ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 23 October 2023

Written Observations by the Kingdom of Norway

represented by Kristine Møse and Helge Røstum, advocates at the Office of the Attorney General for Civil Affairs, submitted pursuant to Article 20 of the Statute of the EFTA Court, in

Case E-8/23 Trannel International Limited v Staten v/Kultur- og likestillingsdepartementet

in which Oslo tingrett (Oslo District Court) has 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 (SCA).

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1 INTRODUCTION

(1) The request for an advisory opinion concerns the interpretation of Article 5(1)(b) and the first subparagraph of Article 10(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("the Directive").[1]

(2) The request has been made in proceedings before the Oslo District Court between Trannel International Limited, an international gaming company, ("the plaintiff" or "Trannel") and Staten v/Kultur- og likestillingsdepartementet (the Norwegian Government, represented by the Ministry of Culture and Equality).

(3) The case concerns the legality of the Norwegian State's grant of an exclusive right to offer games of chance on horses to the foundation Stiftelsen Norsk Rikstoto ("Norsk Rikstoto"). Trannel claims that the grant must in fact be classified as a services concession, which has been awarded directly without prior public call for tenders, contrary to the rules of the Directive. In the Government's view, the exclusive right has been granted through an authorisation scheme that falls outside the scope of the Directive.

(4) Evidently, and as explained by the Directive itself, not all arrangements where an operator is given some form of permission to exercise an economic activity, are by their nature *contractual*. This case, therefore, boils down to the proper understanding of the basic condition for the application of all the public procurement directives, namely the concept of *a contract for pecuniary interest*. In effect, the referring court seeks guidance on the determination of the distinction between this concept, on the one hand, and *authorisation schemes and licences*, on the other, the latter falling outside the EEA rules of public procurement completely.

(5) Although that distinction is of fundamental importance under EEA procurement law, the Government fails to see that the case at hand raises any real doubts as to the correct classification. In fact, should the authorisation scheme in this case be deemed as a concession contract, it would blur the lines between concession contracts covered by the Directive, on the one hand, and authorisations, licenses, and other non-contractual arrangements, on the other. That would not only run counter to the Directive's aim of providing legal certainty[2]. It would also limit the freedom of EEA States to choose an authorisation scheme as its method for organising and controlling the operation of games of chance.

(6) Due to a subsidiary claim from the Government in the main proceedings, the case also raises certain issues as to the interpretation of the exclusion concerning services concessions awarded to a contracting authority on the basis of an exclusive right.

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[1] OJ 2014 L 94, p. 1.

[2] Recital 1 of the Directive.

2 THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

(7) Norsk Rikstoto has held an exclusive right to offer games of chance on horses ("hesteveddeløp ved totalisator") in Norway since 1982. The exclusive right has been granted for five years at a time in the form of authorisations by Royal Decree by the King in Council. On the basis of the Gaming Act and the Royal Decree of 9 December 2022, the foundation was granted a new ten-year authorisation with effect from 1 January 2023, covering all forms of games of chance on horses ("pengespill på hest").

(8) Norsk Rikstoto's primary purposes are to facilitate that games of chance on horses are taking place within a responsible and safe framework and to prevent the negative consequences of that gaming activity.

(9) The activities of Norsk Rikstoto are subject to strict control by the public authorities. First, the Ministry may appoint a majority of the members of the foundation's board. Further, the foundation is subject to strict supervision both by the Ministry and by Lotteri- og stiftelsestilsynet ("the Norwegian Gambling and Foundation Authority"). Detailed requirements on the gaming activity are also laid down in legislation, including concerning the types of bets and events authorised.[3]

(10) Moreover, strict control over Norsk Rikstoto's activities is also ensured through the conditions laid down in the authorisation itself.[4] First, it follows that dialogue meetings must take place between the Ministry and Norsk Rikstoto at least twice a year concerning the foundation's operations and gaming activity, in order to ensure that these comply with the rules and objectives of the Gaming Act and the conditions in the authorisation. Second, Norsk Rikstoto shall provide the Ministry and the Norwegian Gambling and Foundation Authority with annual reports on channelling ability and accountability measures ("kanaliseringsevne og ansvarlighetstiltak"). Third, Norsk Rikstoto shall provide the Ministry with annual reports on how the foundation is complying with the requirements of the Gaming Act concerning efficient operation ("effektiv drift").

(11) Trannel had previously applied for such authorisation. The Ministry of Culture and Equality informed Trannel that the application would not be considered on the merits, due to the State monopoly system for games of chance on horses in Norway and Norsk Rikstoto's prevailing exclusive right.

(12) On 17 September 2022, Trannel lodged civil proceedings before the Oslo District Court, claiming that the grant to Norsk Rikstoto was in fact a services concession under Article 5(1)(b) of the Directive, which should be deemed as an ineffective contract pursuant to Section 13 of the Public Procurement Act.

(13) This 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

[3] See sections 5.2 and 6 of the referring court's request.

[4] See page 12 of the referring court's request.

92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts ("the Remedies Directive").[5]

(14) Trannel also made a subsidiary claim for a declaratory judgment that the grant of the exclusive right be deemed contrary to Articles 31 and 36 of the EEA Agreement.

(15) The Government disputed both claims. The Oslo District Court decided to stay the proceedings and to refer six questions to the EFTA Court for an advisory opinion.

(16) By its first to third questions, which should be examined together, the referring court essentially seeks guidance on the interpretation of the concept of "services concession" in Article 5(1)(b) of the Directive, and its delineation towards authorisation schemes not qualifying as contractual services, including which factors are key for the correct classification. The Government will examine those questions in section 3 below.

(17) In question four, the referring court asks whether the grant of an exclusive right "to a foundation organised in a manner similar to that of" Norsk Rikstoto is in fact a services concession. As the Government will explain in section 4 below, that question is somewhat ambiguous. It may be understood as inviting the EFTA Court to decide on the case in the main proceedings. However, it is for the referring court to apply the relevant rule of EEA law in the specific case pending before it. Needless to say, the EFTA Court does not decide on issues of fact or the content of national law. The Government will nevertheless submit its view on the correct conclusions in the main proceedings, based on the interpretation of the Directive set out in section 3 below. Furthermore, the Government will comment on some of Trannel's main pleas, referred to in the referral.

(18) Due to a subsidiary claim from the Government in the main proceedings, the case raises certain issues on the interpretation of the exclusion in the first subparagraph of Article 10(1) concerning services concessions awarded to a contracting authority on the basis of an exclusive right. By its fifth and sixth questions, the referring court seeks guidance on the interpretation of that exclusion. The Government will examine those questions in section 5 below.

3 THE FIRST TO THIRD QUESTIONS: THE DISTINCTION BETWEEN SERVICES CONCESSIONS AND AUTHORISATION SCHEMES

3.1 Preliminary remarks

(19) By its first to third questions, the referring court essentially seeks guidance on the interpretation of the concept of "services concession" in Article 5(1)(b) of the Directive, and its delineation towards authorisation schemes not qualifying as contractual services, including which factors are key for the correct classification.

[5] OJ 2007 L 335 p. 31.

(20) At the outset, the Government underlines that the main aim of granting Norsk Rikstoto an exclusive right to offer games of chance on horses is to ensure that it takes place within a responsible and safe framework and to mitigate the negative social consequences of that activity. The aim is not to acquire a contractual service to the State's direct economic benefit.

(21) The grant of exclusive rights in the form of authorisations or licences, without prior public call for tenders, has been a common way of organising the field of gambling and betting across the European countries for years. As explicitly follows from the first sentence of recital 35, the Directive had no intention to "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".

(22) It is settled case-law that EEA law allows for the direct grant of an exclusive right to offer gaming services without competition, as long as the authorities have "strict control" over the operator.[6] This condition was elaborated upon in *Zeturf*, a case concerning the conferral of a monopoly to offer horserace betting on a private operator. The Court of Justice considered that the French public authorities appeared to have particularly strict control over the operator. Inter alia, its board of directors were in part appointed or approved by the authorities, the activity was under the inspection and supervision by two ministries, and there existed detailed rules on the betting activity. As held by the Court, the State exercised direct control over the functioning of the exclusive operator, the organisation of the events on which bets were placed, the types of bets authorised and their channels of distribution, including the proportion of the winnings to the stakes and the conduct and supervision of the regulated activities.[7]

(23) The referring court does not question the EEA States' freedom to choose the appropriate methods to control the field of games of chance on horses, nor does the request concern the question of whether restrictions on free movement may be justified under the EEA Agreement. Instead, the referring court seeks guidance on how to determine whether an exclusive right to offer such gaming activities has in fact been granted by the conclusion of a services concession, meaning that the rules on public procurement apply.

3.2 Question 1: Article 5(1)(b) – legal analysis

(24) By its first question, the referring court asks which factors are key for the determination of the distinction between services concession, on the one hand, and authorisation schemes, on the other.

(25) The Government recalls that services concession is an autonomous concept of EEA law and must be interpreted uniformly throughout the EEA. That means that national legal

[6] A landmark judgment is *Sporting Exchange*, C-203/08, EU:C:2010:307, paras. 59 to 60.
[7] Judgment in *Zeturf*, C-212/08, EU:C:2011:437, paras. 41 and 55 to 56. As follows from para. 9 to 10 above, the degree of control in *Zeturf* is comparable to the present case.

classification is irrelevant for the purpose of determining whether the Directive is applicable, including the terms or words that are used in the EEA State's regulatory framework.[8]

(26) Previously, services concession was not governed by any of the 2004 Directives on public procurement.[9] However, contracting authorities concluding them were bound to comply with the fundamental rules of the EU Treaty and the EEA Agreement, including the obligation of transparency.[10]

(27) This state of law generated legal uncertainty and gave rise to several judgments from the Court of Justice on the interpretation of the concept of services concession. One of the main aims of the Directive was, therefore, to provide clarification on the definition of concession contracts, in particular by referring to the concept of operating risk, and thus to ensure legal certainty and an effective and non-discriminatory access to that market.[11]

(28) With the adoption of the Directive in 2014, the term "services concession" was defined in Article 5(1)(b) as 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".*

(29) The definition also sets out that it shall involve "the transfer to the concessionaire of an operating risk" in exploiting those services, which encompasses demand or supply risk or both. In what situations such operating risk will exist, is explained further in the provision.

(30) It follows from the definition in Article 5(1)(b) that services concessions are in fact public service contracts with certain specific features. The difference between service concessions and public service contracts lies in the method of consideration and the transfer of risk associated with operating the services.[12]

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[8] E.g., judgment in *SHARENGO*, C-486/21, EU:C:2022:868, para. 57; and Opinion in *Promoimpresa*, Joined Cases C-458/14 and C-67/15, EU:C:2016:122, para. 60 to 61.

[9] See Articles 1(4) and 17 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2004 Public Sector Directive), OJ 2004 L 134 p. 114; and Articles 1(3)(b) and 18 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (2004 Utilities Directive), OJ 2004 L 134 p. 1.

[10] Case E-24/13 *Casino Admiral AG v Wolfgang Egger*, paras. 51 to 56, with further references.

[11] Recitals 1 and 18 of the Directive; the European Commission, COM (2011) 897 final, pages 5 to 6; and the European Commission, SEC (2011) 1588 final, pages 4 and 11 to 15.

[12] On the difference between "services concession" under the Directive and "public service contract" under Article 2(1)(9) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94 p. 65), se judgment in *Politanò*, C-225/15, EU:C:2016:645, paras. 30 to 31.

(31) However, the common feature in both set of rules – and a fundamental requirement for any of the three public procurement directives to apply – is the existence of a "contract for pecuniary interest".[13] That is also the decisive factor that distinguishes services concessions from authorisations schemes, the latter falling outside the Directive. Hence, the question posed by the referring court revolves around a closer legal analysis of that requirement.

(32) The distinctive features of services concessions, namely the method of consideration and the transfer of operating risk are, as the Government sees it, not relevant when answering the referring court's request. These conditions will for that reason not be examined further.

(33) As to the *first* element of the requirement "contract for pecuniary interest", the concept of a "contract" is essential for the purpose of defining the scope of the Directive.

(34) According to settled case-law, the ordinary meaning of the concept of a contract is that it refers to the creation of *binding and reciprocal obligations which are legally enforceable*. In *Helmut Müller*, the Court of Justice held that "[s]ince the obligations under the contract are legally binding, their execution must be legally enforceable".[14] In *Tax-Fin-Lex*, it was underlined that the "reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable".[15] This fundamental principle is also confirmed in recital 14 of the Directive, where concession contracts are described as providing for "mutually binding obligations [...] which are legally enforceable".

(35) The conclusion that can be drawn from the case-law referred to above, is that the nature of the obligations must be such that their performance can be enforced before the domestic courts (or other judicial bodies), either by the court ordering specific performance or performance surrogates (inter alia, damages). Arrangements or schemes that do not fulfil those requirements, fall outside the scope of the Directive.

(36) To that effect, recital 14 of the Directive makes clear that authorisations or licences that establish conditions for the exercise of an economic activity, including a condition to carry out a given operation, but "where the economic operator remains free to withdraw" from that activity, should not qualify as concession contracts. Those are not contractual obligations within the meaning of the Directive, but arrangements based on other mechanisms that must be assessed under EEA primary law.

(37) In other words, whereas the grant of an exclusive right such as an authorisation, only confers a *right* to engage in a particular activity, the award of a public service contract, on the other hand, amounts to a contract providing for mutually binding *obligations* that are legally enforceable.

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[13] Article 5(1)(a) and (b) of the Directive; Article 2(1)(5) of Directive 2014/24/EU; and Article 2(1) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94 p. 243).

[14] Judgment in *Helmut Müller*, C-451/08, EU:C:2010:168, para. 62.

[15] Judgment in *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, para. 26.

(38) As to the *second* element, that the contract is "for pecuniary interest", this requires that the contracting authority *receives a service pursuant to that contract in return for consideration*, the service being of *direct economic benefit* to the contracting authority.[16]

(39) This presupposes the *acquisition* (or procurement) of a service, which is of immediate economic benefit for the authorities. On the same note, the recital of the Directive underscores that a contract for pecuniary interest means that the contracting authorities "always obtain the benefits of the works or services in question".[17] A services concession will, therefore, necessarily have to be subject to specific requirements in order to ensure that the authority obtains the benefits of the services in question, cf. recital 14 of the Directive, which states that concession contracts are "subject to specific requirements defined by the contracting authority".

(40) In contrast, the objective of authorisation schemes and licenses, on the other hand, is not to *acquire a service* of immediate economic benefit to the public authority, in return for consideration. The objective is quite different; it is to *regulate* the exercise of an economic activity. The authority merely "establishes the conditions for the exercise of an economic activity", cf. recital 14 of the Directive. As illustrated by *Sporting Exchange*, a decision granting authorisation or licence to offer gaming activities may, for instance, include conditions relating to the maximum number of sports-related prize competitions permitted per year, and to the amounts thereof.[18]

(41) Thus, the absence of specific requirements on what is to be acquired and obtained from the public authority, also serves to indicate that one is not dealing with a contract for pecuniary interest, but rather regulatory arrangements, such as authorisations or licenses.

(42) To conclude, the Government submits that the answer to the referring court's first question should be that in order for a grant of an exclusive right to offer games of chance on horses to be a services concession, it must provide for mutually binding obligations where the performance of the service is subject to specific requirements defined by the contracting authority, which are legally enforceable. The contracting authority must receive a service pursuant to that contract in return for consideration, the service being of direct economic benefit to the contracting authority.

(43) An authorisation scheme, on the other hand, does not establish mutually binding obligations that are legally enforceable, but regulates the exercise of an economic activity by establishing the conditions of the pursuit thereof.

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[16] Judgment in *Helmut Müller*, C-451/08, EU:C:2010:168, paras. 48 to 54. See also, e.g., judgments in *Remondis*, C-51/15, EU:C:2016:985, para. 43; *Informatikgesellschaft für Software-Entwicklung*, C-796/18, EU:C:2020:395, paras. 40 to 53; and *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, paras. 24 to 29.

[17] Recital 11 of the Directive.

[18] Judgment in *Sporting Exchange*, C-203/08, EU:C:2010:307, paras. 44 to 46.

3.3 Question 2: The adoption of the Directive

(44) By its second question, the referring court asks whether the adoption and entry into force of the Directive altered the distinction between services concessions and authorisation schemes.

(45) As follows from paras. 28 to 29 above, the definition of services concession in Article 5(1)(b) is partly a repetition of the definition of services concession in the former 2004 Directives, and partly a codification of case-law from the Court of Justice on the concept of operating risk.[19] In the Government's view, there is nothing to suggest that the Directive meant to change or expand the concept of services concession in any way.

(46) At any rate, the concept of "contract for pecuniary interest" clearly remained the same with the adoption of the Directive. [20] As this is the decisive factor that distinguishes services concessions from authorisation schemes, cf. above, the Directive did not alter the distinction between the two concepts. Consequently, the referring court's second question must be answered in the negative.

3.4 Question 3: The State's control of profits through regulation and distribution to third parties

(47) By its third question, the referring court asks what significance it has for the determination of the distinction between services concessions and authorisation schemes that any profits from the gaming activity are controlled by the State through regulation and distributed to third parties.

(48) The issue of profits is not a relevant factor in the definition of "services concession" in Article 5(1)(b) of the Directive.

(49) However, in the Government's view, if the arrangement in question establishes a requirement that any profits from the economic activity shall be controlled by the State and distributed to third parties, such an element indicates that the arrangement is not contractual in nature. Typically, in a "contract for pecuniary interest", one would expect the provider of the service in question to administer its profits from the economic activity. If it were the other way around, this would leave the service provider with few incentives.

(50) In a regulatory arrangement, on the other hand, it would indeed be natural in some cases that the authority imposes conditions concerning the control and distribution of profits. Such conditions would typically have the intention to regulate and impose a strict control with the pursuit of the economic activity, ensuring that certain aims are met, cf. section 3.2 above.

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[19] Judgments in *Commission v Italy*, C-382/05, EU:C:2007:445; *Eurawasser*, C-206/08, EU:C:2009:540; and *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130.

[20] Cf., e.g., Prof. S. Arrowsmith, *The law of Public and Utilities Procurement [...] Volume 1* (2014) pages 397 to 398, on the lack of impact of Directive 2014/24 on the concept. The same must be the case for our Directive.

(51) In this regard, *Sporting Exchange* is illustrative. The Dutch authorities' decision to grant a single licence to offer games of chance included conditions on the distribution of net funds and on the operator's own income, the latter being only entitled to keep the amount of costs incurred without making any profit. The operator was authorised to establish a reserve fund every year, corresponding to no more than 2.5% of funds obtained in the previous calendar year, in order to ensure the continuity of the activities. As follows from the premises, it went without saying for the Court of Justice that it was correct of the national court to consider such an arrangement as a licence, and not a contractual arrangement.[21]

(52) Consequently, although it is not a decisive factor, the answer to the referring court's third question is that if the profits from the activity are controlled by the State and distributed to third parties, this may have significance in that such an element typically would indicate that the arrangement in question is in fact *not* a services concession, but a regulatory arrangement, ensuring strict control with the exercise of the economic activity.

4 QUESTION 4: WHETHER THE EXCLUSIVE RIGHT GRANTED TO NORSK RIKSTOTO IS A SERVICES CONCESSION

4.1 Preliminary remarks

(53) By its fourth question, the referring court asks whether the grant of an exclusive right to offer games of chance on horses "to a foundation organised in a manner similar to that of" Norsk Rikstoto, is in fact a services concession under Article 5(1)(b) of the Directive.

(54) That question is somewhat ambiguous. One possible reading is that the referring court is asking what significance the "organisation" of the holder of an exclusive right has for the application of the Directive.

(55) In the Government's view, unless the organisational features of a gaming provider entail that the conditions in section 3.2 above are met, they are not in themselves decisive when determining whether an arrangement is in fact a services concession. Such features are, on the other hand, highly relevant when determining whether exclusive rights granted by authorisations or licences may be justified under the EEA Agreement.[22]

(56) The other possible reading of question four is that the referring court is effectively asking the EFTA Court to decide on the case in the main proceedings. As already mentioned, it is for the referring court to apply the relevant rules of EEA law in the specific case pending before it, and the EFTA Court does not decide on issues of fact. Nevertheless, the Government will submit its view on the correct conclusions in the main proceedings, based on the interpretation of the Directive set out in section 3 above, see section 4.2 below.

[21] Judgment in *Sporting Exchange*, C-203/08, EU:C:2010:307, paras. 42 to 46.

[22] As mentioned in para. 20 above, EEA law allows for the direct grant of an exclusive right to offer gaming services to a private operator without competition, as long as the authorities have "strict control" over the operator, cf. judgment in *Sporting Exchange*, C-203/08, EU:C:2010:307, paras. 59 to 60.

Furthermore, the Government will comment on some of Trannel's main pleas in the referral, see section 4.3 below.

4.2 Norsk Rikstoto's exclusive right is granted by means of an authorisation scheme, not by the conclusion of a services concession

(57) In some cases, the distinction between concession contracts and authorisations may give rise to doubts. However, in the Government's view, the referring court's request concerns no such borderline case. Norsk Rikstoto's exclusive right to offer games of chance on horses has not been granted by the conclusion of a services concession, but by way of an authorisation scheme.

(58) First, it follows explicitly from the preparatory works of the Gaming Act that, as Norsk Rikstoto is a foundation, it remains free to decide whether or not it *wishes* to operate the activities within the current legal framework. The Ministry would not impose a statutory obligation on Norsk Rikstoto to perform such a task, and such an obligation is not established in the Royal Decree. Further, it is also stated in the preparatory works of the Gaming Act that Norsk Rikstoto is envisaged the role as the sole provider of games of chance on horses in the future, provided that this is the *wish* of the foundation itself.[23]

(59) Consequently, Norsk Rikstoto is under no binding *obligation* to offer games of chance on horses to the public. On the contrary, it remains *free to withdraw* from its activities at any time. Thus, there is no obligation that can be legally enforced before the domestic courts, either by ordering a specific performance or alternatively ordering performance surrogates. This in itself is sufficient to draw the conclusion that the arrangement does not qualify as a services concession.

(60) Nevertheless, the Government will in the following support this conclusion with some additional arguments.

(61) As follows from the referring court's request page 11 to 12, the authorisation scheme does not include contractual remedies. Nowhere in the Royal Decree is there any mention of remedies for breach of contractual obligations, such as penalties or compensation for damages.

(62) On the contrary, the only mechanism included in the Royal Decree is that the authorisation may be *withdrawn* if the preconditions for it change. Moreover, it follows from the Royal Decree that the conditions regulating the activity of games of chance on horses aim to

[23] Cf. the referring court's request pages 10 to 11 on Prop.220 L (2020–2021) pages 91 to 92, where the exact text in Norwegian reads as follows: "[...] Departementet holder fast ved at forskjellen mellom Norsk Rikstoto som stiftelse og Norsk Tipping som et statlig eid selskap er vesentlig i dette spørsmålet. Det vil være opp til en stiftelse selv å beslutte om den ønsker å utføre pengespillvirksomhet, innenfor de rammene som fastsettes i regelverket. Departementet vil ikke pålegge stiftelsen gjennom lov å gjennomføre en slik oppgave. Departementet viderefører derfor forslaget fra høringen og foreslår i § 14 en generell bestemmelse som vil gjelde for den som får tillatelse til å tilby pengespill på hest, uten å knytte bestemmelsen direkte til Norsk Rikstoto. Departementet presiserer at det også i framtiden er Norsk Rikstoto som er tiltenkt rollen som enerettstilbyder for hestespill, forutsatt at stiftelsen selv ønsker dette."

ensure a strict control with the gaming activity and that its exercised within the boundaries of the national regulatory framework for those activities.[24]

(63) The Royal Decree refers to certain mechanisms in Chapter 6 of the Gaming Act. However, these are purely regulatory sanctions that apply in the event of violations of the Gaming Act and administrative decisions or regulations pursuant to it. As regulatory sanctions, they are enforced by the Norwegian Gambling and Foundation Authority, not by the Ministry of Culture and Equality. They are not contractual remedies or enforcement mechanisms.

(64) The authorisation scheme merely establishes certain conditions for the pursuit of the activity of games of chance on horses, the conditions aiming to facilitate that it takes place within a responsible and safe framework and to prevent negative consequences of the activity. As mentioned in para. 10 above, the authorisation includes conditions concerning dialogue meetings between the Ministry and Norsk Rikstoto, as well as a duty on Norsk Rikstoto to provide annual reports concerning channelling ability, accountability measures and the requirement of so-called efficient operation. In the Government's view, this substantiates that the grant of an exclusive right to Norsk Rikstoto has a *regulatory purpose*, ensuring strict control with the activity, as opposed to an aim of *acquiring a service* with a direct economic benefit.

(65) Lastly, it follows from the Gaming Act that the profits from games of chance on horses shall be distributed to organisations that promote equestrian sports, horse husbandry and Norwegian horse-breeding.[25] Thus, the profits are not at Norsk Rikstoto's disposal at all. As mentioned above, although this element is not decisive, in the Government's view, it supports the conclusion that the arrangement in question is not a services concession. The purpose of regulating the profits is to ensure that the activity is exercised under strict control.

(66) As concerns *the aim of the Directive*, it follows from its recitals that the EEA legislator set out to *clarify* the scope of concession contracts and thus ensure legal certainty and an effective and non-discriminatory access to that market. The purpose was not to *expand* the concept of concession contracts to include the granting of authorisations or licenses. It follows explicitly from the first sentence of recital 35 of the Directive that there was no intention to limit 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. In the Government's view, if the arrangement in question were to be classified as a services concession, this would effectively broaden the scope of the Directive to arrangements which have been accepted as not falling under its scope.

[24] Cf. the Royal Decree, page 4.

[25] Cf. the fourth subsection of Section 14 of the Gaming Act. It is specified by regulation that 97 percent of the profits are to be distributed to three pre-determined organisations without application (Det Norske Travselskap; Norsk Galopp; and Norsk Hestesenter), whereas the remaining 3 percent are distributed upon application to other non-profit organisations that work to promote the named objectives, cf. Section 4 and 5 of the regulation Forskrift 13. mars 2023 nr. 327 om fordeling av overskuddet fra pengespill på hest.

4.3 Consideration of Trannel's main pleas

(67) The Government cannot follow Trannel's deductions from the case-law of the EFTA Court and of the Court of Justice (pages 15 to 17 of the request). First, it is not correct that the arrangements in question in *Engelman* and *Sporting Exchange* were classified as services concessions, as claimed by Trannel. These two judgments concerned the issue of whether exclusive licences – no different from the system of authorisation in Norway – could be justified under the EC Treaty.[26] Second, as regards *Casino Admiral AG v Wolfgang Egger* and *Stanley International Betting and Stanleybet Malta*, they raised certain issues concerning concession contracts, but as follows from the overview of the facts of those cases, they are clearly not comparable with the case at hand.[27]

(68) As mentioned above, the Member States are free to *choose*, in accordance with EEA law, the methods for organising and controlling the operation of gambling and betting. Whether or not the arrangement should be classified as a services concession, will depend on a concrete assessment of the exact approach chosen.

(69) Further, Trannel argues that Norsk Rikstoto is in fact *funding* Norwegian equestrian sport, horse husbandry and horse breeding, and that these expenses would have had to be covered in the State budget had it not been for the concession, meaning that the concession provides the State with considerable savings. Thus, it is argued that the objective of the arrangement is to cover the State's need for a service. Trannel also claims that Norsk Rikstoto bears an operating risk in the operation of the gaming activity.

(70) The Government does not dispute that authorisation schemes and concession contracts often will have some similar features, in that both the concessionaire and the holder of the authorisation assumes the operation and responsibility of a certain activity or service. However, such overlapping elements are not decisive for the determination of the distinction between those two concepts.

(71) As mentioned above, the decisive factor is whether the execution of the activity in question takes the form of a contractual service, that is, provides for mutually binding obligations where the provision of the services is subject to specific requirements defined by the contracting authority, which are legally enforceable, and where the contracting authority receives a service pursuant to that contract in return for consideration, the service being of direct economic benefit to the contracting authority.

(72) As for Trannel's arguments on the "funding" of equestrian sport, horse husbandry and horse breeding, the distribution of profits to non-profit organisations is certainly a positive side effect of the scheme of games of chance in Norway, but it is not its main purpose. The main purposes are to ensure that games of chance take place in a responsible and safe framework and to prevent negative consequences of the activity.

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[26] Judgments in *Engelman*, C-64/08, EU:C:2010:506, paras. 7 to 12 and 52; and *Sporting Exchange*, C-203/08, EU:C:2010:307, paras. 10 to 13 and 46.

[27] Judgments in Case E-24/13 *Casino Admiral AG v Wolfgang Egger* paras. 14 to 18; and *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026, paras. 8 to 17.

(73) Lastly, Trannel asserts, without it being further substantiated, that the arrangement in question cannot be classified as an authorisation, as Norsk Rikstoto never *applied*. In the Government's view, the lack of an application does not preclude an arrangement from being classified as an authorisation scheme, as the way in which the arrangement came into place, necessarily will vary from case to case. This is corroborated by recital 14 of the Directive, which states that authorisations and licences in general are "normally" granted on request of the economic operator and not on the initiative of the contracting authority or entity.

(74) In any event, an application would be completely out of place and unnecessary in a situation such as the present, where the right to provide games of chance on horses throughout the years has been reserved to one explicit provider.

5 THE FIFTH AND SIXTH QUESTIONS: INTERPRETATION OF THE EXCLUSION FOR SERVICES CONCESSION AWARDED ON THE BASIS OF AN EXCLUSIVE RIGHT

5.1 Preliminary remarks

(75) As follows from the above, it is the Government's view that Norsk Rikstoto's exclusive right is granted by an authorisation scheme, not by the conclusion of a services concession.

(76) In the main proceedings, the Government has, as a subsidiary claim invoked the exclusion in the first subparagraph of Article 10(1) of the Directive. The Government underlines, that this is a *subsidiary position*, in the unlikely event that the authorisation scheme is classified as a services concession.

(77) According to Article 10(1), the 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". Similar exclusions are found in the other two procurement directives.[28]

(78) Article 10(1) of the Directive, read in conjunction with the definition of the concept of an "exclusive right" in Article 5(10), includes several conditions that all must be fulfilled for the exclusion to be applicable. However, the questions of the referring court do not ask for a clarification of all those conditions.[29]

(79) By its fifth and sixth questions, which are interconnected and therefore should be examined together, the referring court asks the EFTA Court to clarify the significance of certain aspects of the national legislation which forms the basis of an exclusive right, when deciding whether that exclusion is applicable.

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[28] Article 11 of Directive 2014/24 and Article 22 of Directive 2014/25, which replaced Article 18 of Directive 2004/18 and Article 25 of Article 2004/17.

[29] Inter alia, the parties disagree on whether Norsk Rikstoto is a "contracting authority" within the meaning of Article 10(1), cf. the definition under Article 6. However, that disagreement is not touched upon in the referring courts questions and will for that reason not be dealt with any further in this observation.

(80) In the view of the Government, the questions essentially deal with the interpretation of the requirement in the first subparagraph of Article 10(1), that the services concession must be awarded "on the basis of an exclusive right". Further, the questions call for a clarification of what basis the exclusive right must have in national law, for the exclusion to be applicable.

(81) The Government will set out its observations on that issue under section 5.2 below.

(82) Also, the questions from the referring court are framed in a manner that, in effect, invites the EFTA Court to go one step further and consider whether national law fulfils the requirement mentioned above. That is in principle a matter for the national court to decide. Since those questions are brought forward to EFTA Court in the referral, the Government will nevertheless indicate its view on that matter under section 5.3 below.

5.2 Question 5 and 6: Legal analysis of the requirement under Article 10(1) that the services concession must be awarded "on the basis of an exclusive right"

(83) It follows from the wording of the exclusion under Article 10(1) that the services concession must be "awarded [....] on the basis of an exclusive right".

(84) The wording indicates that there must exist a legal basis for the exclusive right in national law, other than merely the award of the services concession itself. In other words, the award of the contract cannot be the sole legal basis for the exclusive right.

(85) That interpretation is substantiated by the context and the rationale of the exclusion. Although not explicitly stated in the Directive or its recital, the exclusion is explained by the fact that it would be pointless to follow a competitive procedure in circumstances where a contracting authority under national law holds an exclusive right to provide the service in question, and where that law precludes other entities from being awarded that contract.[30] That rationale clearly presupposes the existence of a right under national law, other than merely the award of the services concession itself.

(86) The purpose of the Directive supports the interpretation above. If the award of the contract itself would be sufficient as a legal basis for the exclusive right exclusion, that would undermine the competition for public contracts, as it could be argued that any award of a contract is also a grant of an exclusive right.

(87) Further, the questions from the referring court call for a clarification of what basis the exclusive right must have in national law, for the exclusion to be applicable.

(88) The wording of Article 10(1) only states that the award of the concession must be based on an exclusive right. However, the concept of "exclusive right" is defined in Article 5(10) as

> *"a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator,*

[30] One may, however, argue that that rationale may be inferred from recital 32 of the Directive. See also the European Commission, SEC (2011) 1588, final, page 26, section 9.1.5.

and which substantially affects the ability of other economic operators to carry out such an activity".

(89) The definition refers to an exclusive right granted to a "single economic operator". However, as follows from the wording of Article 10(1), the exclusion is only applicable if the entity that holds the exclusive right is a contracting authority or a contracting entity within the meaning of the Directive.[31] As mentioned in footnote 29, that condition is not the topic of the referring court's request and will therefore not be examined further.

(90) Also, the definition set out that the basis for the exclusive right under national law must be "compatible with the Treaties". Since such a right involves a restriction on the free movement rules, it must be justified by explicit derogations from the free movement rules or by general interest requirements. As the referring court has not referred any questions concerning that requirement, the Government will not examine that further in this case.

(91) The definition in Article 5(10) further states that the exclusive right in question must be granted by means of "any law, regulation or published administrative provision". Except for the condition that the legal basis must be "published", the wording does not set out any formal or substantive conditions for the law, regulation or administrative provision that serve as the basis for the exclusive right.

(92) In any event, nothing in the wording suggests that there is an *additional* requirement that the holder of the exclusive right under national law (the contracting authority or contracting entity) is explicitly named in the *text* of that legislation, regulation, or the administrative provision, cf. question 5 of the referring court.

(93) On the contrary, the rationale behind the exclusion is that it is unnecessary to follow a competitive procedure in circumstances where other entities under national law are prohibited from being awarded the contract, cf. para 85 above. This suggests that the decisive factor is whether national law, in effect, establishes an exclusive right for the entity in question, not whether certain formalities are in place, including if the *text* of the legislation, regulation or the administrative provision explicitly names the holder of the right.

(94) Whether or not that is the case, must depend on a concrete assessment and an analysis of the national law, regulation, or administrative provision in question. Under such an assessment, the context and regulatory framework of the national law is of relevance, including whether a contracting authority or a contracting entity has held an exclusive right uninterruptedly under both the previous and current regulatory framework, cf. question 6 of the referring court. Such factors serve to illustrate that the holder in fact "enjoys" such an exclusive right, cf. Recital 32 of the Directive.

(95) The context of the exclusion under Article 10(1) lends support to that interpretation. According to the definition of the concept of an exclusive right under Article 5(10) referred to above, it is the combination of an exclusiveness of the right for the contracting authority,

[31] The concept of a "contracting authority" and a "contract entity" is defined in Articles 6 and 7 of the Directive.

with the prohibition of other entities from the possibility to carry out the same activities, that explains the exclusion in Article 10(1). Hence, the application of the exclusion must necessarily depend on a concrete assessment of whether or not the national legislation, in effect, establishes the "monopoly" that the exclusion demands.

(96) Drawing the lines together, the Government considers that the answer to the referring court's question 5 and 6 is that the requirement in the first subparagraph of Article 10(1), that the services concession must be awarded "on the basis of an exclusive right", means that there must exist a legal basis for the exclusive right in question other than merely the award of the concession itself.

(97) That basis may be "any law, regulation or published administrative decision". The decisive factor when assessing whether there exists such a basis in national law, is whether national law effectively establishes an exclusive right for the contracting authority, which substantially affects the ability of other economic operators to carry out the same activity. That must depend on a concrete assessment and an analysis of national law.

(98) Under such an assessment, the context and regulatory framework of national law is of relevance, including whether an entity has held an exclusive right uninterruptedly under both the previous and current regulatory framework. It is not a condition that the holder of the exclusive right under national law is explicitly named in the *text* of the legislation, regulation, or the administrative provision.

5.3 Subsidiary claim: Norsk Rikstoto is awarded a concession on the basis of an exclusive right

(99) As set out under para 82 above, the questions from the referring court are framed in a manner that, in effect, invites the EFTA Court to assess the facts of the case and the content of national law, and whether that law fulfils the conditions under Article 10(1) of the Directive. Although, that is in principle a matter for the national court to decide, the Government will, in brief, submit its view on whether national law fulfils the requirement set out above.

(100) Also, the Government reiterates that the present question is a *subsidiary one*, that presupposes that the grant of the authorisation to Norsk Rikstoto is classified as a services concession, which the Government strongly disputes.

(101) In the Government's view, a concrete assessment and an analysis of national law shows that Norsk Rikstoto holds an exclusive right to offer games of chance on horses within the meaning of the Directive. That right is based on the Gaming Act, read in light of its preparatory works, the legislation that the Gaming Act replaces, the present Royal Decree, and four decades of administrative practice that grants Norsk Rikstoto that exclusive right, to the exclusion of others.

(102) Thus, the exclusive right has a legal basis in national law other than merely the award of the concession itself.

(103) First, Norsk Rikstoto has uninterruptedly since 1982 been the only entity in Norway that has been allowed to offer games of chance on horses. That exclusive right was previously based on provisions in the Totalisator Act of 1927, but is presently based on the new Gaming Act, which entered into force 1 January 2023. Both legislative acts prohibited other entities from exercising that activity, and effectively established a monopoly for Norsk Rikstoto.

(104) Second, the fact that Norsk Rikstoto is not explicitly named as the holder of the exclusive right in the *text* of the legislation, presently in the new Gaming Act, does not preclude the application of the exclusion under the first subparagraph of Article 10(1). Section 14 of the Gaming Act sets out that the King in Council may grant an exclusive right to offer games of chance on horses to an entity that fulfils certain specific conditions. It follows explicitly from the preparatory works of the Gaming Act, that this exclusive right is reserved for Norsk Rikstoto, and that no other entity is eligible.[32] The only reason Norsk Rikstoto is not named in the text of Section 14 of the Gaming Act, is that Norsk Rikstoto, being a foundation, cannot formally be made subject to an *obligation* to offer such gaming by law.[33]

(105) The fact that Norsk Rikstoto, due to reasons of legal formalities pertaining to the legal status of foundations under Norwegian Law, is not explicitly *named* in the text of the Gaming Act, cannot preclude the application of the exclusion under Article 10(1).

(106) Third, and as already mentioned, Norsk Rikstoto has held that exclusive right uninterruptedly since 1982. The legislation has simultaneously prohibited other entities from carrying out the same activities. Thus, the effect of both the previous and present legislation on games of chance on horses has clearly been to limit the exercise of that activity to Norsk Rikstoto, and at the same time substantially affecting the ability of other operators to carry out such an activity, cf. the definition of an exclusive right under Article 5(10).

(107) Conclusively, in the unlikely event that the authorisation scheme is classified as a services concession, the award of a services concession in the present case fulfil the requirement under the first subparagraph of Article 10(1), read in conjunction with Article 5(10), in that it is awarded "on the basis of an exclusive right" by means of "any law, regulation or published administrative provision".

6 ANSWERS TO THE QUESTIONS

(108) Based on the foregoing, the Government respectfully submits that the questions posed by the referring court should be answered as follows:

1. *In order for a grant of an exclusive right to offer games of chance on horses to be a "services concession" under Article 5(1)(b) of Directive 2014/23, it must provide for mutually binding obligations where the performance of the service is subject to specific requirements which are legally enforceable. The contracting authority must receive a service pursuant to that contract in return for consideration, the service being of direct*

[32] See pages 10 to 11 of the referring court's request on Prop.220 L (2020–2021) pages 92 and 191 to 192.
[33] Ibid.

economic benefit to the contracting authority. An authorisation scheme, on the other hand, does not establish mutually binding obligations that are legally enforceable, but regulates the exercise of an economic activity by establishing the conditions of the pursuit thereof.

2. *The adoption of Directive 2014/23 and its regulation of concession contracts has not altered the distinction between services concessions, on the one hand, and administrative authorisation schemes, on the other.*

3. *In the determination of whether one is dealing with an administrative authorisation scheme or a services concession, the fact that any profits of the party holding the exclusive right are controlled by the State through regulation, and distrubuted to the benefit of third parties, indicates that the arrangement is not a services concession falling under Directive 2014/23, but a regulatory arrangement, ensuring strict control with the exercise of the economic activity.*

4. *The award of an exclusive right to offer games of chance on horses to a foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto is not a "services concession" under Article 5(1)(b) of Directive 2014/23.*

5. *The requirement in the first subparagraph of Article 10(1), that the services concession must be awarded "on the basis of an exclusive right", means that there must exist a legal basis for the exclusive right, other than merely the award of the concession itself. That basis may be "any law, regulation or published administrative decision".*

   The decisive factor when assessing whether there exists such a basis in national law, is whether national law effectively establishes an exclusive right for the contracting authority or contracting entity, which substantially affects the ability of other economic operators to carry out the same activity. That must depend on a concrete assessment and an analysis of national law. The context and regulatory framework of national law is of relevance, including whether the contracting authority or contracting entity has held an exclusive right uninterruptedly under both the previous and current regulatory framework. It is not a condition that the holder of the exclusive right under national law is explicitly named in the text of the legislation, regulation or the administrative provision.

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