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## Norwegian Gambling Law and EEA Law

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## I. EEA law fundamental freedoms and fundamental rights

Freedoms of movement of goods, services, persons, self-employed and companies and of capital are the **backbone** of the EEA internal market.

Confer subjective rights to natural and legal persons.

EFTA Court has, moreover, recognised the existence of EEA fundamental rights.

In Norway, according to Article 2 EEA Act, these rights take precedence over conflicting Norwegian law.

## I. EEA law fundamental freedoms and fundamental rights

Restrictions may be justified

if they pursue a legitimate aim,

and

if they fulfil requirements of proportionality:

- suitability,
- consistency and systematicity ("**hypocrisy test**"),
- necessity,
- proportionality stricto sensu.

## II. Position of Norwegian authorities

Situation once and for all cleared by Supreme Court judgment of 26 June 2007 in *Gaming Machines* and Oslo City Court judgment of 3 October 2008 in *Ladbrokes*.

- State gambling monopolies such as the ones existing in Norway compatible with EEA law.
- Pursue legitimate goals and are proportionate.

ESA has remained inactive since 2007/2008.

## II. Position of Norwegian authorities

Crucial figure: Government Attorney *Fredrik Sejersted*.

- Combating private gaming operators as an important personal concern.
- April 2015: “Fight against slot machines” may very well prove to be the epitaph on his tombstone.

Government Attorney pleads:

Light, superficial proportionality test, which gives the State almost unlimited leeway.

→ **Room for Manoeuvre.**

### III. Wrong implementation of EFTA Court case law

#### 1. EFTA Court and Supreme Court *Gaming Machines*

EFTA Court: *Norsk Tipping's* slot machines monopoly is legal provided that the competent authorities effectively supervise it.

Overlooked by the Supreme Court.

Supreme Court: Intensity of EFTA Court's proportionality test is **moderate**. This is in perfect harmony with the Norwegian tradition of judicial review of assessments of a distinct political nature.

EFTA Court never made any such statement, **on the contrary**.

### III. Wrong implementation of EFTA Court case law

#### 2. EFTA Court and Oslo City Court *Ladbrokes*

EFTA Court: In light of its enormous marketing budget, *Norsk Tipping* is unlikely to pass the proportionality test.

However, Oslo City Court applied superficial proportionality test.

Government Attorney had propagated such a test before the EFTA Court --- explicitly **rejected** at paragraph 55.

Nevertheless again pleaded by the Government Attorney before the Oslo City Court.

Violation of Article 3 EEA (duty of loyalty or good faith).

### III. Wrong implementation of EFTA Court case law

#### 2. EFTA Court and Oslo City Court *Ladbrokes*

Superficial proportionality test **as such** criticised by European Court of Human Rights Judge *Arnfinn Bårdsen*.

Oslo City Court's ***Ladbrokes* test** criticised by University of Agder Professor *Tor-Inge Harbo*.



## IV. New development

### 1. ECJ Grand Chamber *Markus Stoß* (8 September 2010)

State monopolies which aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours are not compatible with European fundamental freedoms.

That's what *Norsk Tipping* is doing.

## IV. New developments

### 2. Consequences of *Markus Stoß*

Commission initiates infringement proceedings against **Denmark** and **Sweden**.

Denmark and Sweden give up their State monopolies in gambling law.

Switch to licensing systems.

**ESA remains inactive** as far as Norway is concerned.

## V. Reaction of private operators

1. On 20 October 2019, Norwegian private firm *Norsk Lotteri* failed in attempt to topple monopoly of *Norsk Tipping*.

Oslo City Court simply relied on the 2007 *Gaming Machines* judgment of the Supreme Court and the 2008 *Ladbrokes* judgment of the Oslo City without looking into the questions of whether these judgments were accurate at the time nor whether there are new developments in EU law.

Followed the line of argument of Government Attorney.

Judgment appealed to Borgarting Lagmannsrett.

## V. Reaction of private operators

2. On 2 July 2020, Oslo City Court decided that an action brought by *Trannel*, a subsidiary of the London based private operator *Kindred*, challenging a decision of the Norwegian State ordering it to change its website should be stayed pending the Borgarting Court of Appeal's decision in *Norsk Lotteri*.

Private operators from within and outside Norway are thus caught up in a *Kafkaesque* nightmare.

**Access to justice** is no longer guaranteed nor is there a system of sufficient checks and balances.

## V. Reaction of private operators

3. On 20 August 2019, Oslo District Court held that Norwegian State has right to block payments to and from gambling operators based in other EEA Contracting Parties.

Interference with freedom to **conduct a business** guaranteed by EU Charter and recognised by EFTA Court in *Deveci* on 18 December 2014?

## V. Reaction of private operators

4. On 8 July 2020, ESA closed complaint against Norwegian payment ban claiming that it was proportionate

Proportionate to what?

To the protection of the sacrosanct State monopoly?

ESA did not consider it necessary to investigate whether the State monopoly itself was legal under EEA law.

## VI. Regulatory capture

If you compare the statements of the monopolist, the administrative authorities, the Ministry and the Government Attorney, you get the impression that they all come from **the same pen.**

They all seem to have the same goal: to save the lucrative monopolies.

Question: Is this a case of regulatory capture?

According to Nobel laureate economist *George J. Stigler's* famous theory, an agency that has to regulate an industry tends to be "captured" by that industry.

One will have to assume that this applies *a fortiori* to monopolists.

## VI. Regulatory capture

Bedfellows?

Latest example: Ministry's public consultation paper on the New Money Gaming Act.

- Selective use of materials.
- Materials that do not fit the objective of maintaining the monopolies at all cost are suppressed.

*Modus operandi* by which no student at a good university would pass an exam.