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KINGDOM OF BELGIUM
Federal Public Service
Foreign Affairs,
Foreign Trade and
Development Cooperation

EFTA COURT

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statute and Article 90 of the Rules of Procedure of the EFTA Court by:

THE KINGDOM OF BELGIUM

Represented by Mrs. Hadja LAHBIB, Minister of Foreign Affairs, European Affairs and Foreign Trade, and Federal Cultural Institutions, whose offices are located at rue des Petits Carmes 15 in 1000 Brussels, Belgium, having as agents Liesbet VAN DEN BROECK, Counsellor, Antoine DE BROUWER and Aurélie VAN BAELEN, Attachés, within the Directorate General for Legal Affairs of the Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, assisted by Sirs Philippe VLAEMMINCK, Robbe VERBEKE and Valentin RAMOGNINO, attorneys-at-law, in the case

E-8/23

Trannel International Limited v. Staten v/Kultur- og likestillingsdepartementet

in which the Oslo District Court (*Oslo tingrett*) has requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

To the President and Members of the EFTA Court

The Kingdom of Belgium is honoured to present the following submission:

I. Facts, procedure and applicable national law

1. As regards the facts of the underlying dispute, the procedure, and the precise scope and content of the Norwegian legislation that has led to the referral to the EFTA Court for an advisory opinion, the Kingdom of Belgium refers to the order of the Oslo District Court.

2. However, it is worthwhile to summarise in general terms the legal background to the dispute at hand, as well as certain critical factual elements which could prove to have a decisive influence on the legal analysis.

3. In Norway, a new Act of 18 March 2022 No 12 on gaming ("the Gaming Act") was enacted and entered into force as from 1 January 2023. The objectives of the Gaming Act are to prevent problems associated with gambling and other negative consequences of gaming and to ensure that gaming is operated in a responsible and safe manner. A third complementary objective is to facilitate profits from gaming being directed towards specific non-profit purposes (Section 1 of the Act). These three objectives do not carry equal weight. The objective of directing profits towards non-profit purposes will always be preceded by the first two objectives.

4. The Gaming Act updated the rules on totalisator betting (horse race betting) while maintaining the exclusive rights model. In particular, the Gaming Act strictly regulates the award of an exclusive right to offer horse race betting (Section 14 of the Act). Section 14 provides, on one hand, that the government shall appoint a majority of the members of the service provider's board and on the other hand, that profits from horse race betting are distributed to organisations that promote equestrian sport, horse husbandry and Norwegian

horse breeding. Accordingly, a specific regulation (Regulation of 13 March 2023 No 327) has been issued to set out provisions on the distribution of profits from horse race betting.

5. Together with the entry into force of the Gaming Act, a new Regulation of 17 November 2022 No 1978 on gaming ("the Gaming Regulation") entered into force, which sets out the details for the rules under the Gaming Act, including the requirements for gaming services offered under an exclusive right by exclusive right providers.

6. 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 (Legislative proposal Prop.220 L (2020-2021) p. 91-92).

7. Stiftelsen Norsk Rikstoto is a foundation (Article 1 of its Statutes), established in 1982, which has held an exclusive right to offer totalisator betting on the basis of the Totalisator Act of 1927 since its creation up until 31 December 2022. On the basis of the Gaming Act, Norsk Rikstoto was granted, without prior application, a new expanded authorisation to offer betting on horse racing, for a period valid of 10 years (Authorisation to offer horse race betting by Royal Decree of 9 December 2022).

8. Furthermore, it is provided in the authorisation letter, that the provider (Norsk Rikstoto) shall report annually to the Norwegian Gambling Authority (*Lotteritilsynet*) on channelling abilities and responsibility-related measures. The Norwegian Gambling Authority and the Ministry have the power to withdraw the authorization at any time if the provider does not comply with the requirements in the authorisation. The most important requirement is to secure responsible gambling (Section 34 of the Gaming Act).

9. Although there are several judgments from the European Court of Justice ("the Court") and your Court covering the concept of contract in the public procurement directives and relating to the award of an exclusive right for gaming, the Oslo District Court requests clarification with regard to the scope of the concept of a 'contract for pecuniary interest' under Directive 2014/23/EU of the European Parliament and of the Council of

26 February 2014 on the award of concession contracts[1] ("Directive 2014/23/EU"), but also of the exception in the first subparagraph of Article 10(1) of Directive 2014/23/EU for services concession contracts concluded on the basis of an exclusive right.

10. The Oslo District Court refers the following questions for an advisory opinion from 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*

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[1] *O.J.* L 94, 28.3.2014, p. 1.

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?*"

II. European law framework

11. The Oslo District Court refers to the rules enshrined in Directive 2014/23/EU, incorporated by Decision of the EEA Joint Committee No 97/2016 of 29 April 2016 amending Annex XVI (Procurement) to the EEA Agreement[2].

12. Hence, as regards the reference of EEA law in the main proceedings, the Kingdom of Belgium refers to paragraph 4 of the order of the Oslo District Court.

III. Analysis

1. Preliminary remark regarding games of chance

13. Contrary to what it may seem, the present case does not solely deal with the correct interpretation of the concept of service concessions regulated under Directive 2014/23/EU.

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[2] *O.J.* L 300, 16.11.2017, p. 49.

The dispute at hand also concerns the award of an exclusive right to offer horse race betting, and the consequential rights for the service provider, regulated in the Gaming Act which means that the Court of Justice's case-law with respect to gambling activities must be taken into account.

14. Although operating games of chance in principle constitutes an economic activity under European law, it is one of a special nature in light of the societal risks typically associated with this type of activity (fraud, crime, addiction, etc.).

15. This is settled case-law which has first been recognised in 1994 in the landmark case *Schindler*, in which the Court stated:

> "*First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.*"[3]

16. It has furthermore been expressly stated by the Court that games of chance are an activity where common unbridled application of free competition rules would have

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[3] Judgment of 24 March 1994, *Schindler*, C-275/92, EU:C:1994:119, para. 60.

detrimental effects, and that this should hence not be the premise for a Member State in deciding how to organise its national gambling markets:

> "*It is also common ground that, unlike the introduction of free, undistorted competition in a traditional market, the presence of that kind of competition in the very specific market of games of chance, that is to say, between several operators authorised to run the same games of chance, is liable to have detrimental effects owing to the fact that those operators would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction.*"[4]

17. The special nature of gambling is also the reason why it is excluded from various European legislative instruments, such as the Services Directive.[5]

18. As a result of the specific moral, religious or cultural factors that differ substantially between Member States, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, a margin of discretion is granted to the national authorities with respect to regulating gambling activities. This margin of discretion should be sufficient to enable them to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the preservation of public order.[6]

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[4] Judgment of 3 June 2010, *Sporting Exchange*, C-203/08, EU:C:2010:307, para. 58. See also judgment of 24 January 2013, *Stanleybet*, C-186/11 and C-209/11, EU:C:2013:33, para. 45.

[5] Article 2(2)(h) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *O.J.* L 376, 27.12.2006, p. 36–68.

[6] See e.g., judgment of 8 September 2010, *Markus Stoß*, C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, EU:C:2010:504, para. 76; judgment of 6 March 2007, *Placanica*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, para. 47, and judgment of 8 September 2009, *Liga Portuguesa*, Case C-42/07, EU:C:2009:519, para. 57.

19. Therefore, Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought.[7] Consequently, they are at liberty to choose a single-operator licensing system.[8]

20. Furthermore, this margin of appreciation is expressly recognised by your Court in a case regarding a casino concessions system[9] as well as in Directive 2014/23/EU on the award of concession contracts (recital 35 of the Directive's preamble).

2. Considerations with respect to the questions referred

2.1. First, second and third question: factors under EEA law for the determination of an award of an exclusive right for gaming as a "services concession"

2.1.1. The determination of a "service concession"

21. With its first question, the referring court seeks general guidance from the EFTA Court with respect to the essential factors under EEA law to distinguish an administrative authorization scheme from a "service concession".

22. First, it seems undisputed that, regarding the concept of "services concession", the Court stated that it is autonomous and must be interpreted uniformly throughout the territory of the European Union. Hence, the classification given to a contract under national legislation of a Member State is irrelevant for the qualification of a contract as a concession or a public contract under EU law.[10]

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[7] See e.g., judgment of 8 September 2010, *Markus Stoß*, C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, EU:C:2010:504, para. 77; judgment of 8 September 2009, *Liga Portuguesa*, C-42/07, EU:C:2009:519, para. 59.
[8] Judgment of 3 June 2010, *Sporting Exchange*, C-203/08, EU:C:2010:307, para. 48.
[9] Opinion of the EFTA Court of 29 August 2014, *Casino Admiral AG*, E-24/13, paras. 48-50.
[10] Judgment of 10 November 2022, *Sharengo*, C-486/21, EU:C:2022:868, para. 57.

23. The Court has qualified as "service concession" certain regimes of exclusive exploitation rights for various types of games.[11] Similarly, the EFTA Court has applied this qualification for the right to exploit the service of a casino operation.[12]

24. Nevertheless, the Court has also recalled that the system of a single authorization of exclusive rights for betting on horse races is not necessarily equivalent to a "service concession".[13] It has also stated that the restrictions on the freedom to provide services which arise from the procedures for the grant of a licence to a single operator or for its renewal, is justified if the Member State decides to grant a licence to a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.[14]

25. According to the Kingdom of Belgium, the level of State control is **significant** to determine whether the exclusive right is granted by means of an administrative law authorisation.

26. Indeed, it is significant whether the scheme chosen by a Member State providing for the direct granting of an exclusive right, similar to that of Norsk Rikstoto, is primarily a means of pursuing societal objectives in the area of gaming and betting policy and is subject to close control of the operator, and in the case of the foundation ensured by the government's direct governance of Norsk Rikstoto's board of directors.

27. In that respect, the Kingdom of Belgium notes that the Court has stated that the circumstances governing the holding of a licence by a public law entity are not disproportionate to the objectives pursued by the national legislation.[15]

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[11] Judgment of 9 September 2010, *Engelmann,* C-64/08, EU:C:2010:506 (operation of games of chance in casino) and judgment of 19 December 2018, *Stanleybet*, C-375/17, EU:C:2018:1026 (fixed-odds numerical games).
[12] Opinion of the EFTA Court of 29 August 2014 *Casino Admiral AG*, E-24/13, para. 47.
[13] Judgment of 3 June 2010, *Sporting Exchange*, C-203/08, EU:C:2010:307, para. 46.
[14] Judgment of 3 June 2010, *Sporting Exchange*, C-203/08, EU:C:2010:307, para. 59.
[15] Judgment of 21 September 1999, *Läärä and Others*, C-124/97, EU:C:1999:435.

28. In particular, the Court considers that the circumstances of a sole body holder are not disproportionate to the objectives pursued when 1) the body is a "*public-law association the activities of which are carried out under the control of the State*" and 2) "*is required to pay over the State the amount of the net distributable proceeds received from the operation of the slot machines*". The Court concludes that the sum received by the State for public interest could equally be obtained by other means (such as taxation) however the obligation imposed on the licensed public body to pay over its proceeds to the State, constitutes a measure "*which given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.*"[16]

29. The Court also clearly acknowledged that the grant of exclusive rights to operate online games of chance to a single operator, which is subject to strict control by the public authorities, may confine the operation of gambling within controlled channels and could be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.[17]

30. Therefore, the level of State control is determinant in the characterization of a public body type and in the grant of an exclusive right to operate games of chance based on the national legislation and the objectives it pursues.

31. Furthermore, the Kingdom of Belgium notes that in the *Sharengo* case, to which reference is made in the order of the Oslo District Court, the Court recalls that the concept of a "services concession" is defined in Article 5(1)(b) of Directive 2014/23/EU and that consequently :

> "*the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those services encompassing*

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[16] Judgment of 21 September 1999, *Läärä and Others*, C-124/97, EU:C:1999:435, paras. 40 and 42.
[17] Judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional*, C-42/07, EU:C:2009:519, paras. 66 and 67.

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 vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible."[18]

32. The Court then finds that it follows from a comparison of that definition with the definition of "public contracts" as provided in article 2(1)(5) of Directive 2014/23/EU that a services concession is distinguished from a public contract "*by the grant to the concessionaire of the right, possibly together with a price, to operate the services which are the subject matter of the concession, the concessionaire enjoying, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions for the operation of the services which are granted to it and assuming, at the same time, the risk associated with operating those services.*"[19]

33. Moreover, in *Helmut Müller*, to which reference is made in the Order of the Oslo District Court, the concept of a contract of pecuniary interest is based on the premise that the contractor assumes a direct or indirect obligation to carry out the service, which is the subject of the contract, in return for consideration. In this respect it is therefore relevant that the execution of the contract must be legally enforceable under national law since the obligations are legally binding.[20]

34. The Court indeed stated that "*the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assumes a*

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[18] Judgment of 10 November 2022, *Sharengo (Directive 2014/23)*, C-486/21, EU:C:2022:868, para. 59. The Kingdom of Belgium underlines.
[19] Judgment of 10 November 2022, *Sharengo (Directive 2014/23)*, C-486/21, EU:C:2022:868, para. 59. The Kingdom of Belgium underlines.
[20] Judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paras. 60-62.

direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law."[21]

35. However, those factors are not only stated in the abovementioned case-law of the Court but have also been implemented in Directive 2014/23/EU, more precisely in recitals 11 and 18 regarding the factors determining concessions contracts (pecuniary interest, transfer of ownership and legally enforceable obligations) and in recital 14 regarding the factors determining an authorization or licence.

36. Therefore, the Kingdom of Belgium suggests that the EFTA Court replies to the question referred that the essential factors to determine whether the award of an exclusive right to operate gambling services should be regarded as an administrative authorization scheme or as the award of a "service concession" are to be found in the established case-law of the Court and has been implemented in Directive 2014/23/EU.

2.1.2. The impact of the entry into force of Directive 2014/23/EU

37. With its second question, the referring court in essence asks the EFTA Court to clarify whether the adoption and entry into force of Directive 2014/23/EU and its regulation of concession contracts entails any change for the abovementioned demarcation.

38. It is undisputed that prior to the entry into force in 2017 in the EEA of Directive 2014/23/EU, service concession contracts were not governed by a directive regulating the field of public procurement. However, public authorities concluding such contracts were already required to comply with the TFEU, in particular Article 56 TFEU, the principles of equal treatment and non-discrimination on grounds of nationality, and the resulting obligation of transparency.

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[21] Judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, para. 63.

39. Since Directive 2014/23/EU is applicable in the EEA, the concepts and definitions concerning service concession contracts and administrative authorisation schemes developed in that Directive should be taken into account for their demarcation.

40. According to the Kingdom of Belgium, the concepts currently enshrined in Directive 2014/23/EU implement the case-law of the Court in that regard (notably cases *Sharengo* and *Helmut Müller*). It does not change the demarcation of the concepts *per se*, but rather clarifies them and gives them a basis in secondary EU law. Member States must consider the concepts and definitions as set out in Directive 2014/23/EU.

41. Concomitantly, it should be noted, for instance, that the granting of exclusive rights by means of administrative authorisations has been expressly excluded from the scope of Directive 2014/23/EU (recital 14 of the Directive).

42. According to the Kingdom of Belgium, the case-law of the Court and the EFTA Court whether the award of an exclusive right to operate gambling services should be regarded as an administrative authorization scheme or as the award of a "service concession" has been implemented in Directive 2014/23/EU, which nevertheless indicates no changes in the demarcation but a confirmation of the factors to take into account.

43. Therefore, the Kingdom of Belgium suggests that the EFTA Court replies negatively to the second question referred whether Directive 2014/23/EU entailed any change to such demarcation. Directive 2014/23/EU builds on the case-law of the Court and the EFTA Court with respect to the concept of concessions but does not entail a fundamental change in this respect.

2.1.3. The significance of the fact that any profits of the exclusive (gambling) service provider are controlled by the State.

44. With its third question, it asks whether 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 significance in this regard.

45. In the present case, it appears that in the Norwegian regulation (Section 14 of the Gaming Act), it is provided that profits from horse race betting should entirely be directed to organisations that promote equestrian sport, horse husbandry and Norwegian horse breeding. The provider has to operate efficiently, so that as much as possible of the income from the provider's betting services is directed towards those non-profit purposes.

46. Furthermore, the Regulation of 13 March 2023 No 327 regulates the distribution of the profits (defined as the operating result) in such a way that 97% is to be distributed to pre-determined organisations without an application. Only up to 3% of the profits may be distributed to other parties (Section 5 of the Regulation) which is to the Ministry of Agriculture to grant such profits and control its distribution.

47. According to the Kingdom of Belgium, the fact that profits, if any, are controlled by the State by regulation, for the benefit of third parties, should be decisive in determining whether the award of an exclusive right qualifies as a system of administrative authorisation or a service concession contract. Indeed, if such award of an exclusive right is an authorisation scheme with the objective to maintain a responsible supply of gambling services, which is apparent from the fact that the provider does not retain control over the profits but rather distributes them to specific causes as determined by the authorities, then the exclusive right in question cannot qualify as a service concession.

48. According to the Kingdom of Belgium, the fact that the foundation does not keep any of the profits is characteristic of an element of an administrative authorisation scheme where the purpose is to ensure and maintain responsible gaming services.

49. This interpretation is supported by the Court's case-law, finding that an obligation imposed on the licensed public body, which requires it to transfer to the State the profits deriving from operating games of chance, constitutes a measure which, given the risk of

crime and fraud, is effective in ensuring that strict limits are set to the lucrative nature of such activities.[22]

50. The Kingdom of Belgium is of the opinion that the entry into force of Directive 2014/23/EU has not undermined the importance and relevance of the criteria set out in the case-law of the Court and of the EFTA Court, including the fact that any profits of the exclusive service provider are controlled by the State.

51. Therefore, the Kingdom of Belgium suggests that the EFTA Court replies to the question referred that 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 a **predominant** significance for determining of whether it deals with an administrative authorisation scheme or a services concession contract.

52. The Kingdom of Belgium suggests that the EFTA Court replies that the fact that any profits of the exclusive (gambling) service provider are controlled by the State is a characteristic of an administrative authorisation scheme.

2.2. Fifth and sixth Question: Significance of the name of the holder of the exclusive right in the preparatory works and of previous award of exclusive right for horse race betting for the application of the exception under the first subparagraph of Article 10(1) of Directive 2014/23/EU

53. Having established the decisive factors to determine the demarcation between an administrative authorization scheme on the one hand and a service concession contract on the other, the Kingdom of Belgium deems it necessary to clarify the scope and conditions of the exclusion provided in the first subparagraph of Article 10(1) of Directive 2014/23/EU. This will answer the fifth question by which the referring court wants the EFTA Court to clarify whether the fact that the name of a single economic operator is not

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[22] Judgment of 21 September 1999, *Läärä and Others*, Case C-124/97, EU:C:1999:435, paras. 40 and 42.

expressly mentioned in the relevant legislation is determinant for the application of the exception under the first subparagraph of Article 10(1) of Directive 2014/23/EU.

54. First and foremost, the first subparagraph of Article 10(1) of Directive 2014/23/EU provides an exception to the application of the Directive to services concessions awarded to a contracting authority including "bodies governed by public law" as defined in Article 6(4), on the basis of an exclusive right. Furthermore, Article 5(10) defines "exclusive right" as a right granted by a competent authority of a Member State by means of any law, regulation or administrative provision with the effect to limit the exercise of an activity to a single economic operator.

55. According to the Kingdom of Belgium, it is highly relevant that the preparatory works originate from the principle that the exclusive right must be attributed to a specific provider of exclusive rights, in this case Norsk Rikstoto. It is legitimate not to impose a statutory obligation on the foundation in view of its legal independent status (not State-owned). The non-statutory obligation also presents a characteristic element of an administrative authorisation or licence scheme.

56. Indeed, in that regard, the difference with Norsk Tipping, which is named in the Gaming Act, is clear since Norsk Tipping is a company wholly owned by the State. The main difference is therefore the ownership. However, the fact that the preparatory works name Norsk Rikstoto as the exclusive service provider, while stating "*that some steps should be taken to increase the level of responsibility and public control of horse race betting*" is characteristic of an administrative authorisation and of a sufficient degree of public control of Norsk Rikstoto by the State (Legislative proposal Prop. 220 L (2021-2022) p. 90).

57. On the other hand, it should not be compulsory to mention the operator in the Gambling Act, since there may be different operators, or a change of operator if the conditions are no longer met by the initial provider of the exclusive right. It is relevant to differentiate a concession from an authorisation in that it is up to the operator to decide

whether it wishes to organise games of chance in the case of an authorisation, within the parameters set by the State.

58. With its sixth question, the referring court is asking the EFTA Court to clarify whether the fact that the foundation was awarded an exclusive right on the basis of previous legislation is determinant for the application of such an exception.

59. According to the Kingdom of Belgium, the fact that the foundation had an exclusive right on the basis of earlier national legislation is relevant but not determinant as part of the characterization of the Article 10(1) exclusion.

60. Indeed, on the one hand it is relevant since the past exclusive right illustrates that the earlier regime was defined as an award to a contracting authority or to a contracting entity or to an association (like Norsk Rikstoto as a foundation) on the basis of an exclusive right.

61. Moreover, this fact mainly demonstrates that the foundation was already connected to the public sector and was "*established for the specific purpose of meeting needs in the general interest*" (Article 6 paragraph 4 (a)), which seems to confirm its classification as a "body governed by public law".

62. On the other hand, however, according to the Kingdom of Belgium, this fact is **not determinant** for the application of the exception of Article 10(1) of Directive 2014/23/EU since that Directive did not apply under the old foundation's authorisation based on a different set of rules (Totalisator Act of 1927). Hence, the application of the exception must now be examined under the Gaming Act to ascertain whether Norsk Rikstoto has such an "exclusive right" pursuant to the relevant national legislation.

63. Therefore, according to the Kingdom of Belgium, the fact that the foundation was awarded for a long time (40 years) an exclusive right to offer totalisator betting in Norway is not a primary element to take into consideration when applying or not applying now the exception of Article 10(1) of Directive 2014/23/EU.

2.3. Fourth question: Assessment to be done by national judge

64. With its fourth question, the referring court seems to ask the EFTA Court to make an assessment under EU law of the facts. It is however up to the referring court to make an assessment, taking into account all relevant facts of the case, in accordance with European law as it will be clarified by the advisory opinion of the EFTA Court.

65. Although the Kingdom of Belgium cannot have a full view on the facts, nor on the relevant provisions of Norwegian law to be taken into consideration, it seems from the order of the Oslo District Court that the award of an exclusive right to offer horse race betting to a foundation organised and controlled by the State as Stiftelsen Norsk Rikstoto is an administrative authorisation and not a service concession.

66. According to the Kingdom of Belgium, it should be answered that the award of an exclusive right to offer horse race betting to a foundation organised and controlled by the State as Stiftelsen Norsk Rikstoto is in conformity with EEA law.

67. If the national court would however find that the award of the exclusive right is a service concession, it would – as explained above – have to determine in accordance with national law if the exception in the first subparagraph of Article 10(1) of the Directive 2014/23/EU applies, whereby a services concession contract awarded to a "*contracting authority (...) on the basis of an exclusive right*" is not in the scope of the Directive.

68. According to the Kingdom of Belgium, the national court would have to take into consideration the fact that the foundation, even not named in the Gaming Act, is explicitly singled out as the sole provider in the preparatory works of the Gaming Act.

69. The Kingdom of Belgium is of the opinion that the facts are demonstrative of the fact that the award is not a concession in the first place, and that the foundation is a 'body governed by public law', therefore, the exception of Article 10(1), first subparagraph of Directive 2014/23/EU would apply in the alternative.

70. Furthermore, according to the Kingdom of Belgium, it is of the utmost relevance that the Court has stated expressly that in any event, certain restrictions on the fundamental freedom to provide services enshrined in Article 56 TFEU in the context of a procedure to grant a licence to a single operator or for the renewal thereof (in the sense that it is not done through a public tendering procedure) may be regarded as justified if the Member State concerned decides to grant a licence to, or to renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities[23].

71. Therefore, the conditions for the award of the exclusive right to offer totalisator betting in Norway granted to Norsk Rikstoto in order to ensure responsible gaming, which is characterised by a strict control of Norsk Rikstoto's activities by the public authorities, should justify in any case the restriction consisted of the absence of tendering procedures.

IV. Conclusion

72. In light of the above analysis, the Kingdom of Belgium proposes to answer the questions referred to as follows:

First, second and third questions:

"EU law requires that the concepts of "service concession" and "administrative authorization" shall be distinguished based on the following factors:

- ***Service concessions are contracts for pecuniary interest by which a contracting authority entrusts the performance and management of services to one or more economic operators.***
    - ***a) There must be a consideration, either solely of the right to exploit the services subject of the contract or of this right accompanied by a price;***

[23] Judgment of 3 June 2010, *Sporting Exchange*, Case C-203/08, ECLI:EU:C:2010:30, para. 58.

b) *The operating risk is transferred to the concessionaire;*

c) *Concession contracts entail mutually binding commitments, under which the performance of services is subject to specific requirements defined by the contracting authority, which requirements are enforceable in courts.*

- *Administrative authorizations are those where the operator receives permission to operate a service but is under no obligation to do so.*

  a) *Authorizations have no contractual basis;*

  b) *In the case of an authorization granted to a single operator, the operator must be subject to adequate control by the authorities, which is a matter for the national court to determine, including of the fact that any profits of the exclusive service provider are controlled by the State.*

Fifth and sixth question:

"The fact that national legislation does not specifically name the holder of the exclusive right is not per se relevant. By contrast, it is significant that the preparatory works assume that the exclusive right is to be awarded to a specific exclusive right provider for the application of the exception under the first subparagraph of Article 10(1) of Directive 2014/23/EU.

Furthermore, the fact that the foundation was 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 is relevant but not determinant for the application of the exception under the first subparagraph of Article 10(1) of Directive 2014/23/EU."

Brussels, 19th October 2023

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