JUDGMENT OF THE COURT

13 May 2024*

(*Directive 2014/23/EU – Article 5(1)(b) – Exclusive right – Horse race betting – Services concessions – Contract for pecuniary interest – Administrative authorisation*)

In Case E-8/23,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in the case between

Trannel International Limited

and

Staten v/Kultur- og likestillingsdepartementet (*the Norwegian State, represented by the Ministry of Culture and Equality*),

concerning the interpretation of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, in particular Article 5(1)(b) and Article 10(1) thereof,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann, and Michael Reiertsen (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

– Trannel International Limited (“Trannel International”), represented by Johanne Førde and Thomas Nordby, advocates;

– the Norwegian Government, represented by the Ministry of Culture and Equality, represented by Kristine Møse and Helge Røstum, acting as Agents;

– the Austrian Government, represented by Dr Albert Posch and Dr Julia Schmoll, acting as Agents;

– the Belgian Government, represented by Liesbet Van den Broeck, Antoine De Brouwer and Aurélie Van Baelen, acting as Agents, and Philippe Vlaemminck, Robbe Verbeke, and Valentin Ramognino, advocates;

– the EFTA Surveillance Authority (“ESA”), represented by Kyrre Isaksen, Ewa Gromnicka, and Melpo-Menie Joséphidès, acting as Agents; and

– the European Commission (“the Commission”), represented by Geert Wils and Giacomo Gattinara, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of Trannel International, represented by Johanne Førde; the Norwegian Government, represented by the Ministry of Culture and Equality, represented by Kristine Møse and Helge Røstum; the Belgian Government, represented by Philippe Vlaemminck; ESA, represented by Ewa Gromnicka; and the Commission, represented by Geert Wils and Giacomo Gattinara, at the hearing on 14 December 2023,

gives the following

Judgment

I LEGAL BACKGROUND

EEA law

1 Directive 2014/23/EU of 26 February 2014 of the European Parliament and of the Council on the award of concession contracts (OJ 2014 L 94, p. 1; and Norwegian EEA Supplement 2018 No 84, p. 509) (“the Directive”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 97/2016 of 29 April 2016 (OJ 2017 L 300, p. 49; and Norwegian EEA Supplement 2017 No 73, p. 53). The Directive was added as point 6f of Annex XVI (Procurement) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 14 November 2016 and the decision entered into force on 1 January 2017.

2 Recital 11 of the Directive reads:

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.

3 Recital 14 of the Directive reads:

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 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.

4 Recital 18 of the Directive reads:

Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify

as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.

5 Recital 35 of the Directive reads:

This Directive should not affect the freedom of Member States to choose, in accordance with Union law, methods for organising and controlling the operation of gambling and betting, including by means of authorisations. It is appropriate to exclude from the scope of this Directive concessions relating to the operation of lotteries awarded by a Member State to an economic operator on the basis of an exclusive right granted by means of a procedure without publicity pursuant to applicable national laws, regulations or published administrative provisions in accordance with the TFEU. That exclusion is justified by the granting of an exclusive right to an economic operator, making a competitive procedure inapplicable, as well as by the need to retain the possibility for Member States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.

6 Article 1(1) and (2) of the Directive, entitled "Subject matter and scope", reads:

1. This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.

2. This Directive applies to the award of works or services concessions, to economic operators by:

(a) Contracting authorities; or

(b) Contracting entities, provided that the works or services are intended for the pursuit of one of the activities referred to in Annex II.

7 Article 5(1) and (10) of the Directive, entitled "Definitions", in extract, reads:

(1) 'concessions' means works or services concessions, as defined in points (a) and (b):

…

(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;

(10) '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;

8 Article 6 of the Directive, entitled "Contracting authorities", reads:

1. For the purposes of this Directive, 'contracting authorities' means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law other than those authorities, bodies or associations which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities.

2. 'Regional authorities' includes all authorities of the administrative units listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council.

3. 'Local authorities' includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.

4. 'Bodies governed by public law' means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) *they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies or authorities; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.*

9 Article 7(1)(a) of the Directive, entitled "Contracting entities", reads:

1. For the purposes of this Directive, 'contracting entities' means entities which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities, and which are one of the following:

(a) *State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;*

10 Article 10(1) of the Directive, entitled "Exclusions applicable to concessions awarded by contracting authorities and contracting entities", reads, in extract:

1. 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.

...

National law

11 The Directive is implemented in Norwegian law by Section 2 of the Act of 17 June 2016 No 73 on public procurement ("the Public Procurement Act") (*lov 17. juni 2016 nr. 73 om offentlige anskaffelser* (*anskaffelsesloven*)) and the Norwegian Regulation of 12 August 2016 No 976 on concession contracts ("the Concession Contracts Regulation") (*forskrift 12. august 2016 nr. 976 om konsesjonskontrakter* (*konsesjonskontraktforskriften*)). The Public Procurement Act and the Concession Contracts Regulation apply to public authorities who conclude concession contracts for services having an estimated value equal to or exceeding NOK 100 000, exclusive of value added tax, see Section 2 of the Public Procurement Act and the first paragraph of Section 1-1 of the Concession Contracts Regulation.

12 Section 1-2 of the Concession Contracts Regulation, entitled "Concession contract" reads:

1. A concession contract is a services contract or a works and service contract the consideration of which consists either solely in the right to exploit the services or works or in that right together with payment, and the

> *operating risk of which is transferred from the contracting authority to the supplier.*
>
> *2. The operating risk relating to the services or works may encompass demand or supply risk or both. The operating risk shall be deemed to have been transferred where the supplier, under normal operating conditions, is not guaranteed to recoup its investments made or costs incurred in the operations. The risk transferred to the supplier shall involve real exposure to the fluctuations in the market, such that any potential estimated loss incurred by the supplier shall not be merely negligible.*

13 Section 2-3 of the Concession Contracts Regulation, entitled "Exception for concession contracts entered into on the basis of an exclusive right", reads:

> *The Public Procurement Act and the Regulation shall not apply in respect of services concession contracts concluded by the contracting authority with:*
>
> *a. a contracting authority as referred to in letters (a) to (d) of the first paragraph of Section 1-3 who has an exclusive right to provide the service, or*
>
> *b. suppliers who have an exclusive right to provide the service. This applies only when the exclusive right is awarded in accordance with EEA rules allowing for the performance of supply activities. If the rules do not lay down transparency requirements, the contracting authority shall publish notice of conclusion of the contract under Section 9-4.*

14 The award of an exclusive right to offer totalisator betting was previously regulated by the Act of 1 July 1927 No 3 on totalisator betting ("the Totalisator Act") (*lov 1. juli 1927 nr. 3 om veddemål ved totalisator*) and the Regulation of 24 August 2007 No 1011 on totalisator betting ("the Totalisator Regulation") (*forskrift 24. august 2007 nr. 1011 om veddemål ved totalisator*).

15 On 1 January 2023, a new Act of 18 March 2022 No 12 on gaming ("the Gaming Act") (*lov 18. mars 2022 nr. 12 om pengespill*) entered into force. That act replaced the Totalisator Act of 1927, the Act of 24 February 1995 No 11 on lotteries etc., ("the Lottery Act") (*lov 24. februar 1995 nr. 11 om lotterier mv*.) and the Act of 28 August 1992 No 103 on gaming etc., (*lov 28. august 1992 nr. 103 om pengespill mv*.). The Totalisator Regulation was replaced by the Norwegian Regulation of 13 March 2023 No 327 on distribution of profits from horse race betting (*forskrift 13. mars 2023 nr. 327 om fordeling av overskuddet fra pengespill på hest*).

16 Section 4 of the Gaming Act prohibits offering gaming services without authorisation.

17 Section 14 of the Gaming Act, entitled "The exclusive right to offer horse race betting", reads:

The King may grant an exclusive right to offer horse race betting to a provider whose purpose is:

a. to facilitate the provision of a responsible range of gaming services;

b. to prevent negative consequences of gaming;

c. to support horse husbandry, equestrian sport and horse breeding.

The Ministry shall be entitled to appoint a majority of the members of the provider's board.

The King may lay down conditions in the authorisation to facilitate attainment of the objectives of the Act. Authorisation shall be granted for 10 years at a time.

Profits from horse race betting are to go to organisations that promote equestrian sport, horse husbandry and Norwegian horse breeding. The provider is to operate efficiently, so that as much as possible of the income from the provider's betting services is directed towards those purposes. The Ministry shall issue regulations on the distribution of the profits from horse race betting.

18 Section 15 of the Gaming Act, entitled "The exclusive right holders' offer of gaming", reads:

Norsk Tipping and the party holding authorisation to offer horse race betting under Section 14 may not offer or market gaming on behalf of others.

The Ministry shall issue regulations on which gaming the exclusive right providers may offer in order to attain the purposes referred to in letters (a) and (b) of Section 1, and which gaming requires authorisation from the Norwegian Gambling Authority.

The exclusive right providers shall set the gaming rules for the gaming they offer.

The Norwegian Gambling Authority may grant authorisation for temporary trials of new gaming types and other measures intended to facilitate attainment of the purposes referred to in letters (a) and (b) of Section 1. The Ministry may issue regulations on permission for temporary trials.

19 The first and fourth paragraphs of Section 34 of the Gaming Act, entitled "Withdrawal of authorisation or licence", read:

In the event of repeated or material breach of provisions laid down in or adopted on the basis of this Act, the Norwegian Gambling Authority

(Lotteritilsynet) may impose conditions for continued operation or withdraw an authorisation or licence. Where the authorisation has been granted by the King under Section 14, the King shall confirm a withdrawal before it is implemented. An authorisation or licence may be withdrawn for a maximum of two years.

…

If an authorisation or licence is withdrawn, the Norwegian Gambling Authority shall determine how affected gaming is to be liquidated.

II FACTS AND PROCEDURE

20 Stiftelsen Norsk Rikstoto ("Norsk Rikstoto") is a commercial foundation established by the Norwegian Trotting Association (*Det Norske Travselskap*) and the Norwegian Jockey Club (*Norsk Jockeyklubb*) in 1982. Foundations are independent, self-owned legal entities, see the Act of 15 June 2001 No 59 on foundations (*lov 15. juni 2001 nr. 59 om stiftelser (stiftelsesloven)*). Since 1982, Norsk Rikstoto has had an exclusive right to offer totalisator betting (horse race betting) on the basis of the now repealed Totalisator Act. Under the Totalisator Act, the exclusive right was awarded by the King for five years at a time.

21 On 9 December 2022, Norsk Rikstoto was awarded an exclusive right to offer horse race betting in Norway by the King in Council. The authorisation was granted for 10 years, with effect from 1 January 2023.

22 Trannel International applied for authorisation to offer horse race betting in Norway. In its reply, the Ministry of Culture and Equality informed Trannel International that the application would not be considered on the merits by reference to the Totalisator Regulation, the concession currently held by Norsk Rikstoto and the established exclusive rights model governing the gambling and gaming sector in Norway.

23 Trannel International then brought the case before Oslo District Court seeking a declaratory judgment ruling that the award of an exclusive right to offer horse race betting was ineffective. Trannel International argued that the award was in breach of EEA law, in particular the Directive and the EEA law principles of equal treatment, non-discrimination and transparency.

24 Against this background, Oslo District Court requested an Advisory Opinion from the Court. The request, dated 6 July 2023, was registered at the Court on 13 July 2023. Oslo District Court has referred the following questions to the Court:

1. *Which factors are key under EEA law for the determination of whether an award of an exclusive right for gaming is to be regarded as an administrative authorisation scheme falling outside the scope of the public procurement rules,*

or whether it is to be regarded as an award of a "services concession" under Article 5(1)(b) of Directive 2014/23?

2. *Have the adoption and entry into force of Directive 2014/23 and its regulation of concession contracts entailed any change for how to draw the line between public contracts in the form of services concession contracts, on the one hand, and administrative authorisation schemes, on the other?*

3. *What significance does the fact that any profits of the party awarded the exclusive right are controlled by the State through regulation, to the benefit of third parties, have for the determination of whether one is dealing with an administrative authorisation scheme or a services concession contract?*

4. *Is the award of an exclusive right to offer horse race betting to a foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto, a "services concession" under Article 5(1)(b) of Directive 2014/23?*

5. *Is it of significance for whether the exception under the first subparagraph of Article 10(1) of Directive 2014/23 applies that the national legislation does not specifically name the holder of the exclusive right, but that the preparatory works assume that the exclusive right is to be awarded to a specific exclusive right provider, although this is not laid down in statute because an obligation may not be imposed on the foundation to offer gaming?*

6. *Is it of significance for whether the exception under the first subparagraph of Article 10(1) of Directive 2014/23 applies that the foundation was also awarded an exclusive right on the basis of previous national legislation, including that the foundation was awarded an exclusive right for horse race betting uninterruptedly under that previous national legislation, although for five years at a time, until such time as the exclusive right was awarded again after new legislation entered into force on 1 January 2023?*

25 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWER OF THE COURT

Questions 1 to 4

26 By Questions 1 to 4, the referring court asks, in essence, (1) which factors are key for the determination of whether an exclusive right for gaming is to be regarded as an administrative authorisation scheme falling outside the scope of the Directive; (2) whether the adoption and entry into force of the Directive entailed any change for the delimitation between public contracts in the form of services concession contracts and

administrative authorisation schemes; (3) what significance it has for the determination of whether one is dealing with an administrative authorisation scheme or a services concession contract that any profits of the party awarded the exclusive right are controlled by the State through regulation, to the benefit of third parties; and (4) whether the award of an exclusive right to offer horse race betting to a foundation organised in a manner similar to Norsk Rikstoto is a services concession.

27 All of these questions concern the interpretation and application of the notion of services concessions under Article 5(1)(b) of the Directive. The Court therefore finds it appropriate to answer the questions together.

28 The concept of "concession" within the meaning of Article 5(1)(b) of the Directive is an autonomous concept of EEA law and must, on that basis, be interpreted uniformly in EEA law (compare the judgment of 10 November 2022 in *SHARENGO*, C-486/21, EU:C:2022:868, paragraph 57 and case law cited).

29 The Directive, as is stated in Article 1(1), establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession. A services concession is 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.

30 It follows from the wording of Article 5(1)(b) that the services concession must be a written contract for pecuniary interest. The purpose of the concession contract, as follows, inter alia, from recital 11 of the Directive, is for the contracting authority to obtain the service that the contracting authority intends to benefit from (compare the judgment of 25 March 2010 in *Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 48 and case law cited).

31 In this respect, it follows from Article 1(1) and (2), in particular the reference to "procurement" in Article 1(1), that the Directive only applies to the acquisition of works or services by contracting authorities and contracting entities by means of a concession. Accordingly, the contracting authority or contracting entity must as such procure works or services to its own benefit.

32 It is further established that the concept "contract for pecuniary interest" requires a contract between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services. That concept is based on the premise that an economic operator undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public service contract, the economic operator therefore undertakes to carry out, or to have carried out, the services which form the subject of that contract. Accordingly, each of the parties undertakes to provide one form of consideration in exchange for another. The synallagmatic nature of the contract is thus

an essential element of a public contract (compare the judgments in *Helmut Müller*, C-451/08, cited above, paragraphs 48 and 60 and case law cited, and the judgment of 10 September 2020 in *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, paragraphs 24 and 25 and case law cited).

33 Moreover, as stated in the second paragraph of Article 5(1) of the Directive, "the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible".

34 As for the consideration required in return for the service, it follows directly from Article 5(1)(b) of the Directive that the consideration received by the operator may consist solely in the right to exploit the services that are the subject of the contract or in that right together with payment. However, the contract still entails a pecuniary interest even if the remuneration to the operator remains limited to reimbursement of the expenses incurred in order to provide the agreed service (compare the judgment of 18 October 2018 in *IBA Molecular Italy*, C-606/17, EU:C:2018:843, paragraph 29).

35 That consideration need not necessarily consist of the payment of a sum of money, but the reciprocal nature of a public contract must necessarily result in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable. Conversely, a contract under which a contracting authority is not legally obliged to provide any consideration in return for that which the other party to the contract has undertaken to provide does not fall within the concept of a "contract for pecuniary interest" (compare the judgments in *Helmut Müller*, C-451/08, cited above, paragraphs 62 and 63, and *Tax-Fin-Lex*, C-367/19, cited above, paragraph 27).

36 In the assessment of whether a contract is for pecuniary interest, a distinction must be made between contracts for services concessions covered by the Directive and administrative authorisation schemes not covered by the Directive. As follows, inter alia, from recitals 12 and 14 of the Directive, 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. On the other hand, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not fall under the scope of the Directive. Similarly, authorisations and licences, whereby the EEA 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.

37 The Court recalls that moral, religious and cultural factors that differ substantially between EEA States, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the preservation of public order (see the judgment of 14 March 2007 in *ESA v Norway*, E-1/06, paragraph 29, and compare the judgment of 8 September 2010 in *Markus Stoß and Others*, C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 76, and the judgment of 8 September 2009 in *Liga Portuguesa*, C-42/07, EU:C:2009:519, paragraph 57).

38 EEA States are therefore free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, and are at liberty to choose a single-operator licensing scheme, provided that they comply with the requirements under the case law of the Court with regard to their proportionality (see the judgment of 29 August 2014 in *Casino Admiral AG*, E-24/13, paragraphs 48 to 50 and case law cited, and compare the judgment of 3 June 2010 in *Sporting Exchange*, C-203/08, EU:C:2010:307, paragraphs 28 and 59 and case law cited).

39 It is against this background that it, in recital 35 of the Directive, is recognised that the Directive should not affect the freedom of EEA States to choose, in accordance with EEA law, methods for organising and controlling the operation of gambling and betting, including by means of authorisations. Therefore, concessions relating to the operation of lotteries awarded by an EEA State to an economic operator on the basis of an exclusive right granted by means of a procedure without publicity pursuant to applicable national laws, regulations or published administrative provisions in accordance with EEA law are excluded from the scope of the Directive. That exclusion is justified by the granting of an exclusive right to an economic operator, making a competitive procedure inapplicable, as well as by the need to retain the possibility for EEA States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.

40 In contrast to a contract for services concessions which is based on an agreement, an administrative authorisation is granted to an economic operator and establishes the conditions for the exercise of the activity whilst the economic operator remains free to withdraw from the provision of the works or services. Indeed, an authorisation scheme regulates the exercise of an activity rather than the acquisition of a service of economic benefit to the public authority and, in the context of gambling and games of chance, allows the EEA States to regulate and organise the gambling sector as they choose. Further, 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 amounts to a contract with mutually binding obligations that are legally enforceable.

41 As to the significance of the fact that any profits of the party awarded the exclusive right are controlled by the State through regulation, to the benefit of third parties, the Court

reiterates that the relevant legal condition is whether the award entails a "contract for pecuniary interest". As already mentioned above, a contract for pecuniary interest requires that the contract entails a material exchange of consideration between the parties. In that respect, control over profits is, as such, not decisive.

42 Similarly, as the relevant legal condition is whether the award constitutes a contract for pecuniary interest, the organisational structure of the entity awarded the exclusive right is not in and of itself of relevance to that assessment.

43 As to the question whether the Directive and the regulation of concession contracts therein has altered the distinction between services concession contracts and authorisations, the Court notes that it follows, inter alia, from Article 1(1) and recitals 14 and 35 that the Directive distinguishes between concession contracts and authorisations. Further, recitals 1 and 18 make clear that the Directive was intended to clarify what constitutes a services concession contract based on previous case law and directives and thus to codify the definition of a services concession as it followed from case law. Accordingly, the entry into force of the Directive has not altered the distinction between services concession contracts and administrative authorisation schemes.

44 Trannel International argues that licences for the operation of gaming services in the manner organised in the present case generally will be considered to be "services concessions" under the Directive, and asserts that the judgment of 13 September 2007 in *Commission v Italy*, C-260/04, EU:C:2007:508, the judgment of 9 September 2010 in *Engelmann*, C-64/08, EU:C:2010:506, and the judgment in *Sporting Exchange*, C-203/08, cited above, lend support to that assessment. However, the Court observes that those judgments must be read in their proper context. None of them concerned the distinction between services concession contracts and administrative authorisations and, accordingly, they cannot be interpreted as meaning that the organisation of horse race betting in general must always take the form of a services concession. That said, even though gambling and games of chance may be organised through a concession contract, with respect to the applicability of the Directive, it is a question of whether the arrangement in the individual case constitutes a contract for pecuniary interest.

45 Accordingly, in order to determine whether an award of an exclusive right to offer horse race betting to a foundation such as in the present case constitutes a contract for a services concession within the meaning of Article 5(1)(b) of the Directive, regard must be had to whether the right is subject to a contract concluded in writing for pecuniary interest between one or more economic operators and one or more contracting authorities, having as its object a concession for services, in return for consideration and to the benefit of the acquiring authority, which is legally binding on both parties and legally enforceable. On the other hand, administrative authorisation schemes by which an authorisation is granted to an economic operator, and which regulates and establishes the conditions for the exercise of the activity whilst the economic operator remains free to withdraw from the provision of the works or service, the provision of which cannot be legally enforced, are not within the scope of the Directive.

46 It is for the referring court to assess whether the award of the exclusive right to offer horse race betting to Norsk Rikstoto at issue in the case before it bears the characteristics of a contract for pecuniary interest.

47 In the light of the foregoing, the answers to Questions 1 to 4 must be that in order to determine whether an award of an exclusive right to offer horse race betting to a foundation such as in the present case constitutes a contract for a services concession within the meaning of Article 5(1)(b) of the Directive, regard must be had to whether the right is subject to a contract concluded in writing for pecuniary interest between one or more economic operators and one or more contracting authorities, having as its object a concession for services, in return for consideration and to the benefit of the acquiring authority, which is legally binding on both parties and which is legally enforceable. Administrative authorisation schemes by which an authorisation is granted to an economic operator, and which regulate and establish the conditions for the exercise of the activity whilst the economic operator remains free to withdraw from the provision of the service, the provision of which cannot be legally enforced, are not covered by the scope of the Directive. The entry into force of the Directive has not changed the distinction between contracts for services concessions falling within the scope of the Directive and administrative authorisation schemes falling outside the scope of that directive. The fact that any profits of the party awarded the exclusive right are controlled by the State through regulations, to the benefit of third parties, is not in and of itself relevant for the assessment of whether the arrangement at issue constitutes a contract for a services concession within the meaning of the Directive. The organisational structure of the entity awarded an exclusive right to offer horse race betting, such as a foundation organised in a similar manner to that of Norsk Rikstoto, is not relevant for the assessment of whether the arrangement constitutes a contract for a services concession within the meaning of the Directive.

Questions 5 and 6

48 By Questions 5 and 6, the referring court asks, in essence, whether it is of significance for the exemption provided under Article 10(1) of the Directive that the national legislation does not specifically name the holder of the exclusive right, but that the preparatory works assume that the exclusive right is to be awarded to a specific exclusive right provider and, further, whether it is of significance that the foundation was also awarded an exclusive right on the basis of previous national legislation.

49 Under Article 10(1) of the Directive, services concessions awarded to a contracting authority or to a contracting entity as referred to in point (a) of Article 7(1), on the basis of an exclusive right, are excluded from the Directive.

50 At the outset, the Court observes that Article 10(1) of the Directive only exempts contracts for services concessions within the meaning of Article 5(1)(b). Therefore, if the referring court finds that the exclusive right in question is granted on the basis of an administrative authorisation scheme by which it is merely sought to regulate and control the operation of gambling and betting, it falls outside the scope of the Directive, thus making it unnecessary to assess whether the conditions for the exemption in Article

10(1) are fulfilled.

51 Further, the exemption in Article 10(1) of the Directive only applies to services concession contracts awarded to a "contracting authority" or to a "contracting entity" as defined in Articles 6 and 7(1)(a) of the Directive respectively. As follows, inter alia, from recital 32 of the Directive, this exception is aimed at cases in which a State, regional or local authority or body governed by public law or a given association thereof might be the sole source for a given service, for the provision of which it enjoys an exclusive right pursuant to national laws, regulations or published administrative provisions which are compatible with EEA law.

52 In addition, the services concession contract in question must be awarded "on the basis of an exclusive right", which is defined by Article 5(10) of the Directive as a right granted by a competent authority of an EEA State by means of any law, regulation or published administrative provision which is compatible with the EEA Agreement 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.

53 As the criterion for applying the exception is the award of an exclusive right, not the legal basis for such an award, it is not relevant for that assessment whether the national legislation awarding the right does not specifically name the holder of the right. Nor does it affect that assessment that the right has been awarded to the same holder uninterruptedly under the previous legislation.

54 In the light of the foregoing, the answer to Questions 5 and 6 must be that it is not of significance for the exception in Article 10(1) of the Directive that national legislation on which the exclusive right is based does not specifically name the holder of the right or that the foundation that is awarded an exclusive right has also been awarded that right uninterruptedly under previous national legislation.

IV COSTS

55 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo District Court hereby gives the following Advisory Opinion:

1. **In order to determine whether an award of an exclusive right to offer horse race betting to a foundation organised in a manner similar to that of Stiftelsen Norsk Rikstoto constitutes a services concession within the meaning of Article 5(1)(b) of Directive 2014/23/EU on the award of concession contracts, regard must be had to whether the right is subject to a contract concluded in writing for pecuniary interest between one or more economic operators and one or more contracting authorities, having as its object a concession for services, in return for consideration and to the benefit of the acquiring authority, which is legally binding on both parties and which is legally enforceable. Administrative authorisation schemes by which an authorisation is granted to an economic operator, and which regulate and establish the conditions for the exercise of the activity whilst the economic operator remains free to withdraw from the provision of the service, the provision of which cannot be legally enforced, are not within the scope of Directive 2014/23/EU.**
2. **The entry into force of Directive 2014/23/EU has not changed the distinction between services concessions falling within the scope of Directive 2014/23/EU and administrative authorisation schemes falling outside the scope of that directive.**
3. **The fact that any profits of the party awarded the exclusive right are controlled by the State through regulations, to the benefit of third parties, is not in and of itself relevant for the assessment of whether the arrangement at issue constitutes a services concession within the meaning of Directive 2014/23/EU.**
4. **The organisational structure of the entity awarded an exclusive right to offer horse race betting, such as a foundation such as in the present case, is not relevant for the assessment of whether the arrangement constitutes a services concession within the meaning of Directive 2014/23/EU.**
5. **It is not of significance for the exception in Article 10(1) of Directive 2014/23/EU that national legislation on which the exclusive right is based does not specifically name the holder of the right or that the foundation that is awarded an exclusive right has also been awarded that right uninterruptedly under previous national legislation.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 13 May 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President