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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 18 of the Statue of the EFTA Court, by

TRANNEL INTERNATIONAL LIMITED

Case no.:	E-8/23
Plaintiff:	Trannel International Limited Level 6 The Centre, Tigne Point, Sliema TPO 0001 Malta
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Defendant:	Norwegian State, represented by the Ministry of Culture and Equality (Staten v/Kultur- og likestillingsdepartementet)
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1. INTRODUCTION

(1) On 6 July 2023, a request for an advisory opinion was submitted to the EFTA Court by Oslo District Court ("**Request for Advisory Opinion**") concerning the applicability and the interpretation of Directive 2014/23/EU ("**the Concessions Directive**") when issuing an exclusive right to a private operator to provide and manage gaming services within a Member State.

(2) In summary, the referring court asks whether the Concessions Directive applies to the award of an exclusive right to offer totalisator operating services in the form of horse betting services to a non-profit-making commercial foundation governed by private law. The questions referred can be arranged in two categories. Firstly, the referring court asks whether the award of an exclusive right to a commercial foundation organised in a similar manner as Stiftelsen Norsk Rikstoto constitutes a "services concession" within the meaning of Article 5(1)(b) of that Directive. Secondly, assuming that the Concession Directive applies, it asks whether the derogation in Article 10(1) on the award of services concessions to contracting entities on the basis of an exclusive right is applicable in a situation such as the one at hand where the award is carried out without the existence of national legislation explicitly deciding that the recipient shall have said right.

2. FACTUAL BACKGROUND

(3) In Norway, games of chance are regulated by the Gaming Act of 18 March 2023 No 12 (*pengespilloven*) and the Gaming Regulation of 13 March 2023 No 327 (*pengespillforskriften*) which both entered into force on 1 January 2023. Previously, games of chance were regulated by the Gaming Act of 1992, the Lottery Act of 1995, and the Totalisator Act of 1927. The award of concessions for totalisator games was further regulated by the Totalisator Regulation of 2007. These acts were combined in the Gaming Act of 2023 ("**the Gaming Act**"), which continues the regulation regarding the Norwegian exclusive rights model. The Gaming Act establishes a system of exclusive rights under which the organisation or promotion of games of chance is prohibited unless an operator has been granted such an exclusive right.

(4) Pursuant to the Gaming Act Sections 10 to 16, two exclusive rights may be granted, one for the provision of casino, lottery, and betting services and one for the provision of totalisator operating services in the form of horse betting services. The state-owned operator Norsk Tipping AS is by law granted the exclusive right to provide casino, lottery, and betting services pursuant to Section 10 of the Gaming Act, and the Norwegian government may issue an exclusive right to one operator for the provision of horse betting services pursuant to Section 14 of the Gaming Act. Although the Totalisator Regulation referred to the exclusive right as a "concession" while the Gaming Act refers to it as an authorisation, this change was purely linguistic and not meant to have any material effects.[1] No operator for the provision of totalisator operating services is named in the Gaming Act and the Norwegian government has chosen to award the exclusive right to a private operator. Historically, it has been awarded to the non-profit-making commercial foundation Stiftelsen Norsk Rikstoto pursuant to the Totalisator Act and the Totalisator Regulation, and the exclusive right currently in force was awarded to Stiftelsen Norsk Rikstoto by Royal Decree on 9 December 2022 pursuant to the Gaming Act.

(5) According to the Norwegian Foundations Act of 15 June 2001 No. 59 (*stiftelsesloven*) Section 1, a foundation may be a non-commercial foundation or a commercial foundation. Commercial

[1] See Prop. 220 L (2020-2021) p. 91.

foundations are foundations whose object is to engage or engages in commercial activity, and foundations that, as a result of an agreement, or as shareholders or unit holders, have a controlling interest in a business enterprise outside the foundation itself, cf. Section 4 of the Foundations Act. Moreover, it follows from Section 2 that foundations are autonomous and self-owning legal entities. The Norwegian government has no ownership in Stiftelsen Norsk Rikstoto, however, pursuant to Section 14 of the Gaming Act, the state shall have the right to appoint a majority of the foundation's board members.

(6) According to the Statutes of Stiftelsen Norsk Rikstoto, Section 1, it is an independent commercial foundation.[2] The Foundation was established by Det Norske Travselskap and Norsk Jockeyklubb in 1982 and has ever since been granted an exclusive right to provide totalisator operating services in the form of horse betting services by the Norwegian government. The exclusive right has never been awarded pursuant to a competitive procedure despite genuine attempts from other private operators, and Stiftelsen Norsk Rikstoto has been awarded the exclusive right despite never having applied for it.

(7) On 17 September 2022, Trannel International Limited delivered a writ of summons to Oslo District Court claiming that the award of the exclusive right to Stiftelsen Norsk Rikstoto should have been exposed to competition and that the lack of such constituted a breach of the Concessions Directive and the EEA Agreement. The case concerns a claim that the Norwegian government's granting of an exclusive right to offer horse betting services shall be set aside pursuant to Section 13 of the Norwegian Public Procurement Act (*anskaffelsesloven*). This provision implements Article 2d of Directive 89/665/EEC (the "**Remedies Directive**", as amended by Directive 2007/66/EC), which requires public contracts to be declared invalid if they have been concluded without prior publication without this being permissible in accordance with the Concessions Directive. The fact that the right to provide and manage totalisator operating services in the form of horse betting services is only awarded to a single operator, is not in itself challenged in the case. While Member States are free to choose its methods for organising the provision and management of gaming services, as is presumed in recital 35 in the preamble of the Concessions Directive, the question at issue in the main proceedings is whether the award of an exclusive right to provide horse betting services constitutes a "services concession" pursuant to the Concessions Directive.

(8) Otherwise, reference is made to the Request for Advisory Opinion sections 2 to 6 for further factual background to the case.

3. LEGAL ANALYSIS

3.1 Introduction

(9) In the following, a legal analysis of each of the six questions referred to the EFTA Court will be presented on behalf of Trannel International Limited.

(10) We will firstly respond to the second question, as it raises the question of whether the adoption and entry into force of the Concessions Directive entailed any change for how administrative authorisations shall be distinguished from services concessions. The answer to this question bears meaning to the legal sources available to respond to the five other questions, and in

[2] The Statutes of Stiftelsen Norsk Rikstoto are published on its websites, and can be found here: https://content.rikstoto.no/globalassets/dokumenter/diverse/22_03786-1-godkjente-vedtekter-for-stiftelsen-norsk-rikstoto-984671_2_1.pdf (accessed on 7 October 2023).

particular the first question, regarding which factors are key under EEA law when determining whether the award of an exclusive right to offer gaming services shall be regarded as an administrative authorisation or a services concession. For this reason, we have chosen to respond to the second question before the first question, and thereafter, we will respond to the remaining questions in the order they were raised.

(11) Furthermore, the third and the fourth question are closely connected in that they relate to the application of Article 5(1) of the Concessions Directive when a Member State awards an exclusive right to provide horse betting services in a manner similar to that in the present case, and it is natural to handle these two questions together. It is also natural to handle the fifth and the sixth question together because they both concern the interpretation of Article 10(1) of the Concessions Directive.

3.2 The second question

(12) By its second question, the referring court asks whether the adoption and entry into force of the Concessions Directive entailed any change for how to draw the line between, on the one hand, public contracts in the form of services concessions, and on the other, administrative authorisations.

Context of the award of the exclusive right and the laws on public procurement

(13) The question is particularly relevant because the Norwegian government has provided the following justification for the direct award of the exclusive right to provide totalisator operating services in the Royal Decree dated 9 December 2022:

> *"Case law from the ECJ has opened up for a direct award of an exclusive right to provide gaming services without an open competition from other applicants as long as the government has sufficient possibility to control the operator. Reference is made to, inter alia, C-203/08 Sporting Exchange, where the ECJ concluded that the requirements of equal treatment and transparency could be exempted from when an exclusive right is awarded a public operator pursuant to direct governmental control or a private operator when the operator is subject to strict control from the government."* (Our translation).

(14) In the Royal Decree, the Ministry of Culture further states that the exclusive right should be awarded to Stiftelsen Norsk Rikstoto with reference to how the commercial foundation has amended its statutes which puts it in a position to be awarded the right to provide horse betting services aligned with the conditions as stipulated by the Gaming Act and how Stiftelsen Norsk Rikstoto is considered best suited to achieve the social policy considerations behind the Norwegian gaming politics. Finally, it concludes:

> *"The Ministry considers that the conditions put forth to the exclusive provider of horse betting services in the new Gaming Act ensures a sufficiently strict control with the provider in accordance with EEA law. A direct award of the right to provide horse betting services to Stiftelsen Norsk Rikstoto is therefore considered lawful."* (Our translation).

(15) As will be explained under section 3.2, the conclusion in *Sporting Exchange* rests on the assumption that the award of the exclusive right to provide gaming services in question constituted a services concession and, therefore, it was exempted from the laws on public procurement. However, the award of a services concessions is no longer exempted from the

procurement regulations, as it is regulated by the Concessions Directive. When assessing the award of an exclusive right such as the one at hand, it is therefore relevant to ask whether the adoption and entry into force of the Concessions Directive entailed any change for how to distinguish between services concessions and administrative authorisations.

(16) Prior to the entry into force of the Concessions Directive on 26 February 2014 in the EU and the EEA Agreement, and in Norwegian law by the Concessions Regulation (*konsesjonskontraktforskriften*) on 12 August 2016, services concessions were exempted from the rules on public procurement, cf. Article 17 of Directive 2004/18/EC. Thus, the implementation of the Concessions Directive into the EEA Agreement entailed that the award of services concessions went from only being governed by the main text of the EEA Agreement to being subjected to the detailed rules in the secondary legislation.

The meaning of services concessions in Directive 2004/18/EC and the Concessions Directive

(17) Prior to the entry into force of Directive 2004/18/EC, there was no common definition of a services concession in EU procurement law. The preceding Directive 92/50/EEC did not contain any reference to this type of contract. It was, however, common ground that Directive 92/50/EEC did not apply to services concessions and that the inclusion of Article 17 of Directive 2004/18/EC was merely a codification of this exception, see, inter alia, ECJ case C-358/00 *Deutsche Bibliothek* paragraph 30 and case C-458/03 *Parking Brixen* paragraph 41. The concept of a services concession was the same within the meaning of Directive 92/50/EEC and Directive 2004/18/EC.

(18) In order to assess whether the adoption and entry into force of the Concessions Directive entailed any change to the understanding of services concessions, the definition of a services concession in that Directive must be compared to the definition in Directive 2004/18/EC.

(19) The following definition of a "service concession" was provided in Directive 2004/18/EC Article 1(4):

> *"'Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment."*

(20) A "public service contract" was in turn given the following definition in Directive 2004/18/EC Article 1(2)(d):

> *"'Public service contracts' are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II."*

(21) Finally, a "public contract" was given the following definition in Directive 2004/18/EC Article 1(2)(a):

> *"'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."*

(22) Case law from the ECJ related to Directive 2004/18/EC Articles 1 (4) and (17) further underlined that a service concession is characterised by the economic operator taking over the risks

involved in the operation of the service. Reference is made to case C-300/07 *Hans & Christophorus Oymanns* paragraphs 71 and 72:

> *"In any event, it flows from the abovementioned definition of a service concession that such a concession is distinguished by a situation in which a right to operate a particular service is transferred by the contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised since, in parallel, the concessionary is, to a large extent, exposed to the risks involved in the operation of the service. On the other hand, the distinguishing characteristic of a framework agreement is that the activity of the trader who has concluded the agreement is restricted in the sense that all contracts concluded by that trader during a given period must comply with the conditions laid down in the agreement.*
>
> *That distinguishing factor is confirmed by the Court's case-law, according to which a service concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question (Case C-382/05 Commission v Italy [2007] ECR I-6657, paragraph 34 and the case-law cited therein)."*

(23) It is clear from the abovementioned definitions that a service concession in relation to Directive 2004/18/EC Article 1(4) and (17) is considered a contract for pecuniary interest concluded in writing in a situation where the public authority has entrusted an economic operator with the right to operate a particular service and the consideration consists in the right to exploit these services, and where the economic operator assumes the risk involved in the operation of the service.

(24) The Concessions Directive, on the other hand, provides the following definition of a "services concession" in Article 5(1)(b):

> *"'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.*
>
> *The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible."*

(25) There are no meaningful differences between the definition of a "service concession" in Directive 2004/18/EC Article 1(4) and that of a "services concession" in the Concessions Directive Article 5(1)(b). In the preamble of the Concessions Directive, recital 4, it is made clear

that the similarity is intentional, and that the main objective of the Directive was simply to provide a detailed regulation for a type of contract that was previously exempted from the procurement directives:

> *"The award of public works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council; while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency."*

(26) It has not been implied in case law from the ECJ or the EFTA Court that the concept of a services concession changed from Directive 2004/18/EC to the Concessions Directive. On the contrary, the ECJ has continued to use case law relating to Directive 92/50/EEC and Directive 2004/18/EC for questions relating to the interpretation of the Concessions Directive. To this effect, see case C-486/21 *Sharengo* paragraph 57:

> *"In that regard, both the 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)."*

(27) Considering that one of the main purposes of the EEA Agreement and the Treaty on the Functioning of the European Union is establishing and ensuring a single market across all EEA member states,[3] this supports the view that service concessions that were previously exempted from the procurement regulations must now be awarded pursuant to the detailed requirements of ensuring a competitive procedure as provided in the Concessions Directive.

Conclusion

(28) Therefore, the answer to the second question must be that the adoption and entry into force of the Concessions Directive did not entail any change for how to draw the line between services concessions and administrative authorisations.

3.3 The first question

(29) By its first question, the referring court asks which factors are key under EEA law when determining whether the award of an exclusive right to offer gaming services shall be regarded as an administrative authorisation falling outside the scope of EEA rules on public procurement,

[3] See, for instance, Article 26 of the Treaty on the Functioning of the European Union and Article 1 of the EEA Agreement.

or whether it shall be regarded as a "services concession" pursuant to Article 5(1)(b) of the Concessions Directive.

(30) There are four criteria which must be fulfilled for an award of rights to be considered a services concession according to Article 5(1)(b) of the Concessions Directive, namely that the award in question constitutes a contract for pecuniary interest where the contracting authority entrusts the provision and the management of services to an economic operator, the consideration consists in the right to exploit the services in question, and where the operating risk in exploiting the services is transferred to the concessionaire.

Contract for pecuniary interest

(31) The notion of a "contract for pecuniary interest" covers any mutual exchange of services between a contracting authority and an economic operator. It is, however, not clear from Article 5(1)(b) how a contract for pecuniary interest in the Concessions Directive is distinguished from an authorisation or a licence to provide certain services which according to recital 35 is not regulated by that Directive.

(32) At the outset, the interpretation of "contract for pecuniary interest" must be done in light of the purpose of the Concessions Directive, which according to recital 3, inter alia, is to ensure competition in the internal market for the provision of services on assignment by government entities. For the purpose of free movement of services and the opening-up to competition to have real effect, the notion of a contract for pecuniary interest must be given a wide range, see, to this effect, ECJ case C-113/13 *Spezzino* paragraph 51 and case C-325/22 *TS and HI* paragraph 37. Therefore, there must be a presumption that when a contracting authority seeks to obtain services of economic value from third parties against consideration, this is to be regarded as mutual exchange of services and, thus, a contract for pecuniary interest.

(33) It is irrelevant for the definition of a contract for pecuniary interest whether the agreement for the provision of services is defined as a contract, an authorisation, or a concession in national law, see, to that effect, ECJ case C-220/05 *Auroux* paragraph 40 and case C-486/21 *Sharengo* paragraph 57. The fact that a Member State has chosen to classify the award of certain rights as an authorisation or a licence, but not as a contract or an agreement, is therefore without relevance when considering whether the act in question is a contract for pecuniary interest.

(34) The concept of a contract of pecuniary interest is discussed in recital 11 of the Concessions Directive:

> *"Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment. Such contracts may, but do not necessarily, involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question."*

(35) In recitals 13 and 14, the distinction is made between concessions on the one hand and licence or authorisations on the other:

> *"Furthermore, arrangements where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not qualify as concessions, including those based on legal agreements between the public authority and the economic operators. Such systems are typically based on a decision by a public authority defining the transparent and non-discriminatory conditions on the continuous access of economic operators to the provision of specific services, such as social services, allowing customers to choose between such operators.*
>
> *In addition, certain Member State acts such as authorisations or licences, whereby the Member State or a public authority thereof establishes the conditions for the exercise of an economic activity, including a condition to carry out a given operation, granted, normally, on request of the economic operator and not on the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. In the case of those Member State acts, the specific provisions of Directive 2006/123/EC of the European Parliament and of the Council (5) apply. In contrast to those Member State acts, concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable."*

(36) Further, in recital 54:

> *"Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such systems ensure sufficient advertising and complies with the principles of transparency and non-discrimination."*

(37) The wording of Article 5(1)(b) and the above-mentioned recitals of the Concessions Directive indicate that a situation where the contracting authority entrusts the provision and the management of services to an economic operator against consideration qualifies as a mutual exchange of services and, thus, a contract for pecuniary interest.

(38) The concept of a contract for pecuniary interest is also touched upon in case-law from the ECJ. In case C-51/15 *Remondis*, the ECJ stated the following in paragraph 43:

> *"Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18, the pecuniary nature of the contract meaning that the contracting authority which has concluded a public contract receives a service which must be of direct economic benefit to that contracting authority (see, to that effect, judgment of 25 March 2010, Helmut Müller, C-451/08, EU:C:2010:168, paragraphs 47 to 49). The synallagmatic nature of the contract is thus an essential element of a public contract, as observed by the Advocate General in point 36 of his Opinion."*

(39) This is reiterated in case C-796/18 *Stadt Köln* paragraph 40:

> *"Consequently, to be categorised as a 'public contract' within the meaning of that provision, a contract must have been concluded for pecuniary interest, meaning that the contracting authority which has concluded a public contract receives under that contract, in return for consideration, a service which must be of direct economic benefit to that contracting authority. In addition, the contract must have a synallagmatic nature, which is an essential element of a public contract, (see, by analogy, judgment of 21 December 2016, Remondis, C-51/15, EU:C:2016:985, paragraph 43)."*

(40) Regarding the meaning of "for pecuniary interest", in case C-606/17 *IBA Molecular* paragraphs 28 and 29 it is stated that:

> *"It is clear from the usual legal meaning of 'for pecuniary interest' that those terms designate a contract by which each of the parties undertakes to provide a service in exchange for another.*
>
> *Thus, a contract providing for the exchange of services is covered by the concept of public contract, even if the remuneration provided for is limited to the partial reimbursement of costs incurred in order to supply the services agreed (see to that effect, judgments of 19 December 2012, Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:817, paragraph 29, and of 13 June 2013, Piepenbrock, C-386/11, EU:C:2013:385, paragraph 31)."*

(41) As the cited legal sources indicate, a contract for pecuniary interest within the meaning of Article 5(1)(b) of the Concessions Directive is characterised by the existence of a mutual exchange of services between the contracting authority, which pays a consideration, and the economic operator, who, in exchange for that consideration, undertakes to provide a service that is of the direct economic benefit to the contracting authority.

(42) Licences and authorisations, on the other hand, are characterised by a situation where a contracting authority establishes the conditions for the exercise of an economic activity, in which any economic operator fulfilling the conditions may exercise, and where the contracting authority has no economic interest in whether the economic operator offers its services, and the economic operator remains free to withdraw from providing the services without repercussions. Moreover, the granting of an authorisation is typically requested by the economic operator and is not awarded at the initiative of the contracting authority. If any kind of mutual exchange of services between the economic operator and the contracting authority can be identified, and the act of the Member State in question lacks the characteristics of a licence or authorisation as mentioned in recitals 13, 14 and 54 of the Concessions Directive, it indicates that the government act constitutes a contract for pecuniary interest.

(43) In sum, if there is a mutual exchange of services between an economic operator and a contracting authority, where the contracting authority entrusts the economic operator the provision and management of services against consideration which entails a direct economic benefit to the contracting authority, a contract for pecuniary interest exists. In other words, in exchange for a non-exclusive or exclusive right, the concessionaire assumes the responsibility to provide and manage the services in question that benefits the contracting authority.

A contracting authority entrusts the provision and management of services to an economic operator

(44) Secondly, in order for the contract for pecuniary interest to classify as a services concession, a contracting authority must entrust the provision and the management of services to an economic operator. In the context of the Concessions Directive, a 'contracting authority' means inter alia state authorities such as a Ministry and an 'economic operator' means any person offering the provision of services on a market pursuant to Articles 5(2) and 6(1).

(45) This criterion is fulfilled if the subject matter of the contract for pecuniary interest concerns the provision of services other than the execution of building or civil engineering works as defined in Article 5(8) of the Concessions Directive, which means that the management and provision of gaming services in a Member State would fulfil this criterion.

The consideration consists in the right to exploit the services

(46) Thirdly, for a government act to be classified as a services concession, the consideration must consist in the right for the economic operator to exploit the services in question. Thus, a services concession is fundamentally different from a public service contract in that a services concession gives the economic operator the right to receive remuneration from third parties, whereas a public service contract only entitles the economic operator to receive payment from the contracting authority, see, to this effect, ECJ case C-458/03 *Parking Brixen* paragraph 40:

> *"In the situation referred to in the first question, on the other hand, the service provider's remuneration comes not from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration means that the provider takes the risk of operating the services in question and is thus characteristic of a public service concession. Therefore, in a situation such as that in the main proceedings, it is not a case of a public service contract, but of a public service concession."*

(47) It shall be noted that both authorisation and services concessions are characterised by the right of an economic operator to exploit its services, which means that this criterion will typically not be decisive when determining whether a government act classifies as the one or the other.

The award of the services concession involves a transfer of the operating risk

(48) Fourthly, the award of the services concession must involve the transfer of the operating risk in exploiting the services from the contracting authority to the economic operator. The precise content of this criterion is elaborated upon in Article 5(1)(b) second paragraph, as cited above, and shall be considered fulfilled where the concessionaire, under normal operating conditions, is not guaranteed to recoup the investments it has made or the costs it has incurred in operating the services in question. This means that the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, in such a way that any potential estimated loss incurred by the concessionaire shall not merely be nominal or negligible.

(49) The transfer of operating risk has been discussed in case law, see for instance joined cases C-458/14 and C-67/15 *Promoimpresa* paragraph 46:

> *"In that regard, the Court notes that a services concession is characterised, inter alia, by a situation in which the right to operate a particular service is transferred by the*

> *contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised and, in addition, is, to a large extent, exposed to the risks of operating the service (see, to that effect, judgment of 11 June 2009 in Hans & Christophorus Oymanns, C-300/07, EU:C:2009:358, paragraph 71)."*

(50) It is sufficient, as the wording of Article 5(1)(b) explicitly states, that the economic operator is exposed to the vagaries that exist in the market and that the operator is not guaranteed to recoup its investments when providing the services in question, see, to that effect, case C-274/09 *Stadler* paragraph 48, where the distinction between a 'service concession' and a 'service contract' is discussed in a situation where the economic operator assumed only a limited economic risk:

> *"The answer to the questions posed must therefore be that, where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the principles laid down by national law, that contract must be classified as a 'service concession' within the meaning of Article 1(4) of Directive 2004/18."*

(51) Although Article 5(1)(b) of the Concessions Directive requires that the concessionaire takes on an operating risk, there is no requirement that the operating risk must be of a certain size or that the economic operator must be able to enjoy excess profits from the provision of services in order for the contract to be considered a services concession. It is therefore, in principle, not necessary to consider how the profits from the services provided under the contract are distributed, regardless of the degree of public control over said profits, when assessing the transfer of the operating risk.

(52) If the four conditions referred to in the preceding paragraphs are fulfilled, then the Member State act at hand must be considered a services concession which is regulated by the Concessions Directive.

Case law regarding services concessions in the gaming market

(53) No case law thoroughly assesses how to draw the line between services concessions and administrative authorisations within the meaning of Article 5(1) of the Concessions Directive in the field of gaming services. However, the ECJ and the EFTA Court have on numerous occasions concluded that the award of an exclusive right to offer gaming services shall be regarded as a services concession.

(54) In case E-24/13 Casino Admiral, the EFTA Court referred to a right to offer casino services in Liechtenstein as a "service concession", see inter alia paragraph 47 of the judgment:

> *"At the outset, it is noted that the consideration for the provision of services under the contract at issue in the main proceedings consists solely in the right to exploit the service of casino operation. Thus, the contract amounts to a service concession, as defined in Article 1(4) of the Directive. Accordingly, it falls outside the Directive's scope as provided for in Article 17 of the Directive."*

(55) As services concessions at the time fell outside the scope of the EU procurement directives, the EFTA Court noted in paragraph 51 of the judgement:

> *"Thus, although service concession contracts are not, as EEA law now stands, governed by any of the directives by which the field of public procurement is regulated the public authorities concluding them are bound to comply with the fundamental rules of the EEA Agreement in general, including the freedom to provide services and, in particular, the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency. The latter obligation applies where the service concession in question may be of interest to an undertaking located in an EEA State other than that in which the concession is awarded (see, for comparison, Case C-203/08 Sporting Exchange [2010] ECR I-4695, paragraphs 39 and 40 and case law cited."*

(56) Similarly, the ECJ refers to the award of rights to operate various types of gaming services as a "services concession" or "concession contract" in numerous cases regarding EU public procurement law, see, to that effect, case C-260/04 *Commission v. Italian Republic*, case C-203/08 *Sporting Exchange*, case C-64/08 *Engelmann*, case C-375/17 *Stanley International Betting* and joined cases C-721/19 and C-722/19 *Sisal*. These cases all demonstrate that the operation of gaming services in a Member State generally will be considered as services concessions in accordance with the Concessions Directive.

(57) In case C-260/04 *Commission v. Italian Republic*, the ECJ stated that the award of licences for horse-race betting operations in Italy constituted a public service concession and, therefore, it was excluded from the public procurement directive applicable at the time, cf. paragraph 20:

> *"As the Commission rightly observed, the Italian Government has not denied, either during the pre-litigation procedure or in the course of these proceedings, that the award of licences for horse-race betting operations in Italy constitutes a public service concession. That classification was accepted by the Court in Placanica and Others (C-338/04, C-359/04 and C-360/04 [2007] ECR I-0000), in which it interprets Articles 43 and 49 EC in relation to the same national legislation."*

(58) In C-203/08 *Sporting Exchange*, it is asked whether the case-law developed by the ECJ "*in the field of service concessions is applicable to the procedure for the grant of a licence to a single operator in the field of games of chance*", see paragraph 38. The ECJ notes in paragraph 39:

> *"As European Union law now stands, service concession contracts are not governed by any of the directives by which the Union legislature has regulated the field of public procurement. However, the public authorities concluding them are bound to comply with the fundamental rules of the EC Treaty in general, including Article 49 EC and, in particular, the principles of equal treatment and of non-discrimination on the ground of nationality and with the consequent obligation of transparency (see, to that effect, Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraphs 60 to 62; Case C-206/08 Eurawasser [2009] ECR I-0000, paragraph 44; and Case C-91/08 Wall [2010] ECR I-0000, paragraph 33."*

(59) In paragraph 46, the ECJ notes that the issue of a single licence is not necessarily the same as a services concession. These statements must be viewed in light of the background of the case. *Sporting Exchange* regarded the conformity with EU law of the extension of licences to De Lotto and SGR where the decisions were taken without a prior call for tenders. De Lotto

was a non-profit making foundation governed by private law that held an exclusive right for the organisation of sports-related prize competitions, the lottery and numbers, and SGR was a profit-making private company that held an exclusive right for the organisation of a totalisator on the outcome of horse races.

(60) In the opinion of General Advocate Bot paragraph 131, it is assumed that the licences in question were either "a public service contract" or a "concession contract". It is noted in paragraphs 136 and 137 that if the contracts in question were governed by one of the directives concerning public contracts, it would have to comply with the detailed conditions put forth there, and that if not covered by these directives, Member States nevertheless would have to comply with the obligation of transparency in so far as it follows from the fundamental rules of the Treaty and the principle of equal treatment. Thereafter, the General Advocate refers to *Commision v. Italy* and notes that the Court found that the award of the management and collection of horse-race bets in Italy was a public service concession and observed that these concessions were excluded from the scope of the directives concerning public contracts. Hence, when interpreting the ECJ's statements in *Sporting Exchange* paragraph 46, it must be borne in mind that the pretext of the statement that a contract may not necessarily be a service concession contract, was that if so, it would constitute a public service contract.

(61) General Advocate Bot continues its assessment and concludes that the principle of equal treatment and the associated obligation of transparency are applicable to a licensing system in the gaming sector where the licence is granted only to a single operator, cf. paragraph 152, which the ECJ also concludes in its judgement in *Sporting Exchange* paragraph 62. Moreover, it is noted in paragraph 151 that i.e. the Norwegian government argued that the obligation of transparency is not applicable in a single-operator licensing system, but the General Advocate clearly states that he does not share that view, and underlines in paragraph 156 that a situation where the monopoly arises from a licence issued in an administrative procedure rather than by virtue of a concession agreement does not remove the risk of partiality which the obligation of transparency aims to prevent. In the reasoning, it is also emphasised that a call for tenders for the contract would not have detrimental effects comparable to those of competition in the market, rather, such a call for tenders would enable the competent authorities to grant the licence to the provider who appears to be best able to comply with all the conditions in question, cf. paragraphs 159 to 164. As the General Advocate concludes his assessment, it is highlighted in paragraph 170 that exclusive rights are not synonymous with opacity.

(62) Therefore, the ECJ's ruling in *Sporting Exchange* supports the position of Trannel International Limited in the present case when arguing that the provision of licences for gaming services were considered service concessions under Directive 2004/18/EC, which would imply that the provision of an exclusive right to provide horse betting services in Norway constitutes a "services concession" pursuant to the Concessions Directive article 5(1)(b).

(63) Similarly, in C-64/08 *Engelmann* the ECJ also assumes that the granting of a licence to operate the gaming establishments in question constituted service concessions, see, to that effect, paragraph 49:

> "*With regard, thirdly, to the procedure for the grant of the concessions at issue in the main proceedings, it must first be recalled that although, as European Union law now stands, service concessions are not governed by any of the directives by which the European Union legislature has regulated public procurement, the public authorities which grant such concessions are none the less bound to comply with the fundamental rules of the Treaties, in particular Articles 43 EC and 49 EC, and with the*

consequent obligation of transparency (see, to that effect, Case C-324/98 Telaustria and Telefonadress [2000] ECR I-10745, paragraphs 60 and 61; Case C-231/03 Coname [2005] ECR I-7287, paragraphs 16 to 19; Case C-458/03 Parking Brixen [2005] ECR I-8585, paragraphs 46 to 48; Case C-91/08 Wall [2010] ECR I-0000, paragraph 33; and Case C-203/08 Sporting Exchange [2010] ECR I-0000, paragraph 39."

(64) As was mentioned in *Sporting Exchange*, it is noted in *Engelmann* paragraph 52, that the issuing of licences to operate gaming establishments may not necessarily be the same as service concession contracts. However, in that specific case, licences to operate gaming establishments were assumed to constitute service concessions. Regardless, the ECJ noted that the obligation of transparency would apply because the effects of the award of such licences are the same as those of a service concession contract. This should be taken into account when assessing whether the issuing of an exclusive or non-exclusive right has the characteristics of an administrative authorisation or a services concession. Moreover, General Advocate Mazák in *Engelmann* consistently referred to the licences to operate gaming establishments as concessions.

(65) The questions raised in case C-375/17 *Stanleybet* regarded the award of a sole concession in Italy for the provision of lottery services. The ECJ consistently refers to the award of a "concession contract" but it concluded that Directive 2014/23 was not applicable *ratione temporis* because the invitation to tender at issue in the main proceedings was published before the expiry of the period for the transposition of the Concessions Directive, cf. paragraph 36. The applicability of the Directive was thoroughly addressed by Advocate General Sharpston, who firstly deemed it necessary to identify the type of contract at issue, cf. paragraph 27 in her opinion. Further, by reference to how the referring court assumed that it was a service concession contract, she concluded that "(...) *it seems to me that the contract described in the call for tenders is indeed for the concession of a service.*" In the following paragraphs, the General Advocate assessed whether Directive 2014/23 was applicable and concluded that the directive seemed applicable *ratione temporis* but, nevertheless, it would not be applicable *ratione materiae* since the award of the Lotto service concession contract would be exempted from the provisions of the Directive pursuant to Article 10(9) stating that the Directive does not apply to service concessions for lottery services covered by CPV code 92351100-7.

(66) In joined cases C-721/19 and C-722/19 *Sisal* paragraph 23 to 33, the ECJ assumed that an award of a right for the management of instant lottery games in Italy constituted a services concession. However, because the original call for tenders was published in 2009 and 2010, which was before the Concessions Directive entered into force, the ECJ found that the Directive was inapplicable *ratione temporis*. In the opinion of Advocate General Campos Sánchez-Bordona, it was presumed that the award at issue constituted a services concession. The question assessed was whether the Concessions Directive applied but, as the Advocate General noted in paragraphs 32 and 37, the result would in any event be substantially the same as the Directive incorporate the ECJ's case-law on public contracts. In *Sisal*, the ECJ consistently referred to the right to provide instant lottery games as a concessions contract, see, to that effect, inter alia paragraphs 38, 40, 41, 46, 48, 51, 52, and 54 of the judgement.

(67) Other cases that do not expressly relate to gaming concessions, but that may cast light over the concept of services concessions, are cases C-292/21 *AUDICA* paragraph 46 regarding the provision of road safety awareness and training courses, C-643/19 *Resopre* paragraph 23 to

26 regarding the provision of parking services, and C-486/21 *Sharengo* paragraph 59 regarding the provision of car sharing services.

(68) Finally, it must be noted that while services concessions are regulated by the Concessions Directive, licences or authorisations are regulated by directive 2006/123/EC ("**the Services Directive**"). Section 2(2)(h) of the Services Directive excludes gaming activities from the application of that Directive, meaning that the award of exclusive rights to provide gaming services would, if not covered by neither the Services Directive nor the Concessions Directive, solely be regulated by the main text of the EEA Agreement. However, the structure of the Concessions Directive clearly indicates that gaming activities falls within the scope of that Directive. Pursuant to Article 10(9) lottery services covered by CPV-code 92351100-7 are excluded from the application of the Directive, indicating that all other gaming activities, including the provision of totalisator operating services covered by CPV-code 9235100-4 such at the one at issue in the main proceedings, falls within the scope of the Concessions Directive. If the EU legislator meant to exclude gaming activities from the scope of both the Services Directive and the Concessions Directive, it would have passed the initial proposal to exclude gaming activities all together from the application of the Concessions Directive[4]. In order to ensure that the purposes of free movement of services and the opening-up to competition have real effect within the gaming sector, it must be presumed that such awards constitute services concessions rather than licences or authorisations, see, to this effect, ECJ case C-113/13 *Spezzino* paragraph 51 and case C-325/22 *TS and HI* paragraph 37.

Conclusion

(69) For the reasons as stated above, the answer to the first question must be that the award of an exclusive right to offer gaming services in a Member State in a similar manner as the present case shall be regarded as a "services concession" pursuant to Article 5(1)(b) of the Concessions Directive.

3.4 The third and fourth questions

(70) By its third and fourth questions, the referring court seeks to know whether the award of an exclusive right to offer horse betting services to a commercial foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto, where the profits of the grantee of the exclusive right is controlled by the state via regulatory means, constitutes a "services concession" under Article 5(1)(b) of the Concessions Directive.

(71) The ECJ has on several occasions found that the award of both exclusive and non-exclusive rights to provide gaming services constitute services concessions in cases similar to that in the present case. As mentioned above, the ECJ explicitly stated that the award of a right to provide horse-race betting in a Member State would constitute a service concession in case C-260/04 *Commission v. Italian Republic* and implied so in case C-203/08 *Sporting Exchange*. This is also indicated in other judgements regarding gaming services, such as in ECJ case C-375/17 *Stanleybet*, joined cases C-721/19 and C-722/19 *Sisal*, and EFTA Court case E-24/13 *Casino Admiral*.

[4] See amendment 110, proposal for a directive article 8 – paragraphs 5a and 5b: https://www.europarl.europa.eu/doceo/document/A-7-2013-0030_EN.html

(72) Even though existing case-law implies that the award of an exclusive right in a manner such as the one at hand constitutes a services concession within the meaning of the Concessions Directive, it is necessary to examine each of the criteria found in the definition of the term in Article 5(1) in that Directive.

(73) For an award to qualify as a "services concession", the award must constitute a contract for pecuniary interest where the contracting authority entrusts the provision and the management of services to an economic operator, the consideration consists in the right to exploit the services that are the subject of the contract, and where the operating risk in exploiting the services is transferred to the concessionaire.

(74) It is not disputed between the parties of the present case that the offering and management of gaming services in a Member State constitutes a service within the meaning of the Concessions Directive, nor is it disputed that the Ministry of Culture constitutes a "contracting authority" and Stiftelsen Norsk Rikstoto constitutes an "economic operator" pursuant to Article 5(2) and 6(1) of the Concessions Directive.

Contract for pecuniary interest

(75) If a mutual exchange of services between an economic operator and a contracting authority exists where the contracting authority entrusts the economic operator with the provision and management of a service against consideration and the contracting authority directly benefits from the provision of those services, a contract for pecuniary interest exists.

(76) It must be reiterated that national classification is not relevant when determining whether the award of a right constitutes a contract for pecuniary interest, see for instance ECJ case C-220/05 *Auroux* paragraph 40. If a Member State could decide that an exclusive right such as the one at issue in the main proceedings is not a contract for pecuniary interest by referring to it as a licence or an authorisation, or by awarding it in the form of a Royal Decree instead of a traditional contract, this would undermine the purpose of the Concessions Directive which is to ensure transparency and equal treatment in the field of services concessions, and would be a violation of the prohibition on circumvention in Article 3(1) second paragraph of that Directive which has the following wording:

> *"The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services."*

(77) In order to decide whether the award of an exclusive right to a commercial foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto constitutes a contract for pecuniary interest, we will in the following explain how a mutual exchange of services exists between the contracting authority and the economic operator.

The existence of a mutual exchange of services

(78) In a situation such as the one at issue in the main proceedings, where the Norwegian government awards an exclusive right pursuant to the Gaming Act Section 14, the chosen economic operator is entitled to exclusively provide horse betting services in Norway and it is entrusted with the management of all such services, including, inter alia, marketing for the service, for a period of ten years at a time. The fact that the exclusive right to manage the

system of horse betting services in the present case is regulated by the Gaming Act, the Gaming Regulation, and the Royal Decree dated 9 December 2022, does not preclude the existence of a contract for pecuniary interest, see joined cases C-197/11 and C-203/11 *Libert and Others* paragraph 113.

(79) An award such as the one in the present case, entails a mutual exchange of services between a contracting authority and an economic operator. On the one hand, the Norwegian government provides the exclusive right to operate horse betting services, and on the other hand, Stiftelsen Norsk Rikstoto, in exchange for that exclusive right, assumes the responsibility to provide and manage the gaming services in question.

(80) The Norwegian government cannot legally impose a statutory obligation on an autonomous and self-owning commercial foundation to manage the provision of horse betting services,[5] which is the reason why the award of the exclusive right to Stiftelsen Norsk Rikstoto in the present case was done through the Royal Decree dated 9 December 2022 instead of by law in the Gaming Act.[6] This was done at the initiative of the Norwegian government without prior publication or competition, and Stiftelsen Norsk Rikstoto never applied for the exclusive right. Although the Norwegian government may technically award the exclusive right to another economic operator than Stiftelsen Norsk Rikstoto, this has never been done since the foundation was established in 1982, and no other providers of horse betting services have ever been allowed to compete for the exclusive right despite genuine attempts from other private operators.

(81) At the same time, Stiftelsen Norsk Rikstoto does not remain free to withdraw from providing horse betting services without repercussions. If the foundation were to stop providing and managing the national horse betting services, the exclusive right would be revoked and awarded to another operator. The Norwegian exclusive rights model requires there to be a concessionaire operating the horse betting services at any given time. It is implied in the preparatory works for the Gaming Act that if Stiftelsen Norsk Rikstoto did not give its consent to manage horse betting services in accordance with the Royal Decree, the exclusive right would be offered to a different operator.[7] Additionally, if the holder of the exclusive right does not work to promote and maintain the public policies as laid down in the Gaming Act, the government will have to take on this task itself to fulfill the purposes of the Act. Moreover, Stiftelsen Norsk Rikstoto's lack of freedom to withdraw from providing the services without repercussions, may be illustrated by the fact that, while working on the new Gaming Act, the Norwegian government assessed whether the state-owned exclusive rights operator Norsk Tipping AS should be awarded the exclusive right to provide horse betting services.[8]

(82) Furthermore, the concessionaire must provide its services in accordance with the Gaming Act and the Gaming Regulation. In the event that the concessionaire no longer fulfills the purposes of the Norwegian gaming legislation, or if it does not fulfill the prerequisites for the exclusive right, or if it were to violate other obligations as stipulated in the Gaming Act, the Gaming Regulation, and the Royal Decree, the Norwegian government is entitled to revoke the exclusive right according to the Royal Decree. Finally, it may be emphasised that the performance under the exclusive right is subjected to frequent and extensive public scrutiny in

[5] The Norwegian Act on Foundations Section 2.
[6] Prop. 220 L (2020-2021) pp. 91-92.
[7] Prop. 220 L (2020-2021) p. 92.
[8] See Prop.220 L (2020-2021) p 91.

the form of evaluation meetings as well as yearly reports on the efficiency, channelisation, and gaming responsibility efforts of Stiftelsen Norsk Rikstoto, as required by the Royal Decree from 9 December 2022, which is illustrative of the mutual exchange of services.

(83) For these reasons, there is a mutual exchange of services between an economic operator and a contracting authority. The contracting authority entrusts the economic operator the provision and management of the exclusive right. In exchange for that exclusive right, the concessionaire assumes the responsibility to provide and manage horse betting services in Norway. In the following, we will explain how the provision of horse betting services directly benefits the contracting authority.

The provision of horse betting services directly benefits the contracting authority

(84) The aim of the award of the exclusive right in the case at hand is to meet public policy needs as defined by the Norwegian government in the Gaming Act, which according to its Section 1 is to reduce the negative consequences of gaming, to ensure that gaming is performed in a responsible and safe manner, and to ensure that the profits from gaming go to non-profit purposes. These are purposes that Stiftelsen Norsk Rikstoto, as the holder of the exclusive right to provide horse betting services in Norway, is legally obligated to promote and maintain on assignment from the government, and which the government directly benefits from[9]. The government has a direct economic interest in the concessionaire providing and managing the services in question, which is clearly distinguishable from the award of authorisations and licences where the government generally has no direct economic interest in whether the services are provided and managed.

(85) Furthermore, the holder of the exclusive right, is obligated to distribute its profits to third parties in accordance with the Gaming Act which is legally enforceable and means that the government in reality controls the profits of the holder of the exclusive right. Significant revenue is distributed to the Norwegian equestrian sport, horse husbandry, and horse breeding due to the provisions established by the Regulation on the Distribution of Profits from Horse Betting. This represents a direct economic benefit to the contracting authority, and it may be illustrated by the concessionaire's financing of the Norwegian Equestrian Centre, which is assigned the task as the head research community for education of horse personnel and for horse breeding in Norway by the Norwegian Ministry of Agriculture and Food. This task forms a part of the Norwegian government's efforts of maintaining national horse breeds in accordance with its duties pursuant to the UN Convention on Biodiversity (the Rio Convention). Stiftelsen Norsk Rikstoto's financing of this center thus represents a cost which the Norwegian government would otherwise have to cover itself.

(86) Moreover, on occasions, it is discussed whether the Norwegian government should re-assume some of the assignments financed through Stiftelsen Norsk Rikstoto, e.g., on 11 December 2022, Members of Parliament voted against reassuming the responsibility for financing the Norwegian Equestrian Centre and the assignments related to anti-doping control, race veterinaries, racing stable controls, and preventive anti-doping work.[10] Additionally, in 2023, the Norwegian government decided to take on the costs for race veterinarians from the totalisator

[9] See, inter alia, Prop. 220 L (2020-2021) p. 85, the Norwegian Gambling Act Sections 1 and 14, and the Royal Decree dated 9 December 2022.

[10] See case number 4, proposal IV: https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt/votering-detaljer/?p=80198&dnid=1&vt=15340.

tracks which were previously managed by Stiftelsen Norsk Rikstoto, resulting in an expenditure cut of roughly 3.8 MNOK for the foundation.

(87) For these reasons, it is clear that the government, by issuing an exclusive right to provide and manage horse betting services to a private third party, directly benefits from having the services offered as means of achieving social policy aims and from expenditure cuts for not having to perform the services itself. Likewise, it is clear that receiving an exclusive right to provide an economic activity in a Member State entails a benefit to that economic operator, seeing as the recipient of the right would otherwise not be able to provide said services. Moreover, it may be mentioned that one of the recipients of the profits stemming from the exclusive rights holder is Det Norske Travselskap, which is one of the founders of Stiftelsen Norsk Rikstoto which receives 82 per cent of the surplus.[11]

(88) To summarise, in a case such as the one at issue, a mutual exchange of services between a contracting authority and an economic operator exists. The contracting authority entrusts the economic operator with the provision and management of horse betting services against consideration. The concessionaire has, in exchange for an exclusive right, assumed the responsibility to provide and manage the horse betting services. And, in turn, the provision of the exclusive right entails a direct economic benefit to the contracting authority who achieves social policy aims and expenditure cuts. Thus, a contract for pecuniary interest exists within the meaning of Article 5(1) of the Concessions Directive.

The contract consists of the right to exploit the services

(89) To be considered a services concession, the consideration of the contract for pecuniary interest must consist of either partially or entirely the right to exploit the services in question. The exclusive right awarded pursuant to the Norwegian Gaming Act Section 14 gives the concessionaire the right to receive remuneration through payment from third parties, and not directly by the Norwegian government. The holder of the exclusive right in the present case, Stiftelsen Norsk Rikstoto, receives its compensation for providing and managing the national system of totalisator operating services by charging its customers for the use of the services.

(90) In a situation such as the one at hand, the payment stream flows directly from the exclusive rights holder's customers and not through the state and, thus, fulfils the second criterion in Article 5(1) of the Concessions Directive.

The contract involves the transfer of an operating risk

(91) In order to decide whether the award of an exclusive right to a commercial foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto constitutes a "services concession", it is necessary to explain how the contract involves the transfer of an operating risk.

(92) The grant of the exclusive right to provide horse betting services entails that the operational risk associated with the services has been transferred from the Norwegian state to the recipient. More specifically, the exclusive rights holder has assumed the demand risk for the

[11] Vedtekter for Stiftelsen Norsk Rikstoto (last updated 23 September 2022) § 6: https://content.rikstoto.no/globalassets/dokumenter/diverse/22_03786-1-godkjente-vedtekter-for-stiftelsen-norsk-rikstoto-984671_2_1.pdf

provision of services, as it must bear losses resulting from reduced demand for horse betting. The significant fluctuations in the demand for horse betting are confirmed by, inter alia, the preparatory works Ot.prp. nr. 44 (2002-2003) section 3.3.3, where the following is stated:

> *"Norsk Rikstoto's game has had a more uneven development and has since an increasing demand in the 1990s experienced a real revenue decline in the past year (year 2002). This despite extensive development of the game offering and introduction of 'Rikstoto Direct' broadcasts to commissioners. The decline is believed to have the connection that Norsk Rikstoto is increasingly noticing competition from international games."* (Our translation).

(93) It must also be noted that the exclusive rights holder has no other sources of income apart from those derived from its gaming services, and the state has not guaranteed for the commercial foundation's income. Therefore, a reduced demand for horse betting would result in reduced earnings for Stiftelsen Norsk Rikstoto as the exclusive rights holder. Furthermore, through the concession, the foundation has assumed responsibility for the entire spectrum of service operations, including the operation of gaming platforms, marketing, payment systems, customer query contact point, implementation of responsible gaming measures, and more. This operational responsibility entails significant costs and investments, which Stiftelsen Norsk Rikstoto is not guaranteed to recoup, given the fluctuating demand for horse betting services. Therefore, the exclusive rights holder has assumed an operational risk that involves real exposure to vagaries of the market and, moreover, it is not guaranteed to recoup the expenses associated with the operation of the services provided.

(94) In this regard it may also be noted that, since Stiftelsen Norsk Rikstoto carries out economic activities by providing gaming services on the Norwegian market, the Norwegian government cannot remedy the economic losses of the foundation through economic aid without risking a breach of Article 61 of the EEA Agreement. This eliminates much of the possibility for the Norwegian government to reduce the economic risks taken by the exclusive rights holder in its daily operations, which makes it clear that the award to a commercial foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto entails exposure to the vagaries that exist in the market and that it must carry its own potential losses when providing gaming services.

(95) The contract in question therefore involves the transfer of an operating risk in exploiting the services to the economic operator receiving the exclusive right.

Conclusion

(96) The award of the exclusive right to provide horse betting services in a case such as the one at issue in the main proceedings constitutes a "services concession" pursuant to article 5(1)(b) of the Concessions Directive. It is a contract for pecuniary interest where the contracting authority entrusts the provision and the management of horse betting services to an economic operator. The consideration consists in the right to exploit the services, and it involves a real exposure to the vagaries of the market and it involves the transfer of operating risk to the concessionaire.

(97) Therefore, the answer to the third and fourth question must be that the award of an exclusive right to offer horse betting services to a commercial foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto, where the profits of the grantee of the exclusive right is controlled by the state via regulatory means, constitutes a "services concession" within the meaning of Article 5(1)(b) of the Concessions Directive.

3.5 The fifth and sixth questions

(98) By its fifth and sixth question, assuming that the Concessions Directive applies, the referring court seeks to know whether the derogation in Article 10(1) is applicable in a situation such as the one at hand, where the award is carried out without the existence of national legislation explicitly deciding that the recipient shall have said right. The referring court asks whether it bears any significance on the exception that the preparatory works to the Gaming Act assume that the exclusive right should be awarded to a specific recipient, where this is not codified by law because said recipient cannot unilaterally be obligated by the government to offer gaming services, and whether it bears any significance that the recipient continuously has been awarded this exclusive right in the past.

(99) Article 10(1) first paragraph of the Concessions Directive provides the following exception to the applicability 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."*

(100) In order for the exception provided in Article 10(1) of the Concessions Directive to apply, the contracting authority or contracting entity in question must have been given an exclusive right within the meaning of the Directive in a manner which is compatible with the EEA Agreement. Seeing as this Article constitutes an exception to the rule regarding the applicability of the Concessions Directive, it must be interpreted strictly and construed in a manner consistent with the objectives of this Directive so that it does not undermine its intended effect, see, to that effect, ECJ case C-19/13 *Fastweb* paragraph 40:

> *"Since Article 2d(4) of Directive 89/665 constitutes an exception to the rule regarding the ineffectiveness of contracts, laid down in Article 2d(1) of that directive, it must be interpreted strictly (see, by analogy, the judgment in Commission v Germany, C-275/08, EU:C:2009:632, paragraph 55 and the case-law cited). Nevertheless, the exception must be construed in a manner consistent with the objectives that it pursues."*

(101) The parties disagree whether Stiftelsen Norsk Rikstoto may be considered a contracting authority rendering the exemption in Article 10(1) applicable, however, the referring court has only asked the EFTA Court whether the services concession is awarded "on the basis of an exclusive right." The notion of a contracting authority will therefore not be commented.

Preparatory works cannot on their own constitute an exclusive right

(102) The term "exclusive right" is given the following definition in Article 5(10) of the Concessions Directive:

> *"'exclusive right' means 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."*

(103) When considering whether an economic operator has been awarded an exclusive right by means of law, regulation, or published administrative provision, the national legal system of the

Member State in question must be assessed. It is in principle relevant to take into consideration the preparatory works of national legislation when making this assessment, see joined ECJ cases C-49/98, C-50/98, C-52/98, C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* paragraph 40, as well as ECJ case C-164/99 *Portugaia Construcoe* paragraph 27, and EFTA Court case E-1/06 *ESA v. Norway* paragraph 33. However, when a derogation from EU law is made dependent on government acts with certain characteristics, a strict interpretation of that derogation requires that the government act in question corresponds explicitly to these characteristics. For Article 5(10) of the Concessions Directive to be fulfilled, it is therefore necessary that the government act in question has the explicit characteristics as a legally binding law, regulation or published administrative provision.

(104) Preparatory works cannot on its own be considered a "law, regulation or published administrative provision" within the meaning of Article 5(10) and 10(1) of the Concessions Directive. In Norwegian law, preparatory works are non-binding documents that explain the procedures and assessments that have been done prior to the formal adoption of a legal Act. They do not bring about rights or obligations on their own but may be used as background information to interpret the legislation they relate to. The purpose of Article 5(10) of the Concessions Directive requiring the exclusive right to be anchored in a law, regulation, or published administrative provision, however, is to ensure sufficient legal authority and transparency surrounding the exclusive right, so that any interested party may review the compliance of the exclusive right with the EEA Agreement.

(105) Preparatory works, being non-binding documents that lack any formal legal authority, do not fulfil the purposes of the Concessions Directive, and are therefore not covered by the definition of "law, regulation or published administrative provision" or "exclusive right" in Article 5(10) of the Concessions Directive.

The exclusive right must have been awarded prior to the contract award

(106) Article 10 of the Concessions Directive allows a contracting authority to award a contract on the basis of an existing exclusive right to provide the services covered by said exclusive right. That Article does not, however, give a contracting authority the right to award an exclusive right without competition. Therefore, Article 10 may only be relied on where there already exists an exclusive right before the contract in question is awarded.

(107) In Norwegian gaming law, the Gaming Act Section 14 grants the government the right to award an exclusive right to any single supplier that fulfils the criteria provided. Even though Stiftelsen Norsk Rikstoto is mentioned in the non-binding preparatory works, it is not singled out as an exclusive supplier in the legally binding Gaming Act, and Stiftelsen Norsk Rikstoto was not provided this right before the award that took place on 9 December 2022. Stiftelsen Norsk Rikstoto could therefore not have been awarded the service concession on the basis of an exclusive right, because that exclusive right was established by the services concession itself.

(108) If Article 10(1) of the Concessions Directive were to be interpreted in any other way than suggested in the preceding paragraphs, a contracting authority could circumvent the rules in the Directive by awarding an exclusive right together with the concession and thus avoid any requirement to publish the contract. Such a circumvention would constitute a violation of Article 3(1) second paragraph of the Concessions Directive by designing the concession award procedure with the intention of excluding it from the scope of the Directive and unduly favouring a certain economic operator.

It is irrelevant whether an economic operator has had the exclusive right in the past

(109) The fact that the recipient of a services concession has been the sole provider of the services in question in the past is not a relevant consideration when awarding the services concession in relation to Article 10(1) of the Concessions Directive. It is clearly stated in this Article that the exception can only be used where an underlying exclusive right exists, which according to Article 5(10) must be established through law, regulation or published administrative provision. Historically continuous awards of exclusive rights do not constitute a law, regulation, or published administrative provision which can be relied upon to award services concessions without following the Concessions Directive and is not recognised as a valid reason to derogate from the rules on public procurement anywhere else in the Directive.

(110) Furthermore, according to Article 18 of the Concessions Directive, the duration of a services concession shall be limited. The purpose of this is to combat restrictions of competition, which is clearly stated in recital 52 of the Directive:

> *"The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment."*

(111) If past awards of contracts were to be a relevant consideration when applying the derogation in Article 10(1) of the Concessions Directive, this would be in direct violation of the purpose of the Directive to safeguard the free movement of services and the freedom of establishment in the EEA, which is not compatible with a strict interpretation of that Article. Therefore, after the adoption and entry into force of the Concessions Directive, all services concessions must, unless an exemption is applicable, follow the detailed regulation of the Directive, regardless of how that services concession was awarded prior to adoption and entry into force of this Directive.

Conclusion

(112) The answer to the fifth and sixth question must therefore be that the derogation provided in Article 10(1) of the Concessions Directive is not applicable to an award of a services concession without the existence of a law, regulation, or published administrative provision giving an exclusive right prior to the award of a services concession, that meaning, it is irrelevant whether a single provider has been singled out in the preparatory works of the national gaming legislation when this is not reflected in the final legislation, and that it does not bear any significance that the recipient continuously has been awarded this exclusive right in the past.

4. CONCLUSIONS

(113) Accordingly, Trannel International Limited proposes that the EFTA Court responds to the Request for Advisory Opinion as follows:

I. Regarding the second question, the adoption and entry into force of Directive 2014/23/EU did not entail any change for how to draw the line between services concessions, on the one hand, and administrative authorisations, on the other hand, compared to Directive 2004/18/EC.

II. Regarding the first question, the award of an exclusive right to offer gaming services in a Member State in a similar manner to that in the present case shall be regarded as a "services concession" pursuant to Article 5(1)(b) of Directive 2014/23/EU.

III. Regarding the third and fourth question, the award of an exclusive right to offer horse betting services to a commercial foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto, where the profits of the grantee of the exclusive right is controlled by the state via regulatory means, constitutes a "services concession" within the meaning of Article 5(1)(b) of Directive 2014/23/EU.

IV. Regarding the fifth and sixth question, the derogation provided in Article 10(1) of Directive 2014/23/EU is not applicable to an award of a services concession without the existence of a law, regulation, or published administrative provision giving an exclusive right prior to the award of a services concession, that meaning, it is irrelevant whether a single provider has been singled out in the preparatory works of the national gaming legislation when this is not reflected in the final legislation, and that it does not bear any significance that the recipient continuously has been awarded this exclusive right in the past.

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