



OSLO TINGRETT

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EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg

Luxembourg

Deres referanse

Vår referanse

Dato

22-132552TVI-TOSL/05

06.07.2023

Tranel International Ltd. – the Norwegian State, represented by the Ministry of Culture and Equality

Pursuant to Section 51a of the Norwegian Courts of Justice Act (*lov om domstolene*) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), Oslo District Court (*Oslo tingrett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 22-132552TVI-TOSL/05.

1. Parties to the case

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Defendant:

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(*Staten v/Kultur- og
likestillingsdepartementet*)

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2. Introduction

The case concerns an action for declaratory judgment seeking to have the defendant's award of an exclusive right to offer horse race betting declared to be ineffective under Section 13 of the Public Procurement Act (*anskaffelsesloven*). That provision implements Article 2d of Directive 2007/66/EC (the Enforcement Directive), which allows for public contracts to be declared ineffective where they have been concluded without having been publicised.

The case has arisen after the Norwegian State, acting through the King-in-Council, awarded the foundation Norsk Rikstoto an exclusive right to offer horse race betting in Norway. On 9 December 2022, authorisation was granted for 10 years, with effect from 1 January 2023. The defendant in the case is the Norwegian State, represented by the Ministry of Culture and Equality.

The plaintiff, the international gaming company Tranel International Limited, has applied for authorisation to offer totalisator betting in Norway. The application has not been dealt with on its merits by reference to the Norwegian regulation on totalisator betting, the concession currently held by Norsk Rikstoto and the established exclusive rights model governing the gambling and gaming sector in Norway. The parties disagree as to whether the authorisation granted to Norsk Rikstoto is contrary to EEA law.

The case raises inter alia questions as to whether Directive 2014/23/EU of 26 February 2014 of the European Parliament and of the Council on the award of concession contracts (the Concession Contracts Directive) applies to the award of an exclusive right to offer totalisator betting to Norsk Rikstoto. The parties disagree as to whether Norsk Rikstoto's exclusive right was awarded through a "services concession" under Article 5(1)(b) of the Concession Contracts Directive.

If the award of the exclusive right in question is to be regarded as a services concession contract under the Directive, then in the alternative the parties also disagree as to whether the exception for services concession contracts entered into on the basis of an exclusive right will apply, see Article 10(1) of the Directive.

Given the doubts about interpretation relating to the scope of the Concession Contracts Directive and the exception provided for in the first subparagraph of Article 10(1), the court has decided to request an Advisory Opinion from the EFTA Court.

The parties also disagree as to whether the direct award of an exclusive right to operate horse race betting is, in any event, contrary to the fundamental EEA law principles of equal treatment, non-discrimination and transparency. The court has decided not to refer any questions to the EFTA Court relating to that part of the case.

3. Reasons for the request for an Advisory Opinion

The referring court is of the view that there are doubts about the interpretation relating to whether the award of an exclusive right to offer horse race betting to a foundation such as Stiftelsen Norsk Rikstoto, is a "services concession" under Article 5(1)(b) of Directive 2014/23/EU. The referring court takes the view that the scope of the term "services concession" in Article 5(1)(b) of the Directive has not been clarified by the judgments of the European Court of Justice ("ECJ") or the EFTA Court.

The court is in doubt as to whether the entry into force of Directive 2014/23 entails that the award of such an exclusive right is to be regarded as a services concession contract and not as an administrative authorisation scheme. To the court's knowledge, there are no judgments clarifying where the line is to be drawn between an administrative authorisation scheme and a services concession contract covered by Directive 2014/23 in the area of gaming activity.

There are several judgments from the ECJ covering the concept of contract in the public procurement directives, see inter alia C-451/08 Helmut Müller and C-796/18 ISE (Directive 2014/24), and C-486/21 Sharengo (Directive 2014/23). There have also been several judgments relating to the award of an exclusive right for gaming, and in which the question was whether that restriction could be justified under the Main Part of the EEA Agreement, see inter alia C-203/08 Sporting Exchange and E-24/13 Casino Admiral. It is unclear for the court how those decisions are to be construed in the interpretation of Directive 2014/23.

The crux of the court's doubts about interpretation is whether the award of an exclusive right to offer horse race betting to a foundation that is organised in a manner similar to that of Stiftelsen Norsk Rikstoto can be said to be a "contract for pecuniary interest" under Article 5(1)(b) of Directive 2014/23, including the significance of the fact that any profits from the gaming services offered are controlled by the State pursuant to a national regulation, for the benefit of third parties. The doubts about interpretation also relate to whether the adoption of Directive 2014/23 has entailed any changes for how to draw the between administrative authorisation schemes and services concession contracts.

If the award is to be regarded as a "services concession" under the Concession Contracts Directive, the parties also disagree as to whether the exception in the first subparagraph of Article 10(1) of Directive 2014/23 for services concession contracts concluded on the basis of an exclusive right applies. The doubt about interpretation concerns whether any significance is to be attached to the fact that the legislation does not expressly name the holder of the exclusive right but that a foundation is singled out in the preparatory works. The court also has doubts as to whether it is of significance that the foundation was awarded the exclusive right to offer horse race betting on the basis of previous national legislation uninterruptedly until the exclusive right was awarded on the basis of new legislation.

To the referring court's knowledge, neither the EFTA Court nor the ECJ has previously ruled on these questions of interpretation. The market for gaming services has a clear cross-border element in the EEA. In order to ensure effective mutual compliance with the European internal market and the abovementioned directive, it is both appropriate and necessary that the EFTA Court provides its Advisory Opinion on the relevant questions of interpretation.

4. EEA law

Directive 2014/23/EU of 26 February 2014 of the European Parliament and of the Council on the award of concession contracts was incorporated by Decision of the EEA Joint Committee No 97/2016 of 29 April 2016.

Recital 11 of the Directive's preamble reads:

“Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The

object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment. Such contracts may, but do not necessarily, involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question.”

Recital 14 of the Directive’s preamble reads:

“In addition, certain Member State acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally, on request of the economic operator and not on the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. In the case of those Member State acts, the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council apply. In contrast to those Member State acts, concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable.”

Recital 18 of the Directive’s preamble reads:

“Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.”

Recital 35 of the Directive’s preamble reads:

“This Directive should not affect the freedom of Member States to choose, in accordance with Union law, methods for organising and controlling the operation of gambling and betting, including by means of authorisations. It is appropriate to exclude from the scope of this Directive concessions relating to the operation of lotteries awarded by a Member State to an economic operator on the basis of an

exclusive right granted by means of a procedure without publicity pursuant to applicable national laws, regulations or published administrative provisions in accordance with the TFEU. That exclusion is justified by the granting of an exclusive right to an economic operator, making a competitive procedure inapplicable, as well as by the need to retain the possibility for Member States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.”

Article 1(1) and (2) read:

“1. This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.

2. This Directive applies to the award of works or services concessions, to economic operators by:

(a) Contracting authorities; or

(b) Contracting entities, provided that the works or services are intended for the pursuit of one of the activities referred to in Annex II.”

Article 5(1)(b) reads:

“ For the purposes of this Directive the following definitions apply:

1) ‘concessions’ means works or services concessions, as defined in points (a) and (b):

...

(b) ‘services concession’ means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the fluctuations in the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.”

Article 10(1) and (9) read:

“Article 10 Exclusions applicable to concessions awarded by contracting authorities and contracting entities

1. This Directive shall not apply to services concessions awarded to a contracting authority or to a contracting entity as referred to in point (a) of Article 7(1) or to an association thereof on the basis of an exclusive right.

This Directive shall not apply to services concessions awarded to an economic operator on the basis of an exclusive right which has been granted in accordance with the TFEU and Union legal acts laying down common rules on access to the market applicable to activities referred to in Annex II.

(...)

9. This Directive shall not apply to service concessions for lottery services, which are covered by CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right. For the purpose of this paragraph, the notion of exclusive right does not cover exclusive rights as referred to in Article 7(2).

The grant of such an exclusive right shall be subject to publication in the Official Journal of the European Union.”

5. National law

5.1. Implementation of the public procurement rules

Directive 2014/23/EU is implemented in Norwegian law by Section 2 of Act of 17 June 2016 No 73 on public procurement (“the Public Procurement Act”) (*lov 17. juni 2016 nr. 73 om offentlige anskaffelser (anskaffelsesloven)*) and Regulation of 12 August 2016 No 976 on concession contracts (“the Concession Contracts Regulation”) (*forskrift 12. august 2016 nr. 976 om konsesjonskontrakter (konsesjonskontraktforskriften)*). The Public Procurement Act and the Concession Contracts Regulation apply in respect of public authorities who conclude concession contracts for services having an estimated value equal to or exceeding NOK 100 000, exclusive of value added tax, see Section 2 of the Public Procurement Act and the first paragraph of Section 1-1 of the Concession Contracts Regulation.

Section 1-2 of the Concession Contracts Regulation reads:

1. A concession contract is a services contract or a works and service contract the consideration of which consists either solely in the right to exploit the services or works or in that right together with payment, and the operating risk of which is transferred from the contracting authority to the supplier.
2. The operating risk relating to the services or works may encompass demand or supply risk or both. The operating risk shall be deemed to have been transferred where the supplier, under normal operating conditions, is not guaranteed to recoup its investments made or costs incurred in the operations. The risk transferred to the supplier shall involve real exposure to the fluctuations in the market, such that any potential estimated loss incurred by the supplier shall not be merely negligible.

Section 2-3 of the Concession Contracts Regulation provides for an exception to the application of the Directive [presumably the Public Procurement Act and the Concession Contracts Regulation]:

The Public Procurement Act and the Regulation shall not apply in respect of services concession contracts concluded by the contracting authority with:

- a. a contracting authority as referred to in letters (a) to (d) of the first paragraph of Section 1-3 who has an exclusive right to provide the service, or

- b. suppliers who have an exclusive right to provide the service. This applies only when the exclusive right is awarded in accordance with EEA rules allowing for the performance of supply activities. If the rules do not lay down transparency requirements, the contracting authority shall publish notice of conclusion of the contract under Section 9-4.

Section 1-3 of the Concession Contracts Regulation reads:

1. The Regulation shall apply in respect of the following contracting authorities:
 - a) State authorities;
 - b) county and municipal authorities;
 - c) bodies governed by public law;
 - d) associations of one or more contracting authorities as referred to in letters (a) to (c);
 - e) public undertakings as defined in the third paragraph of Section 1-2 of the Supply Regulation (*forsyningsforskriften*);
 - f) other businesses who perform supply activities on the basis of an exclusive right or a special right (*særrett*) as defined in the fourth paragraph of Section 1-2 of the Supply Regulation.
2. A body governed by public law is a body which:
 - a) is established in order to serve the needs of the general public and is not industrial or commercial in nature;
 - b) is an independent legal entity; and
 - c) is connected to the public sector in that:
 1. the body is financed principally by public authorities or other bodies governed by public law;
 2. the management of the body is subject to such authorities' or bodies' management control; or
 3. the body has an administrative, management or control body in which over half of the members are appointed by such authorities or bodies.

5.2. The regulatory framework governing gaming

Previously, the award of an exclusive right to offer totalisator betting was regulated by Act of 1 July 1927 No 3 on totalisator betting (“the Totalisator Act”) (*lov 1. juli 1927 nr. 3 om veddemål ved totalisator*) and Regulation of 24 August 2007 No 1011 on totalisator betting (“the Totalisator Regulation”) (*forskrift 24. august 2007 nr. 1011 om veddemål ved totalisator*). The award was granted by the King for five years at a time.

A new Act of 18 March 2022 No 12 on gaming (“the Gaming Act”) (*lov 18. mars 2022 nr. 12 om pengespill*) entered into force on 1 January 2023. That act replaced the Totalisator Act of 1927, and Act of 24 February 1995 No 11 on lotteries, etc., (“the Lottery Act”) (*lov 24. februar 1995 nr. 11 om lotterier mv.*) and Act of 28 August 1992 No 103 on gaming, etc., (*lov 28. August 1992 nr. 103 om pengespill mv.*). Moreover, the Totalisator Regulation of 2007 was replaced by Regulation of 13 March 2023 No 327 on distribution of profits from horse race betting (*forskrift 13. mars 2023 nr. 327 om fordeling av overskuddet fra pengespill på hest*). The new Gaming Act maintains the exclusive right model and updates the prevailing rules. At the same time, an update was undertaken and new provisions introduced along with more stringent requirements for gaming providers. In connection with the introduction of the new Gaming Act, the Ministry considered whether the totalisator betting operated by Norsk

Rikstoto should be transferred to Norsk Tipping. The Ministry concluded that “the current organisational model for horse race betting should be continued, but that some steps should be taken in the new Gaming Act to increase the level of responsibility and public control of horse race betting”, see legislative proposal Prop. 220 L (2021-2022) p. 90.

The objectives of the Gaming Act are to prevent problems associated with gambling and other negative consequences of gaming, to ensure that gaming is operated in a responsible and safe manner and to facilitate profits from gaming being directed towards non-profit purposes, see Section 1 of the Act. It is stated in the preparatory works for the Act that those three objectives do not carry equal weight. The objective of preventing negative consequences of gaming and the objective of facilitating the provision of a responsible range of the offered gaming services will always take precedence over directing profits towards non-profit purposes, see Prop.220 L (2020-2021) p. 24. The Act prohibits offering gaming services without authorisation, see Section 4 of the Gaming Act. Authorisation is currently granted for 10 years at a time. The award of an exclusive right to offer horse race betting is regulated in Section 14 of the Gaming Act, which reads:

“The King may grant an exclusive right to offer horse race betting to a provider whose purpose is:

- a. to facilitate the provision of a responsible range of gaming services;
- b. to prevent negative consequences of gaming;
- c. to support horse husbandry, equestrian sport and horse breeding.

The Ministry shall be entitled to appoint a majority of the members of the provider’s board.

The King may lay down conditions in the authorisation to facilitate attainment of the objectives of the Act. Authorisation shall be granted for 10 years at a time.

Profits from horse race betting are to go to organisations that promote equestrian sport, horse husbandry and Norwegian horse breeding. The provider is to operate efficiently, so that as much as possible of the income from the provider’s betting services is directed towards those purposes. The Ministry shall issue regulations on the distribution of the profits from horse race betting.”

The profits are distributed in their entirety to organisations involved in equestrian sport, horse husbandry and Norwegian horse breeding. A specific regulation (Regulation of 13 March 2023 No 327) has been issued on the basis of the fourth paragraph, setting out provisions on the distribution of profits from horse race betting. That regulation fixes the distribution of the profits (defined as the operating result) in such a way that 97% is distributed to pre-determined organisations without an application. Up to 3% of the profits may be distributed to other parties under Section 5 of the Regulation, which reads as follows:

“Upon application, up to 3% of the profits referred to in the second paragraph of Section 3 may be distributed to organisations other than those referred to in Section 4. Profits shall be given to non-profit organisations working to promote Norwegian horse breeding, horse husbandry and equestrian sport and, in any event, in accordance with

the rules on State aid. The Ministry of Agriculture and Food may lay down more detailed rules on grants under this paragraph.”

Section 7 of the Regulation provides that the Directorate of Agriculture is to adopt decisions on grants under the Regulation. The Ministry of Agriculture and Food is the appeal body. The consequences of repeated or material breaches of an authorisation granted under Section 14 is regulated in Section 34 of the Gaming Act, entitled “Withdrawal of authorisation or licence”. The first and fourth paragraphs of that provision read as follows:

“In the event of repeated or material breach of provisions laid down in or adopted on the basis of this Act, the Norwegian Gambling Authority (*Lotteritilsynet*) may impose conditions for continued operation or withdraw an authorisation or licence. Where the authorisation has been granted by the King under Section 14, the King shall confirm a withdrawal before it is implemented. An authorisation or licence may be withdrawn for a maximum of two years.

...

If an authorisation or licence is withdrawn, the Norwegian Gambling Authority shall determine how affected gaming is to be liquidated.”

The exclusive right provider’s range of the offered gaming services in Norway is regulated in Section 15 of the Gaming Act, which reads:

“Norsk Tipping and the party holding authorisation to offer horse race betting under Section 14 may not offer or market gaming on behalf of others.

The Ministry shall issue regulations on which gaming the exclusive right providers may offer in order to attain the purposes referred to in letters (a) and (b) of Section 1, and which gaming requires authorisation from the Norwegian Gambling Authority.

The exclusive right providers shall set the gaming rules for the gaming they offer.

The Norwegian Gambling Authority may grant authorisation for temporary trials of new gaming types and other measures intended to facilitate attainment of the purposes referred to in letters (a) and (b) of Section 1. The Ministry may issue regulations on permission for temporary trials.”

At the same time as the entry into force of the new Gaming Act, Regulation of 17 November 2022 No 1978 on gaming (“the Gaming Regulation”) (*forskrift 17. november 2022 nr. 1978 om pengespill (pengespillforskriften)*) entered into force. That regulation provides more detail for the rules applying under the new Gaming Act and sets out detailed requirements for gaming services offered by gaming providers, including those offered under an exclusive right by exclusive right providers.

Under Section 21 of the Gaming Regulation, the party holding an exclusive right to offer horse race betting has an exclusive right to offer gaming relating to physical arrangements or competitions involving horses.

Under Section 22 of the Gaming Regulation, material changes in the range of the offered gaming services must be approved by the Norwegian Gambling Authority. Under Section 23 of the Gaming Regulation, the holder of the exclusive right is responsible for setting the

gaming rules for the gaming being offered. Chapter 6 of the Regulation lays down more detailed rules for the range of gaming services offered. The Regulation inter alia sets out requirements that gaming must take place in a recorded manner, see Section 25 of the Gaming Act. An upper loss limit per player per month is imposed, see Section 26 of the Act. It is further required that the player himself or herself sets a personal loss limit per day and per month, within the total loss limit, see Section 28, and requirements of tools giving the player an overview of his or her own playing pattern and the loss amount over the past year and month, see Section 29.

The foundation may not offer other gaming products than as permitted under the Gaming Act and the Gaming Regulation, and Norsk Rikstoto may not introduce material changes to the existing range of gaming services offered without authorisation from the Norwegian Gambling Authority, see the second paragraph of Section 15 of the Gaming Act. Norsk Rikstoto's betting may be marketed only to the extent necessary to inform about the range of gaming services offered and to direct demand for gaming in society towards a responsible and safe range of gaming services offered, see Section 6 of the Gaming Act.

6. Further on the facts

6.1. Norsk Rikstoto and the exclusive right to offer horse race betting in Norway

Under Article 1 of its Statutes, Stiftelsen Norsk Rikstoto is a commercial foundation. The foundation was established by the Norwegian Trotting Association (*Det Norske Travselsskap*) and the Norwegian Jockey Club (*Norsk Jockeyklubb*) in 1982 and, since then, has held an exclusive right to offer totalisator betting in Norway. Foundations are independent, self-owned legal entities, see Act of 15 June 2001 No 59 on foundations (“the Foundations Act”) (*lov 15. juni 2001 nr. 59 om stiftelser (stiftelsesloven)*). Since 1982, the foundation has had an exclusive right to offer totalisator betting (horse race betting) on the basis of the now-repealed Totalisator Act of 1927. Under the Totalisator Act, the exclusive right was awarded by the King for five years at a time.

The foundation's authorisation under the old Act expired on 31 December 2022. On the basis of the new Gaming Act, promulgated on 18 March 2022, Norsk Rikstoto, without prior application, was granted a new, expanded authorisation to offer horse race betting as from 1 January 2023. Norsk Rikstoto is a foundation that cannot be made subject to an obligation to operate gaming, and the foundation is not named specifically in the Gaming Act. In the preparatory works for the Gaming Act, it is stated that Norsk Rikstoto is envisaged in the role of exclusive right provider of horse race betting in Norway, provided that the foundation itself so wishes, see Prop.220 L (2020-2021) p. 92. The preparatory works designate Norsk Rikstoto as the relevant exclusive right provider in the following terms, see Prop.220 L (2020-2021) pp. 91-92:

“[...] The Ministry is not aware of any material developments that have occurred since the Ministry examined the range of horse race betting services offered in the spring of 2020. The Ministry therefore suggests that it be assumed that the King's authorisation is to be granted Stiftelsen Norsk Rikstoto.

A foundation is an independent, self-owned legal entity, see Section 2 of the Foundations Act. During the hearing, the Ministry observed that it will be difficult to

impose a statutory obligation on a specifically-named foundation to offer gaming and betting. For Norsk Tipping, which is a company wholly-owned by the State, the situation is different, and Norsk Tipping's operations are therefore regulated by name throughout the legislative proposal. In their joint consultation statement, the Norwegian Trotting Association and the Norwegian Jockey Club have stated that Norsk Rikstoto should be named in the Act, as Norsk Tipping is. The Ministry maintains its position that the difference between Norsk Rikstoto as a foundation and Norsk Tipping as a State-owned company is vital in this issue. It will be up to a foundation itself to decide whether it wants to operate gaming, within the parameters laid down in the rules. The Ministry will not impose a statutory obligation on the foundation to perform such a task. The Ministry accordingly maintains the proposal from the hearing and suggests making Section 14 a general provision that will apply in respect of whoever is granted authorisation to offer horse race betting, without linking the provision directly to Norsk Rikstoto. The Ministry specifies that also in the future, Norsk Rikstoto is envisaged for the role as exclusive right provider for horse race betting, provided that the foundation itself wishes to do so.”

Reference is also made to pp. 191–192 of the same preparatory works:

“The first paragraph allows the King to grant an exclusive right to offer horse race betting to a provider who fulfils the conditions laid down in Section 14. The term ‘exclusive right’ entails that there will be only one provider and the assumption is that that provider will be Norsk Rikstoto [...].”

The authorisation was granted on 9 December 2022. The authorisation is valid for 10 years. The background to the authorisation is elaborated on in the award letter, and is summarised as follows in part 1:

“A new Gaming Act enters into force on 1 January 2023. The Act maintains the exclusive right model and assigns overall responsibility for the regulation of gaming to the Ministry of Culture and Equality. Stiftelsen Norsk Rikstoto (“NR”) currently has the concession to arrange totalisator betting in Norway. The concession expires on 31 December 2022 and a new authorisation to offer horse race betting must be awarded to a provider as from 1 January 2023. It is the King who may grant a provider an exclusive right to offer horse race betting under the new Gaming Act. The authorisation is granted for 10 years at a time. The King may also lay down conditions in the authorisation to facilitate attainment of the objectives of the Gaming Act. The Ministry of Culture and Equality suggests that a new authorisation to offer horse race betting be awarded directly to NR. The Ministry of Culture and Equality further suggests that conditions be imposed for the authorisation. Proposals for the award of and conditions for the authorisation are found in the annex to the decree.”

The relationship to EEA law is considered in part 3, where inter alia the following is stated:

“The Ministry considers that the requirements imposed on the exclusive right provider of horse race betting in the new Gaming Act ensure sufficiently stringent control of the provider in a manner consistent with EEA law. A direct award of authorisation to offer horse race betting to NR is thus considered lawful.”

The authorisation itself is worded as follows:

“Authorisation to offer horse race betting
By Royal Decree of 9 December 2022, pursuant to Section 14 of Act of 18 March 2022 No 12 on gaming (the Gaming Act), be it decreed that:

Stiftelsen Norsk Rikstoto (NR) is granted an exclusive right to offer horse race betting for a period of 10 years from 01.01.2023 until 31.12.2032. The King may withdraw the authorisation if the preconditions therefor change. Section 34 of the Gaming Act shall otherwise apply.

As the exclusive right provider of horse race betting, NR shall be responsible for ensuring that the range of the offered gaming services complies with the requirements applicable to the exclusive right providers and their range of the offered gaming services as formulated at any given time under the Gaming Act, the Gaming Regulation and other provisions laid down in or adopted on the basis of the Gaming Act.

The following conditions shall also apply in respect of the authorisation:

1. At least twice a year a meeting shall be held between the Ministry of Culture and Equality (the Ministry) and NR in order to maintain an ongoing dialogue about NR’s operations and range of the offered gaming services in the light of the objectives of the Gaming Act and requirements imposed on the exclusive right providers. The Ministry shall summon the parties to the meetings and minutes of those meetings shall be drawn up.
2. Each year before the end of January, NR shall prepare and send to the Norwegian Gambling Authority a report on channelling abilities and responsibility-related measures. The report shall contain an assessment of how NR balances channelling of players with a responsible range of the offered gaming services. The report shall also be sent to the Ministry. The Ministry may grant an extended time limit for submission of the report.
3. Each year before the end of October, NR shall prepare and send to the Ministry a report on how NR is complying with the requirements of the Gaming Act on efficient operation.
4. The King may amend the conditions in the present authorisation if necessary in order to ensure compliance with the objectives of the Gaming Act.”

6.2. Norsk Rikstoto’s purposes

Under Section 14 of the new the Gaming Act, a provider who is awarded an exclusive right is to have as its purpose the facilitation of a responsible range of the offered gaming services, preventing negative consequences of gaming, as well as supporting horse husbandry, equestrian sport and horse breeding. In the preparatory works for the Act, Prop.220 L (2020-2021), it is stated that the new Act entails a need for changes to Norsk Rikstoto’s purposes as laid down in its Statutes, see page 92:

“Thus the legislative proposal entails that, if Norsk Rikstoto wishes to obtain authorisation to offer horse race betting under the new Gaming Act, the foundation must make changes to its purposes as laid down in its Statutes in order to comply with the

requirement in letters (a) and (b) of the first paragraph of Section 14 of the legislative proposal.”

Norsk Rikstoto amended its purposes as laid down in its Statutes. Article 4 of its Statutes was amended on 23 September 2022 and is now worded as follows:

“Norsk Rikstoto’s principal purpose is to facilitate responsible horse race betting and prevent negative consequences of gaming. Norsk Rikstoto’s purposes also include supporting horse husbandry, equestrian sport and horse breeding. The foundation shall be operated efficiently, so that as much as possible of the income benefits those purposes.”

The Gaming Act and the Norwegian policy on gaming are founded on considerations of responsible gaming and prevention of negative consequences of gaming, which are to take precedence over considerations of generating income for the purposes supported by profits. This means that, if the consideration of preventing problematic behaviour comes into conflict with the consideration of maximising profits, the consideration of preventing negative consequences of gaming is to take precedence over considerations of generating income for the purposes supported by profits.

6.3. Organisation of Norsk Rikstoto

The board of Norsk Rikstoto is the foundation’s highest body and shall ensure “the governance of the foundation” and “ensure that at the foundation’s purposes are upheld”, see Section 30 of Act of 15 June 2001 No 59 on foundations.

Under the second paragraph of Section 14 of the Gaming Act, the Ministry is entitled to appoint a majority of the members of the provider’s board. That condition was introduced in order to strengthen the public control over providers of horse race betting. Norsk Rikstoto has amended its Statutes on this point as well, so that they are now compliant with the requirements of the Act. Article 6 of the Statutes is now worded as follows:

“The foundation shall have a board consisting of seven members. The composition of the board shall be as follows:

- Four members and two numeric deputies shall be appointed by the State. The State shall appoint the chairperson of the board from among those members.
- One member and one deputy shall be appointed by the founders. The individual founding organisation may appoint either the member or the deputy. The Norwegian Jockey Club shall be entitled to appoint the member at least once every fifth board appointment.
- Two board members with deputies shall be elected by direct vote by and from among the employees of Norsk Rikstoto.

The deputy appointed by the founders shall be entitled to participate in board meetings, although without a right to vote, unless the mandate of the member appointed by the founders has expired.

The board should at all times have board members possessing expertise in equestrian sport. The board members and the deputies may not hold board positions in the tracks’

operating companies or real property companies connected with the operating companies, the Norwegian Trotting Association or the Norwegian Jockey Club.

The mandate period shall be two years. Board members may be reappointed.”

The foundation is subject to the supervision of the Norwegian Gambling and Foundation Authority (*Lotteri- og stiftelsestilsynet*), see Section 24 of the Gaming Act.

6.4. Norsk Rikstoto’s turnover and profits

Norwegian authorities have not provided a guarantee in order for Norsk Rikstoto to recoup the costs incurred in operating the betting services. Norsk Rikstoto’s accounting figures show that the foundation had negative operating results in inter alia 2011, 2013, 2015 and 2018. According to Norsk Rikstoto’s annual reports for 2020 and 2021, Norsk Rikstoto had a turnover of over NOK 3.64 billion in 2020 and NOK 3.23 billion in 2021. A number of organisations benefit from the distribution of Norsk Rikstoto’s profits. According to Norsk Rikstoto’s annual report for 2021, NOK 507 million went to the intended recipients. The funds are distributed amongst prizes and transport assistance for racehorse owners, prizes for horse breeders, operating assistance to the Norwegian Trotting Association and the Norwegian Jockey Club, transfers to the operating companies who arrange trot and gallop races, transfers to the Norwegian Equestrian Centre (*Norsk Hestesenter*) and grants to Rikstotoklinikken Bjerke, see Prop.220 L (2020–2021) p. 86. In the annual report, it is stated that profits from Norsk Rikstoto are put towards workplaces, breeding, horse welfare, education at the Norwegian Equestrian Centre and improved mental health and integration.

7. EEA law submissions of the parties

7.1. Submissions of the plaintiff

7.1.1. General remarks

Directive 2014/23/EU on the award of concession contracts applies to the Ministry of Culture and Equality’s award of 9 December 2022 to Norsk Rikstoto of an exclusive right to offer totalisator betting. Directive 2014/23/EU applies in the event of an award of a “services concession”, see Article 5(1)(b). A “services concession” is defined as a “contract for pecuniary interest” for the performance of “services”, the consideration of which consists “solely in the right to exploit the services” and the concessionaire assumes “the operating risk” in providing those services. In the plaintiff’s submission, the award of the exclusive right to offer horse race betting to Stiftelsen Norsk Rikstoto fulfils those conditions, with the result that the award is a services concession. The award of the concession to Rikstoto must be regarded as a “services concession”, which means that the award of the exclusive right to operate horse race betting in Norway ought to have been put out to competition in accordance with Directive 2014/23/EU. The exception provided for in the first subparagraph of Article 10(1) of the Directive for services concession contracts concluded on the basis of an exclusive right does not apply.

7.1.2. The concept of “services concessions”

The exclusive right to offer horse race betting is a contract for pecuniary interest. A contract for pecuniary interest is characterised by a public authority’s providing the concessionaire with a performance, and that the concessionaire provides the authority with a performance in

return. The pecuniary interest element in a services concession contract is characterised by the concessionaire acquiring a right to carry out a specific activity on behalf of the State, whilst the public contracting authority obtains the benefit of the activity having been carried out, see recital 11 of Directive 2014/23/EU. Contracts for pecuniary interest are not the same thing as general authorisation schemes. In recital 14 of Directive 2014/23/EU, it is explained that a services concession, unlike an authorisation scheme, is characterised by the contracting authority taking initiative to find a supplier who can provide a service, where the conditions for the performance of the service are determined by the contracting authority, with the possibility of including enforceable remedies for breach.

The description of the facts in the present case shows that the award of the exclusive right to offer horse race betting to Stiftelsen Norsk Rikstoto must be regarded as a contract for pecuniary interest. First, the State took the initiative to award the exclusive right to offer horse race betting to Norsk Rikstoto. The foundation did not apply to be awarded the exclusive right. Second, Norsk Rikstoto's operations are regulated in detail in the Norwegian Gaming Act, the Totalisator Regulation, and in the award letter itself. Third, the concession may be withdrawn under Section 34 of the Gaming Act in the event of serious or repeated breach of Rikstoto's obligations and, according to the award letter, if the preconditions underlying the award change. Fourth, Norsk Rikstoto, as concessionaire, contributes considerable amounts of funding to Norwegian equestrian sport, horse husbandry and horse breeding. These are expenses the State would have had to cover from the State budget had it not been for the concession. Thus, the award of the concession provides the State with considerable savings. The State achieves further savings by not having to make investments to attain the abovementioned policy objective of offering betting within sound parameters. Such investments are not without risk. Section 1 of the Gaming Act states that the State has an interest in horse race betting taking place within safe parameters. When Rikstoto helps to safeguard that interest, an element of "for pecuniary interest" within the meaning of Article 5(1) of the Directive arises for the State. Overall, it is clear that the object of the contract concluded with Norsk Rikstoto is to cover the State's needs. Fifth, there is contractual consideration for the service provided by Norsk Rikstoto to the State in that the foundation has the right to exploit the services. If the State had awarded the exclusive right to offer horse race betting, but had paid Norsk Rikstoto using money instead of granting the right to exploit the economic potential of the exclusive right, there would have been no doubt that the award had constituted a general public contract under Directive 2014/24/EU. That the State has instead opted to grant Norsk Rikstoto the right to exploit the right to offer betting services by way of consideration does not alter the nature of the contract being for pecuniary interest, apart from its having to be termed a concession contract subject to Directive 2014/23/EU.

The award of the exclusive right to offer horse race betting in Norway entails a contract for the performance of services, since the exclusive right consists in making a particular kind of gaming available for third parties in return for payment. Stiftelsen Norsk Rikstoto has an exclusive right to operate all totalisator betting in Norway. That this is a service is substantiated by Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement (CPV), Annex I, in which CPV code 92352100-4 uses the wording "Totalisator operating services". Furthermore, the award of a concession for the operation of horse race betting is referred to as a *service* concession by the ECJ in its judgment in Case C-203/08 *Sporting Exchange* and by the EFTA Court in its

judgment in Case E-24/13 *Casino Admiral* relating to the award of a *service* concession for the operation of a casino.

The award of the exclusive right to Stiftelsen Norsk Rikstoto entails an exclusive right to offer horse race betting in Norway, and to be paid by customers for its offer of such totalisator betting. The State's consideration provided to the concessionaire thus consists solely in the right to exploit the offered services. Moreover, the operating risk of exploiting the services is transferred from the State to Stiftelsen Norsk Rikstoto. The operating risk must always be deemed to have been transferred if the concessionaire is not guaranteed that it will recoup the investments made in connection with the operation of the services, see the second sentence of the second paragraph of Article 5(1) of Directive 2014/23/EU.

Norsk Rikstoto has overall responsibility for all totalisator betting and overall financial management. The operating responsibility assumed by Rikstoto entails significant costs associated with inter alia the operation of betting platforms, marketing, payment systems and contact points for customer inquiries. The total amount of those costs means that Rikstoto has no guarantee that it will be able to recoup its investments or get costs incurred during operations covered. Nor does the Norwegian State make any funds transfers to or investments in Norsk Rikstoto, and nor has it provided a guarantee so that Norsk Rikstoto will recoup the costs incurred in operating the betting services. Norwegian authorities are under no obligation to cover Rikstoto's ongoing deficits. This is substantiated by Norsk Rikstoto's accounting figures, which show that the foundation had negative operating results inter alia in 2011, 2013, 2015 and 2018.

Under the third sentence of the second paragraph of Article 5(1) of Directive 2014/23/EU, a requirement is imposed to the effect that the risk transferred to the supplier must involve real exposure to the fluctuations in the market, such that any potential estimated loss incurred by the supplier must not be merely negligible. The award of the exclusive right to offer horse race betting in Norway entails that Rikstoto assumes the demand risk for the service and that it is Rikstoto that must absorb any losses arising from reduced demand for horse race betting. Nor can that loss risk be regarded as negligible, a point evidenced by the deficits over a number of fiscal years as outlined above. Since it is the concessionaire who must bear the risk of the fluctuations in the market, without any guarantee of recouping the investments made to exploit the service, the award amounts to a transfer of operating risk from the contracting authority to the concessionaire under the second paragraph of Article 5(1) of Directive 2014/23/EU.

In light of the foregoing, the award of the exclusive right to offer horse race betting to Stiftelsen Norsk Rikstoto must be understood to be a "services concession" under Article 5(1)(b) of Directive 2014/23/EU.

Under Article 8(1) and (2) of Directive 2014/23/EU, the Directive applies to concessions where the total turnover generated for the concessionaire is at least EUR 5 186 000 by way of consideration for the services which are the object of the concession, calculated over the entire duration of the contract. The financial statements from Norsk Rikstoto from 2020 and 2021 show that the foundation has an annual turnover of over NOK 3 billion derived from

income from the range of the offered horse race betting services. This exceeds the threshold amount laid down in Article 8 of Directive 2014/23/EU.

Directive 2014/23/EU accordingly applies in respect of the award of an exclusive right to offer horse race betting in Norway.

Earlier case law from the ECJ and the EFTA Court shows that the award of an exclusive right to offer horse race betting to a private business is a “services concession” under Directive 2014/23/EU. In Case E-24/13 Casino Admiral, the EFTA Court referred to a right to exploit the service of a casino to offer gambling and betting in Liechtenstein as a “service concession”, see inter alia paragraph 47 of the judgment. Similarly, the ECJ refers to the award of rights to operate various types of gaming as a “services concession” or “concession contract” in cases such as C-64/98 [presumably C-64/08] Engelmann and C-375/17 Stanleybet.

When Norwegian authorities fail to comply with Directive 2014/23/EU in the award of the exclusive right to offer horse race betting, they do so with reference to an exception established in the ECJ’s Case C-203/08 Sporting Exchange from 2010. However, the authorities disregard the fact that a decisive premiss for the outcome in Sporting Exchange was that, at the time of that judgment, services concessions fell outside the scope of the public procurement rules. It was only once Directive 2014/23/EU entered into force in 2016 that services concessions came within the scope of the public procurement rules. That directive entered into force under the EEA Agreement first in 2017. In any event, in Sporting Exchange, the ECJ referred to a Dutch exclusive right scheme for horse race betting as a “service concession”, see inter alia paragraph 39, as the ECJ also did in the abovementioned cases.

7.1.3. *The exclusive right exception*

The exception provided for in the first subparagraph of Article 10(1) of Directive 2014/23/EU does not apply. This is both since Stiftelsen Norsk Rikstoto is not a “body governed by public law” under Article 6(4) of the Concession Contracts Directive and since the requirement that Norsk Rikstoto “have” an exclusive right was not met at the time of the award.

The description of the facts in the present case shows that Norsk Rikstoto is commercial in nature. The foundation is engaged in commercial operations in a competitive market and is for profit. This is a feature suggesting that the foundation does not seem to have been established in the interest of the general public, with the result that it is not a body governed by public law under the public procurement rules.

In any event, the exception applies only in respect of awards of concession contracts in which the concessionaire already “has” an exclusive right to provide the service under the contract before the concession is awarded. That condition is not met if the exclusive right recipient obtains the exclusive right first as a consequence of the award of the concession contract, as is the situation in the present case. Such an interpretation would amount to circumvention contrary to Article 3 of the Directive.

It is irrelevant that Norsk Rikstoto has had an exclusive right in the past. The previous concession expired on 31 December 2022, which means that an award of a concession contract with effect from 1 January 2023 had to be publicised under the rules in Directive 2014/23/EU. The Directive had not entered into force in the EEA when the previous concession was awarded to Norsk Rikstoto in 2016.

7.2. Submissions of the defendant

7.2.1. General remarks

The relevant award of an exclusive right to offer horse race betting to Norsk Rikstoto is not a services concession contract coming within the public procurement rules. The exclusive right is awarded by means of an exclusive administrative authorisation subject to stringent parameters and stringent public control, where the principal purpose is to ensure responsible horse race betting and prevent negative consequences of gaming. It follows from the ECJ's case law that the award of such an exclusive right to offer gaming services, without open competition from other operators, may be justified under the rules on free movement provided that the operator is subject to adequate control by the authorities, see *inter alia* C-203/08 Sporting Exchange, paragraph 59.

It is not a contract for pecuniary interest where the purpose is to obtain performance of a service. Nor does it involve consideration being paid to the supplier consisting in the right to exploit the service, see, by way of comparison, Article 5(1)(b) of Directive 2014/23.

If the authorisation is to be regarded as a services concession contract under Directive 2014/23, the State submits that the exception in the first subparagraph of Article 10(1) of the Directive, concerning awards to a body governed by public law having an exclusive right, applies.

7.2.2. The concept of "services concessions"

The Concession Contracts Directive applies *inter alia* in respect of "services concessions". Article 5(1)(b) provides a definition of the term. The concept is autonomous and is to be interpreted solely in the light of EU law, see C-486/21 Sharengo, paragraph 57. The article imposes an absolutely fundamental requirement that the contracting authority must have concluded "a contract for pecuniary interest" with a supplier. This is the case when a supplier undertakes to perform a service on behalf of a contracting authority, and the parties are subject to legally binding obligations that are enforceable before the courts, see C-451/08 Helmut Müller, paragraphs 60–62. The concept of contract has been traced out in detail in the ECJ's case law, and that court has operated for a long time with a fundamental distinction between contracts, on the one hand, and authorisations, on the other. Previously, both methods for the award of an exclusive right were covered by the rules on free movement, see C-203/08 Sporting Exchange, paragraph 46. When the Concession Contracts Directive was introduced in 2014, concession contracts were incorporated into the public procurement rules. The award of exclusive rights through administrative authorisations was, however, expressly excluded. It is not covered by the public procurement rules. Reference is made to recital 14 of the Directive.

Member States are free to choose methods for organising and controlling the operation of gambling and betting, including through the award of authorisations, see the first sentence of recital 35 of the Directive. In Norwegian law, the exclusive right to offer horse race betting has been awarded to Stiftelsen Norsk Rikstoto by means of a “classic” administrative law authorisation.

There is nothing about the authorisation denoting pecuniary interest. The awarding authority and the foundation are not subject to legally-binding obligations that are enforceable before the courts. Any breach of the conditions in the authorisation may be sanctioned by means of public law penalties in the form of inter alia withdrawal, not by means of remedies for breach. The foundation is granted authorisation to operate horse race betting, but is not under any obligation to do so. Nor does it respond to a need of the State per se. The scheme involving the direct award of an exclusive right to Norsk Rikstoto is primarily a means of pursuing societal objectives in gambling and betting policy. Moreover, the authorisation is granted by royal decree subject to specific conditions on a statutory basis and has no contractual legal basis. The content of the authorisation is not the subject of prior negotiation; rather, it is the State that sets the terms unilaterally.

The concept of concession contract is autonomous and national terminology is not decisive. The use of the term “concession” in the now-repealed Totalisator Act must not be misconstrued as a reference to the rules on concession contracts in public procurement law. In Norwegian linguistic usage, the term “*konsesjon*” (“concession”) is synonymous with the term “*tillatelse*” (“authorisation”). In the new Gaming Act, the term “authorisation” is used instead, and the change was not meant as a substantive change, but rather was intended to harmonise the use of terminology in the Gaming Act.

Nor are the other conditions in Article 5(1)(b) of the Directive on transfer of the right to exploit and operating risk met. It is an authorisation scheme the purpose of which is to maintain a responsible range of the offered gaming services. Nor does the foundation keep any of the profits, since it is paid out in their entirety to horse-related causes. It is true that Norsk Rikstoto operates gaming activities and the income comes from the players. Nevertheless, it is not correct to view the gaming income as a substitute for “consideration” from the Ministry, and there is no transfer of “operating risk” for a commercial operation. The background for the negative operating result in some years is due to the fact that Norsk Rikstoto decided on distributions to the intended recipients that exceeded the profits from operations.

As regards the rules on distribution of the profits, there is a specific regulation containing provisions on this point, issued by the authorities. This also distinguishes the scheme from a services concession contract.

7.2.3. *The exclusive right exception*

If the authorisation is to be regarded as a services concession contract under Directive 2014/23, the State submits that the exception in the first subparagraph of Article 10(1) of the Directive applies. Under that provision, services concession contracts awarded to a “contracting authority [...] on the basis of an exclusive right” do not come within the scope of the Directive.

Norsk Rikstoto is a “contracting authority” under Article 6 of the Directive. Norsk Rikstoto is a “body governed by public law” under Article 6(4)(a) to (c). It is a “legal person” connected to the public sector and was established “for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”.

Any services concession contract is, in that case, awarded “on the basis of an exclusive right”, see the first subparagraph of Article 10(1) of the Directive. This is defined in Article 5(10) of the Directive as “a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision”. Norsk Rikstoto has such an exclusive right pursuant to national law.

Application of the exception is not precluded by the fact that the exclusive right is awarded at the same time as the legislation that grants the body an exclusive right enters into force. Nor can it be required that the legislation explicitly name the relevant exclusive right provider. The preparatory works for the new Act singled out Norsk Rikstoto as the sole provider. Norsk Rikstoto also had an exclusive right to offer horse race betting under the previous legislation.

8. *Questions referred to the EFTA Court*

1. Which factors are key under EEA law for the determination of whether an award of an exclusive right for gaming is to be regarded as an administrative authorisation scheme falling outside the scope of the public procurement rules, or whether it is to be regarded as an award of a “services concession” under Article 5(1)(b) of Directive 2014/23?
2. Have the adoption and entry into force of Directive 2014/23 and its regulation of concession contracts entailed any change for how to draw the line between public contracts in the form of services concession contracts, on the one hand, and administrative authorisation schemes, on the other?
3. What significance does the fact that any profits of the party awarded the exclusive right are controlled by the State through regulation, to the benefit of third parties, have for the determination of whether one is dealing with an administrative authorisation scheme or a services concession contract?
4. Is the award of an exclusive right to offer horse race betting to a foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto, a “services concession” under Article 5(1)(b) of Directive 2014/23?
5. Is it of significance for whether the exception under the first subparagraph of Article 10(1) of Directive 2014/23 applies that the national legislation does not specifically name the holder of the exclusive right, but that the preparatory works assume that the exclusive right is to be awarded to a specific exclusive right provider, although this is not laid down in statute because an obligation may not be imposed on the foundation to offer gaming?
6. Is it of significance for whether the exception under the first subparagraph of Article 10(1) of Directive 2014/23 applies that the foundation was also awarded an exclusive right on the basis of previous national legislation, including that the foundation was awarded an exclusive right for horse race betting uninterruptedly under that previous national legislation, although for five years at a time, until such time as the exclusive right was awarded again after new legislation entered into force on 1 January 2023?

Oslo District Court

Lena Skjold Rafoss
District Court Judge