona to cease this activity, and initiated legal proceedings, claiming that the order was in breach of Community law.

305. The question referred by the national court was whether the Treaty provisions on services "preclude rules such as the Italian betting legislation in view of the social-policy concerns and of the concern to prevent fraud that justify it".

306. The Court started by reiterating the remarks from the Schindler judgment on the "the moral, religious and cultural considerations" in the gambling sector, and the justification of a sufficient national "degree of latitude" (14-15). It went on to state that this latitude applied both to the scope of protection, and what measures to take in the context of the aim pursued:

> 32. (…) the Italian betting legislation differs from the legislation at issue in Schindler, in particular in that it does not totally prohibit the transactions at issue but reserves them for certain bodies under certain circumstances.
> 33. However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the

> margin of appreciation which the Court, in paragraph 61 of Schindler, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

307. The most important new aspect of the Zenatti ruling, as compared to Schindler and Läärä, was that the Court elaborated further on the issue of the underlying financial implications and considerations of national gambling law. The reason might have been that the Court this time was more inclined to suspect that the system had strong financial motivations. Anyway, it stressed that the public interest purposes justifying restrictions would have to be the real (genuine) purposes, and that the financing of social activities from gambling could only be "an incidental beneficial consequence and not the real justification for the restrictive policy adopted":

> 35. As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 Läärä and Others [...] in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.
>
> 36. However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

308. The expression "incidental beneficial consequence" in the English version gave rise to some discussion in the Norwegian slot machine case before the national courts, as the private slot machine operators claimed that it meant "coincidental" (in Norwegian: "tilfeldig fordel"). This is clearly a misunderstanding. Under the Zenatti formulae it is perfectly permissible for the financial considerations to be planned, and to be part of the original legislative intent and the preparatory works, as long as they do not constitute the necessary main justification. There need be no element of "coincidence". This appears more clearly from the original Italian and French versions, which speak of financing as an *accessory* advantage, "une conceguenza vantaggiosa accesoria", "une conséquence bénéfique accessoire".[28]

[28] The Swedish version also uses the word "aksessorisk", while the Danish is "ekstra fordel".

309. Any other interpretation would also be impossible to apply. Behind all national regulations on gambling there will always be financial considerations which form part of the legislate deliberations, along with other considerations, of social, moral or other character. The point of the Zenatti formulae is only that financial considerations cannot "in itself" be part of the objective justification for the restrictions. In other words, they will have to be subtracted, before assessing whether the remaining public interest considerations are sufficient to uphold the restrictions.

310. While in recent years reference is usually made to Gambelli, this ruling does not really go much beyond Zenatti, except on one point, concerning "consistency", and even there (arguably) only in cases of suspected protectionism.

The Anomar judgment

311. The September 2003 Anomar ruling was a Portuguese case involving restrictions on slot machines. Under Portuguese law "the right to operate games of chance or gambling is reserved to the State", though licenses agreements may be issued. Major forms of gambling may as a main rule only be offered in casinos, and this includes slot machines which pay out winnings in cash. The casinos are in turn subject to a public exclusive-rights system. This system was challenged before the national courts by eight private commercial companies involved in the marketing and operation of slot machines, who argued that Portuguese authorities had not demonstrated any moral or public-order concerns to justify such a legal regime.

312. The Court of Justice did not agree. In a very clear ruling the Court found that national gambling restrictions such as the Portuguese public exclusive rights system for the casino based operation of slot machines were in compliance with Community law. Pertinent passages include:

> 70. All the governments which submitted observations maintain that such legislation is compatible with Article 49 EC. According to them, it must be regarded as being justified by overriding reasons relating to the public interest such as the protection of consumers, prevention of fraud and crime, protection of public morality and the financing of public-interest activities. [...]
> 73. The various considerations leading to the adoption of such legislation to govern games of chance or gambling must be taken together, as the Court pointed out in paragraph 58 of the judgment in Schindler, cited above. In the present case, those considerations concern the protection of consumers, who are the recipients of the service, and the maintenance of order in society. [...]
> 74. Furthermore, as the Commission points out, the Portuguese legislation in issue in the main proceedings is substantially similar to the Finnish legislation on slot machines, in issue in Läärä and Others, in respect of which the Court found that it was not disproportionate, in view of the objectives which justified it (Läärä and Others, cited above, paragraph 42). Moreover, the Court considered that limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, falls within the ambit of such public-interest objectives (Case C-67/98 Zenatti [1999] ECR I-7289, paragraph 35). [...]
> 79. It is common ground that it is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or

only to restrict them and to lay down more or less rigorous procedures for controlling them (Läärä and Others, cited above, paragraph 35, and Zenatti, cited above, paragraph 33). [...]
86. As the Portuguese Government points out, the Court has held that national measures which restrict the freedom to provide services, which are applicable without distinction and are justified by overriding reasons relating to the public interest - as is the case here, as is evident from paragraphs 68 and 72 to 75 of this judgment - must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it [...].
87. None the less, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict (see, to that effect, Schindler, cited above, paragraph 61; Läärä and Others, cited above, paragraph 35, and Zenatti, cited above, paragraph 33) and which have been deemed compatible with the Treaty.

The Gambelli judgment

313. Two months after Anomar, in November 2003, the ECJ passed judgment in the Gambelli case, which has left some uncertainty as to its more detailed interpretation and application, and which has been heavily leaned upon by the private commercial parties and the Authority in the present case, to some extent misinterpreting and misapplying the criteria formulated by the Court.

314. The case concerned the national restrictions on sports betting in Italy, which were basically the same as those tested in the Zenatti case a few years earlier, but which had since then been amended, so as to increase the number of license-holders and the volume of such betting, as well as tightening the criminal law provision against unauthorised betting operations. Mr Gambelli was an Italian agent for the British bookmaking company Stanleybet, who was indicted on criminal charges (together with more than a hundred other persons) for having offered unauthorised sports betting services over the internet on behalf of Stanleybet in Liverpool.

315. In a lengthy opinion, Advocate General Alber held that Article 49 on the freedom of services precludes national legislation such as the Italian one "which provides for prohibitions enforced by criminal penalties on the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, where such activities are effected by, on the premises of, or on behalf of, a bookmaker which is established in another Member State and which duly carries out those activities in accordance with the legislation applicable in that State".

316. The Advocate General based this conclusion partly on legal interpretation, which he wanted to formulate more restrictively than in earlier gambling cases, and partly on the factual characteristics of the case, under which he quoted the referring court's remarks that the recent legislative amendments were dictated mainly by the need to protect a group of Italian companies (the Totoricevitori), that there were "no evidence of any public policy concerns that could justify a restriction of rights under Community law" (17), and that there was an "apparent imbalance between domestic legislation that rigorously restricts the activity of accepting sports bets by foreign Community undertakings and an opposing policy of considerably expanding gambling and betting

pursued by the Italian State at national level for the purpose of generating State revenue" (19). He further held that:

> 121. [...] The Italian State itself has made it possible, through the legislation it has adopted, for the range of gambling opportunities on the Italian market to be substantially extended. It has further been submitted, without contradiction, that the Italian State has also made it easier to collect bets. Reference was made earlier to the fact that the infrastructure has been expanded through the award of 1 000 new concessions. [...]
> 123. As regards the amendments made to the Italian legislation in 2000 by the Finance Law, and the circumstances surrounding the adoption of that law, which reinforced the provisions previously applicable (as examined by the Court in Zenatti), it should be pointed out that, according to the legislation cited in the written observations, those amendments were made at least partly in order to protect Italian concession holders. These are clearly protectionist motives which are not capable of justifying the legislative amendments in question and, what is more, cast doubt on the legislation as a whole.

317. The Court of Justice neither followed the Advocate General's conclusion, nor all of his proposals for a more restrictive legal interpretation. The Court was, however, also clearly struck by the facts of the case,[29] and it did take the opportunity to further develop Community law on national gambling restrictions, revising and somewhat tightening it. The language of the judgment is harsher than in the previous cases, and it is apparent that the Court is in serious doubt as to the justification for the Italian rules, even if it does not actually conclude that they are illegitimate.

318. One of the new things about the Gambelli ruling is that the Court assesses the national restrictions not only under Article 49 on the freedom of services, but also under Article 43 on the freedom of establishment. The two sets of rules were however in this case interpreted and applied in the same way.

319. The Court started its assessment by referring to the Zenatti formula that national restrictions on gambling must "reflect a concern to bring about a genuine diminution of gambling opportunities", and that the financing of social activities from gambling revenue must constitute "only an incidental beneficial consequence and not the real justification for the restrictive policy adopted" (62). This passage reflects the underlying doubt as to the real justification of the Italian sports betting restrictions, but from a legal point of view it is just a confirmation of Zenatti.

320. The Court then went on to confirm that the basic approach to national gambling restrictions under Community law still applied:

> 63. On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

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[29] Cf. paragraph 22, where the Court refers to the remarks of the national court on "the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other".

321. The Court pointed out that national restrictions must still satisfy the basic requirements of Community law on justification, suitability and necessity, and that these were for the national court to assess. In that regard, the Court asked the national court to take account of the following issues, which from a legal point of view are the most important new interpretative parts of the judgment:

> 67. First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.
>
> 68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.
>
> 69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

322. The central element here is the formulation of a "consistency test" in paragraph 67 – stressing that in order to be suitable, national restrictions must "serve to limit betting activities in a consistent and systematic manner". In the two next paragraphs (68-69) the Court first points to the facts of the Italian case, as described by the referring court, whereby the state is accused of pursuing a policy of substantially expanding national betting in order to increase public revenue while at the same time protecting the existing national operators. The Court then states that as long as national authorities incite and encourage betting to the financial benefit of the public purse, it cannot at the same time rely on public order concerns relating to the need to reduce betting opportunities in order to justify measures such as those at issue in the Gambelli case. The wording of paragraph 69 is rather general, but must clearly be read in light of paragraph 68.

323. The remarks in Gambelli paragraphs 67-69 leave a number of questions open. Should this test of whether a certain restriction contributes in a "consistent and systematic" manner be used on all kinds of national gambling restrictions, or does it only apply to cases where there is suspicion of protectionism or arbitrary discrimination, like in Gambelli? And what is to be tested? Is it the consistency of the contested restriction in itself, or should this be tested as part of general national gambling law and policy?

324. This will be further elaborated below. But the opinion of the Government is that the remarks on "consistency" in Gambelli must be read and interpreted in light of the particular facts of the case, as well as the previous case-law on the Court, and the specific characteristics of the gambling sector. Seen in this perspective, the Gambelli judgment is clearly not a "shift of paradigm", but rather a correction of the course, marking the outer limits, but otherwise not limiting the margin of appreciation of national legislators in this sector. The threshold is still high.

325. After a few remarks on the need for invitations to tender for sport betting licenses to be applied in a non-discriminatory manner (70-71), the Court went on to pronounce on the proportionality issue (72-75):

> 72. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court's case-law (...), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.

326. In its discussion of proportionality and necessity the Court did not formulate any new criteria for the gambling sector, nor did it pronounce itself on the necessity of the Italian restrictions as such. Rather, the direct remarks on the proportionality/necessity test are of a very limited nature, merely directing the national court to assess the proportionality on a few minor points, such as the national criminal provision, questioning the need for punishment of up to a year of prison for agents serving as intermediaries to bookmaking firms operating legally in other Member States.

327. Finally the Court stated (unlike the Advocate General) that it is for the national courts determine whether the national legislation actually serves the aims that might justify it, and whether the restrictions imposed are proportionate. What later actually happened was that the Italian Supreme Court found that the national legislation on sports betting fulfilled the Gambelli criteria (see below section 6.6).

328. It should be noted that the Gambelli case was about sports betting, and that it directly concerned restrictions on the cross-border offering of sports betting from companies legally operating in other Member States. Furthermore, the case did not question the privileged position of UNIRE as such within Italy, but rather the way in which this system functions, shutting out agents of foreign bookmaking companies, and reserving the licenses to offer UNIRE betting to national agents. Unlike Läärä and Anomar, the ruling is not about an exclusive-rights system.

The Lindman case

329. Reference should also briefly be made to the Lindman judgment (C-42/02), which was handed down a week after Gambelli, on 13 November 2003. This case was not about a gambling restriction as such, but about the fact that under Finish law winnings from national lotteries and gaming were not taxed, while winnings from foreign games were. The Court held that the Finish tax legislation in this respect had a "manifestly discriminatory character" and found it in breach of Article 49.

Analyzing the ECJ case law on gambling – some cardinal points

330. Based on the above, the following twelve points may be inferred from the case law of the European Court of Justice on national gambling restrictions:

1. The relevant case law consists mainly of five judgments, which must read as a whole. The later rulings complement the earlier, but do not derogate. There has been gradual development, but no radical new departures. All five judgments are still of interest, and the basic points of the first cases still stand.

2. The Gambelli judgment is the most recent, but it must be read in context, and it can easily be misinterpreted if seen in isolation from the earlier case law and the particular factual circumstances of the case.

3. All five judgments refer to the special "moral, religious and cultural" aspects of gambling, and the "morally and financially harmful consequences for the individual and society" associated with it. Gambling is still seen as a special sector. The basic approach of the Schindler judgment still applies.

4. The national legislator's "degree of latitude" (Schindler, Läärä), or "margin of appreciation" (Gambelli) in the gambling sector not only applies to the level of social and public protection sought, but also to some extent to the means (measures) by which to achieve this level – whether by prohibition, exclusive rights, or regulation within a restricted marked.

5. Exclusive rights systems for the operation of gambling – as found in some form or another in most Member States – are in themselves recognised as a legitimate and suitable way of restricting gambling opportunities and ensuring effective public control and responsibility. This was stated in Läärä and repeated in Anomar – the only two judgments where exclusive right systems were evaluated as such. Both concerned public exclusive rights for the operation of slot machines.

6. National restrictions on gambling may legitimately serve a number of public interest purposes, including the prevention of compulsive gambling, consumer protection for the players, restricting the volume of gambling out of other moral or social considerations, protecting public order, preventing crime and fraud, etcetera. When assessing the legitimacy of the restrictions, these considerations "must be taken together" (Schindler 58, cf. Läärä 33, Zenatti 31, Anomar 73), and evaluated *as a whole.*

7. In Läärä the ECJ recognized as a particular advantage of public exclusive rights systems that these may serve the purpose of "confining the desire to gamble and the exploitation of gambling within controlled channels" (37, cf. Zenatti 35). The idea of "controlled channels" for gambling desire, ensuring public control and responsibility, is basic in most Member States, and this is recognized as legitimate by the ECJ.

8. The ECJ recognized in Schindler that it is basically laudable that lotteries and gaming make "a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture", and that this was not without relevance, although it could not "in itself be regarded as an objective justification" (60). In later rulings the ECJ has elaborated on this. The result is the Zenatti formula, stating that the financing of social activities from

gambling revenue may be an accessory (incidental) advantage of the system, as long as it is not "in itself" the objective reason for the restriction.

9. National legislative intent that gambling should not be "a source of privat profit" was recognized as a legitimate concern in itself in Schindler (60), and later referred to in Läärä (13) and Zenatti (30). Why this is so is not elaborated by the ECJ. The Government holds that this must partly be seen as a part of the (recognized) moral aspects of gambling, and partly out of consideration for the fact that private profit will always serve as a particulary strong incitament to increase gambling opportunities and volume.

10. In the Gambelli case the ECJ redefined the suitability test as a consistency test, stating that national gambling restrictions must "serve to limit betting activities in a consistent and systematic manner". How it is to be further interpreted and applied, however, still leaves room for debate.

11. In Zenatti the ECJ interpreted the traditional doctrine of legitimate national requirements with regard to the economic aspects of the gambling sector, and in Gambelli it elaborated on suitability. By contrast, the ECJ has been very cautious as regards judicial testing of the *proportionality* principle in the gambling sector. In the first four cases it stated that the proportionality and necessity is for the national authorities to decide, with wide latitude. And even in the Gambelli case the ECJ only directed the national court to make a very restricted proportionality review, on a few minor aspects of national law – not on the contested restrictions as such.

12. The five major gambling judgments are all preliminary rulings, in which the ECJ was only called upon to interpret Community law, not to apply it to the facts at hand. Nevertheless, in four out of five the ECJ went far in stating that restrictions such as those at issue were legitimate under Community law. In Läärä it explicitly concluded in favour of the national exclusive right arrangement. The only exception is the Gambelli case, where the ECJ left the factual evaluation to the national courts, albeit hinting that the consistency of the national legislation was questionable. (The Italian Supreme Court later found that it was legitimate). Thus, none of the cases considered have led to the national gambling restrictions being set aside.

6.3 Legal doctrine on the gambling case law of the ECJ

331. Following the 2003 Gambelli judgement there has been a number of articles analysing its alleged importance for the further development of Community law in the gambling sector. The most in-depth analysis to be published so far in English is an article by professor Straetmans of the University of Antwerp in the Common Market Law Review, in which he considers the three judgements passed by the ECJ in 2003 (Anomar, Gambelli and Lindman), and analyses the approach taken by the ECJ.

332. Professor Straetmans main point is that the ECJ has not basically changed its previous approach (from Schindler, Läärä and Zenatti), which is founded on relaxed principle of proportionality, due to the special concerns and sensitivities of the gambling sector. The

ECJ has only adjusted and refined this approach, pointing out the outer limits of national legislative discretion:

> In that sense *Gambelli* and *Lindman* do not herald a generalized application of a *strict* suitability and proportionality test in lottery or gambling markets. The precise and extreme circumstances of the cases stand in the way of such generalization, all the more when one compares the Court's analysis in the present cases with the much more straightforward assessment of the Advocate General in *Gambelli.* Therefore it is submitted that the Court in line with previous case law confirms the existence of a margin of appreciation for the Member States in the lottery and gambling field but instantly adds in a much clearer way than hitherto that this discretion has its limits. If Member States demonstrate that national restrictions bring about a genuine diminution of the gambling opportunities, the Court will continue to apply a relaxed proportionality test and will be reluctant to substitute itself for the national competent authorities. In case of excess, e.g. when a Member State deliberately and gravely exceed the non-economic purposes of the imposed restrictions or if a Member State does not limit the exploitation of the human passion for gambling at all, the Court is now prepared to apply a strict proportionality test.[30]

333. The Government agrees with this analysis, which is similar to the interpretation of national courts in a number of Member States. By way of contrast, the legal action launched by Ladbrokes calls for a much stricter legal approach, which seems to be based on a very narrow reading of certain passages of the Gambelli judgement, disregarding other passages, as well as disregarding the facts and context of the case.

334. Given the nature of the traditional Norwegian gambling restrictions laid down in the three contested statutory Acts, it is in the Government's view completely untenable to hold that the legislator and authorities have in any way "deliberately and gravely exceeded the non-economic purposes of the imposed restrictions" or that they do not try to "limit the exploitation of the human passion for gambling at all". The contested Norwegian legislation is indeed factually very far from the threshold formulated by professor Straetmans from his analysis of ECJ case law.

6.4 The EU legislator's approach to gambling

335. In many areas of EU/EEA law secondary legislation (directives) has been adopted which supplements the general provisions, and which to a greater or lesser degree harmonises various sectors. This has *not* been done in the area of lotteries and gaming. Not only has the EU legislature not wanted to harmonize gambling activities specifically, not even to a limited extent. But the EU legislator has even chosen to *exclude* gambling activities from more general attempts at harmonizing the trade in services.

336. On a few occasions the Commission has proposed to include gambling activities in such harmonizing directives, but this has been stopped both by the EU Member States and by the European Parliament – with reference to the specific nature of gambling activities and the special requirements of social policy and public order in this sector.

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30 Cf. **Annex 33** Straetmans "As you sow, so shall you reap: On Member States overstepping the mark", Common Market Law Review 2004 pp 1409-1428, at p 1424 (original emphasis).

337. One example is the directive on electronic commerce (2000/31/EC). The Commission had originally proposed that it should apply to lotteries and gaming, but this was rejected by the Member States and the European Parliament. Instead, all forms of "gambling activities" were specifically excluded. This follows from Article 1 paragraph 5 point d, which states that the directive shall not apply to "gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions".

338. The same legislative considerations have been strongly manifested in recent years throughout the process to adopt a general Service Directive.

339. In January 2004 the Commission submitted its proposal for a Service Directive to The Council and the European Parliament. According to this proposal lotteries and gaming would in principle be covered by the scope of the directive, although in a limited way.[31] Even this cautious approach to harmonizing gambling met with strong opposition in the Member States, and in July 2005 the whole 25 of them came out against the Commission's proposal, holding that they considered gambling a special sector, which should fall outside the scope of the directive.

340. A broad majority in the European Parliament was of the same opinion. The proposal was referred to the Committee on the Internal Market, which also received opinions from a number of other committees. In May 2005 the Internal Market Committee presented a Draft Report, in which one of the many proposed amendments was that all kinds of "gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions" should be excluded from the scope of the directive. This was stated in a new recital as well as in Article 2. The justification given was that:

> *Justification*
>
> In its established case-law, the European Court of Justice has left it up to the Member States' governments to decide what restrictions to impose on the freedom to provide these services for the purposes of maintaining the social order and consumer protection, objectives which are deemed to be overriding reasons relating to the public interest.[32]

341. In the spring of 2005 a number of the other committees gave opinions on the directive proposal, and several of them commented upon the gambling issue, stating that gambling activities should be excluded from the scope of the directive. The Committee on Culture and Education gave the following justification:

> *Justification*
>
> This amendment is in the interests of consistency with the amendment proposed to Article 2, which aims to exclude gambling activities which involve wagering a stake, including lotteries and betting transactions, from the scope of the Directive. The delicate area of games of chance calls for a regulatory policy and social policy approach, which would not

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31 See the Commission's proposal of 13.01.2004 "Proposal for a directive of the European Parliament and of the Council on Services in the Internal Market". Pursuant to art 18 of the proposal the general rules would not apply to lotteries and gaming until and if special rules for this sector had been adopted, and according to art. 40 (1) § b the Commission had a year in which to present a possible proposal for harmonising rules for lotteries and gaming.

32 Cf. European Parliament Draft Report of 25.5.2005 (2004/0001 COD) p. 12.

be ensured under the Services Directive. Moreover, surplus profits from games of chance are first and foremost channelled to sport. [33]

342. The justification of the Committee on Industry, Research and Energy was shorter:

> *Justification*
> Gambling is not an EU competence and should not be covered by this directive.[34]

343. The Committee on Legal Affairs had the following justification:

> *Justification*
> The gambling sector should be excluded from the scope of this directive. Gambling is subject everywhere in Europe to special and exclusive rights based on the public interest. Government supervision and national regulations are necessary in order to combat fraud and organised crime in this sector. National lotteries also generate considerable income for public interest objectives.[35]

344. In the final Report of the Internal Market Committee in December 2005 the proposed recital stating the gambling exemption was justified as follows:

> *Justification*
> Amendment linked to the amendment to Article 2 seeking to ensure that gambling activities are not covered by the directive. Gambling activities are intrinsically linked to public order and consumer protection issues and therefore lie outside the sphere of competence of the Community institutions and must remain a sector which the Member States are free to regulate as they see fit. Attention should therefore be drawn to the fact that they are a special case.[36]

345. On 16 February 2006 the European Parliament adopted its Position with regard to the Service Directive. Here the gambling exemption was laid down in Recital 30 and Article 2 point 1:

> **Recital 30**
> Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive, in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public order and consumer protection. The specific nature of these activities is not called into question by Community case law, which simply requires national courts to examine in depth the reasons of public interest which may justify derogations from the freedom to provide services or the freedom of establishment. In addition, given the considerable disparities in the taxation of gambling activities, which are at least partly related to differences in Member States' public order requirements, it would be totally impossible to establish fair cross-border competition between operators in the gaming industry without either first or simultaneously dealing with

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33 Cf. Opinion of the Committee on Culture and Education of 22.04.2005, drafted by Marie-Helene Descamps.
34 Cf. Opinion of the Committee on Industry, Research and Energy of 27.04.2005, drafted by Jorgo Chatzimarkakis.
35 Cf. Opinion of the Committee on Legal Affairs of 1.7.2005, drafted by Kurt Lechner.
36 Cf. European Parliament Report A6-0409/2005 Final of 15.12.2005.

questions of fiscal cohesion between Member States, which are not addressed by this Directive and which are not part of its scope.

Article 2
This Directive shall not apply to the following activities:
[...]
(l) gambling activities that involve wagering a stake with pecuniary value in games of chance, including lotteries, casinos and betting transactions;

346. On 4 April 2006 the Commission adopted an amended proposal for the directive, which built on that of the European Parliament, and in which the Commission acknowledged that gambling shall be excluded.

347. On 17 July 2006 the Council agreed with the European Parliament on a Common Position on the new Services Directive.[37] The text states in article 2 (2) that gambling shall be exempted. During the Council's handling of the case, it once again became clear that the vast majority of Member States are generally supportive of the view that gaming policy should not be harmonized.

348. The preparatory works to the Service Directive illustrate how the EU legislator interprets the EC Treaty and the ECJ case law on gambling, as a special sector, where particular considerations of social policy and public order apply, and where national authorities have a wide margin of appreciation to apply restrictions in the public interest.

349. Furthermore, these preparatory works show that there is a strong and broad opinion in the EU legislature that gambling should be allowed to *remain* a specific sector, due to the specific nature of these activities, and that they should not be subject to future harmonization, much less to Community-led liberalization and privatization.

350. On this basis the Norwegian Government holds that respect for the legislative intent and the democratic processes of the EU and the EEA strongly argues against judicial activism applied in this sector.

6.5 The Commission's approach to national gambling restrictions

351. The position of the Commission on the gambling sector has been more ambiguous and shifting than that of the Member States and the European Parliament. In recent years there have been voices in the Commission arguing for at least a certain level of harmonization and liberalisation, either through legislative initiatives, or by way of infringement proceedings against the Member States, threatening legal action before the ECJ. This is, however, not a universal and consequent position. The desire for harmonization and liberalisation of gambling seems to have been stronger in the late Prodi Commission than in the present Barroso Commission, and stronger in DG Internal Market than in other departments.

352. Traditionally the Commission has not tried to take direct action against any of the numerous national prohibitions, monopolies, exclusive right arrangements and other restrictions existing in the field of gambling ever since the Community was first

[37] CS/2006/10003

founded. In some of the preliminary cases before the ECJ the Commission has argued for a more restrictive line than that adopted by the Court. But the Government is only aware of one single case in which the Commission has launched an infringement action against a Member State over national gambling restrictions, and this is a Greek case concerning lack of notification of technical restrictions in the slot machine sector, which appears to have very little resemblance to the present case.

353. Following the November 2003 Gambelli judgment, the Commission has, however, received a number of complaints from private commercial companies with interests in gambling operations. These complaints prompted the Commission to open informal investigations against a number of Member States in the spring of 2004, and in some cases they were followed by letters of formal notice, informing national authorities that official inquiries were being conducted, and asking them for comments. Most of these cases concern the sports betting sector, which is the one ruled upon in Gambelli, and the one with the largest number of major existing commercial operators, many of them originally British bookmaking firms.

354. An example of this was the letter of formal notice served to Denmark in March 2004, questioning the fact that Danish law prohibits the cross-border offering and advertising of sports betting from companies legally operating in other Member States. Similar letters of formal notice on sports betting were served against several other Member States.

355. Apart from sports betting, the Commission also launched an investigation against the Swedish public exclusive right on slot machines, following a complaint. A short letter of formal notice was served in October 2004, and the Swedish government replied in December 2004. Since then, however, the Swedish authorities have heard nothing more concerning the case.

356. After the November 2004 appointment of the Barroso Commission little happened for a long time with the commenced infringement investigations in the gambling sector. The parallel legislative Service Directive process demonstrated that there was very little political support for attempts to liberalise the gambling sector, and the Commission was also internally split on the issue. This was admitted on several occasions, as reported inter alia in July and October 2005 by the media.[38] In the meantime the investigations were put on ice, and national authorities such as the Danish and Swedish did not get any response on their comments to the earlier letters of formal notice.

357. While the Commission deliberated, DG Internal Marked Commissioner McCreevy argued on several occasions rather strongly in the press against national gambling restrictions. On one occasion, when visiting Sweden and Finland in October 2005, McCreevy's remarks to the press prompted the Finish Minister of the Interior, Ms Kari Rajamäki, to send a formal letter to the Commission, stating that the Finish government did not share his opinion, as well as pointing to the mixed signals of the Commission, the political position of the Member States and the European Parliament on gambling harmonisation, and the fact that the case law of the ECJ leaves the Member States a

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[38] Cf. **Annex 20**, "Commissioners divided over move to liberalise gambling market", Europe Information 20 July 2005, and **Annex 21**, "Future gambling policy unclear as infringement cases postponed", Europe Information 19 October 2005.

broad discretion to determine how gambling activities should be regulated, including by monopoly arrangements.

358. After a stand-still of almost a year and a half, the Commission decided on 4 April 2006 what to do with the pending gambling investigations. A decision was made to go ahead with some of the inquiries, but only in the sports betting sector. The Commission did not issue reasoned opinions to those states which had already received earlier letters of formal notice, such as Denmark, but only signaled that there would be new amended letters asking for further information. The tone of the press release was unfamiliarly close to being apologetic, and the Commission explicitly stressed that it was neither seeking to challenge the existence of national gambling monopolies as such, nor to liberalise the gambling sector in other ways. The main part of the Press Release reads:

> The European Commission has decided to send official requests for information on national legislation restricting the supply of sport betting services to seven Member States (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden). The Commission wishes to verify whether the measures in question are compatible with Article 49 of the EC Treaty which guarantees the free movement of services. This decision relates only to the compatibility of the national measures in question with existing EU law, and only to the field of sports betting. It does not touch upon the existence of monopolies as such, or on national lotteries. Nor does it have any implications for the liberalisation of the market for gambling services generally, or for the entitlement of Member States to seek to protect the general interest, so long as it this is done in a manner consistent with EU law i.e. that any measures are necessary, proportionate and non-discriminatory. [...] The Commission hopes that the answers it receives will lead to an early and satisfactory resolution of the matter.
>
> Internal Market and Services Commissioner Charlie McCreevy said: "The Commission has an obligation under the Treaties to ensure that Member States' legislation is fully compatible with EU law. This is an important responsibility which it takes seriously. It has received a number of complaints from operators in the area of sports betting, and it feels obliged to respond. It has, therefore, decided to seek information on the matter from the Member States concerned. I don't underestimate the sensitivities that exist in many Member States on the question of gambling. In sending these letters, we are not seeking to liberalise the market in any way. Rather, we are seeking reassurance that whatever measures Member States have in place are fully compatible with existing EU law, or have been brought fully into line. I hope that the replies we receive will offer us sufficient reassurance. In that case, it will be the end of the matter. I will certainly do what I can to facilitate an early resolution, and I encourage all concerned to play their part too."[39]

359. Judging by the tone of the Press Release, it does not seem altogether probable that the pending Commission inquiries will result in infringement actions before the European Court of Justice. This however, is not certain, and seen from the outside, there still seems to be a certain internal disagreement as whether to continue to push for legal actions. This was also illustrated when the Commission earlier this autumn (2006) launched new inquiries against Austria, France and Italy of a similar kind as earlier launched against the other Member States.

360. In the context of the present Ladbrokes case before the Oslo District Court, the Government would like to note that the pending inquiries of the Commission apparently only concern (i) the field of sports betting and (ii) only the national restrictions on the

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[39] Cf. Commission Press release IP/06/436 of 4 April 2006.

marketing of such betting from other countries in relation to the freedom of services (EC Article 49, cf. EEA Article 36). In other words this is only of potential relevance in relation to the fifth and last question from the Oslo Court. And even in this regard the position of the Commission seems to be rather careful and ambiguous, and the processes still at a far to early stage for any definite conclusions to be drawn – except that the inquiries launched by the Commission are certainly so far being met with strong and united counter-arguments from all the Member States concerned. The two alternatives for the further process will either be that the Commission accepts the arguments of the Member States and closes the cases, or that they will result in one or more actions before the ECJ, which will not be decided for many years yet to come.

361. The Government also notes that the legal positions and interpretations advocated by the Commission (through its Legal Service) in the pending slot machine case before the EFTA Court were in fact very careful and moderate (especially as compared to the legal argument of the EFTA Surveillance Authority).

6.6 Relevant case law on gambling in the national courts of the Member States

362. In recent years there have been a number of cases before the national courts in the Member States on the relationship between national gambling legislation and Community law. The Government holds that these are of relevance because they illustrate how national courts have interpreted Community law, inter alia the Gambelli judgment, and this is of interest, even if it is not formally a source of law at the Community/EEA level.

363. The Government does not claim to have a full overview of all recent national case law on gambling in all Member States. But it has found cases of relevance from Sweden, Finland, Germany, Italy and the Netherlands.[40] These are Supreme Court judgments, and they explicitly confirm that national exclusive right arrangements and other restrictions are legitimate under Community law. Indeed the overall impression from national case law so far is that it is massively in favor of maintaining existing national restrictions in the gambling sector. The legal interpretation and factual assessments of the national courts are clearly in line with those of the Government in the present case.

364. This is particularly evident in the cases decided so far by the Supreme Courts of Sweden and Finland, two Nordic Member States with similar traditions and gambling legislation as in Norway.[41]

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40 These are cases which have been finally decided by the national supreme courts, the Dutch Ladbrokes-case albeit only in a preliminary procedure. In addition there is national case-law from the lower courts, of which the Government does not have a full overview. And then there are *pending* cases, as in Denmark, where a Ladbrokes-case (very similar to the Norwegian Ladbrokes-case) was argued before the Østre Landsret (the Eastern District Court) in August 2006, with a judgment expected later in November. The Finish Ladbrokes-case was decided by the Council of State on 9 December 2005, and is now pending before the Supreme Administrative Court. The Swedish Unibet-case is pending before the Eskiltuna tingsret and will probably be decided in the first instance before the end of 2006. More national cases are referred to in the report of the Swiss Institute on Comparative Law, inter alia from France.

41 It should be noted that these supreme courts did not find reason to refer questions to the ECJ for preliminary ruling. In the Wermdö Krog case the Swedish Supreme Administrative Court invoked the *acte clair* principle by holding that "The EU court has made it very clear that any further specifications in a case as this does not need to be treated at the community level, but that it is the responsibility of the national courts through the application of the specified criteria to determine whether the domestic lottery system can be accepted". This is parallel to the assessment of the

Sweden

365. In Sweden there have recently been two gambling cases before the Supreme Administrative Court and one before the (ordinary) Supreme Court. In all three cases the existing national restrictions were found to be in compliance with the requirements of Community law.

366. The most important of these cases is the Wermdö Krog case, which was decided by the Supreme Administrative Court on 26 October 2004. The case concerned an administrative decision fining the restaurant Wermdö Krog for transmitting bets on behalf of SSP Overseas Betting Ltd and ordering this activity to end. The action was however broadly formulated, and the Supreme Administrative Court used the case to judge on Swedish gambling regulation as a whole under Community law, including not only sports betting but also the restrictions on other forms of gaming, inter alia on slot machines.[42]

367. Before assessing the case, the Supreme Administrative Court analyzed the case law of the Court of Justice on national gambling in general, from Schindler to Gambelli. The analysis is thorough, and may serve as an example of proper national interpretation and application of the relevant case law.

368. On the proportionality test, the Supreme Administrative Court held that:

> The proportionality criterion would appear, in the light of the ECJ's above-cited statement concerning the Member States' freedom to choose the level and method for such protection as they wish to accord those interests which are regarded by the Court as legitimate, to play a less prominent role. The mere fact that one Member State has opted for a system of protection which differs from that of another Member State cannot affect the assessment of the need for and proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued and the level of protection which they are intended to provide (Läärä paragraph 36, Zenatti paragraph 34). If alternative solutions are available, these are a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard "must not be" or "must not appear to be" disproportionate to the aim pursued (Läärä paragraph 39, Gambelli paragraph 75).

369. After interpreting the relevant Community case law, the Supreme Administrative Court went on to assess national regulation according to the criteria of the ECJ. The Court had some remarks on the development and marketing of lotteries and gaming under the exclusive rights arrangements, and on the suitability of the authorities' supervision and control. All in all, however, the Court found that the Swedish gambling legislation meets the requirements of Community law:

Norwegian Government in the present case, which is the most important reason why it has earlier argued against asking the EFTA Court for an Advisory Opinion in the present case.

42 Cf. **Annex 24**, judgment of the Swedish Supreme Administrative Court of 26 October 2004 in the case between Wermdö Krog AB and the National Gaming Board, with a full English translation enclosed. The president of the court was Hans Ragnemalm, former Swedish judge at the ECJ.

> To sum up, the Supreme Administrative Court will cite the following. The EU court has in the gaming area shown a significant tolerance for member states general practice of implementing powerful limitations to the treaty based freedom to offer and receive services and to establish within the union. The Supreme Administrative Court does find that the lottery legislation and its application raises questions on compatibility with the conditions which EU court in this context has set, but that the Swedish system still in total is considered to comply with these requirements.

370. On 20 June 2005 the Supreme Administrative Court ruled on a case brought forward by Ladbrokes Inc.[43] The arguments in law were similar to those of the Wermdö Krog-case, and what Ladbrokes tried for was to get a second and different assessment. The court was however unconvinced, and affirmed its earlier ruling.

371. Swedish legislative restrictions on gambling have not only been before the administrative courts, but also before the ordinary courts. In October 2001 Göta Hovrätt (an appeal court) ruled on a criminal case concerning breaches of the Lottery Act by two agents on behalf of SSP Overseas Betting Ltd. The case was appealed to the Supreme Court, with the appellants claiming that the relevant restrictions were contrary to Community law. In its decision of 8 December 2004 the Supreme Court referred to the premises of the Supreme Administrative Court in the Wermdö Krog-case, and stated that it did not find any cause to make a different assessment on the legality of Swedish gambling legislation.[44] The appeal was therefore dismissed.

372. It should be added that there is another Swedish gambling case (on sports betting) pending before the Eskiltuna tingrätt, which concerns yet another UK bookmaking company, this time Unibet. This case was started in 2003, and is still pending. In this case a request for a preliminary ruling has been sent to the ECJ, but only on a question of procedural and constitutional law relating to interim measures, not on the substantive law as applied in the gambling sector.

373. So far, the situation in Sweden is that both the Supreme Administrative Court and the Supreme Court have found national gambling restrictions to be in compliance with the requirements of Community law.

Finland

374. On 24 February 2005 the Supreme Court of Finland (Högsta Domstolen) handed down a ruling on the compatibility with Community law of the Finish exclusive right arrangement on gambling.[45] This was a criminal case, arising from the fact that the Åland Penningautomatförening (the Åland Slot Machine Association) had offered different forms of gambling over the Internet to customers on the Finish mainland.

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[43] Cf. **Annex 25**, judgment of the Swedish Supreme Administrative Court of 20 June 2005 in the case between Ladbrokes Worldwide Betting and the National Gaming Board, with an English translation enclosed.

[44] Cf. **Annex 26**, decision of the Swedish Supreme Court of 8 December 2004 in the case between the Attorney General and Ms Runesson, Mr Rees and SSP Overseas Betting Ltd.

[45] Cf. **Annex 27**, decision of the Finish Supreme Court of 24 February 2005 in the case between the Attorney General and Åland Penningautomatförening (the Aaland Slot Machine Association). The full text of the judgment is enclosed in Swedish, but the paragraphs on the interpretation and application of Community law (23 to 38) is also enclosed in English translation.

375. The main argument of the Åland Penningautomatförening was that Finish gambling law was in breach of Community law, and this was discussed in length by the Supreme Court with reference to the case law of the ECJ. The main finding of the Supreme Court was that the Läärä judgment still applies to the Finish exclusive right arrangements, and that this is not altered by the Gambelli judgment. Pertinent passages include:

> 30. The system prescribed in the Finnish lottery legislation and which is based on a licence and monopoly for special types of gaming, has been the express subject of a EU court judgment in the Läärä et al. case. [...] There are no grounds to question the basic judgement found by the EU court in issues relating to the Finnish lottery law, according to which the Finnish system of a monopoly is considered to be compatible with EU treaty.
> 31. The EU court judgment in the Gambelli case does not change this conclusion, as the circumstances on which the evaluation of this case was based were different. [...]
> 32. It is therefore only a question of whether the Gambelli case judgment, irrespective of the different circumstances, contains any positions which should mean that such a change in legal position could be considered relevant to EU court judgment in the Läärä et al. case with respect to the Finnish lottery law. It can first be stated that nothing in the Gambelli case judgement indicates that the EU court should have deviated from the interpretations presented in the court's previous decisions in the case concerning the regulation of gaming for money. In the judgment, it is stated that this is rather a question of specification in the criteria that are applied in the evaluation of the compatibility of national measures with the treaty. [...]
> 35. With respect to the Finnish regulation, that presented in this case gives no grounds to suspect that the real goal of lottery legislation or the monopoly in question, is to strengthen the public treasury and not that presented in the legislation's preparatory work, specifically to prevent exploitation of the population's desire to gamble in individual profit motive and to limit and control the market for gaming to prevent social problems, abuse and criminal activity which otherwise could arise.

376. The Supreme Court also had a brief evaluation of the proportionality of national law with regard to the criminal aspects of the lottery legislation (like in Gambelli), but found this to be clearly proportionate.

377. The situation in Finland is thus that the Supreme Court has made a new evaluation of national gambling restrictions, following Gambelli, and has come to the conclusion that the Läärä judgment still basically applies to the Finish exclusive right arrangements.

378. There is also a Ladbrokes case pending in Finland before the Supreme Administrative Court, similar to the Ladbrokes cases in Denmark, Sweden and Norway, and based on the authorities' 2004 rejection of Ladbrokes' application to operate sports betting, horse race betting, dog racing, betting on special events, and games with fixed factors. In February 2005 the Supreme Administrative Court reversed the decision of the authorities on formal grounds, the reason being that they had based it solely on Finish law, and not considered the extensive Community law arguments of Ladbrokes, in particular on the Gambelli ruling.

379. On 9 December 2005 the Finish Council of State made a new Decision, this time after a more thorough administrative procedure, with a new round of statements given by Ladbrokes and other interested parties. The new decision confirms the result of the earlier, but this time with a substantial reasoning on the relationship between Finish gambling legislation and Community law, in particular the interpretation and application

of the Läärä and Gambelli judgments.[46] The main finding is that Läärä still basically applies, and that Finish legislation also complies with the supplementary specifications added by the ECJ in Gambelli:

> The Gambelli case decision does not reverse the Court's earlier precedents but supplements and specifies them. [...]
>
> The European Court specifies the acceptable legal justification of providing services in Gambelli sections 67 and 69. The purpose of the exclusive gaming law set in the Finnish Lotteries Act is to guarantee the legal protection of those who engage in gaming activities, prevent abuse and criminal activity and reduce social problems created by gaming. The main purpose of ratifying exclusive gaming licences and gaming rules is to restrict the supply of gaming services. Ratification is a means used by the government to regulate the harshness of the gaming activities and to reduce the addictivity of the games.
>
> Limiting the number of gaming providers limits the amount of games available and it also limits competition between the gaming providers, which would in itself, let alone unregulated, lead to aggressive forms of tempting people to play. Competition would thus lead to growing numbers of players and to the growth of gaming related negative consequences. The principle of exclusivity adopted in the Finnish Lotteries Act is in keeping with the Gambelli verdict, section 67 requirement to limit betting activities in a consistent and systematic manner. Neither is the system based on exclusivity a disproportionate action, as the European Court of Justice has concluded in its assessment of exclusivity granted by the Finnish Lotteries Act in regard to the operation of slot machines. The Court explicitly states in its Läärä decision that granting exclusive rights is not disproportionate in so far as they affect freedom to provide services, to the objectives they pursue.

380. This Decision is now pending appeal before the Supreme Administrative Court.

The Netherlands

381. There have been several cases before the Dutch courts on the relationship between national gambling restrictions and Community law.

382. The major case so far is the one between the De Lotto Foundation (which has exclusive rights) and Ladbrokes. This case has been pending before the courts since December 2002, with several rulings in an interlocutory procedure, ending in a ruling by the Supreme Court of the Netherlands on 18 February 2005, and then the judgment in the main action, which was decided by the Court of Arnhem on 31 August 2005, and then by the Court of Appeal of Arnhem on 17 October 2006.[47] In all instances, the courts held that the contested Dutch restrictions on gambling are in compliance with Community law, as they are based on imperative requirements, form part of a consistent policy aimed at reducing gambling, and are necessary in order to achieve the required aims.[48]

[46] Cf. **Annex 28**, Decision of the Finish Council of State of 9 December 2005, enclosed in English translation.

[47] Cf. **Annex 29**, Ruling by the Supreme Court of the Netherlands of 18 February 2005, **Annex 30** Judgment of the Court of Arnhem, Civil law section, of 31 August 2005, and **Annex 31** Judgment of the Court of Appeal of Arnhem of 17 October 2006. All three rulings are enclosed in English translation.

[48] In this case, special attention was paid to the argument by Ladbrokes' that the contested Dutch legislation did not meet the Gambelli Formula because De Lotto is allowed development and extensive marketing of its gaming

383. Other Dutch gambling cases include a case between the Dutch authorities and Betfair, under which Betfair applied for permit to organize sports betting. This was denied, and a call for provisional relief was dismissed by the Court in Interlocutory Proceedings (The Hague) on 9 December 2004. In another case between De Lotto and the companies Interwetten, Grün Weis and Betfair, they were ordered to stop their Internet offering of games to the Dutch public in interlocutory proceedings before the Court of Appeal in Arnhem on 23 November 2004.

384. In one Dutch case so far the court has found national gambling restrictions to be in breach of Community Law. This is the Holland Casino case referred to by the Authority in its Application (p 42, footnote 103), in which the Administrative Court of Breda held that the casino monopoly of Holland Casino has not been justified according to the criteria of the ECJ in Gambelli. The case is pending appeal.

Italy

385. In Italy there have also been several cases before the national courts on the relationship between gambling restrictions and Community law. Most of them have been related to sports betting, and two (Zenatti and Gambelli) gave rise to proceedings before the ECJ.

386. Following the November 2003 Gambelli judgment the issue before the Italian courts was to actually assess the contested legislation according to the criteria stated by the ECJ. This was done by the Italian Supreme Court in April 2004 in another case already pending before it, the Corsi case.[49] After referring to the previous ECJ case law on gambling the Supreme Court stated that the Gambelli judgment "belongs to this constant jurisprudential vein, even if it contains innovative considerations" (12.2). It then went on to assess the Italian legislation according to the Gambelli test, stating that although it was clear that the Italian legislator for many years had been expanding gambling opportunities for fiscal reasons, and although this in itself was not legitimate under Community law, the legislation was still legitimate because it *also* protected Italian society against "criminal infiltration" and prevented "a possible criminal degeneration" (12.2.3). On this basis it found the legislation to be justifiable.

387. Under the proportionality test the Italian Supreme Court took the same approach as the ECJ in Gambelli, and only assessed the proportionality of the penal sanctions as such, which were upheld as proportionate (13).

388. Italian restrictions on the operation of sports betting continues to be contested, and several gambling cases currently awaiting preliminary judgment by the ECJ come from Italian courts, inter alia the Placanica case.

Germany

389. On 28 March 2006 the German Constitutional Court in Karlsruhe handed down its ruling on the "sportwetten" case, which involved federal and state legislation requiring

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portfolio. This argument was rejected first by the Court of Appeal and the Supreme Court in the interlocutory proceedings, and then in the main action by the Court of Arnhem and the Court of Appeal of Arnhem.

49 Cf. the decision of the Italian Supreme Court of Appeals of 26 April 2004, enclosed in English translation as **Annex 32**. This was a criminal case, involving Mr. Corsi, who (like Mr. Gambelli) was an agent for the bookmaking company Stanleybet.

that sports betting in Bavaria can only be offered by the Free State of Bavaria.[50] The case concerned the requirements of freedom of occupation under German constitutional law (the Basic Law art. 12), but the Court made it clear that it regarded the judgment to be in conformity also with Community law, with particular reference to the Gambelli judgment. Formally the case only concerned sports betting at fixed odds but the Court made a number of observations of more general interest.

390. The most important aspect of the case is that the Constitutional Court recognized the specific nature of the gambling sector, as well as the legitimacy and suitability of strong restrictions, including monopoly arrangements. However, in the specific case, it held that the state betting monopoly in Bavaria in its current legal and actual form is disproportionate under the constitutional requirements, because it is not structured to achieve the legitimate aims of fighting gambling addiction and containing the betting urge of the population. The German legislature was given until 31 December 2007 to amend the law. In the meantime the present regulation remains in force, and sports betting in Bavaria can still only be offered under the public exclusive right arrangement.

391. The offering of sports betting in Bavaria differs from operating slot machines in Norway in many ways. The more general observations of the Constitutional Court are however of interest to the pending case.

> d) The legal establishment of a state betting monopoly is a fundamentally suitable means of achieving the legitimate objectives. (111)
> In the sense of constitutional law, a means is suitable if, with its help, the desired success can be achieved whereby the possibility of achieving the objective is sufficient [...]. Therein, the legislator has precedence of assessment and prognosis [...]. It is primarily up to the legislator to decide which measures it will apply in the interest of the common good with observance of the subject laws of the respective subject area [...]. (112)
> aa) According to this criterion, the assumption of the legislator that the establishment of a state betting monopoly is a suitable means of combating the risks and dangers associated with gambling cannot be rejected in principle. This also applies for the assumption that the competition that would arise from opening the betting market would lead to considerable expansion of the betting services on offer and that this expansion would cause an increase in problematic and addiction-influenced behaviour. (113)
> bb) This suitability does not fail because the state betting monopoly can only be enforced with limitations. There will always also be illegal forms of games of chance, which cannot be prevented completely. Furthermore, with today's technological circumstances, sports bets can be placed globally on the internet without the state being able to prevent such internet gaming offers completely, However, impediments to execution arising from technological and economic developments do not render an essentially suitable organisation of the state's pursuit of the common good on a national level unsuitable. (114)
> e) The legislator may also assume the necessity of a betting monopoly. (115)
> aa) It also has scope of judgement and prognosis for assessing necessity [...]. Subsequent to this prerogative of assessment, measures deemed necessary by the legislator for the protection of an important community good such as the prevention of risks associated with the operation and mediation of games of chance can only be rejected under constitutional law if, with the facts known to the legislator and in respect of experiences already gained, it can be established that the restrictions considered as alternatives promise the same efficacy but burden the affected parties less [...]. (116)

[50] Cf. the decision of the German Bundesverfassungsgericht of 28 March 2006 in case 1 BvR 1054/01, enclosed in English translation as **Annex 23**.

bb) With these criteria, the assessment of the legislator of a betting monopoly as being necessary is not to be rejected. (117)
Nevertheless, it is not to be excluded from the onset that consumer protection and the protection of minors, as well as the prevention of crime associated with gambling and gaming is realized by the standardization of appropriate legal requirements on commercial betting services offered by private betting operators. These requirements could be enforced by licensing reservations and official control by means of the trade supervision commission (see also ECJ, decision of 6 November, 2003 - C-243/01 - Gambelli a.o., coll. 2003, I-13076, fig. 73 ff.). In light of its broad scope of assessment, the legislator should, however, assume that the risks of addiction can be controlled more effectively with a betting monopoly aimed at combating addiction and problematic gambling behaviour with a betting offer with state responsibility than by control of private operators [...]. (118)

392. In this way the Constitutional Court gave recognition to the principle that state betting monopolies are a "a fundamentally suitable means" for restricting gambling, and that the legislator has a "scope of judgement and prognosis for assessing necessity" in this regard.

393. Following the decision of the Bundesverfassungsgehrict the German legislators had to make a choice between two basic alternatives – either to liberalise sports betting or to refashion and strengthen the existing state monopolies. In a conference on 22 June 2006 the leaders of the German Länder voted for the second alternative, holding that: [51]

1. The government leaders of the German Länder welcome the decision of the German Federal Constitutional Court on sports bets of 28 March, 2006 in its fundamental confirmation of the legitimacy of a state lottery monopoly, structured effectively to combat gambling and limit the gaming urge.
2. The government leaders of the Länder reinforce their resolution of 23 June, 2005, and declare to maintain the state lottery monopoly and to develop it further on the basis of the sports bets decision of the Federal Constitutional Court. The state monopoly is necessary and suitable for achieving the regulatory legal objectives of containing gambling addiction and the gaming urge, and fighting crime associated with gambling and gaming, as objectives also authorised by the Federal Constitutional Court. [...]

394. The Government holds that this policy decision by the leaders of the German Länder is very much in line with the position of the Norwegian authorities since 2001, both as regards the 2003 slot machine reform and as regards other decisions and initiatives to uphold and strengthen national restrictions aimed at limiting the gambling urge.

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[51] Resolution from the Conference of the Government Leaders of the German Federal States on 22 June 2006.

6.7 Conclusions on the legal framework

Based on the above, the following main conclusions may be drawn on the legal status of the gambling sector under EU/EEA law:

- The operation of gambling is recognized in ECJ case law as a special sector, in which special legal criteria has been formulated, giving the national legislator a wider margin of appreciation to restrict gambling than other kinds of services, according to national traditions, evaluations and requirements.

- At the legislative level, the Member States and the European Parliament have held that gambling is a special sector, in which the national legislator should have wide latitude and discretion, and they have rejected proposals for harmonization of gambling services put forward by the Commission.

- The Commission has not been completely consistent on the gambling issue, but it has recently stated that it does not seek to harmonize, liberalize or privatize the existing national gambling arrangements, including national monopolies.

- National courts have to some extent been puzzled by the Gambelli formula, which has led some of them to make a critical assessment of traditional national gambling arrangements. But on the whole, national courts have massively come out in favour of maintaining existing restrictions and monopolies. In some cases (like the recent Karlsruhe case) the courts have stated that national gambling policy and legislation should be even stricter in order to be consistent.

- On the whole, the trend in the European Union in recent years has not been towards a deconstruction of national exclusive right arrangements on gambling, but merely towards an insistence that such arrangements must be operated in a moderate and responsible manner in order to be legitimate and consistent.

7. JUDICIAL REVIEW OF NATIONAL RESTRICTIONS IN THE GAMBLING SECTOR UNDER EEA LAW

7.1 Introduction

395. The five questions raised by the Oslo District Court are of a somewhat different nature. The first three questions relate to each of the three statutes regulating the Norwegian gaming and lottery sector, each of which imposes restrictions that are related but still somewhat different in character. In order to review these restrictions under EEA law the national courts will have to apply the basic tests of legitimacy, suitability and necessity (as interpreted in the gambling sector) to each of the three. Even if the interpretation is the same, regardless of what sort of gambling restriction it is applied to, and even if the result in our view should clearly be the same for all the three statutes, the national courts will still at least to some extent have to make separate assessments.

396. The same does not apply to the EFTA Court within the framework of an advisory opinion procedure limited to the interpretation of the relevant EEA law.

397. The Court will of course have to give an answer to each of the questions posed. But to a large extent the answers as regards legal interpretation can be similar. In Community law the European Court of Justice has so far taken an overall approach to the gambling sector, and interpreted the basic Treaty provisions in the same way whether the case at hand concerned lotteries (Schindler), slot machines (Läärä and Anomar) or sports betting (Zenatti and Gambelli).

398. Furthermore the ECJ has in these five cases confined itself to making relatively short and general statements on the correct interpretation of the basic treaty provisions within the gambling sector. As the EFTA Court is aware, the more detailed an interpretation gets, the further it moves on the gliding scale between on the one hand general legal interpretation and on the other hand legal interpretation which is so specified as to actually assess and solve the case at hand. In the gambling sector, the ECJ has confined itself to a relatively general level, formulating quite broad and open legal tests, for all kinds of gambling restrictions, and leaving the rest to be solved as part of the factual assessment of (partly) the national authorities and (partly) the national courts.

399. The Government respectfully holds that the EFTA Court should take the same approach, and confine itself to formulating the general legal criteria under which national gambling restrictions are to be evaluated, without trying to go into more detailed interpretation, which would inevitably mean a further development of EEA law, in one or the other direction, beyond the present state of Community law. The Government holds that the EFTA Court should not do this, and that it is certainly not necessary in order to give the Oslo District Court a satisfactory and correct advisory opinion on the questions asked.

400. On this basis the Government would suggest that the Court should answer the first three questions on the same level as the ECJ has answered similar questions in its case law on gambling restrictions, and using the same formulas and expressions. In this regard the Court should in particular look to the cases which are most similar to the present case, meaning the Schindler, Läärä and Anomar cases, and it should be most careful when considering to what extent to make use of the statements of the ECJ in the Italian sports betting cases (Zenatti, Gambelli and presumably soon Placanica) which arise out of a national legal and factual situation quite far removed from the Norwegian one.

401. Having stated this, and in case the Court should want to go further into interpretative details than so far done by the ECJ, the Government finds it appropriate to give some remarks on what in its opinion constitutes a correct legal interpretation of EEA law in the gambling sector – as regards each of the general "tests" applied when reviewing national restrictions under the general provisions in EEA Articles 31 and 36.

402. The Government has earlier set out its views on these legal questions in more detail in its Statement of Defence and Rejoinder to the EFTA Court in the Slot Machine Case (E-1/06), which are publicly available documents, and to which reference is made for more detail.[52] The following is a somewhat shorter version of the main points – setting out the Government's basic opinion on the legal criteria for assessing non-discrimination (7.2), justification (7.3), suitability and "consistency" (7.4) and "necessity" (7.5).

403. The Government holds that each of these tests from an EEA legal point of view should be interpreted in the same way in relation to each of the three sectors of national gaming and lottery regulation contested in the case, and that the interpretative opinion of the Court should therefore be similar as regards the first three questions.

404. The fourth and fifth questions of the Oslo District Court are of a somewhat different nature.

405. The fourth question is whether one specific national concern, which is found in many of the Member States, may be considered a legitimate part of the justification under EEA law under the legal doctrine on mandatory public requirements. The Government's view on this is set out in section 7.3 on justification and section 8.4 below.

406. The fifth question concerns the legitimacy of another principle which is found in almost all the Member States, namely a prohibition against the marketing and offering of unlicensed games and lotteries. This is a non-discriminatory and indistinctly applicable rule which applies to all unlicensed (and therefore illegal) gaming, domestic or foreign, but its main practical effect is to stop marketing of games of chance from other countries all over the world (including EEA countries). The question is whether such a provision is compatible with EEA article 36 on the free movement of services, and the Government holds that the answer is clearly affirmative – as will be elaborated in section 8.5.

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[52] The Statement of Defence of 18 May 2006 can be found at http://www.odin.no/filarkiv/281968/Forsvarsskrift-EFTA-CaseE-1-06-Statement-of-Defence-18May2006.pdf The Rejoinder of 13 September 2006 has also been made publicly available, and can be obtained through the Ministry of Culture.

7.2 Judicial review of whether restrictions are discriminatory

407. When reviewing national restrictions under EEA Articles 31 and 36 the first question is whether the contested rules amounts to discrimination based on origin (nationality).

408. The Government holds that the legal criteria for this test are in general no different in the gambling sector than in more ordinary and less sensitive sectors of the EEA market.

409. Having said this, it is of some interest to note that the ECJ has discussed the question of discrimination in several of the gambling cases put before it. In the Lindman case (C-42/02) it found the contested national tax differentiation between national and foreign winnings to be "manifestly discriminatory", and used this as the basis for a strict review, coming to the conclusion that the differentiation was in breach of Community law.

410. In all the other gambling cases decided so far, the ECJ has either explicitly or implicitly held that the contested restrictions were not discriminatory on the basis of nationality.

411. Of most direct relevance to the case at hand is the Läärä judgment, in which the ECJ held that a public monopoly on slot machines is a non-discriminatory measure. And it is also directly relevant that the ECJ had earlier held the same in the Schindler case came as regards a national prohibition on the offering of lottery tickets from abroad.

412. These are the situations which are most directly comparable to the contested restrictions in the case at hand, not only as regards the public exclusive rights system of the Gaming Act, but also the regimes of the Totalisator Act and the Gaming Act, none of which discriminate on the basis of nationality. Or in other words – the application of Ladbrokes for licenses would have been handled and decided in exactly the same way if it had come from a domestic company – under all the three statutes. There is neither direct nor any form of indirect discrimination in the case at hand.

413. By comparison it is interesting to note that even if the ECJ in the Gambelli case did not pronounce the contested restrictions to be directly discriminatory, it is still clear from the judgment (and the AG's opinion) that the Court harbored a strong suspicion that they were indirectly discriminatory and protectionist.[53] This is the main reason why the statements in the Gambelli judgment have to be interpreted with care, and why they are not at all automatically transferable to cases like the present, in which there are no hidden discrimination.

[53] The same seems to apply to the still pending Placanica case (cases C-338/04, C-359/04 and C-360/04), which arises out of the same national legal and factual situation as Gambelli, and in which Advocate General Colomer has based his opinion on the view that the contested Italian legislation is directly discriminatory.

7.3 Legitimate public requirements in the gambling sector

The general legal test

414. If a national restriction is not directly discriminatory, then it can be justified with reference to the doctrine on imperative requirements, as formulated by the ECJ and the EFTA Court on numerous occasions. According to this doctrine, a long list of public concerns may in principle be considered legitimate. Roughly speaking, requirements which are sensible will normally also be legitimate in the legal sense. The main exemption is so-called financial considerations, which are not legitimate. The exact outer limits of this legal concept are not always clear. But the core is clear. National restrictions on the four freedoms can never be justified in themselves by reference to the need to increase or protect state income. If a national restriction is otherwise based on legitimate objective requirements, however, the fact that it also serves objectives of a financial nature does not impair the justification.

752. In many sectors the ECJ has given more precise and specific instructions, supplementing the general doctrine on imperative requirements. The gambling sector is one of these. Starting with the 1994 Schindler ruling the Court has specifically listed national requirements in the field of gambling which are to be considered legitimate, and this list has been repeated in the later rulings, as described above in section 7.2.[54]

753. In general the ECJ has recognised that national restrictions on gambling may legitimately serve a number of public interest purposes, including the prevention of compulsive gambling, consumer protection for the players, restricting the volume of gambling out of other moral or social considerations, protecting public order, preventing crime and fraud, and preventing gambling from being a source of private profit.

754. As regards national exclusive rights arrangements on gambling the ECJ has specifically recognised in Läärä that they legitimately strengthen public control and responsibility, and also that they may legitimately serve the purpose of "confining the desire to gamble and the exploitation of gambling within controlled channels" (Läärä 37, cf. Zenatti 35).

755. National restrictions on gambling operations are in practice seldom based on one singular requirement, but usually on a set of supplementary objectives. The reason for this is of course that gambling restrictions may typically serve several aims at the same time, but it is also a fact that such restrictions are often the result of long national legislative traditions, which over time have developed in a way that makes it difficult to point out one decisive and objective justification at any given point in time.[55] The ECJ has recognized this, and it has explicitly stated that when assessing the legitimacy of the restrictions, such considerations "must be taken together" (Schindler 58, cf. Läärä 33, Zenatti 31, Anomar 73), and evaluated *as a whole*.

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[54] Cf. Case C-275/92 Schindler, paragraphs 57-60, as quoted above in section 6.2.

[55] The main example is the fact that gambling restrictions were in the old days often justified by reference to religious and moral considerations. In recent years this has in most countries been eclipsed by social and health policy requirements, primarily the need to prevent and contain gambling addiction. But that is not to say that old legislative not still be of great importance to substantial parts of the national population.

Evaluation of economic considerations in national gaming law

415. The only widespread traditional requirement in the gambling sector which has caused the ECJ some difficulty are the national economic considerations and ramifications common in this sector. Here, it is a fact that most European states at least to some extent apply a principle under which revenues from gambling should as far as possible be channeled to socially beneficial causes, making this a major source of income for such activities. This is a fact which the ECJ has had to reconcile with the the traditional principle that public "financial considerations" may not be considered a legitimate requirement.

416. The result is that the Court of Justice recognized as early as in Schindler that it is basically laudable that lotteries and gaming make "a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture", and that this was not without relevance, although it could not "in itself be regarded as an objective justification" (60). In the later rulings the Court has elaborated on this, in particular in the 1999 Zenatti ruling, in which it stated that the financing of social activities from gambling revenue may be an "incidental beneficial consequence" (meaning an accessory advantage) of the system, as long as it is not "in itself" the objective reason for the restriction.[56]

417. In the pending slot machine case before the national courts and the EFTA Court the commercial operators and the Authority has argued that this means that national gambling restrictions must be based exclusively on public interest objectives, and that a national piece of legislation therefore almost automatically becomes illegitimate if the national legislator has included considerations on how the revenue from gambling should be spent, and for the benefit of whom.

418. This is clearly a wrong interpretation of Zenatti, as well as an impossible requirement to make. Behind almost all existing national gambling regulations, whether old or new, in all the Member States, there will always be legislative considerations of an economic nature, including in most states clear statements that gambling revenue should be used for the benefit of socially benevolent and humanitarian causes. This is perfectly natural and sensible, and can of course not mean that the legislation as such is illegitimate.

419. The point of the Zenatti formula is that such "economic" considerations cannot in themselves be part of the legal justification for the restriction under Community law. They may only be accessory (incidental) advantages. As such they are legitimate. But when assessing whether a national restriction is based on recognised public interest considerations, they have to be subtracted. The test is then whether the remaining considerations behind the legislation are enough to objectively justify the restriction. If there are strong social or other public policy concerns justifying the restriction, this will then of course be considered legitimate under Community law, even if there are also economic considerations at the national level.

420. The Government holds that this interpretation follows directly from the wording used by the ECJ in Zenatti (and later in Gambelli), and that it is indeed the only interpretation

[56] Cf. Case C-67/98, paragraph 36, which is described above in section 6.2, with an analysis of the concept of an "incidental beneficial consequence".

which makes sense in the gambling sector. Furthermore, this is how the test was applied by the ECJ itself in Zenatti and Anomar, and how it has been applied since by national courts, including supreme courts in Sweden, Finland, Italy and the Netherlands.[57]

421. One should add that this is also the viewpoint adopted by the ECJ in its case law outside the area of gambling. The Court has thus in several cases emphasized that if a public interest justification is found, it is irrelevant that the national measure also enables the achievement of economic objectives:

> The mere fact that national provisions, justified by objective circumstances corresponding to the needs of the interests referred to therein [Article 36, now Article 30 EC], enable other objectives of an economic nature to be achieved as well, does not exclude the application of Article 36 [Article 30 EC].[58]

Evaluation of national concerns to avoid commercial gambling and private gambling profits

422. Preventing the operation of gambling from being a source of private commercial profit is an ancient principle in Norwegian gambling legislation and policy, as described above. This is not particular to Norwegian tradition, but can be found in many countries, even in traditionally quite liberal countries, such as the UK, which referred to this principle in its defense in the 1994 Schindler case.

423. As demonstrated in section 6.2 the national legislative intent that gambling should not be "a source of privat profit" was recognized by the ECJ as a legitimate concern in itself in Schindler (60), and later referred to in Läärä (13) and Zenatti (30). Why this is so is not elaborated by the Court. The Government holds that this must partly be seen as a part of the (recognized) moral aspects of gambling, and partly out of consideration for the fact that private profit will always serve as a particulary strong incitament to increase gambling opportunities and volume.

424. The historical reason behind the principle that private commercial profit should as far as possible be excluded from the gambling sector is probably threefold – at least in Norway. First, there are the moral aspects. Private persons should not profit from the misfortune of others. Second, private profit is the most important market incitement, and should therefore be suppressed or excluded if the aim is to contain gambling. Third, national legislators have traditionally wanted to reserve gambling revenue as a source of income for charitable and socially beneficial causes.

425. In this way, the requirement to prevent gambling from being a source of private commercial profit can both be a legitimate *aim* in itself, and a (very effective) *means* to achieve other ends, namely to restrict and diminish gambling volume and opportunities, by eliminating commercial competition.

426. It should be emphasized that the requirement to prevent and avoid private commercial gambling profit and competition is a distinct legislative concern *of its own*, which must

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57 See above sections 6.2 and 6.6.

58 E.g. Case 72/83 *Campus Oil* [1984] ECR 2727; para 36 and Case 118/86 *Nertsvoederfabriek* [1987] ECR 3883, para 15.

be distinguished from the concern to channel gambling profits to charitable organisations, even if the two are related. The first is a requirement based on moral concerns and the concern to moderate and confine gambling. The second is a concern that to the extent that gambling is nevertheless allowed, then at least the revenues should be put to some use, for the public good.[59]

427. In the pending slot machine case before the national courts and the EFTA Court the commercial operators and the Authority has argued that eliminating private profit can not be a legitimate requirement. The argument is that to accept this would be "fraught with danger", and would mean that Member States "would be given a blank cheque to introduce state monopolies in basically all sectors". This is wrong. The reason why the elimination of private profit might be a legitimate consideration in itself is specific to the gambling sector, and follows from the moral and ethical character of this sector. This is the reason why the prevention or elimination of private profit might be a legitimate end in itself in the gambling sector, something which is explicitly recognized by the ECJ as legitimate in Schindler, Läärä and Zenatti. It is not an argument which is transferable to other sectors of the service economy.

428. Apart from this, the prevention or elemination of private profit is not an end (or a public consideration) in itself, but as demonstrated above an effective *means* to achieve other ends, namely to restrict and diminish gambling volume and opportunities. Once again this argument is quite spesific to the gambling sector. In normal sectors of the economy the authorities have no legitimate interest in restricting activity. In the gambling sector the oppositie is true. Here the restriction, diminuation and moderation is in itself a legitimate aim. In this situation the elemination of market incenticves, such as private commercial profit, becomes an effective and efficient means by which to achieve this aim. The legitimacy of this is recognized both in Läärä and Anomar.

7.4 Suitability (and "consistency") of national restrictions

The ordinary suitability test in the gambling sector

429. If a national restriction is based on legitimate public requirements, the next test under EEA law is whether it is suitable in order to achieve these aims. Again, the criteria for "suitability" are to be found in the case law of the ECJ and the EFTA Court, and these might on closer analysis differ somewhat according to the characteristics of the case and the sector concerned. The same goes for the level and intensity of judicial review.

430. In the *gambling* sector the ECJ has traditionally been very clear on the point that it is primarily for *the national authorities* to assess which measures are best suited to address gambling problems and problem gambling. This has been the consistent approach of the ECJ in Schindler (61), Läärä (35), Zenatti (33), and Anomar (87):

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59 There might also be circumstances under which the charitable receivers of gambling revenue would economically be better served by a percentage of the surplus from a competitive commercial gambling sector than by the whole surplus from a (much smaller) public gaming arrangement. This is the situation in the Norwegian slot machine sector, where the future total revenue from machine gaming (which in its entirety will be channeled to socially beneficial aims) will be much smaller than the amounts derived from the present 40 percent share which the charitable licence holders get from (the far larger) total machines revenues under the current market-based regime.

> [I]t is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, *to determine the means which they consider most suited to achieve them* and to establish rules for the operation and playing of games, which may be more or less strict [...] and which have been deemed compatible with the Treaty.[60]

431. Furthermore, even if it otherwise holds that this is for the national legislator to decide, the ECJ in Läärä still went out of its way to expressly state that a public exclusive rights system is suitable for achieving public policy requirements in the gambling sector, such as control and confinement of gambling, and the prevention of crime and exploitation. The appellants in the case had stressed the fact that the Finnish legislation did not entail a prohibition, and questioned whether a restriction in the form of an exclusive rights system was suitable for achieving the purported aims. The Court gave this argument short thrift and held that an exclusive rights arrangement for slot machine operations was a *per se* suitable measure:

> 37. [...]. Limited authorisation of such games *on an exclusive basis, which has the advantage* of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.[61]

432. Hence, the Court has found that it is for the national authorities to assess the suitability of national measures intended to restrict gambling problems, and has explicitly added that exclusive rights systems such as those found in the traditional Norwegian gaming and lottery legislation are indeed suitable for achieving those aims.

The test of "consistency" in the Gambelli case

433. While in the first four gambling cases of the ECJ applied a traditional test of suitability, and did so in a careful manner, instructing the national courts to leave national authorities a wide discretion as to which measures are most suitable in order to contain gambling problem, some uncertainty has existed since late 2003 of whether and to what extent this is changed by the Gambelli judgment.

434. The reason for this, as the Court is aware, is that in Gambelli the ECJ stated that in order to be suitable, a national gambling restriction must "serve to limit betting activities in a consistent and systematic manner" (para 67).

435. In the Government's view there are in theory three possible ways in which to interpret the suitability and consistency test which should be applied to national gambling restrictions following Gambelli:

    1. The main rule should still be an "ordinary" suitability test, as applied by the ECJ in Schindler, Läärä, Zenatti and Anomar, leaving wide discretion to national authorities as to which measures they consider best suited to obtain public aims in

60 Cf. Anomar para 87 (emphasis added).
61 Cf. Läärä para 37 (emphasis added). The same wording was used in Zenatti para 35.

the gambling sector. The Gambelli test of "consistency" should not apply to ordinary cases, and should be reserved for cases where there is reason to suspect arbitrary discrimination or protectionism.

2. There should be a consistency test according to Gambelli, but confined to testing the consistency of the contested national measure in itself, meaning the consistency of the restriction itself within the relevant field of the gaming and lotteries sector.

3. There should always be a wide and general consistency test of national gambling restrictions, to check whether the contested measure is a consistent and systematic part of national gambling policy as a whole. If so, then all aspects of national gaming policy and regulation would necessarily have to be included.

436. The Government holds that alternative (1) is the legally correct interpretation, followed in the alternative by (2), while option (3) is an almost impossible criterion for judicial review, which would require the courts to assume the role of national legislator.

First alternative – why the "Gambelli formula" should be confined to special cases

437. The Government holds as its principal position that interpreted in its proper context, it is clear that the "Gambelli formula" is not a new general criterion, and that it does not in general limit the traditional discretion of national authorities to decide which measures are most suitable for protecting legitimate public concerns in the gambling sector.

438. In order to understand this, it is necessary to examine the context in which the Gambelli formula was introduced by the ECJ and in particular the issues which the national court was required by the ECJ to take into account when assessing the consistency and systematic nature of the Italian restrictions.

439. "In that regard", the ECJ stated, "the national court [...] has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licenses" (para 68). The ECJ tersely noted in response that the Member State cannot invoke public order concerns under such circumstances, and indicated that the national court should assess more closely the justification for the national measures and whether they were discriminatory (paras 69-71).

440. Against this background, it appears likely that usage of the words "consistent and systematic" actually corresponds to the similar and more familiar, but less diplomatic notions of 'arbitrary discrimination or a disguised restriction', cf. Article 30 EC by analogy. This rhymes also with the fact that Gambelli is to date the only gambling case in which the ECJ has formulated a consistency-test, while also being the only case where the referring national court explicitly invited the ECJ to consider what it described as arbitrary and discriminatory features of the national legislation.

441. This interpretation is strengthened by the fact that there are not really any substantive arguments why non-discriminatory gambling restrictions should be subjected to a stricter test of suitability/consistency than what applies in more ordinary sectors of the market, where the ECJ has not formulated the same kind of consistency test as in

Gambelli. On the contrary, the previous case law in the gambling sector confirmed that judicial review of the national suitability evaluations should be less intense as regards gambling restrictions than in other more ordinary sectors of the economy.

442. In particular, it is not likely that the ECJ meant for the new consistency test formulated for use in Gambelli to be also applied in general on the kind traditional public exclusive rights arrangements such as the one earlier recognized in Läärä.

443. This interpretation is also corroborated by a recent ruling from 2004, Commission v. France, which was rendered after Gambelli.[62] Seemingly inspired by Gambelli, the Commission attempted to challenge French restrictions on alcohol advertisements with claims of inconsistency. There were no indications that the French rules were discriminatory. The ECJ did not venture into any "consistency" evaluation. Instead it merely responded to the inconsistency claim by holding that:

> [I]t is sufficient to reply that that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved. (para. 33)

444. On this basis the Government submits that in the absence of any indications of arbitrary discrimination or protectionist intention, the ECJ will also in the gambling sector confine itself to the traditional review of suitability, in respect of which it is for the Member States' authorities to decide on the degree of protection and on the way in which that protection is to be achieved.

445. In other words, Gambelli para 67-69 is *not* to be interpreted as a general shift in the gambling sector, which must be applied equally to all kinds of national restrictions. It is rather a particular test, designed for use in those cases in which there is reason to suspect that the contested restriction might have a discriminatory or protectionist character.

446. In the case at hand, this means that the EFTA Court should advise the national courts to stick to the ordinary suitability test as laid down in the first four gambling cases of the ECJ, since there is no reason to hold that any of the contested Norwegian restrictions resemble the situation in Gambelli.

447. If in the alternative the EFTA Court should advise the national courts to apply a "consistency-test" on the traditional and non-discriminatory national gambling restrictions contested in the present case, the Government therefore holds that this would imply extending judicial review in the gambling sector much further than previously called for by the ECJ. The Government holds that this will not be a good solution, neither in Community law nor certainly not in the context of EEA law.

Second and third alternatives – the possible contents of a "consistency" test

448. Should the EFTA Court choose to advise the national courts to apply a "consistency-test" on the present case, then it has to consider the problem arising from the fact that the content and finer details of the test as described by the ECJ is far from clear.

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[62] Case C-262/02 *Commission v. France* [2004] ECR I-1795.

449. The remarks of the ECJ in Gambelli paras 67-69 are short and clearly influenced by the apparent suspicion declared in para 68. Furthermore there is little or no guidance to be found in other parts of the case law of the ECJ, certainly not in the other gambling cases, but even not in the more general case law, since the concept of "consistent and systematic" has not been used in other cases neither before nor after November 2003.

450. In the absence of authoritative legal sources, the Government holds that the consistency test laid down in Gambelli can basically be interpreted in two rather different ways.

451. The first alternative is to test whether the contested national gambling restriction is "consistent and systematic" *in itself*, meaning that it does not contain elements which are contradictory or arbitrary – typically by both restricting and expanding gambling at the same time. This, it must be remembered, was the suspicion in Gambelli – that the national authorities were expanding gambling opportunities for Italian concession-holders of sports betting while at the same time imposing new and stricter criminal punishment on the agents of foreign bookmakers. This kind of confined consistency test is manageable within the usual limits of judicial review.

452. The other alternative is to test whether the contested national gambling restriction forms a "consistent and systematic" *part of the wider* national gambling policy and regulation in a way that serves to limit gambling opportunities. One part of this could be to test whether the contested restriction systematically fits into the existing legislation and policy or whether it derogates from this, in such a way as to increase gambling. Another part might be to test national regulation and policy itself is aimed at limiting gambling. But a more probable interpretation would be to test whether the contribution of the contested restriction to overall national policy serves to limit gambling activity in a way which is consistent with the systematic structure of the wider national law and policy.

453. To interpret Gambelli in such a way puts a formidable task upon the courts which are to exercise judicial review, Not only will they then have to study and assess the contested restriction, but they will in fact have to study and assess all other aspects of national gambling law and policy as well, to evaluate whether the contested restriction contributes in a consistent and systematic manner to the overall aim of limiting gambling opportunities. To make such an evaluation requires a degree of insight into national law and fact which is difficult even for the national courts to obtain.

454. The Government submits that these are the two basic interpretations possible as regards the "Gambelli test", if it is really to be applied as a general test, on all gambling cases, on all kinds of national restrictions, whether or not there is suspicion of discrimination.

455. As for which interpretation is the most correct, the Government submits that when the ECJ formulated the Gambelli test, it was questioning a national set of rules (on sports betting) which were at the same time very liberal (for national license-holders) and very restrictive (for others), and which had also recently been amended so as to increase the volume of betting, while also increasing criminal punishment on the cross-border offering of sports betting from another country (in which this activity is legal). This was not enough for the ECJ to declare the contested legislation unsuitable, as proposed by the Advocate General. But it was enough for the Court to instruct the national courts to review whether the legislation really did contribute to limiting betting in a consistent and systematic way.

456. On this basis, the Government holds that the most natural way to interpret the test is that the courts should assess whether the contested restrictions in themselves are consistent and systematic in their approach to limiting betting opportunities. This is also in conformity with the wording in para. 67, which states that "...restrictions ... must also be suitable ... inasmuch as *they* must serve to limit betting activities in a consistent and systematic manner".

457. In the Gambelli judgment paras 68-69 the ECJ referred to the suspicion that the Italian authorities were inciting and encouraging betting and gaming at the national level with a view to obtaining funds. This has been used by Ladbrokes in the present case (as well as by private gambling companies in a number of other cases in other countries) to argue that if national authorities allow for the legal state or charitable gaming and lotteries to expand and market their activities, then these activities are per se not "consistent", and the restrictions must be abolished so as to allow other competitors to enter the market.

458. The Government holds that this interpretation is basically threefold wrong.

459. First, it stretches the Gambelli formula way too far. There is no way in which the statements in Gambelli can be read and interpreted so as to hold that any development and marketing of restricted national gaming (for example under a public monopoly), would mean a breach of "consistency". On the contrary, if one accepts the basic idea of having restricted and responsible national gaming, then it follows that such arrangements must be allowed to market and develop their activities. More on this below.

460. Second, the conclusion drawn from this argument is not logically tenable. If one should come to the conclusion that, for example, a state-owned entity or a charity markets and expands it gaming propositions too much, then the logical response would be to instruct them to cut down on this, and moderate future marketing. There is no logic in holding that because present marketing is too excessive, leading to too much gambling, therefore the restrictions must be abolished so as to open up for even more gambling.

461. Third, the Government holds that even if the issues of marketing and development are two relevant elements of a wide consistency test, it would certainly be wrong (and inconsistent) only to look at these two elements when evaluating whether a contested national restriction is "consistent". Rather, the correct test must be to review whether the contested restriction contributes to confine and limit gambling in a way which is consistent and systematic with national gaming law and policy in general.

462. In other words, if the national courts are really to conduct wide and general "consistency tests" of national gambling restrictions, then they must consider *all* aspects of national gambling law and policy, not just the two elements of marketing and development.

463. Applied to the case at hand, in which Ladbrokes challenges all parts of national gambling law, this means that the national courts will have to consider all elements of traditional and recent Norwegian gaming and lotteries law and policy, to evaluate whether this in general amounts to a structure which limits and moderates gambling in a consistent and systematic manner. The Government holds that this is certainly so. And should the courts (for some reason) find that there are elements which are not

completely "consistent" with this overall system, then the proper consequence will be to correct this element – and certainly not to use it as an argument for liberalisation.

More on the issue of "marketing"

464. Based on the above the Government's principal view is that the question of the consistency of allowing the present Norwegian operators to market their games is not legally relevant to the case at hand, since the present restrictions within the Norwegian context are so different from those of the Gambelli case.

465. Alternatively, if the Gambelli formula is to have general application on all sorts of traditional gaming restrictions, then the Government holds that marketing of existing games may certainly be a relevant element in the evaluations, but only one of very many elements which has to be considered, and clearly not the most important or decisive one, since inconsistencies related to marketing in itself logically cannot be used as an argument for further expansion and liberalisation.

466. On this basis the Government holds that the way in which the private gambling firms – like Ladbrokes in the present case or the commercial operators in the slot machine case or other firms in other actions in other countries – tries to push the "marketing issue" as an argument for liberalisation and privatisation is quite out of proportion and fundamentally flawed.

467. Since this, however, has become such an issue (in this and other cases), the Government would like to make a few supplementary remarks.

468. The basic point in the Government's view, as regards "marketing", is that if one accepts the concept of public exclusive rights arrangements and other traditional restrictions as a legitimate and suitable way of regulating the gambling sector and limiting gambling opportunities, then it is necessary to give these public entities a certain possibility to market and develop their portfolios. In fact, the more moderate and responsible the public gaming portfolio is, the greater the need for a certain level of marketing, in order for it to compete with the far more aggressive and addictive forms of gambling offered today over the Internet from abroad, much of it from jurisdictions with little or no public control and supervision.

469. On this basis the Government will argue in the present case before the national courts that there is nothing inconsistent in the marketing of the gaming portfolio of Norsk Tipping and the Rikstoto Foundation, much less anything which could impair the basic consistency of these traditional models.

470. The Borgarting Court of Appeal reached the same conclusion in its August 2005 judgment in the pending slot machine case, after hearing extensive argument on the marketing issue, and the statement is of general interest:

> Further to this, Norsk Tipping's relatively comprehensive marketing of State-controlled gambling does not change the Court of Appeal's view. At a time when uncontrolled gambling is offered at an ever-increasing rate from abroad via the Internet, it is a particularly important social responsibility that the gambling habits of the population at large are channelled to gambling activities that are run by responsible and controlled

companies – such as the company Norsk Tipping. This indicates among other things that Norsk Tipping should be able to market its games. The Court of Appeal otherwise remarks that on the basis of the evidence there has recently been an increasing degree of awareness in connection with the company's marketing. Reference is made to that by the Royal Decree of 10th June 2005 guidelines have been laid down for the marketing of State-controlled gambling. Regardless, Norsk Tipping's marketing has limited influence in the present case, in that there is no marketing of pay-out machines.

471. This is also in line with how the marketing issue has been evaluated by the Supreme Courts in Sweden and the Netherlands, which have held that a certain degree of marketing within national restrictive regimes is fully compatible with Community law.

472. The first example is the Swedish Wermdö Krog case, which was decided by the Supreme Administrative Court in October 2004. On the expansion and marketing issue the Court held that:

> If the intention is to channel the gaming interest that unquestionably prevails among large sections of the population towards enterprises that are regarded as ensuring better consumer protection and less risk of irregularities, then one cannot reasonably deny those companies that are in receipt of a permit and responsible for such enterprises the opportunity to launch their products and design them such that they attract gambling clientele and encourage them to favour the State-controlled gambling propositions over other variants.[63]

473. In the Dutch case of De Lotto versus Ladbrokes, the development and marketing of De Lotto's games has been a central theme, with Ladbrokes arguing that gaming under the exclusive right is growing rapidly, and that the games are being advertised on a large scale. In the interlocutory proceedings the Court of Appeal held that this did not in itself make Dutch public policy on gambling inconsistent, and this was confirmed by the Supreme Court of the Netherlands in its ruling of 18 February 2005:

> 3.6.6 [...] In this way, the Court of Appeal has expressed that the circumstances whereby new games of chance are regularly permitted and that advertising takes place on a large scale for the games of chance offered, as argued, are not in themselves irreconcilable with the restrictive policy still advocated by the Dutch government, which is geared towards curbing the desire to gamble. [...]
> 3.6.7 The Court of Appeal's judgment is not in conflict with the objectives of the Betting and Gaming Act [...] the basis of which is, in part, that permitting a limited range of legal games of chance prevents the public becoming drawn to the illegal ones, which results, in the word of the ECJ in the above-mentioned Läärä et al case, in the desire to gamble and the exploitation thereof being anchored in a controllable setting and in preventing the risks of the exploitation having a fraudulent and criminal purpose. The judgment that this objective of channeling, which under certain circumstances can result in an attractive and, if appropriate, extensive and innovative range of legal games being brought to the public's attention as an alternative to illegal games of chance and games of chance bearing a greater risk of the occurrence of gambling addiction, still forms the basis of the government policy, [...]. Against this background, the Court of Appeal's actual judgment that the policy of the Dutch government in the area of games of chance still has a restrictive nature is not incomprehensible, [...].[64]

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63 Cf. **Annex 24**, Ruling by the Swedish Supreme Administrative Court of 26 October 2004.

64 Cf. **Annex 29**, Ruling by the Supreme Court of the Netherlands of 18 February 2005, and **Annex 30**, Judgment of the Court of Arnhem, Civil law section, of 31 August 2005, both in English translation. See section 6.6 above.

474. On this basis the argument of Ladbrokes was dismissed. The ruling of the Supreme Court was part of an interlocutory proceeding, but the assessment was later upheld in the main action by the Court of Arnhem in August 2005:

> 2.20. [...] In this respect it should be borne in mind that a related and systematic restriction of participation in betting and gaming is not necessarily involved only if there is absolutely no expansion of the regulated offer. The idea of restricting compulsive gambling by channeling this through a regulated offer may demand a certain expansion of the offer and of advertisements in connection with technical and societal developments. The chief issue in restriction is that through a regulated offer, gambling has a (far) more restricted scope than it would have if the gambling had not been regulated by (national) rules [...].

475. In the pending Finish Ladbrokes case the same assessment has been made on the administrative level by the Council of State in its December 2005 decision: [65]

> The European Court of Justice preliminary rulings do not contain any grounds stating that an exclusive rights institution would not be allowed to promote their activities, develop their selection of games or sales point network or entering their revenue to the government to be used for the public good. On the contrary, the Court states that revenues can be used to serve the public good as long as this is not the sole purpose or goal of the operation. From the point of view of Finnish legislation, the restrictive measures taken against gaming operations serve the purpose of consumer protection. The fact that the proceeds are used to serve the public good is just a positive add-on benefit of the restrictive policy.
>
> As the exclusive rights institution is a monopoly, it is required to make its services known. Informing the public must be carried out in such manner that people living in all parts of the country have equal access to information about playing possibilities. The licensing authority and the consumer protection authorities are required, among other things, to control gaming services and advertising thereof in order to ascertain that the advertising does not tempt people into gambling. The gaming licence holder's advertisements of gaming activities inform bettors about the legality of the operation. Developing the chain of sales points does not conflict with the obligations set for an exclusive rights institution. It is the duty of an exclusive rights institution to see to it that the gaming services are available equally all over the country. An exclusive rights institution can also develop their selection of games thus channelling the demand for games into the legal gaming sector. The applying company has also referred in its application to the fact that uncontrolled service providers can pose a great risk to the consumer.

476. The Government holds that these examples illustrate that a certain degree of marketing of the gaming portfolios operated under public exclusive rights arrangements is fully compatible with the requirements of Community and EEA law. And this should be emphasized by the EFTA Court when advising the national courts on how to conduct a correct review of the contested national restrictions.

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[65] Cf. **Annex 28**, Decision of the Finish Council of State of 9 December 2005, enclosed in English translation.

7.5 Review of "necessity" in the gambling sector?

477. If a national restriction is based on legitimate public requirements and suitable to achieve these aims, then the final test under EEA law is usually whether it is also "necessary" in the sense that the same requirements can not be achieved "equally effectively" by other measures having less effect on trade and establishment within the EEA.

478. Once again, however, the criteria for this "necessity test", as laid down by in the case law of the ECJ and the EFTA Court on closer analysis differ depending on the characteristics of the case and the sector concerned. The same goes for the level and intensity of judicial review of such "necessity".[66]

479. In the *gambling* sector the ECJ has traditionally been clear on the point that it is primarily for *the national authorities* to determine not only the level of restriction which they seek in the gaming and lotteries sector, but also to decide which means and legal instruments are appropriate and necessary in order to achieve this. This has been the consistent approach of the ECJ in Schindler, Läärä, Zenatti and Anomar:

> [I]t is a matter *for the national authorities alone*, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict [...] and which have been deemed compatible with the Treaty.[67]

480. In other words, the basic traditional approach of the ECJ to the necessity-test in the gambling sector has been that the national authorities should have a wide latitude (or margin of appreciation) to decide for themselves which gambling restrictions are necessary. This discretionary margin should lie with the national *authorities*.

481. Again, however, this interpretation is not uncontested, as there are also some remarks and elements in the first four relevant rulings of the ECJ which can also be read as to indicate that there should still be some judicial review (albeit moderate) of the necessity of national gambling restrictions, and there are also elements of this in Gambelli, although limited to some quite specific minor points, and not to the necessity of the national restrictive legislation as such.

482. Based on the current legal sources, there are in the Government's view in theory three possible ways in which to interpret the necessity test for judicial review which should be applied to national restrictions in the gambling sector:

    1. The solution laid down by the ECJ in Schindler, Läärä, Zenatti and Anomar, namely that if a gambling restriction is found to be legitimate and suitable, then it is for the national *authorities* (and not the courts) to assess whether it is also necessary.

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[66] A good analysis of this is given by Jans, Proportionality Revisited, 27 Legal Issues of European Integration, enclosed as **Annex 34.**

[67] Cf. Anomar para 87 (emphasis added).

2. A moderate review, similar to that applied by the ECJ in infringement cases in other socially and politically sensitive sectors, confined to checking that the necessity assessments of the national authorities are not wrong or manifestly inappropriate.

3. A strict and complete review, under which the courts conduct a full assessment that the contested measure is not disproportionate and that the same aims could not be achieved equally effectively by other less restrictive means – without leaving the national legislator any particular "margin" or "latitude" in this regard.

483. The Government holds that alternative (1) is the legally most correct interpretation, followed in the alternative by (2), while option (3) is impossible to reconcile with the case law of the ECJ in the gambling sector (including Gambelli). This will be elaborated in the following.

Is it for the national authorities or the courts to assess the necessity of national gambling restrictions?

484. In the first four of the gambling cases, the ECJ held that the test of necessity (or proportionality) was first and foremost for the national authorities to make. The most explicit statement on this is Anomar para 87, but it can also be inferred from inter alia Schindler (61), Läärä (35) and Zenatti (33). In Läärä the ECJ held:

> 35. The power to determine the extent of protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment [...]. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely restrict them and, to that end, to establish control mechanisms, which may be more or less strict.

485. The question is therefore whether Gambelli changes this.[68] The Government holds that the answer is clearly no.

486. First, as earlier explained, the distinguishing feature of the Gambelli case is that unlike the previous gambling cases it involved a strong suspicion that the national measures were discriminatory and economically protectionist. Under such particular circumstances, it is more reasonable that the national court should conduct a review of the national authorities' assessment of necessity. Second, even in Gambelli the ECJ in fact only instructed the national court to conduct a very limited review of this (see below). Third, it should be noted that the Gambelli ruling came only two months after Anomar, and it is very unlikely that the ECJ should in this short time-span drastically change its entire view on the proportionality test in the gambling sector, and forfeit its previous case law not only in Anomar, but also in Schindler, Läärä and Zenatti.

[68] In the pending slot machine case the EFTA Surveillance Authority has also invoked the Lindman case (C-42/02) as an argument that the ECJ has recently limited to discretion earlier given to national authorities to determine which legal restrictions are necessary and proportionate within the gambling sector. This is not correct. As explained in section 6.2 the Lindman case concerned a national measure which the ECJ found to be of a "manifestly discriminatory character", and the level of judicial review chosen is therefore of no relevance in cases involving non-discriminatory restrictions

487. The Gambelli judgment therefore does not depart from the main rule laid down in previous strand of case law, but simply provides for an exception in cases where the facts of the case present a clear indication that the national measures are indirectly discriminatory and promote protectionist aims. It should also be noted that the remarks on proportionality in Gambelli came after the ECJ had already voiced its suspicion that the contested legislation was not "consistent". The situation is thus completely different incases where the courts have first found that the contested restrictions are suitable and consistent.

488. This interpretation is basically the same as that provided by professor Straetmans, as quoted earlier (above section 6.3), who stated that "if the Member States demonstrate that national restrictions bring about a genuine diminution of the gabling opportunities, the Court will continue to apply a relaxed proportionality test and will be hesitant to substitute itself for the national authorities".[69]

489. The conclusion that the courts under such circumstances should not advance further than assessing the legitimacy and suitability of the national legislation follows not only from the ECJ case law, but gains also support from the position taken by the Community legislature in this sector.

490. As described above in section 6.4 the Community legislature has specifically exempted gambling from the pending general service directive. It is noteworthy that the reasons advanced by the EP in this respect is not limited to taking due notice of the politically sensitive nature of this field, but it has in fact acknowledged that gambling falls altogether outside the Community's sphere of competence. As stated in the final report of the Internal Market Committee, which is otherwise not known for its deferential attitude to the Member States, "Gambling activities are intrinsically linked to public order and consumer protection issues and therefore lie outside the sphere of competence of the Community institutions and must remain a sector which the Member States are free to regulate as they see fit."[70] Hence, since the Member States still have exclusive competence in the gambling sector as regards the matter of proportionality it follows that the judiciary should not substitute its assessment for that of the national authorities, but should limit itself to an examination of misuse of powers.

491. Indeed, as Jans comments on outcome in Läärä in his expose on the proportionality principle in Community law:

> Such self-restrain in the application of the proportionality principle is found rarely in the Court's decisions. The explanation is of course self-evident. The grounds put forward in justification of the measure here (regulating the passion for gambling, avoiding gambling-related crime, collecting funds for charity) do not as such constitute policy areas in which the Community could take regulatory action. [...] Where the powers are so divided self-restraint in the application of the proportionality principle by the Court is appropriate.[71]

492. On this basis the Government holds that the EFTA Court should advise the national courts that unless there are reasons to believe that the contested rules are in fact discriminatory or protectionist, then the courts should confine themselves to reviewing

[69] Cf. Straetmans, as quoted more extensively above in section 6.3, and enclosed as **Annex 33.**

[70] Cf. European Parliament Report A6-0409/2005 Final of 15.12.2005. See also above section 6.4.

[71] Cf. Jans, 'Proportionality Revisited' at p. 250, enclosed as **Annex 34.**

the justification and suitability of the rules, and leave the evaluation of "necessity" to the national authorities – which in the pending case is the national legislator (Stortinget).

Given judicial review of proportionality in the present case – with which intensity?

493. In the alternative, and in the event that the EFTA court should reach a different conclusion, the next question is to what extent, and with which intensity, the national legislator's assessment of proportionality should be reviewed by the courts.

494. In this regard it is noteworthy that even in the Gambelli case the ECJ specifically did *not* direct the national courts to make a full assessment of the proportionality and necessity of contested Italian restrictions as such, but only directed them to a few very specific elements. The national court should first examine whether the severe criminal sanctions laid down in national legislation were necessary, and secondly whether it was necessary to prevent capital companies quoted on capital markets of other Member States from obtaining licenses, especially where there are other means of checking the accounts and activities of such companies with a view to check fraud. But it was not directed to make a full "necessity" test of the basic restrictive legislative system as such.

495. In this way the ECJ in Gambelli clearly delimitated the scope of the necessity test to specific issues, as opposed to the completely open-ended test suggested by Ladbrokes in its observations before the national court in the present case.

496. Applied to the case at hand, this would mean that if the national courts within the very broad action brought be Ladbrokes, against all the three statutes which regulate Norwegian gaming and lotteries, should find specific elements which it considers particularly problematic, then they might to some extent review the "necessity" of these, and whether the same aims can be achieved equally effectively by other means. But this does not mean that it should make such a review of the basic restrictive rules and principles as such.

497. The Government also notes that as regards national public exclusive rights arrangements, which form a large part of the restrictions challenged by Ladbrokes in the case at hand (the Gaming Act and the Totalisator Act), the ECJ in the Läärä case the ECJ explicitly held that it is for the national authorities (or legislator) to assess whether it is necessary to regulate the gambling sector through such legal instruments.

498. Furthermore the Government holds that it is in fact quite usual for the ECJ to apply only a "soft" and moderate necessity test in particularly sensitive sectors, such as not only gambling but also several other fields. This applies both to the ECJ's own necessity review (in infringement cases) and to its directions to national courts (in preliminary rulings). In cases revolving around sensitive social and political choices, the main rule is in fact that the ECJ only applies a limited review of necessity. The level of protection in such areas are normally seen as belonging primarily to the discretion of the national legislature, and the only question is whether the disputed measure is necessary in order to attain the chosen level of protection. Only if the legislature conducted a 'manifest error of assessment' in this relation may the lawfulness of the measures be called into question.

499. In other words, the restraint exercised by the ECJ sp far in the gambling sector is not *that* particular. Rather the *main model* is that necessity review in such sensitive sectors must be moderate, leaving a certain discretionary latitude to the national legislator to decide what legal instruments and measures are necessary in order to achieve a responsible national gaming and lotteries policy.

500. On this basis the Government holds that the EFTA Court should be very careful when advising the Oslo District Court on the "necessity" test, and that it should either (i) advise it to leave this to the discretion of the Storting, or (ii) at the most advise it on how to conduct a moderate necessity review, limited to specific elements, and respecting the discretionary margin of the Storting and the competent national authorities.

501. Advising the national courts to go beyond this, would mean extending the criteria and intensity of judicial review in the gambling sector far beyond the current status of Community and EEA law.

8. ANSWERS TO THE QUESTIONS

8.1 Question 1 – on the traditional exclusive rights system

502. The first question of the Oslo District Court reads:

> *1. Do EEA Articles 31 and/or 36 preclude national legislation which establishes that certain forms of gaming can only be offered by a State-owned gaming company which channels its profits to cultural and sports purposes?*

503. The question here is whether EEA law precludes a system such as the one laid down in the 1992 Gaming Act, which continues an arrangement dating back to the late 1940s, and which has been the main model for regulating major gaming in Norway since then.

504. In a wider comparative perspective the question is whether EEA law precludes a system which is the main legislative model for regulating the gambling sector in most European countries, at least for some of the major forms of gaming and lotteries (section 5.3).

505. The Government holds that the answer to the question, as formulated, is clear. It is obvious that EEA law does *not* preclude public exclusive rights system in the gambling sector as such. On the contrary, in the Läärä case the ECJ explicitly held that such a legal instrument might be suitable and necessary as regards the operation of slot machines and that this was furthermore the national authorities' own assessment to determine. The same argument must certainly also apply to other forms of gaming and lotteries, such as Lotto or different forms of sports betting. Indeed, it was with the traditional public national lotteries that this model originally started ages ago.

506. The question must therefore clearly be answered in the negative – with a no. The real question is rather to what extent such arrangements shall be subjected to judicial review under the tests discussed earlier, and how strict such review should be. To the extent that the EFTA Court finds it necessary and appropriate to give advice in this regard, then the Government's views on this are set out in detail in the earlier sections.

8.2 Question 2 – on the horserace betting system

507. The second question of the Oslo District Court reads:

> *2. Do EEA Articles 31 and/or 36 preclude national legislation which establishes that licences to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding?*

508. The question here is whether EEA law precludes a system such as the one laid down in the 1927 Totalisator Act, which has consistently regulated all horserace betting in Norway since then, and which formally allows for several licenses to be given as long as the licensees are non-profit entities devoted to the rearing and breeding of horses, but

which in recent years in effect has developed into an exclusive rights system for the Rikstoto Foundation.

509. In a wider comparative perspective the question is whether EEA law precludes a system for the national organisation of horse racing which is common in many European countries, and which not only moderates and confines horserace betting, but also ensures that the revenues generated by this activity is channeled back into equine sector itself, so as to sustain the horserace tradition and age-old equine traditions more generally.

510. The Government holds that the answer to the question, as formulated by the Oslo District Court, is clear. It is obvious that EEA law does *not* preclude a system for horserace betting such as that consistently applied in Norway since 1927. Even if similar arrangements in other EEA countries have not so far been subjected to judicial review by the ECJ, it is clear that the principles laid down by the ECJ in other parts of the gaming and lotteries sector must apply equally to the regulation of horserace betting.

511. The question must therefore clearly be answered in the negative – with a no. The real question is rather to what extent such arrangements shall be subjected to judicial review under the tests discussed earlier, and how strict such review should be. To the extent that the EFTA Court finds it necessary and appropriate to give advice in this regard, then the Government's views on this are set out in detail in the earlier sections.

8.3 Question 3 – on the traditional system of the Lottery Act

512. The third question of the Oslo District Court reads:

> 3. *Do EEA articles 31 and/or 36 preclude national legislation which establishes that licenses to certain forms of gaming may only be granted to non-profit organisations and associates with a humanitarian or socially beneficial purpose?*

513. The question here is whether EEA law precludes a system such as the one laid down in the 1995 Lottery Act, which continues legislation dating back to the first Lottery Act of 1851, which in turn continued a legal principle which was already then age-old.

514. The core of this question has not really been addressed so far in the case law of the ECJ on gaming and lotteries – namely whether it is legitimate for national authorities to hold that gaming and lottery licenses may simply not be given to commercial companies, but only to non-profit charities and other socially beneficial foundations and organisations.

515. Nevertheless, on the basis of the ECJ's case law on other kinds of national gambling restrictions, the Government holds that the answer must once again be evident. Limiting lottery licenses to charities and the like is not only a valuable and venerable tradition, which has been consistently applied in Norway for centuries, but also in general a highly

suitable legal instrument for confining and moderating gaming, at least as long as it is used only for the smaller and less problematic forms of gaming.[72]

516. The question must therefore again be answered in the negative – with a no. The real question is rather to what extent such a regime should be subjected to judicial review under the tests discussed earlier, and how strict such review should be. To the extent that the EFTA Court finds it necessary and appropriate to give advice in this regard, then the Government's views on this are set out in detail in the earlier sections.

8.4 Question 4 – on limiting private profit in the gambling sector

517. The fourth question of the Oslo District Court reads:

> 4. *Under EEA law, is it legitimate for national legislation to emphasise that the profit from gaming should go to humanitarian an socially beneficial purposes (including sports and culture), and not to be a source of private profit?*

518. The question here is whether under the doctrine of "mandatory public requirements" established in the case law of the ECJ, as applied specifically to the gambling sector, is legitimate for national legislation to hold that the profit from gaming should go to humanitarian an socially beneficial purposes (including sports and culture), and not to be a source of private profit.

519. The Government holds that this is really two questions, which are related, but which in principle must be regarded as separate, and to which the answers are also different.

520. The first part of the question is whether under the doctrine of mandatory public requirements it may be a legitimate part of the justification for national gambling restrictions that the revenues generated should go to humanitarian and socially beneficial purposes, or whether this should be seen as an illegitimate "purely financial" concern.

521. As explained in section 7.3 this is a question which the ECJ has struggled somewhat with – since on the one hand it has recognized and acknowledged the basically laudable that lotteries and gaming make "a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture" (Schindler para 60), while on the other hand finding this a bit difficult to reconcile with the traditional principle that "financial considerations" are not a legitimate concern. The result, as explained, is the 1999 "Zenatti formula", stating that the financing of social activities from gambling revenue may be an "incidental beneficial consequence" (an accessory advantage) of the system, as long as it is not "in itself" the objective reason for the restriction.[73]

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[72] This is illustrated by the Norwegian experience. For more than a century the gaming offered by charities and foundations under this regime, mainly small lotteries and bingo, has functioned very well, creating soft and moderate gaming within a responsible framework, without any major problems. The first and so far only time this traditional framework has showed itself unsuitable and inadequate was when the new electronic slot machines first appeared in the mid 1990s.

[73] Cf. Case C-67/98, paragraph 36, which is described above in section 6.2, with an analysis of the concept of an "incidental beneficial consequence".

522. In other words such "economic" considerations cannot with regard to a subsequent EEA legal review in themselves be accounted as part of the EEA justification for the restriction. In this specific regard they may only be an accessory advantage. As such, however, they are legitimate. But when assessing whether a national restriction is based on recognised public interest considerations, they have to be subtracted. The test is then whether the remaining considerations behind the legislation are enough to objectively justify the restriction. If there are strong social or other public policy concerns justifying the restriction, this will then of course be considered legitimate under EEA law, even if there are also economic considerations at the national level.

523. This should be the answer of the EFTA Court as regards the first half of question 4.

524. As regards the second half of question 4, the answer should be affirmative. This is the question of whether preventing the operation of gambling from being a source of private profit, and a market incentive, should in itself be regarded as a legitimate concern. This was argued by the UK Government in the 1994 Schindler case, and acknowledged by the ECJ in para 60, which has later been referred in Läärä (13) and Zenatti (30).

525. As earlier explained in section 7.3 requirement to prevent gambling from being a source of private commercial profit can both be a legitimate moral aim in itself, and a (very effective) means to achieve other ends, namely to restrict and diminish gambling volume and opportunities, by eliminating commercial competition. Both these aspects are valuable and important and must be considered legitimate under EEA law.

526. The Government also notes that the same principle, that the operation of gambling should not be a source of private profit, has been a basic element of national gambling policy in a number of European countries for a very long time, to a degree that this might be regarded as a common European (continental) tradition. In the Netherlands, for example, this has been a principle dating at least back to the 19th century. The same applies in broad terms to the Nordic countries. This in the Government's view is a praiseworthy and responsible tradition, which it is both legitimate and more important than ever to uphold in a time of increasing challenge from aggressive and purely commercial privat gambling interests operating from more liberal jurisdictions, such as Malta, or (in the case of Ladbrokes) the UK and Gibraltar, or (to a large extent) from outside of the EEA altogehther.

527. The answer of the second half of question 4 should therefore be that it is a legitimate public requirement under EEA law for the national legislator to hold that the operation of gambling should not be a source of private commercial profit.

8.5 Question 5 – on the ban on marketing of non-licensed games

528. The fifth question of the Oslo District Court reads:

> 5. *Does EEA Article 36 preclude a national statutory provision which forbids the providing and marketing of gaming which is not permitted in Norway, but which is approved under national law in another EEA State?*

529. The fifth and last question from the Oslo District Court raises the question of whether it is permitted under EEA law to prohibit the offering and marketing of gaming and lotteries which do not have a domestic license. This is regulated inter alia in Article 11 of the Lottery Act, which in effect covers not only domestic unlicensed games, but also games and lotteries which operate under national law in other EEA Member States. This question only refers to Article 36 on the freedom of services, and not to Article 31.

530. The Government initially notes that the right of a Member State to prohibit the offering and marketing of gaming services which do not have a license to operate in that country was explicitly recognised by the ECJ in the Schindler case (62):

> "62. When a Member State prohibits in its territory the operation of large-scale lotteries and in particular the advertising and distribution of tickets for that type of lottery, the prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organized in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services. Such a prohibition on import is a necessary part of the protection which that Member State seeks to secure in its territory in relation to lotteries."

531. As can be seen from the quote, the ECJ considered the prohibition on marketing of gaming from other countries as an inherent part and natural consequence of the domestic restrictions, rather that a new restriction in itself. And it clearly stated that this is "a necessary part of the protection" which each state is allowed to determine.

532. In the Government's view this part of the Schindler judgment still stands and in itself provides the answer to the fifth question of the Oslo District Court. There is nothing in the later case law of the ECJ which alters Schindler on this issue, which was notably not part of the Gambelli case.

533. On this basis the Government holds that the EFTA Court may answer the fifth question quite briefly, with reference to the Schindler judgment of the ECJ, which still applies. However, if the Court should want a more thorough legal analysis, then there are a number of arguments which further supports the same conclusion.

534. In this regard, the Government would initially like to note that a prohibition such as that found in Article 11 of the Lottery Act might in theory be considered under two different perspectives – either (i) as a separate restriction requiring a separate judicial review, with separate testing under the basic criteria, or (ii) as an inherent and logical part and consequence of the other ordinary national gambling restrictions and the basic principle that the offering of gambling propositions is prohibited unless specifically authorized and licensed under statutory law.

535. The Government holds that the second perspective is clearly the correct one, both from a logical, systematical and historical point of view. This has always been so in the Norwegian tradition, in which the rule now laid down in Article 11 has always been considered a natural appendix of the ordinary restrictions. If a certain game of chance is not licensed and permitted to operate then it logically follows that it should not be allowed to be marketed – any more than other illegal activities can be marketed.

536. The same perspective seems to be dominant in most other EEA Member States, for obvious reasons. Reference is made to the overview given above in section 5.3, which

shows there are at least 20 Member States of the EEA Area which have rules similar to Article 11 of the Lottery Act – which in itself demonstrates that this kind of restriction is regarded as an inherent and normal part of national gambling restrictions.

537. The Government furthermore notes that a prohibition on marketing of unlicensed games of chance such as that laid down in Article 11 of the Lottery Act is non-discriminatory and indistinctly applicable, in the sense that it does not refer to nationality or origin, and applies equally and automatically to all non-licensed gaming, whether domestic or foreign. At the same time, it is clear that the most important effect of such a rule is to prohibit the cross-border offering and marketing of games and lotteries from other countries, including EEA states and all other countries.

538. The Government holds that in a sector which is not harmonised, and in which the Member States in principle have the right to define their own policy, there is nothing wrong or unnatural with such a restriction. On the contrary, it is a logical consequence of the principle which the ECJ has explicitly stated, that the fact that a Member State has opted for one level of protection as regards gambling does not mean that another Member State may not choose another and more restrictive level (Läärä 36). Under such a system it follows logically that Member States with strict gambling restrictions can not be obliged to accept cross-border marketing of gambling from more liberal countries. If so, then a few liberal jurisdictions, such as Malta and Gibraltar (where Ladbrokes has an Internet server), would be able to undermine and destroy the whole traditional and restrictive model for gaming and lottery regulation in the rest of Europe.

539. In this regard the Government also holds it to be of some relevance that even in the Commission's first proposal for gambling to be included in the new Service Directive (which was thoroughly rejected by the European Parliament and the Council, as described in section 6.4) the Commission did not go so far as to suggest a country-of-origin principle for gaming and lottery services.

540. The need to prohibit marketing of unlicensed games of chance has become even more imperative in later years as the Internet has developed and has made all kinds of money games accessible to the consumers. If the existing barriers towards freely marketing and offering such games on the domestic market are removed, in such a highly unstable situation as the present, then the social problems connected to the gaming marked might easily explode all over Europe, just like they have in Norway in later years as regards the slot machines sector.

541. In a "post-Gambelli" setting, in which the evaluation of national gaming restrictions is focused (rightly or wrongly) on the concept of "consistent and systematic", the Government holds that it would be deeply inconsistent and structurally unsystematic within a restrictive national gaming regime to allow for the marketing and offering of unlicensed gambling, whether domestic or from abroad.

542. In this regard it is also important to note that even if a specific kind of gaming has a license to operate in another Member State, for example the UK, this does not mean that it is legally licensed and permitted to operate in other countries – as the reach of the British licence only refers to that national jurisdiction. Thus the fact that it is legally operated in one country can not either formally or in effect be used as an argument that it is therefore a "legal" game in other (and perhaps stricter) jurisdictions. The legality of

a given game of chance only extends as far as the jurisdiction of the authorities which have licensed it.

543. On this basis the answer to the fifth question should be that EEA Article 36 does not preclude a national statutory provision which forbids the providing and marketing of gaming and lotteries which are not licensed to operate in Norway.

544. The Government also holds that this restriction is a natural part and consequence of the other (basic) restrictions, and that it is therefore not necessary for the national courts to go through a separate exercise of testing for justification, suitability and necessity. But if they do, then the conclusion should be exactly the same.

8.6 On the formulation of a conclusion

545. In its case law in the gambling sector, the ECJ has formulated its conclusions somewhat differently when approving of national restrictions.

546. In the Schindler case the part of the conclusion most relevant to the case at hand read:

> 3. The Treaty provisions relating to freedom to provide services do not preclude legislation such as the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it.

547. In the Läärä case the conclusion read:

> The Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants to a single public body exclusive rights to operate slot machines, in view of the public interest objectives which justify it.

548. In the Zenatti case:

> The EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

549. In Anomar:

> National legislation such as the Portuguese legislation which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

550. In Gambelli the conclusion was somewhat stricter, which the Government holds to be a consequence of the specific characteristics of that case:

> National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.

551. In light of the character and facts of the Norwegian gaming and lottery market, which is more similar to that of Finland than to any of the other countries involved in preliminary cases before the ECJ so far, the Government holds that it would be most correct for the EFTA Court to seek inspiration from the Läärä judgment when formulating the conclusions in the case at hand.

552. By contrast, the Government holds that for the EFTA Court to base its conclusions on the formulae used by the ECJ in Gambelli – in a national context which has none of the characteristics specific to that case – would be for the Court to develop EEA law in the gambling sector beyond the present stage of legal development in Community law, in a direction which would neither be advisable nor legally sound.

CONCLUSION

553. Based on what has been argued above the Government respectfully requests the Court to answer the questions as follows:

1. *EEA Articles 31 and/or 36 do not preclude national legislation which establishes that certain forms of gaming can only be offered by a State-owned gaming company which channels its profits to cultural and sports purpose, such as under the Norwegian 1992 Gaming Act, in view of the public interest objectives which justifies it.*

2. *EEA Articles 31 and/or 36 do not preclude national legislation which establishes that licences to offer horserace betting may only be granted to non-profit organisations or companies whose aim is to support horse breeding, such as under the Norwegian 1927 Totalisator Act, in view of the public interest objectives which justifies it.*

3. *EEA Articles 31 and/or 36 do not preclude national legislation which establishes that licenses to certain forms of gaming may only be granted to non-profit organisations and associates with a humanitarian or socially beneficial purpose, such as under the Norwegian 1995 Lottery Act, in view of the public interest objectives which justifies it*

4. *It is a legitimate public requirement under EEA law for the national legislator to hold that the operation of gambling should not be a source of private commercial profit. It is furthermore legitimate for the national legislator to channel the revenues generated by gambling to humanitarian and socially beneficial purposes (including sports and culture) as long as this is an accessory advantage of the national legislation and not in itself the sole justification for it.*

5. *EEA Article 36 does not preclude a national statutory provision which forbids the providing and marketing of gaming and lotteries which are not licensed to operate in Norway.*

Oslo, 6 November 2006

THE ATTORNEY GENERAL (CIVIL AFFAIRS)

Fredrik Sejersted
Agent

LIST OF ANNEXES

Annex 1. Royal decree from 1753.

Annex 2. Penal code §§ 298, 299 in Norwegian and in English translation.

Annex 3. Lov 1. juli 1927 nr. 3 om veddemål ved totalisator.

Annex 4. Act of 28 August 1992 No. 103 on Gaming Schemes in Norwegian and in English translation. The Gaming Act is enclosed in two versions, before and after the 2003 amendment.

Annex 5. Act of 24 February 1995 No. 11 on lotteries etc. in Norwegian and in English translation. The Lottery Act is enclosed in two versions, before and after the 2003 amendment.

Annex 6. Application for a licence to operate and provide betting etc. from Ladbrokes, 24 June 2004.

Annex 7. Decision from the Ministry of Culture and Church Affairs, 27 September 2004.

Annex 8. Decision from the Ministry of Agriculture, 15 November 2004.

Annex 9. Decision from the Lottery Gaming Board, 30 June 2004.

Annex 10. Appeal decision from the Lottery Council, 7 March 2005.

Annex 11. Ot.prp. no. 44 (2002-2003) Concerning the Act relating to changes in gaming and lottery legislation, Section 1-3 and 5-6.

Annex 12. "Grunnlaget for Norsk Tippings markedsføring" [*The Basis for Norsk Tipping's Marketing*], memorandum from Norsk Tipping.

Annex 13. Guidelines for the Marketing of State-Controlled Gaming and Gambling, of 10 June 2005 – in Norwegian and in an English translation.

Annex 14. "Norsk Tippings program for spillansvarlighet" [*Norsk Tipping's programme for responsible gaming*].

Annex 15. Ethical guidelines for Norsk Tipping.

Annex 16. "Ansvarlig spilleglede" [*Responsible gaming*], brochure from Norsk Tipping, 2004.

Annex 17. The statutes and instructions for Norsk Tipping issued by the Ministry of Culture and Church Affairs, April 2004.

Annex 18. Governmental Action Plan to prevent Problem Gambling, April 2005.

Annex 19. The case for State Lotteries - A report for the European Lotteries and Toto Association, London Economics, September 2006.

Annex 20. "Commissioners divided over move to liberalise gambling market", Europe Information 20 July 2005.

Annex 21. "Future gambling policy unclear as infringement cases postponed", Europe Information 19 October 2005.

Annex 22. Letter from the Finish Minister of the Interior, Ms Rajamäki to Commissioner McCreevy, "Your Comment on Gambling Monopolies" of 11 October 2005 – English translation.

Annex 23. Judgment of the German Bundesverfassungsgericht of 28 March 2006 in case 1 BvR 1054/01 – English translation.

Annex 24. Judgment of the Swedish Supreme Administrative Court of 26 October 2004 in the case between Wermdö Krog AB and the National Gaming Board, with an English translation.

Annex 25. Judgment of the Swedish Supreme Administrative Court of 20 June 2005 in the case between Ladbrokes Worldwide Betting and the National Gaming Board, with an English translation.

Annex 26. Decision of the Swedish Supreme Court of 8 December 2004 in the case between the Attorney General and Ms Runesson, Mr Rees and SSP Overseas Betting Ltd.

Annex 27. Decision of the Finish Supreme Court of 24 February 2005 in the case between the Attorney General and Åland Penningautomatförening (the Aaland Slot Machine Association). The full text of the judgment is Swedish, with an English translation of the paragraphs on the interpretation and application of Community law (23 to 38).

Annex 28. Decision of the Finish Council of State of 9 December 2005 – English translation.

Annex 29. Ruling by the Supreme Court of the Netherlands of 18 February 2005 in the case of Ladbrokes v De Lotto – English translation.

Annex 30. Judgment of the Court of Arnhem, Civil law section, of 31 August 2005 – English translation.

Annex 31. Judgment of the Court of Appeal of Arnhem, Civil law section, of 17 October 2006 – English translation.

Annex 32. Decision of the Italian Supreme Court of Appeals of 26 April 2004 – English translation.

Annex 33. *Straetmans*, "As you sow, so shall you reap: On Member States overstepping the mark", Common Market Law Review 2004 pp 1409-1428.

Annex 34. *Jans*, "Proportionality Revisited" 27 Legal Issues of Economic Integration (2000)239, at 243.

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