JUDGMENT OF THE COURT
14 March 2007

(National legislation transferring the operation of gaming machines to a State-owned monopoly – restriction of freedom of establishment and freedom to provide services – justification – legitimate aims – consistency of national legislation – necessity of national legislation)

In Case E-1/06,

EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal & Executive Affairs, and Per Andreas Bjørgan, Senior Officer, Legal and Executive Affairs, acting as Agents,

Applicant,

v

The Kingdom of Norway, represented by Fredrik Sejersted, Advokat, the Attorney General for Civil Affairs, and Hanne Ørpen, Adviser, the Ministry for Foreign Affairs, acting as Agents,

Defendant,

supported by the **Kingdom of Belgium,** represented by Annick Hubert, Attaché, Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent,

and the **Republic of Iceland,** represented by Páll Hreinsson, Professor of Law, and Finnur Þór Birgisson, First Legal Secretary and Legal Officer, Ministry of Foreign Affairs, acting as Agents,

Interveners,

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

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Henrik Bull, Judges,

Registrar: Henning Harborg,

having regard to the written pleadings of the parties and the interveners, and the written observations of the Republic of Finland, represented by Johanna Himmanen, Legal Officer, Ministry for Foreign Affairs, acting as Agent; the Hellenic Republic, represented by Caterina Samoni, Legal Advisor, and Nana Dafniou, Deputy Legal Advisor, Special Legal Service for EU Matters, Ministry of Foreign Affairs, acting as Agents; the Republic of Hungary, represented by Judit Fazekas, State Secretary, Ministry of Justice and Law Enforcement, acting as Agent; the Kingdom of the Netherlands, represented by Hanna Sevenster, Head, and Martijn de Grave, Member, European Law Division, of the Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents; the Portuguese Republic, represented by Luís Inez Fernandes, Director, Legal Affairs Service of the General Directorate of European Affairs, Ministry of Foreign Affairs, and Ana Paula Barros, Director, Legal Office of the Games Department, Santa Casa de Misericórdia de Lisboa, acting as Agents; the Kingdom of Sweden, represented by Karin Wistrand, Legal Adviser, Ministry for Foreign Affairs, acting as Agent; the Commission of the European Communities, represented by Frank Benyon, Principal Legal Adviser, and Enrico Traversa, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, represented by its Agents Niels Fenger and Per Andreas Bjørgan, the Defendant, represented by its Agent Fredrik Sejersted, the Kingdom of Belgium, represented by Philippe Vlaemminck, advocaat, the Republic of Iceland represented by its Agent Páll Hreinsson, the French Republic, represented by its Agents Géraud de Bergues and Claire Bergeot-Nunes, the Kingdom of the Netherlands, represented by its Agent Martijn de Grave, and the Commission of the European Communities, represented

by its Agents Frank Benyon and Enrico Traversa, at the hearing on 8 November 2006,

gives the following

Judgment

I Facts and pre-litigation procedure

1 By an application registered at the Court on 13 March 2006, the EFTA Surveillance Authority (hereinafter "the Applicant") filed a request for a declaration that by adopting Act No 90 of 29 August 2003 Relating to Amendments to the Gaming and Lottery Legislation (*Lov av 29. august 2003 nr. 90 om endringer i pengespill- og lotterilovgivningen*, hereinafter "the contested legislation") which introduces a monopoly for the State-owned undertaking Norsk Tipping AS to operate gaming machines in Norway, the Kingdom of Norway (hereinafter "the Defendant") has infringed Articles 31 and 36 of the EEA Agreement.

2 By a letter of 22 January 2003, the Applicant had informed the Defendant of the receipt of a complaint concerning the proposal to grant Norsk Tipping the exclusive right to operate gaming machines in Norway. The Defendant replied to this by letter dated 24 February 2003, and answered questions posed to it by the Applicant in September 2003. On 16 February 2004, the Defendant replied to a second letter sent by the Applicant.

3 On 23 April 2004, the Applicant sent the Defendant a letter of formal notice, contending that the wish to secure a continued amount of revenue for charities had been a driving factor behind the chosen monopoly solution. Besides, the Applicant found fault in alleged inconsistencies in the Norwegian gaming policy, namely that Norsk Tipping had been among the three largest advertisers in Norway, that it had introduced several new games and developed new ways of gambling, and that its explicit aim was to double the number of gaming machine players from 500,000 to 1 million. Moreover, the Applicant suggested that the aims of preventing gambling addiction and fighting crime could be achieved by less restrictive means, i.e. under the current licensing system. In its reply by letter dated 28 June 2004, the Defendant refuted these allegations.

4 On 20 October 2004, the Applicant delivered a reasoned opinion on the case. The Defendant replied by a letter dated 19 November 2004. On 17 November 2005, the Applicant decided to bring the case before the Court.

5 In addition to complaining to the Applicant, the private operators of gaming machines in Norway challenged the contested legislation before the national

courts. On 27 October 2004, Oslo tingrett (Oslo District Court) ruled that the monopoly was contrary to EEA law. The Defendant appealed against that judgment to the Borgarting lagmannsrett (Borgarting Court of Appeal). By judgment of 26 August 2005, Borgarting lagmannsrett overruled Oslo tingrett, holding that the contested legislation was compatible with EEA law. The private operators then brought the matter before Høyesterett (Supreme Court). Høyesterett decided not to make a reference to the EFTA Court. On 18 October 2005, Høyesterett scheduled a date for the hearing for 24 January 2006 in plenary hearing. After the decision of the Applicant to bring an infringement action against the Defendant before the Court, the private operators invited Høyesterett to suspend its proceedings in order to await the judgment of the Court. By decision of 5 December 2005, Høyesteretts Kjæremålsutvalg (Appeals Committee of the Supreme Court) decided to suspend the proceedings holding that the authoritative answer would in any event be given by the EFTA Court.

II Legal background

EEA law

6 Article 31(1) EEA reads:

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

7 Article 36(1) EEA reads:

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

The contested national legislation

8 Under Norwegian law, operating games not permitted by special legislation constitutes a criminal offence. Exemptions from the prohibition against gaming operations are to be found in the Totalisator Act (Act No 3 of 1 July 1927, *lov av 1. juli 1927 nr. 3 om veddemål ved totalisator*), the Gaming Act (Act No 103 of 28 August 1992, *lov av 28. august 1992 nr. 103 om pengespill*), and the Lottery Act (Act No 11 of 24 February 1995, *lov av 24. februar 1995 nr. 11 om lotterier*). The Totalisator Act provides that licences to arrange horserace betting may only be granted to entities whose aims include supporting horse breeding. The Norsk Rikstoto Foundation is currently the only licence holder. The Gaming Act applies exclusively to Norsk Tipping AS, a fully State-owned public company supervised by the Ministry of Culture and Church Affairs (hereinafter "the Ministry"). It gives Norsk Tipping sole rights to operate gaming activities related to sports competitions and other competitions not regulated in the Lottery Act, the game Lotto, and other games as decided by the Government. The profits of Norsk Tipping's activities are to be equally divided between sports objectives and cultural objectives.

9 The Lottery Act covers all gaming activities involving money which are neither regulated by the Totalisator Act nor the Gaming Act. Under the Lottery Act, a lottery may only be held for the benefit of humanitarian or socially beneficial causes. Gaming machines are treated as lotteries under the Lottery Act. Many humanitarian and socially beneficial organisations in Norway hold licences to operate gaming machines. Whereas the biggest organisations operate their own machines, the majority employs commercial companies to operate games for them, against a price or fixed percentage of revenues. Thus, private persons and commercial enterprises can – after having received authorisation – arrange lotteries on behalf of a humanitarian or socially beneficial organisation, provided that a minimum of 35% (later 40%) of the net turnover goes to these causes. Another 20% goes to the owners of the premises where the machines are located, and the remaining share is for the gaming machine operators. In 2004, 138 different companies operated a total of approximately 15,600 gaming machines. The gross turnover from all gaming machines was NOK 26 billion (net turnover: NOK 4.96 billion after deduction of prizes).

10 In an endeavour to reduce the number of gaming machines as well as bets and prizes, the Ministry, on 21 June 2002, issued a first consultation paper based on a continuation of the licensing system for private operators, but with stricter regulation of where gaming machines could be deployed, and a decrease of the machine operators' fraction of the revenues. This proposal met the opposition of operators and organisations. In the meantime, Norsk Tipping, upon invitation from the Ministry, presented on 2 July 2002 a model showing how it could take over the operation of gaming machines on the basis of an exclusive right, ensuring that the maximum profits go to the organisations despite there being fewer machines. On 25 October 2002, the Ministry issued a second consultation paper, based on Norsk Tipping's exclusive rights model. The Ministry summarised the advantages of the proposed model as follows: the organisations'

incomes are secured, the number of machines is significantly reduced, the machines will be less visible in public areas, enforcement of the 18 year age restriction will be significantly improved, and the authorities will obtain full control over the mode of operation of the machines.

11 On the basis of the model presented in the Ministry's second consultation paper, on 14 March 2003, the Government adopted a bill to be put forward to Stortinget (Parliament). The bill stated that the main reasons for the proposal were a desire to be able to fight gambling addiction and prevent crime in a more effective manner, to achieve better control of the irregularities in the industry and to be able to enforce the minimum age limit of 18 years more efficiently. It was further assumed that an exclusive rights model based on a non-profit company will result in lower operational costs than in today's market. The bill also referred to difficulties in introducing stricter rules within the existing licensing system due to massive resistance in the form of lobbying campaigns from the private game operators, which the introduction of an exclusive right would overcome.

12 Along with the introduction of an exclusive right for Norsk Tipping, the number of machines was to be reduced to 10,000 and stricter rules concerning location of machines were to be applied. At the same time, the reduction in revenues to the humanitarian and socially beneficial causes so far benefiting from gaming machines were to be limited to approximately the 2001 level. The Ministry thus determined that the equivalent of the organisations' net income from gaming machines in 2001 should be given to humanitarian and socially beneficial organisations as a third cause (following sports and culture) in the form of a fixed share of 18% of Norsk Tipping's overall profits from gaming. Furthermore, all deployed machines were to be connected together in an electronic network that would give continuous access to information concerning cash flow and the mode of operation of the machines. The payout of winnings was planned to be in the form of a paper receipt that had to be cashed with the owner of the premises instead of direct cash payouts from the machines.

13 In a document dated 3 May 2003 and in its Annual Report for 2003, Norsk Tipping, for its part, announced its intent to increase the number of players by recruiting new players, each player betting for a lower amount than at present. The explicit goal was to at least double, within three years, the number of players on gaming machines. This goal should be reached through marketing, branding, and a tailored offer of games. On 17 November 2004, the Ministry, after the initiation of the infringement procedure by the Applicant and the judgment of Oslo tingrett, wrote a letter to Norsk Tipping stating, inter alia, that active marketing of Norsk Tipping's gaming machines shall not take place beyond what follows from the machines' bare presence at the location, that it was not an aim that the number of players using gaming machines shall exceed today's level and that the annual turnover had to be lower than in 2001.

14 The contested legislation was signed into law on 29 August 2003, leaving the date for entry into force to be set by the Government. The Government has decided to await the decision of the Court.

III Arguments of the parties

15 The application is based on three main arguments, namely that the contested legislation was motivated at least partly by an economic aim, that it fails to reflect a systematic and coherent approach to gambling, and that it does not comply with the principle of proportionality. The Defendant disputes all three claims.

16 Firstly, the Applicant claims that an EEA State may not introduce a monopoly when an important objective behind that step is securing revenue for humanitarian and socially beneficial causes. The desire to secure the level of revenues to such causes corresponding to the level in 2001 goes in the Applicant's view beyond an incidental beneficial consequence as required by the Court of Justice of the European Communities (hereinafter "ECJ") in Case C-67/98 *Zenatti* [1999] ECR I-7289, at paragraph 36.

17 Secondly, the Applicant maintains that the Norwegian gambling policy fails to reflect a systematic and coherent approach, with the overall objective of genuine diminution of those services, as called for by the ECJ in Case C-243/01 *Gambelli* [2003] ECR I-13031, at paragraph 67. The Applicant essentially argues that the Defendant's approach to gambling addiction is inconsistent in two respects, namely that (1) consumers have, as a result of intense marketing, been actively encouraged to participate in money games, and (2) the Defendant itself has, via its ownership and control of Norsk Tipping, substantially expanded the range of games and gaming opportunities in Norway. The Applicant holds that all games offered by Norsk Tipping, and also by Norsk Rikstoto, are relevant in this context and points to figures showing that Norsk Tipping has been among the largest advertisers in Norway.

18 Thirdly, the Applicant contends that establishing a monopoly is a disproportionate measure. The monopoly is in its view not necessary in order to achieve the aim of reducing problem gambling, as the concrete measures taken in addition to the introduction of the monopoly and the level of consumer protection sought with its creation could have been introduced under the old licensing system.

19 The Defendant, supported by the two interveners and the seven Member States of the European Communities which submitted observations in the case, claims that the contested legislation is based on legitimate aims, namely fighting gambling addiction, reducing machine gambling to a socially defensible level, strengthening public control and responsibility, reducing crime and malpractice, enforcing the 18 year age limit, eliminating private profit as a market incentive, and limiting the reduction in revenue to humanitarian and socially beneficial causes. Moreover, the Defendant maintains that under the private regime of the Lottery Act, the introduction of all new and more restrictive regulations would take time since experience shows that it would be challenged by operators through lobbying and legal actions.

20 As to the first argument made by the Applicant, the Defendant acknowledges that limiting the reduction in revenue was part of the legislative considerations behind the contested legislation. However, it denies that this constitutes an illegitimate financial consideration. In any event, the Defendant claims, the main legislative aim of the contested legislation was to fight gambling addiction. Thus, in its view, financial considerations were not the decisive reason, but merely an incidental beneficial consequence within the meaning of *Zenatti*.

21 With regard to the Applicant's second argument, the Defendant maintains that the *Gambelli* test of consistency should only be applied in cases where there is reason to suspect that there are arbitrary or discriminatory features. Acknowledging that Norsk Tipping has been allowed to market its gaming portfolio extensively, the Defendant claims that this is not inconsistent. The Defendant's primary argument is that the marketing of Norsk Tipping's games is irrelevant since there has never been any plan to allow for marketing of gaming machines. Disputing the allegation that Norsk Tipping is substantially expanding the range of games, the Defendant considers a gradual and moderate development of the gaming portfolio to be legitimate in any case. A certain development and marketing of the game portfolio offered under the public monopoly is said to be necessary in order to sustain the system, and channel gambling desire away from the most problematic and addictive games, in particular those offered over the Internet.

22 As to the Applicant's third argument concerning proportionality and necessity of the contested legislation, the Defendant asserts that if a national gambling restriction is found to be legitimate and suitable, then, as a consequence of the margin of appreciation conferred on them, it is for the national authorities to assess whether it is also necessary.

23 Reference is made to the Report for the Hearing for a more complete account of the facts, the pre-litigation procedure, the legal background as well as the arguments of the parties, interveners and those who submitted written and oral observations.

24 By letter dated 18 October 2006, the Court put a number of written questions to the Defendant to which the latter replied by letter of 2 November 2006.

IV Findings of the Court

General

25 The case at hand concerns the question of compatibility of the regulation of gaming machines in Norway with the rules governing the EEA internal market. All games of chance or gambling, including the use, in return for a money payment, of gaming machines, constitute economic activities falling within the scope of EEA fundamental freedoms (see, for comparison, Cases C-124/97 *Läärä* [1999] ECR I-6067, 8621, at paragraph 27, and C-6/01 *Anomar* [2003] ECR I-8621, at paragraph 47).

26 The application essentially concerns the regulatory change in the market for the operation of gaming machines in Norway, from a system based on competition among a plurality of humanitarian and socially beneficial organisations holding licenses and private operators who operate the machines on their behalf, to a system based on an exclusive right for one state-owned company. From the perspective of the internal market, the exclusion of private operators falls to be assessed under the provisions on the freedom of establishment and the free provision of services. In a situation such as the one at issue, the case is to be examined under both provisions in parallel.

27 It is not disputed among the parties that the exclusion of private operators from the market constitutes a restriction on the freedom of establishment and the freedom to provide services, as it completely removes them from the market and insofar denies them access to that market. At the same time, it must be noted that the restrictions are of a non-discriminatory nature, since the contested legislation applies without distinction to domestic and foreign operators of gaming machines.

28 The focal point of the case at issue is thus on the question whether the contested legislation can be objectively justified.

29 The Court recalls in that context that moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order. Although the Contracting Parties are free to set the objectives of their policy on gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law as regards their proportionality (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and others*, judgment of 6 March 2007, not yet reported, at paragraphs 47 and 48).

Legitimacy of the aims pursued by the contested legislation

30 As regards the legitimacy of the restriction, the Defendant specifies several public interest objectives, to be assessed as a whole, namely fighting gambling addiction, reducing machine gambling to a socially defensible level, strengthening public control and responsibility, reducing crime and malpractice, enforcing the 18 years age limit, eliminating private profits as a market incentive and limiting the reduction in revenue to humanitarian and socially beneficial causes. The Applicant maintains that although most of the objectives referred to are legitimate as such, the legislation is still contrary to EEA law because in reality it pursues an illegitimate economic goal.

31 As already stated, the Applicant argues that the introduction of Norsk Tipping's exclusive right to operate gaming machines is motivated by the wish to limit the reduction in revenues for humanitarian and socially beneficial causes and that the

reform therefore pursues an economic aim. In that respect, the Court recalls that it is for the State responsible for a measure restricting a fundamental freedom of the EEA Agreement to prove that the measure can be justified (see, inter alia, Case E-1/04 *Restamark* [1994-1995] EFTA Ct. Rep. 15, at paragraph 60, and Case E-1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Ct. Rep. 143, at paragraphs 34 and 35).

32 The parties disagree as to which preparatory works are relevant when assessing the intent of a national legislature under EEA law. The Applicant is of the view that all the preparatory works that have led to the enactment of the legislation in question are relevant in that respect. The Defendant refers to the bill of 14 March 2003, the proposal of 6 June 2003 by the Parliamentary Committee and the minutes from the parliamentary debate. In the Defendant's view, earlier preparatory documents are to be disregarded.

33 The Court holds that any materials from which the legislative intent can be deduced must be taken into account when assessing that intent. It is clear, however, that, as a matter of principle, the Government's proposal and the reports on the parliamentary debate will be more indicative than earlier drafts and documents. The Court also takes into account that views may change during the legislative process.

34 It is to be recalled that the ECJ has consistently held that, in the field of gaming, policy justification grounds put forward by a Member State must be taken together and considered as a whole. The justification grounds referred to by the Defendant concern the protection of the recipients of the service and, more generally, of consumers, as well as the maintenance of order in society. These objectives are amongst those which may be regarded as overriding reasons relating to the public interest (see Cases C-275/92 *Schindler* [1994] ECR I-1039, at paragraph 58; *Läärä* at paragraph 33; C-67/98 *Zenatti* [1999] ECR I-7289, at paragraph 31; and *Anomar* at paragraph 73).

35 As regards the objective of limiting the reduction in overall revenues to humanitarian and socially beneficial causes, the Court notes that in relevant documents in the legislative history leading up to the contested legislation, this objective was clearly expressed.

36 The ECJ has held that 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 (see *Schindler* at paragraph 60; *Zenatti* at paragraph 14; and Case C-243/01 *Gambelli* [2003] ECR I-3031, at paragraph 62). Moreover, the ECJ has concluded that a limitation in the authorisation of gaming 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 constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted (see

Zenatti at paragraph 36). This formula was reiterated in *Gambelli* at paragraph 62.

37 The *Zenatti* judgment cannot be understood to the effect that the Norwegian legislation in question would *a priori* be rendered unacceptable by the fact that one of the aims of the legislation is to limit the reduction in revenue for humanitarian and socially beneficial causes. The introduction of a monopoly was also motivated by other aims, in particular the aim to reduce the risk of gambling addiction. In fact, the contested legislation is based on the assumption that the introduction of an exclusive right would provide an opportunity to fight gambling addiction *inter alia* by limiting gaming opportunities while at the same time limiting the reduction in revenues by lowering operational costs and eliminating the profit of private operators.

38 The fact that a system based on an exclusive right for one operator leads to a lowering of operational costs, allowing for the same revenue for humanitarian and socially beneficial organisations to be accrued by less gaming activity, cannot by itself compromise the legitimacy of the system. The Court notes in this respect that the facts in the present case differ from the facts underlying the ECJ's ruling in *Gambelli*, where, according to the referring court, the Italian State was pursuing a policy of substantially expanding betting and gaming at the national level with a view to obtaining funds (see paragraph 68 of that judgment).

39 Based on the above, the Court concludes that limiting the reduction in revenues for humanitarian and socially beneficial causes from machine gaming was not the real justification, within the meaning of *Zenatti*, for the restrictive policy adopted, but a beneficial consequence which is incidental in the meaning that it is accessory.

40 Beside the objectives of fighting gambling addiction and reducing crime and malpractice, the other objectives put forward by the Defendant are mostly means to achieve this goal or are of subsidiary importance. This also applies to the Defendant's intention to avoid future political and legal opposition by private operators against more stringent rules under the current system by introducing a State-controlled monopoly. This could not be regarded as a legitimate justification for restricting rights under the EEA legal order. Given its ancillary character in relation to the other objectives, this does not, however, affect the overall legitimacy of the motives behind the contested legislation.

41 Considering the above, the Court rejects the claim of the Applicant that the contested legislation is contrary to EEA law because it in reality pursues illegitimate aims.

Suitability/consistency of the contested legislation

42 In order to be justified, the granting of an exclusive right to Norsk Tipping to operate gaming machines must be suitable to attain the aims pursued. An authorisation to operate gaming machines on an exclusive basis, such as the one

in the case at hand, can in principle be considered suitable for attaining those aims, see *Läärä* at paragraph 37. The Applicant, however, argues that the Defendant's approach to fighting gambling addiction by way of the contested legislation is inconsistent, as consumers have been actively encouraged to gamble by intense marketing and through the expansion of the range of games and gaming opportunities by Norsk Tipping and Norsk Rikstoto.

43 Restrictions based on legitimate grounds of overriding public interest must be consistent with similar measures already taken. This principle, which is of general relevance, has been acknowledged in a case concerning the compatibility of a marketing ban on foodstuffs with the rules on free movement of goods (Case E-3/00 *EFTA Surveillance Authority* v *Norway* [2000-2001] EFTA Ct. Rep. 73, at paragraphs 26 and 41). In accordance with this principle, a State must not take, facilitate or tolerate measures that would run counter to the achievement of the stated objectives of a given national measure. In the sphere of gaming policy, the ECJ has specified that restrictions must be suitable for achieving the target objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner (see *Gambelli*, at paragraph 67). In the case at issue, the Defendant has chosen to fight gambling addiction through the reduction of gambling opportunities by subjecting the operation of gaming machines to a State-owned monopoly. In order to be consistent, the Defendant may not at the same time endorse or tolerate measures, such as extensive marketing, which could lead to an increase of gambling opportunities.

44 However, when assessing the consistency of the contested legislation, it is, in the light of the overriding legislative motivation of fighting gambling addiction, essential to put the focus on games with comparable effects with respect to creating such addiction. Whether and to which extent a given game can lead to gambling addiction must be evaluated by taking into account the specific circumstances, including its features, its presentation, the reactions of its potential consumers and the broader socio-cultural environment**.**

45 The parties do not dispute that among games lawfully marketed in Norway, gaming machines, the football betting game Oddsen and horserace betting involve a risk of addiction. However, it is clear that the increase in gambling addiction in Norway in later years has occurred simultaneously with the increase in gaming machine gambling. Furthermore, figures from the telephone helpline for problem gamblers submitted by the Defendant show that 81% of the callers in 2004 reported gaming machines as a problem. For Oddsen and horse race betting, the comparable numbers were 7,7% and 6,8%. Later statistics submitted by the Applicant show similar figures. Moreover, studies in the field of gambling presented to the Court point at gaming machines as the single most potentially addictive form of gambling. These studies refer, *inter alia*, to the structural characteristics of the machines, such as rapid event frequency, the near miss, and light and sound effects. From this, the Court concludes that gaming machines are more dangerous in terms of leading to gambling addiction than other games lawfully offered on the Norwegian market. Even though other games, most notably Oddsen and horse race betting, may also lead to gambling addiction, the

Court cannot see that this is on a comparable scale. In this situation, the marketing and development of other games is not relevant when assessing the consistency of the contested legislation.

46 Under the current regime in Norway, gaming machines are not marketed beyond their mere presence at authorised locations. According to a letter by the Ministry to Norsk Tipping dated 17 November 2001 (see paragraph 13 above), this will also be the situation in the future. With reference to this and bearing in mind the restrictive approach on which that letter is based, the Court concludes that the fact that the contested legislation is aimed at the operation of gaming machines alone does not render that legislation unsuitable to achieve the aim of reducing gambling addiction in the Norwegian society. The Court underlines, however, that a consistent and systematic approach to fighting gambling addiction must also encompass an effective control of the exclusive right holder's activities once the contested legislation has entered into force.

Necessity of the contested legislation

47 The Applicant argues that the contested legislation violates the principle of proportionality, since tightening the rules on machine gaming in a competition-based system would constitute a less restrictive but equally effective means as compared to the introduction of an exclusive right for Norsk Tipping. In that regard, the Court notes in particular that the contested measures must not go beyond what is necessary in order to achieve the intended aims (see, for comparison, *Läärä* at paragraph 33; *Zenatti* at paragraph 31; *Anomar* at paragraph 86, *Gambelli*, at paragraphs 64 and 65; C-42/02, Case C-42/02 *Lindman*, [2004] ECR I-13519, at paragraph 25).

48 In *Läärä*, the ECJ held that the question of whether it would be preferable to adopt regulations imposing the necessary code of conduct on the operators concerned instead of granting an exclusive right to a public body to operate gaming machines is a matter to be assessed by the Member States. However, the choice made in that regard must not be disproportionate to the aim pursued (at paragraph 39).

49 In the case at issue, the Norwegian legislature has not opted for a total ban. Instead it has chosen a monopoly system with a view to reduce the risk of gambling addiction to a level which it deems acceptable and to reduce crime and malpractice. In such a situation, the necessity test consists in an assessment of whether the monopoly option is functionally needed in order to reduce the problems to the level opted for, or whether this reduction could equally well be obtained through other, less restrictive means such as admitting private operators under a stricter licensing regime. The necessity of the contested legislation thus requires that the introduction of a monopoly leads to a more effective achievement of the aims set than other less restrictive measures (see *Läärä*, at paragraphs 41 and 42).

50 As regards the objective of reducing crime and malpractice, the Court notes that during the pre-litigation procedure, the Defendant stated in a letter to the Applicant dated 1 September 2003 that in Norway the problem is not the presence of unlicensed software of machines. There is certainly a risk that gambling activities may be abused by the operators or their partners for criminal ends such as money-laundering and embezzlement. However, the Defendant has failed to demonstrate that a licensing scheme allowing private operators, if necessary with more restrictive rules on who may qualify, will not be equally effective as an exclusive right for Norsk Tipping in preventing money-laundering and embezzlement. With regard to theft from the machines themselves by outsiders and vandalism related to this, the Court cannot see that an introduction of an exclusive right for Norsk Tipping in itself would reduce the problem. On the other hand, reducing theft and other forms of crime as a consequence of gambling addiction fall to be assessed as an integral part of the aim to reduce gambling addiction.

51 The public interest objectives which the national legislation is aimed at must be considered as a whole. In the Court's view, it is reasonable to assume that a monopoly operator in the field of gaming machines subject to effective control by the competent public authorities will tend to accommodate legitimate concerns of fighting gambling addiction better than a commercial operator or organisations whose humanitarian or socially beneficial activities partly rely on revenues from gaming machines. Furthermore, it is plausible to assume that in principle the State can more easily control and direct a wholly State-owned operator than private operators. Through its ownership role, the State has additional ways of influencing the behaviour of the operator besides public law regulations and surveillance. In fact, the effectiveness of public control and enforcement of a genuinely restrictive approach to machine gaming are the focal point of the proportionality assessment in this case. In a situation where the reform of the gaming machine regulation in Norway has not yet taken effect, the Court cannot base itself on the general assumption that public control and policy enforcement will not satisfy these requirements.

52 The Court concludes that the Defendant has sufficiently demonstrated that the exclusive right system opted for in the contested legislation is likely to be more effective in order to achieve the objectives of the legislation, considered as a whole, than the other means proposed by the Applicant.

53 With regard to the aforesaid, the Court holds that the application cannot be sustained.

V Costs

54 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Defendant has asked for that the Applicant be ordered to pay the costs. Since the latter has been unsuccessful in its application, it must be ordered

to pay the costs. The costs incurred by the interveners and those who submitted observations are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application**.

2. **Orders the EFTA Surveillance Authority to pay the costs of the proceedings.**

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 14 March 2007.

Henning Harborg
Registrar

Carl Baudenbacher
President