

Brussels, 23 October 2023
Case No: 90874
Document No: 1401506

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by
Kyrre Isaksen, Ewa Gromnicka and Melpo-Menie Joséphidès,
of the Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-8/23

Trannel International Limited

v

Staten v/ Kultur- og likestillingsdepartementet

in which the Oslo District Court (Oslo tingrett) requests an advisory opinion on Directive 2014/23/EU of 26 February 2014 of the European Parliament and of the Council on the award of concession contracts.

Table of Contents

1	INTRODUCTION AND THE FACTS OF THE CASE	3
2	EEA LAW and NATIONAL LAW	4
3	THE QUESTIONS REFERRED	4
4	LEGAL ANALYSIS	5
4.1	Introduction to the legal analysis	5
4.2	Question 2 - changes by the entry into force of the Concessions Directive	6
4.3	Questions 1, 3 and 4 - distinction between concessions and administrative authorisation	7
4.4	Questions 5 and 6 - on the exclusive rights exemption	14
5	CONCLUSION	17

1 INTRODUCTION AND THE FACTS OF THE CASE

1. The present request for an advisory opinion (**‘the request’**) by the Oslo District Court (**‘the referring court’**) of 6 July 2023 concerns whether the award of an exclusive right to offer horse race betting to a foundation organised like Stiftelsen Norsk Rikstoto (**‘Rikstoto’**) is a *services concession* under Directive 2014/23 on the award of concession contracts (**the ‘Concessions Directive’ or the ‘Directive’**).¹
2. The Norwegian State, acting through the King-in-Council (the Government), awarded 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 plaintiff before the referring court, the international gaming company Trannel International Limited (**‘the plaintiff’**), has applied for authorisation to offer totalisator betting in Norway.
3. The case concerns an action for a 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*),² for lack of publication of what the plaintiff alleges to be a public concession contract.³
4. The parties disagree as to whether Rikstoto’s exclusive right was awarded through a “services concession” for the purposes of Article 5(1)(b) of the Concessions Directive. If the award of the exclusive right in question is to be regarded as a services concession contract, 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.
5. Given the doubts relating to the interpretation of the Concessions Directive, the referring 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 referring

¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts as corrected by OJ L 114, 5.5.2015, p. 24; incorporated into point 6f of Annex XVI (Procurement) of the EEA Agreement by JCD No 97/2016 of 29 April 2016.

² *Lov om offentlige anskaffelser (anskaffelsesloven)* - LOV-2016-06-17-73.

³ Section 13 of Public Procurement Act 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.

court has decided not to refer any questions to the EFTA Court relating to that part of the case.

6. For the reasons set out in these written observations, the EFTA Surveillance Authority ('ESA') submits that the award of an exclusive right to offer horse race betting to a foundation organised like Stiftelsen Norsk Rikstoto is *not* a services concession, as defined by Article 5(1)(b) of the Directive in essence because it is an administrative authorisation and not a "contract for pecuniary interest".

2 EEA LAW and NATIONAL LAW

7. With regard to the EEA and national law relevant for the present case, ESA refers to the request of the referring court which presents it in a clear and complete manner. Where necessary, reference will be made to the relevant paragraphs of the request.

3 THE QUESTIONS REFERRED

8. The national court has referred the following questions 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 uninterrupted 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?”*

4 LEGAL ANALYSIS

4.1 Introduction to the legal analysis

9. In the words of the EFTA Court, all games of chance (gambling and betting) provided in return for money constitute economic activities falling within the scope of the EEA fundamental freedoms.⁴
10. However, the EFTA Court and the Court of Justice of the European Union (‘CJEU’) have also repeatedly recognised EEA States’ considerable margin of appreciation to restrict gambling services when pursuing legitimate public interest objectives such as the protection of minors, the fight against gambling addiction, or to combat irregularities and fraud.⁵
11. Against this background, ESA on 10 February 2021 decided to deprioritize the treatment of complaints in the area of gambling, pointing out that complaints relating

⁴ See Case E-3/06 *Ladbrokes*, paragraph 39 and case law cited and See Case E-24/13 *Casino Admiral AG*, paragraph 48.

⁵ See, for example, Case E-1/06 *ESA v Norway*.

to gambling may instead be handled more efficiently by national courts, guided by the numerous judgements the EFTA Court and the CJEU have rendered on national gambling legislation. Complainants were therefore encouraged to make use of national remedies when facing problems with EEA law in the gambling sector or on gambling related issues, as the plaintiff has done in the present case. With its decision of 10 February 2021, ESA aligned itself with the European Commission, which in December 2017 took a similar approach.

12. ESA's written observations will be divided into three parts. First, ESA will suggest an answer to question 2 concerning whether the Concessions Directive has entailed any change for how to draw the line between public contracts in the form of services concessions, on the one hand, and administrative authorisation schemes, on the other. Thereafter ESA will offer its observations on questions 1, 3 and 4 from the referring court concerning the difference between service concessions under article 5(1)(b) of the Concessions Directive and administrative authorisations. In the last part ESA will focus on the award of the exclusive right and the significance of the circumstances of the award for the exception in Article 10(1) of the Directive, providing answers to questions 5 and 6.

4.2 Question 2 - changes by the entry into force of the Concessions Directive

13. By its second question, the referring court asks in essence whether the Concessions Directive 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.
14. At the outset, ESA notes that at the time when the Concessions Directive was adopted in 2014, the award of work concessions was subject to a limited number of secondary law provisions, while for service concessions the general principles of EEA law were applicable. The aim of the Concessions Directive, as set out in recitals 1 and 4, was to reduce the uncertainty surrounding the award of concessions contracts, and thereby benefit public authorities and economic operators.⁶

⁶ See also Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, COM/2011/0897 final, page 1.

15. The uncertainty also concerned the distinction between public contracts and concessions and *other types of arrangements or unilateral acts* (such as grants, licences or authorisation schemes).⁷
16. In many ways the Concessions Directive has achieved its aim, but some uncertainty persists, as regards the distinction between administrative authorisation schemes, and services concessions covered by the Directive.
17. Nevertheless, as regards this distinction, the purpose of the Directive was to provide clarity, not change. Hence, and as clearly follows from Recitals 14 and 35 of the Directive, administrative authorisation schemes still fall outside the scope of the Directive. This is, in ESAs view, also confirmed by subsequent case law.⁸
18. Based on this ESA submits that case law from the European Courts from before the adoption of the Concessions Directive, as a starting point, is still relevant for the determination of whether an award of an exclusive right is to be regarded as an administrative authorisation scheme, falling outside the scope of the Directive, or an award of a services concession under the Directive.

4.3 Questions 1, 3 and 4 - distinction between concessions and administrative authorisation

19. In question 1 the referring court asks 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 the Concession Directive.
20. Question 3 concerns the significance for this determination of the fact that any profits are controlled by the State through regulation, to the benefit of third parties.
21. In question 4, the referring court asks, if the award of an exclusive right, such as in the present case, is a services concession under Article 5(1)(b) of the Concessions Directive.
22. ESA finds it appropriate to answer questions 1, 3 and 4 together.
23. Relevant factors for determining whether an award of an exclusive right for gambling is to be regarded as an administrative authorisation scheme or a services concession can be found in the Concessions Directive.

⁷ *Ibid*, page 11.

⁸ See Case C-517/20 *OL*, EU:C:2023:219, paragraph 30.

24. Those factors will be presented and assessed below, but before that, ESA finds it useful to make some general comments about the rationale behind exempting administrative authorisation schemes from the scope of the Concessions Directive.
25. Administrative authorisations involve the exercise of power, in that the economic operator requires a permission to perform the relevant service, and the public authority has the power to grant such permissions. In a situation where a public authority grants, or awards, an authorisation, certain rights and obligations are placed on the beneficiary of the authorisation. Hence, the relationship is one of rights and obligations based on legislation and administrative acts, rather than reciprocity based on contracts.⁹
26. Services concessions, on the other hand, require a contract between the contracting authority and the economic operator.¹⁰ As formulated in Recital 14 of the Concessions Directive, in contrast to acts such as authorisations or licenses, 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.
27. The concept of services concessions within the Concessions Directive is an autonomous concept of EU law and must, on that basis, be interpreted uniformly throughout the EEA. It follows that the legal classification given to a contract by the law of an EEA State is irrelevant for the purpose of determining whether that contract falls within the scope of the Concessions Directive and that the question of whether a contract is to be classified as a concession must be assessed exclusively in the light of EEA law.¹¹ Obviously, public authority cannot circumvent the application of the Directive just by labelling the award of an exclusive right as an administrative authorisation, if it in fact is a services concession as defined in the Directive.
28. The EEA public procurement framework of which the Concessions Directive forms part, deals with *procurement*, that is, some form of “acquisition” by the contracting authority/entity.¹² On the other hand, an authorisation is a permission to do

⁹ See also by analogy the definition of ‘authorisation scheme’ in Article 4(6) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. It should be noted that gambling falls outside the scope of the Services Directive, see Recital 25 and Article 2(2)(h).

¹⁰ See Article 5(1)(b) of the Concessions Directive.

¹¹ See Case C-486/21 *SHARENGO*, EU:C:2022:868, paragraph 57.

¹² As regards procurement and acquisition, see Article 1(2) of Directive 2014/24/EU.

something, rather than a guarantee of delivery. Whilst there are similarities between the two types of operations, the three procurement directives clearly are all limited to *contracts* for pecuniary interest in exchange for goods, services or works. If an authorisation does not entail such a synallagmatic contract, it will not fall under the Concessions Directive.

29. The determination of whether something is an administrative authorisation scheme or a services concession, is in practice not always clear, as the present case demonstrates, where, one could argue, as a matter of Norwegian law, that administrative law meets contractual law.

30. To determine whether an award of an exclusive right for gambling is to be regarded as an administrative authorisation or a services concession, the Concessions Directive sets out certain factors characterising authorisations in general in Recital 14, as well as positively defines “services concessions” in Article 5(1)(b). In addition, Recital 35 reiterates that the Directive should not affect the freedom of States to choose, in accordance with EEA law, methods for organising and controlling the operation of gambling and betting, *including by means of authorisations*.

31. The term “services concession” is defined in Article 5(1)(b) of the Concessions Directive as follows:

“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 [...] 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.”

32. Article 5(1) further specifies that concessions contracts involve the transfer to the concessionaire of an operating risk.

33. Recital 14 of the Concessions Directive qualifies this definition, by specifying what a concession is *not*:

“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 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."

34. As regards gambling specifically, Recital 35 of the Concessions Directive adds:

"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."

35. Hence, Recital 14 makes it clear that certain acts by the EEA States, such as authorisations and licences, should not qualify as concessions, and thus fall outside the scope of the Concessions Directive. The Recital sets out four factors characterising administrative authorisations. Firstly, there must be a *state act* such as an *authorisation* or a licence. Secondly, that the act establishes the *conditions for the exercise of an economic activity*, including a condition to carry out a given operation. Thirdly, that the economic operators remain *free to withdraw*. In addition, Recital 14 mentions that the act *normally is granted on request of the economic operator*, not on the initiative of the contracting authority or the contracting entity.

36. As regards the positive definition of "services concessions" in the Concessions Directive, Article 5(1)(b) also sets out four factors, or conditions. Firstly, there must be a *contract for pecuniary interest*. Secondly, the contract must be concluded in writing by means of which one or more contracting authorities or contracting entities *entrust the provision and the management of services to one or more economic operators*. Thirdly, the consideration of the contract consists either *solely in the right*

to exploit the services that are the subject of the contract or in that right together with payment. Fourthly, the contract shall involve the *transfer of an operating risk* in exploiting those services.

37. Starting with the determination of whether the award of the exclusive right could be considered an *administrative authorisation*, thereby applying the factors identified above to the present case, ESA notes that it seems uncontested that the exclusive right in the present case is based on a *state act*, as the exclusive right was awarded through a decision by the King in Council (the Government), pursuant to Section 14 of the Gaming Act. Furthermore, as regards the second factor, the conditions are indeed set out in the authorisation, as well as in Section 14 of the Gaming Act.
38. A decisive factor when distinguishing an administrative authorisation from a services concession, seems to be to what extent the economic operator remains *free to withdraw* from the provision of works or services.¹³ This does not seem to be regulated explicitly in the authorisation or in the Gaming act, but is presumably a question of Norwegian administrative law.
39. Whereas it is for the referring court to assess whether Rikstoto can withdraw from the provision of horse race betting services, ESA notes that there are decisive elements in the request pointing in that direction. First, the preparatory works of the Norwegian Gaming Act indicate that it is “up to the foundation itself to decide whether it wants to operate gaming”,¹⁴ which in ESA’s view could be understood as including the possibility to withdraw from the provision of horse race betting services. Second, the Norwegian Government has argued that Rikstoto is granted authorisation to operate horse trade betting, but is under no obligation to do so, indicating that Rikstoto could withdraw.¹⁵
40. As regards the reference in Recital 14 to the act normally being granted on request of the economic operator, not on the initiative of the contracting authority or the contracting entity, ESA notes that this does not seem to be the situation in the present case. However, the reference to *normally* indicates that this might not always be the case. The fact that this is an *exclusive* authorisation, indeed makes

¹³ Judgment of the CJEU in joined cases C-458/14 and C-67/15, *Promoimpresa*, EU:C:2016:558. See particularly the Opinion of AG who elaborates extensively on the distinction between services concession and administrative authorisation in Opinion of 25 February 2016, EU:C:2016:122, paragraphs 61 to 67.

¹⁴ Prop.220 L (2020-2021) pp. 91-92, referred to in the request page 10 and 11.

¹⁵ The request page 19.

it different from other, non-exclusive authorisations, open to being granted on requests from economic operators.

41. Based on this, ESA is of the view that the exclusive right in the present case is an administrative authorisation scheme falling outside the scope of the Concessions Directive.
42. ESA will also consider the conditions set out in Article 5(1)(b) of the Concessions Directive, and thereby suggest an answer to the fourth question from the referring court, concerning if the award of an exclusive right to offer horse race betting in a similar manner to that of Rikstoto is a services concession.
43. To recall, and as set out in paragraph 36 above, Article 5(1)(b) sets out four factors, or conditions: There must be a *contract for (1) pecuniary interest*, the contract must (2) *entrust the provision and the management of services to one or more economic operators*, (3) the consideration of the contract consists either *solely in the right to exploit the services that are the subject of the contract or in that right together with payment* and (4) the contract shall involve the *transfer of an operating risk* in exploiting those services.
44. The notion of “pecuniary interest” requires that the service provided by the economic operator is subject to some kind of *remuneration obligation* on the part of the contracting authority.¹⁶ As regards the remuneration, the CJEU has held that a contract does not cease to be a contract for pecuniary interest merely because it is limited to reimbursement of the expenses incurred in providing the agreed service.¹⁷ Hence, the fact that Rikstoto is obliged, pursuant to the Gaming Act Section 14, to pass on the profits from the horse racing betting, and thus is only allowed to keep revenue in order to cover expenses,¹⁸ does not in ESAs view necessarily mean that the exclusive right cannot be a contract for pecuniary interest.
45. The case law also requires, in addition to participation by two parties, *reciprocity* in the form of the material exchange of consideration.¹⁹ Hence, such reciprocity of the

¹⁶ Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH*, EU:C:2020:395, paragraph 40; Case C-606/17 *IBA Molecular*, EU:C:2018:843, paragraphs 30 and 31; Case C-367/19 *Tax-Fin-Lex d.o.o. v. Ministrstvo za notranje zadeve*, EU:C:2020:685, paragraph 25.

¹⁷ Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others*, EU:C:2012:817, paragraph 29. See also the AG Opinion in that case, EU:C:2012:303, paragraphs 32 to 34.

¹⁸ ‘Profits’ (Norwegian: *overskudd*) is defined in Section 2 of the Gambling Regulation as ‘the operating profit from horse race gambling with the operator who has the exclusive right’.

¹⁹ See e.g. Case C-451/08 *Helmut Müller*, EU:C:2010:168, paragraph 48, citing Case C-399/98 *Ordine degli Architetti and Others*, EU:C:2001:401 and Case C-220/05 *Auroux and Others*, EU:C:2007:31; Case C-51/15 *Remondis*, EU:C:2016:985, paragraph 43, referring with approval to the Opinion of AG Mengozzi in the same case, EU:C:2016:504, at paragraph 36; Case C-606/17 *IBA Molecular Italy*, EU:C:2018:843, paragraph 28.

contractual relationship is necessary for the Concessions Directive to apply. Furthermore, the reciprocal nature of a services concessions contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable.²⁰

46. This reciprocal nature is, in ESA's view, absent in the present case. The award gives Rikstoto an exclusive right to provide horse race betting in Norway, but there is no reciprocity in the form of the material exchange of consideration. In addition, the award of the exclusive right does not seem to be a contract that is legally enforceable. On the contrary, as addressed above in paragraph 38, it seems Rikstoto is able to withdraw from the exclusive right and the Government has no ability to prevent that or enforce performance.²¹
47. Based on this, ESA submits that there is no "services concession" under Article 5(1)(b) of the Directive, as there is no "contract of pecuniary interest". In the alternative, however, and for completeness, ESA will in the following also include an assessment of the other factors mentioned in Article 5(1)(b) of the Directive.
48. ESA notes that it seems clear that Rikstoto was entrusted with the right to *provide and manage the services* of horse race gambling, thus (subject to the lack of pecuniary interest) fulfilling what was described as the second factor in paragraph 43 above.
49. Moving on to the issue of whether the consideration of the contract consists either *solely in the right to exploit the services that are the subject of the contract or in that right together with payment*, ESA notes that there is no *payment* in the present case. Hence, based on the wording of Article 5(1)(b), to the extent there is consideration, it consists solely in the right to exploit the services of horse race gambling. It could be argued that Rikstoto is not *exploiting* the services, as that seems to suggest that the operator must be able to make profit, whereas in the present case, Rikstoto is obliged to distribute the profits. However, with reference to paragraph 44 above, since the CJEU, as regards remuneration, has held that a contract does not cease to be a contract for pecuniary interest merely because it is limited to reimbursement of the expenses incurred in providing the agreed service,²² similarly, the fact that an operator is allowed only to keep revenue to cover

²⁰ See by analogy, Case C-451/08, *Helmut Müller*, paragraph 62 and Case C-367/19 *TaxFin-Lex d.o.o. v. Ministrstvo za notranje zadeve*, paragraph 26.

²¹ See Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH*, paragraph 49.

²² Case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 29.

expenses, cannot in itself prevent the right from being *exploitation* of the services. ESA notes that this furthermore, in essence, answers the third question from the referring court: the fact that the *profits* are controlled by the State through regulation and distributed to the benefit of third parties²³ has no significance to determine whether the arrangement is a concession or an administrative authorisation.²⁴

50. Lastly, as regards the issue of whether the award of the exclusive right involves the *transfer of an operating risk*, ESA notes that there does not seem to be any direct reference to this in the Gaming act or in the authorisation. Pursuant to point 6.4 of the request, Norwegian authorities have not provided a guarantee in order for Rikstoto to recuperate the costs incurred in operating the betting services. On the other hand, based on the limited information at hand, ESA submits that it is for the referring court to assess to what extent the award of the exclusive right involves the *transfer of an operating risk*.

51. In conclusion, ESA submits that the award of an exclusive right to offer horse race betting to a foundation organised in a manner similar to that of Rikstoto is an administrative authorisation, falling outside the scope of the Concessions Directive. ESA therefore also submits that it is not a services concession under Article 5(1)(b) of the Directive, as there is no “contract of pecuniary interest”.

52. For the sake of completeness, ESA would like to mention that even though an authorisation, like the one in the present case, would fall outside the scope of the Concessions Directive, it could still be contrary to the EEA Agreement, for example to the fundamental freedoms or fundamental principles of EEA law. These questions have however not been referred in the present case and fall outside the remit of these written observations.

4.4 Questions 5 and 6 - on the exclusive rights exemption

53. By its fifth question, the referring court asks if it is of significance for whether the exception under the first paragraph of Article 10(1) of the Concessions Directive applies that the national legislation does not specifically name the holder of the

²³ The Authorisation, conditions 2 and 3, as referred to on page 12 of the request. See also Section 5 of the Regulation of 13 March 2023 No 327 (*Forskrift om fordeling av overskuddet fra pengespill på hest*) (“the Gambling Regulation”), as referred to on page 8 of the request.

²⁴ ESA notes that Case C-203/08 *Sporting Exchange* EU:C:2010:307, paragraphs 59-60, which is referred to in the request, concerned the significance of a *private operator* being *subject to strict control by public authorities*, which in ESA’s view is different from the question of the significance of the *profits* being controlled by the State and distributed to third parties.

exclusive right, but that but that the preparatory works assume that the exclusive right is to be awarded to a specific provider, although this is not laid down in statute because an obligation may not be imposed on the foundation to offer gaming.

54. Furthermore, the sixth question concerns the significance for whether the exception under the first subparagraph of Article 10(1) of the Concessions Directive 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.
55. ESA considers it appropriate to answer those two questions together.
56. ESA primarily argues that, in light of the answer to the first, third and fourth questions, there is no need to reply to the fifth and sixth questions. Indeed, as the arrangement with Rikstoto is an administrative authorisation and not a services concession, these latter questions are hypothetical.
57. If the arrangement is to be considered a services concession as defined in the Concessions Directive, the Directive shall nevertheless not apply if that concession is “awarded to a contracting authority [...] on the basis of an exclusive right”, as set out in Article 10(1) first subparagraph.
58. ESA notes that for this Article to apply, *the economic operator entrusted with the contract* must fall within the definition of a ‘contracting authority’, as defined in Article 6 of the Directive.²⁵ Hence, the first issue is whether Rikstoto is to be considered as a ‘contracting authority’ as defined in Article 6 of the Directive. In ESA’s view, the most relevant alternative in the present case is Article 6(4), i.e., ‘bodies governed by public law’, which is for the referring court to assess.
59. The second issue is the understanding of “awarded [...] on the basis of an exclusive right”. “Exclusive right” is defined in Article 5(10) as “a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity”.

²⁵ Or be a contracting entity as referred to in point (a) of Article 7(1) of the Directive, or an association of such contracting authorities/entities.

60. Recital 32 elaborates on the rationale for this provision:

“In certain cases, a given contracting authority or contracting entity which is a State, regional or local authority or body governed by public law or a given association thereof might be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to national laws, regulations or published administrative provisions which are compatible with the TFEU. It should be clarified that in those situations a contracting authority or contracting entity as referred to in this recital or association thereof may award concessions to such bodies without this Directive being applied.”

61. The correct reading of Article 10(1) first subparagraph, ESA submits, is that the concession is *based on an exclusive right*, but not that the legal basis for granting that concession must be found in an exclusive right. Whereas elaborating on this distinction would go beyond what is necessary for the scope of the present case, ESA has adopted a position on the point that the concession is based on an exclusive right in another case.²⁶

62. Consequently, in ESA’s view, a situation as in the present case, whereby a concession, based on an exclusive right, granted by means of applicable national laws, such as Section 14 of the Gaming Act, could be covered by the exception in Article 10(1).

63. Accordingly, ESA submits that the answer to the fifth question from the referring court is that it is of no relevance, for whether the exception under the first subparagraph of Article 10(1) of the Concessions Directive applies, that the national legislation does not specifically name the holder of the exclusive right.

64. Furthermore, as regards the sixth question, ESA submits that it is of no significance that Rikstoto was awarded an exclusive right uninterruptedly under the previous national legislation. The question would be whether the foundation has been awarded an exclusive right, fulfilling the conditions of Article 10, read in accordance with Article 5(10), in respect of the services (to be) covered by the concession in question.

²⁶ In this respect, ESA notes for information that it has had cause to consider the application of the equivalent provision in Directive 2014/24/EU on public procurement in a complaint case concerning the award of exclusive rights for collection and treatment of waste. See, for example, section 7 of ESA’s supplementary letter of formal notice of 27 September 2023, Decision No: 136/23/COL, available in ESA’s [public document database](#).

5 CONCLUSION

Accordingly, the Authority respectfully requests the Court respond to the Request for an Advisory Opinion as follows:

- 1. The factors for determining whether an award of an exclusive right for gaming is to be regarded as an administrative authorisation scheme or a services concession under Article 5(1)(b) of the Concessions Directive are set out in that provision, as well as in Recital 14 of the Directive.**
- 2. Case law from the European Courts from before the adoption of the Concessions Directive is, as a starting point, still relevant for the determination of whether an award of an exclusive right is to be regarded as an administrative authorisation scheme, falling outside the scope of the Directive, or an award of a services concessions under the Directive.**
- 3. The fact that the profits are controlled by the State through regulation and distributed to the benefit of third parties has no significance in determining whether the arrangement is a concession or an administrative authorisation.**
- 4. The award of an exclusive right to offer horse race betting to a foundation organised in a manner similar to that of Stiftelsen Rikstoto is not a services concession under Article 5(1)(b) of the Concessions Directive.**
- 5. It is of no relevance, for whether the exception under the first subparagraph of Article 10(1) of the Concessions Directive applies, that the national legislation does not specifically name the holder of the exclusive right.**

6. It is of no significance under the first subparagraph of Article 10(1) of the Concessions Directive that Rikstoto was awarded an exclusive right uninterruptedly under the previous national legislation.

Kyrre Isaksen Ewa Gromnicka Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority