EUROPEAN COMMISSION

Brussels, 23 October 2023
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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the **European Commission**, represented by Geert Wils, Legal Advisor, and Giacomo Gattinara, Member of its Legal Service, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/93, 1049 Brussels and consenting to service by e-EFTA Court, in

Case E-8/23

Trannel International limited (Plaintiff),

v

Norwegian State (Defendant)

in which the Oslo District Court requested 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.

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INTRODUCTION

1. The European Commission (hereinafter: **"the Commission"**) divides its observations into several parts. After outlining the factual and legal framework of the present case (Section I), the Commission discusses in Section III the responses to questions referred to the EFTA Court by the Oslo District Court (hereafter: **"the referring court"**) and recalled in Section II. The proposed responses are provided in the Conclusion (Section IV).

I. THE FACTUAL AND LEGAL FRAMEWORK

I.1. The factual framework

2. The Commission refers to the description of facts as set out in the ruling of the referring court seeking the advisory opinion of the EFTA Court (hereinafter: the "**reference order**")[1]. Nonetheless, the Commission considers it useful to highlight a number of facts mentioned by the referring court in the reference order.

3. The subject-matter of the main proceedings before the referring court concerns the award of an exclusive right to offer horse race betting in Norway to the foundation Stiftelsen Norsk Rikstoto by the Norwegian State (defendant). This right was awarded on 9 December 2022 for 10 years, with effect from 1 January 2023.

4. Stiftelsen Norsk Rikstoto is a commercial foundation. The foundation was established in 1982 and, since then, has held an exclusive right to offer totalisator betting in Norway. Foundations are independent, self-owned legal entities.[2] 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the foundation has had an exclusive right to offer totalisator betting (horse race betting) on the basis of the now repealed Totalisator Act of 1927.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.[3] 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,

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1 The Commission's submission is based on the English translation of the reference order provided by the EFTA Court. References to certain pages or parts of the reference order in the text of this submission are references to the English translation of the order.

2 Act of 15 June 2001 No 59 on foundations ("the Foundations Act").

3 Reference order, page 10.

Stiftelsen Norsk Rikstoto, without prior application, was granted a new, expanded 'authorisation', valid for 10 years, to offer horse race betting as from 1 January 2023.

5. The international gaming company Trannel International Limited (plaintiff), applied for 'authorisation' to offer totalisator betting in Norway. The application was not dealt with on its merits by reference to the Norwegian regulation on totalisator betting, the 'authorisation' currently held by Stiftelsen Norsk Rikstoto and the established exclusive rights model governing the gambling and gaming sector in Norway.

6. The plaintiff in the main proceedings requested 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,[4] which allows for public contracts to be declared ineffective where they have been concluded without having been publicised.

7. 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 ("**Directive 2014/23/EU**" or "**the Concessions Directive**" or "**the Directive**").[5] The court is in doubt as to whether the entry into force of Directive 2014/23/EU 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.

8. The main point of the referring 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.

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[4] That provision implements Article 2d of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p. 31–46.

[5] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, in OJ L 94, 28.3.2014, p. 1–64.

9. If the award is to be regarded as a 'services concession' under the 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.

I.2. The legal framework

10. According to Article 5 ("*Definitions*") (1)(b) of Directive 2014/23/EU, a services concession is

"*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*".

11. Pursuant to Article 5(1), second subparagraph, of the Directive

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

12. Pursuant to Article 10(1) of the Directive:

"*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*".

13. The Commission refers to other relevant provisions of the Directive as appropriate in the course of the analysis below.

II. THE QUESTIONS REFERRED TO THE EFTA COURT

14. The referring court seeks an advisory opinion from the EFTA Court on the following questions:

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?

III. THE ANALYSIS

III.1. On the questions concerning the notion of services concession under Article 5(1)(b) of Directive 2014/23/EU

15. The Commission considers it useful to examine the first four questions together, given that they all concern the notion of services concession under Article 5(1)(b) of the Directive. Moreover, the Commission will examine the first and fourth questions jointly since they largely overlap.

III.1.1. On the first and fourth questions

16. In the first question referred to the EFTA Court, 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 Directive 2014/23.

17. In this regard, Article 1(1) of the Concessions Directive states that "*this Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession*". This indicates that the concept of a concession for the purpose of the Concessions Directive refers only to concession-type arrangements that involve the procurement – that is, the acquisition – of works, supplies and/or services by a contracting authority/contracting entity. Not all arrangements entered into by contracting authorities/contracting entities are therefore covered by the Directive, as different recitals of the Directive confirm. For instance, recital 12 indicates that the Directive does not cover "*mere financing*" through grants; recital 14 suggests that the Directive does not cover authorisations or licenses, whereby the Member State or a public authority establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation and where the economic operator remains free to withdraw from the provision of works or services. In turn, recital 15 of the Directive states that it does not apply to agreements that have as their object the right of an economic operator to exploit certain public domains or resources, where there are established only "*general conditions for their use without procuring specific works or services*".

18. In all these cases, the lack of 'procurement' implies that the contracting authority *does not acquire* works or services, since acquisition is a constituting element of procurement.

19. More importantly, according to recital 35 of the Directive, the latter "*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*". This recital clarifies precisely the wide discretion enjoyed by Member States with regard to gambling activity, in line with the approach generally adopted by the CJEU on this matter.[6]

20. In this context, the definition of a concession, which triggers the applicability of the Directive once the threshold set in Article 8(1) thereof is met, is further clarified in recital 14 of the Directive, according to which, *"[...] 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*".

21. It follows that, besides being concluded in writing, two conditions have to be fulfilled for there to be a concession contract.

22. First, the pecuniary interest of the contract, the consideration of which consists in the right to exploit the works or services or in that right together with payment, according to Article (1), second subparagraph of the Directive. In this regard, the 'right to exploit' is considered in the Directive as a possible source of revenues to cover costs and investments, as recital 18, third sentence of the Directive confirms.[7]

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[6] Judgment of 8 September 2016, Case C-225/15, *Domenico Politanò*, EU:C:2016:645, paragraph 39.

[7] According to which « *[t]he 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*

23. From a purely formal point of view, the pecuniary nature of a public contract and of a concession contract means that there is a *quid pro quo*, *viz.* the public authority, which receives a service (or good) in exchange for a consideration.[8] Both sides of the equation, i.e., both the *quid* and the *quo,* have to be sufficiently certain and defined, so that the contract can be performed according to the agreed specifications. As distinguished from the public service contract, which involves consideration that is paid directly by the contracting authority to the service provider, in the case of a services concession contract, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment.[9] The award of a services concession should involve the transfer to the concessionaire of an operating risk in exploiting those services, encompassing demand or supply risk or both.[10]

24. Secondly, under Article 5(1)(b) of the Directive, the enforceability of the obligations agreed in the contract is one of the characteristics of the concession contract.

25. Concession contracts include binding and enforceable obligations regarding specific requirements for the execution of the works or services defined by the contracting authority or the contracting entity. The definition that would apply to the arrangement under national law is not decisive as to whether there is a 'concession' within the meaning of the Concessions Directive.[11] Instead, regard

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services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity".

[8] Judgments of 25 March 2010, Case C-451/08 *Herbert Mueller*, EU:C:2010:16, paragraph 48; of 18 October 2018, C-606/17 *IBA*, EU:C:2018:843, paragraph 28.

[9] Article 5 (1) (b) of the Concessions Directive.

[10] Article 5 (1) (b), second subparagraph of the Concessions Directive.

[11] Judgment of 10 November 2022, Case C-486/21 *Sharengo*, EU:C:2022:868, paragraph 57: "*[t]he concept of 'public contract' within the meaning of Article 2(1)(5) of Directive 2014/24 and that of 'concession' within the meaning of Article 5(1)(b) of Directive 2014/23 are autonomous concepts of EU law and must, on that basis, be interpreted uniformly throughout the territory of the European Union. It follows that the legal classification given to a contract by the law of a Member State is irrelevant for the purpose of determining whether that contract falls within the scope of one or other of those directives and that the question of whether a contract is to be classified as a concession or a public contract must be assessed exclusively in the light of EU law (see, to that effect, judgments of 18 January 2007, Auroux and Others, C-220/05, EU:C:2007:31, paragraph 40; of 18 July 2007, Commission v Italy, C-382/05, EU:C:2007:445, paragraph 31; and of 10 November 2011, Norma-A and Dekom, C-348/10, EU:C:2011:721, paragraph 40)*".

should be had to the arrangement in question and to whether it would amount to a 'services concession', taking into consideration its characteristics.

26. It is then necessary to consider whether in the case at stake in the main proceedings these two requirements are fulfilled.

27. First, as regards the pecuniary interest, with the benefit of what the Commission will consider in the suggested reply to the third question, which concerns specifically the possible profits of the party awarded the exclusive right, in the case at hand the profits are distributed in their entirety to organisations involved in equestrian sport, horse husbandry and Norwegian horse breeding. A specific regulation has been issued setting out provisions on the distribution of profits from horse race betting.[12]

28. 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.

29. Moreover, the decisions on how to distribute profits are limited by the conditions attached to the authorisation itself, according to which the party awarded the exclusive right should prepare and send to the Ministry a report on how it complies with the requirements of the Gaming Act on efficient operation.[13] Efficient operation means that as much as possible of the income/profit from the provider's betting services goes to organisations that promote equestrian sport, horse husbandry and Norwegian horse breeding.[14]

30. In addition, the Gaming Regulation[15] provides for more (specific) requirements such as that gaming must take place in a recorded manner; an upper loss limit per player per month is imposed; 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, and tools are required giving the player an overview of his or her own playing pattern and loss amount over the past year and month.[16] Those elements inevitably limit the expenses of the player and, accordingly, the gains of the party

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[12] Regulation of 13 March 2023 No 327, as provided in the reference order.

[13] Reference order, page 12.

[14] Reference order, page 8.

[15] Regulation of 17 November 2022 No 1978 on gaming.

[16] Reference order, page 10.

awarded the exclusive right, assuming – as it would seem to be the case - that those gains stem from the amounts of the bets collected.

31. Finally, according to the reference order, 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.[17]

32. Against this backdrop, it would appear that the system of horse race bets is regulated in the case at hand in such a way that, in any event, considerations of maximising profits for the party awarded the exclusive right cannot prevail on the general interest also served by the activity performed.

33. It follows that the discretion of the party awarded the exclusive right in creating a profit out of the services provided seems to be quite limited. Failing any other information in the reference on the way that party is financed by the State, a pecuniary interest, within the meaning of Article 5(1)(b) of the Directive, does not appear to be clearly established. It is however for the referring court to clarify this aspect.

34. Secondly, and turning now to the issue of the existence of enforceable obligations, as said above, 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. This does not seem to be the case with the arrangement in the case at stake in the main proceedings, for the following reasons.

35. First, Stiftelsen Norsk Rikstoto does not appear to have a binding obligation to provide the services in question. The foundation is granted 'authorisation' to operate horse race betting, but it is not under any obligation to do so. Based on the

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[17] Reference order, page 13.

facts of the case, this seems indeed to be excluded by the referring jurisdiction, on account of the status of commercial foundation of Stiftelsen Norsk Rikstoto.[18]

36. Furthermore, the awarding authority and Stiftelsen Norsk Rikstoto do not appear to be subject to legally binding obligations that are enforceable before the courts.[19] In this regard, it should be clarified that the legal enforceability of the agreed obligations constitutes an inherent characteristic of any contract, including of a concession contract.

37. This would imply that the objective of the public authority entering such a contract should be, first and foremost, to obtain the performance of the contract. In the case of the arrangement at issue, this is not the case. The Norwegian Gambling Authority (Lotteritilsynet) may impose conditions for continued operation or withdraw an authorisation or licence in the event of serious or repeated breach of the provisions laid down in, or adopted on the basis of, the Gaming Act.[20] However, the purpose of the arrangement at issue is the fulfilment of Stiftelsen Norsk Rikstoto's purposes and objectives under the authorisation.

38. More precisely, based on Stiftelsen Norsk Rikstoto's statute, activities such as responsible horse race betting are simply the means that party employs in order to attain its main objective, which is to contribute to the implementation of State policy, hence facilitating responsible horse race betting and preventing negative consequences of gaming. In this regard, Stiftelsen Norsk Rikstoto's purposes also include supporting horse husbandry, equestrian sport and horse breeding.

39. Accordingly, the withdrawal of the authorisation would rather appear as a means to exert the direct State supervision and a strict control imposed on the foundation by the public authorities for the fulfilment of its objectives and purposes, rather than a tool to review and possibly enforce certain specific contract obligations.

40. As a consequence, provided that no pecuniary interest is involved and that no mutually binding obligations are provided for, which only the referring court can assess, the Commission takes the view that the arrangement at issue would not

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[18] According to the referring jurisdiction, 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. Reference order, page 10.

[19] Reference order, page 19.

[20] Reference order, page 9.

qualify as a services concession within the meaning of Article 5 (1) (b) of the Concessions Directive.

41. This conclusion also replies to the fourth question, in which the referring court asks whether 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, is a "*services concession*" under Article 5(1)(b) of Directive 2014/23/EU. For the reasons indicated above and at the conditions recalled at the previous paragraph, the Commission takes the view that this is not the case.

III.1.2. On the second question

42. With its second question, the referring court asks whether 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.

43. As the Court clarified in its *Belgacom* judgment, an agreement that does not oblige the tenderer to engage in the transferred activity entails that that agreement confers authorisation to engage in an economic activity, as opposed to a services concession contract, which obliges the transferee to pursue the activity transferred.[21] However, as also recalled in that judgment, *"[s]uch an authorisation is no different from a service concession in terms of the obligation to comply with the fundamental rules of the Treaty and the principles flowing therefrom, as the exercise of that activity is liable to be of potential interest to economic operators in other Member States*".[22]

44. The definition contained in Article 5(1)(b) of the Directive being a codification of the case law of the Court of Justice,[23] it cannot be argued that the adoption and entry into force of the Directive has entailed a change in the distinction between a concession contract and an administrative measure.

45. Nevertheless, the Concessions Directive provides for a more precise definition of services concessions and indicates clearly that the award of a concession contract

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[21] Judgment of 14 November 2013, Case C-221/12, *Belgacom*, EU:C:2013:736, paragraph 33.

[22] *Ibidem*.

[23] See in particular the case law recalled in the judgment of 14 July 2016, in the Joined Cases C-458/14 and C-67/15 *Promoimpresa*, EU:C:2016:558, paras 46-48.

should involve the transfer to the concessionaire of an operating risk in exploiting the services.[24] In addition, it spells out the difference between authorisations and licenses, on the one hand, and services concessions, on the other.[25]

46. Finally, according to its Article 10(9), the Concessions Directive does not apply to services 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. Totalisator operating services are not covered by the afore-mentioned CPV code. Hence, to the extent that the agreement concerned would qualify as a 'services concession' within the meaning of the Concessions Directive, the agreement would not fall under the exclusion of Article 10(9) of the Directive.

47. Having regard to the above, the response to the second question of the referring court is that the adoption and entry into force of Directive 2014/23/EU and its regulation of concession contracts has not really entailed a 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.

III.1.3. On the third question

48. With its third question, the referring court enquires about the significance of 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, to determine whether one is dealing with an administrative authorisation scheme or a services concession contract.

49. However, what is the most relevant to determine whether the requirements for a services concession under Article 5(1)(b) of the Directive are fulfilled is to know whether one is looking at the conclusion of a contract for 'pecuniary interest'.

50. For the determination of whether one is dealing with an administrative authorisation scheme or a services concession contract, it is not of significance that any profits of the party awarded the exclusive right are controlled by the State

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[24] See in this regard, recital 18 of the Concessions Directive and Article 5 (1) (b), second subparagraph.

[25] See in this regard, recitals 14 and 15 of the Concessions Directive.

through regulation, to the benefit of third parties. The regulation of the State in that respect seems indeed an external aspect that neither impacts the actual generation of the profit nor its receipt by the party awarded the exclusive right.

51. More importantly, in the case at hand, and as recalled above, the party awarded the exclusive right does not seem to receive a profit. In particular, according to the referring jurisdiction "*the profits are distributed in their entirety to organisations involved in equestrian sport, horse husbandry and Norwegian horse breeding*".[26] This is based on regulation that, as mentioned, fixes the distribution of the profits (defined as the operating result) in such a way that 97% is distributed to pre-determined organisations and 3% of the profits may be distributed to other parties under Section 5 of the Regulation.[27]

52. While it is up to the referring court to clarify the relevant facts, it would seem therefore that there is no profit that goes to the Stiftelsen Norsk Rikstoto when operating the service.

III.2. On the interpretation of Article 10(1) of Directive 2014/23/EU

53. The fifth and sixth questions both concern the interpretation of Article 10(1) of Directive 2014/23/EU. Therefore, the Commission will examine them together.

III.2.1. On the fifth and sixth questions

54. With its fifth question, the referring court asks whether it is 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 the statute because an obligation may not be imposed on the foundation to offer gaming.

55. With its sixth question the referring court asks whether it is 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

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[26] Reference order, page 8.

[27] Regulation of 13 March 2023 No 327.

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.

56. The "*services concessions*" indicated in Article 10(1) of the Directive being only the contracts defined in Article 5(1)(b) thereof, and the concession at stake in the main proceedings not corresponding to that definition, Article 10(1) of the Directive could not, in any event, apply. The Commission takes then the view that, in the light of the replies suggested to the first and fourth questions, it is not necessary to reply to the fifth and sixth questions.

57. For the sake of completeness, and as regards the fifth question, however, the Commission observes that the fact that the award is carried out by means of a legislative act or an administrative decision is irrelevant in the light of Article 1(1), first subparagraph of the Concessions Directive. Accordingly, it is immaterial 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 the statute because an obligation may not be imposed on the foundation to offer gaming.

58. As regards the sixth question, the fact that the foundation was granted an exclusive right in the past is irrelevant under the first subparagraph of Article 10(1) of Directive 2014/23.

IV. CONCLUSION: THE PROPOSED RESPONSES

59. In the light of the preceding discussion, the Commission proposes to respond to the questions from the referring court as follows:

as regards the first and fourth questions:

"*Provided that no pecuniary interest is involved and that no mutually binding obligations are provided for, which only the referring court can assess, the arrangement at issue in the case at stake in the main proceedings does not qualify as a services concession within the meaning of Article 5 (1) (b) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1–64)*";

as regards the second question:

"*the adoption and entry into force of Directive 2014/23 and its regulation of concession contracts has not entailed a 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*";

as regards the third question:

"*in order to determine whether one is dealing with an administrative authorisation scheme or a services concession contract, it is of no significance that any profits of the party awarded the exclusive right are controlled by the State through regulation, to the benefit of third parties, provided that the regulation of the State neither impacts the actual generation of the profit nor its receipt by the party awarded the exclusive right*";

as regards the fifth and the sixth questions:

"*in order to apply Article 10(1) of Directive 2014/23, it is immaterial 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; for the same purpose, it is also immaterial that the foundation was granted an exclusive right in the past*".

Geert WILS Giacomo GATTINARA

Agents for the Commission