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OSLO TINGRETT

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EFTA Court
- Registry -
1 Rue du Fort Thüngen,
L-1499 Luxembourg
LUXEMBOURG

Deres referanse	Vår referanse	Dato
	23-050237TVI-TOSL/03	08.07.2025

Request for an advisory opinion

1. Introduction

Pursuant to section 51a of Act No 5 of 13 August 1915 on the Courts (Courts of Justice Act) (*lov 13. august 1915 nr. 5 om domstolene (domstolloven)*), read in conjunction with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), Oslo District Court (*Oslo tingrett*) hereby requests an Advisory Opinion from the EFTA Court in Case 23-050237TVI-TOSL/03 *Redd Ullevål sykehus* v *Staten v/Kommunal- og distriktsdepartementet*.

The parties to the case are as follows:

Plaintiff:	Redd Ullevål Sykehus c/o Lene Christine Sundfær Haug Waldemar Thranes gate 62 D 0173 Oslo
Counsel:	Advokat Helge Skogseth Berg Nordia Law advokatfirma AS Dronning Eufemias gate 8 0191 Oslo
Defendant:	Norwegian State, represented by the Ministry of Local Government and Regional Development (*Staten v/ Kommunal- og distriktdepartementet*) P.O. Box 8005 Dep, 0030 Oslo 0030 Oslo

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The case concerns the validity of two State zoning plans adopted by the Ministry of Local Government and Regional Development on 28 February 2023 for the areas Gaustad and Aker in the City of Oslo, and construction commencement permits issued pursuant to those zoning plans.

The plans were adopted as part of the process for establishing the new Oslo University Hospital (*Oslo Universitetssykehus*, "Nye OUS"). They entail that Ullevål Hospital (*Ullevål sykehus*) will, in practice, be replaced by hospitals at Gaustad and Aker, through partial demolition/partial development of existing hospital buildings, as well as new builds. The zoning plans for both areas follow the main features and frameworks of the City of Oslo's master plans and strategies: see section 12-3 of the Planning and Building Act (*lov om planlegging og byggesaksbehandling av 27 June 2008 nr. 71*).

The plaintiff, Redd Ullevål Sykehus, claims that, before the zoning plans were adopted, an environmental impact assessment ought to have been carried out in accordance with the SEA Directive (Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment).

Redd Ullevål Sykehus's position is that the SEA Directive applies. A fragmentation of the decision-making process, in which the placement of the new university hospital was decided first, after which financing was decided and, lastly, State zoning plans were adopted, cannot preclude the SEA Directive from applying. The plaintiff claims that no environmental impact assessment has been carried out in accordance with the requirements laid down in the SEA Directive prior to the adoption of the zoning plans. The plaintiff further claims that non-compliance with the requirement of an environmental impact assessment entails that the zoning plans and accompanying permits to demolish or build are invalid. Lastly, the plaintiff submits that section 41 of the Norwegian Public Administration Act (*forvaltningsloven*) cannot entail that the decisions and accompanying permits nevertheless are valid.

The State's position is that the zoning plans come within the scope of the EIA Directive (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment) and have been processed in accordance with that directive. The zoning plans fall outside the scope of the SEA Directive. Nor does the SEA Directive apply to any of the other decisions relating to the new hospital structure for the health enterprise Oslo University Hospital Trust (*Oslo Universitetssykehus Helseforetak*). In the alternative, the State submits that the reports prepared under the auspices of the South-Eastern Regional Health Authority health enterprise (*Helse Sør-Øst Regionalt Helseforetak*, "HSØ") in any event satisfy the requirements of the SEA Directive. In the further alternative, the State submits that any errors cannot have affected the substance of any of the decisions: see section 41 of the Public Administration Act, so that the zoning plans are at any rate valid.

Oslo District Court has decided to refer two questions of interpretation to the EFTA Court. Firstly, the District Court seeks guidance as to the scope of the SEA Directive (question 1). Secondly, the District Court is uncertain as to whether it is compatible with EEA law for a Norwegian court to apply a rule such as section 41 of the Public Administration Act in legal proceedings involving infringement of the SEA Directive (question 2).

2. Further description of factual background to the case

2.1 Parties

Redd Ullevål Sykehus is an association with over 1000 paying members whose purpose is to prevent the closure of Ullevål Hospital. In decision HR-2024-837, the Supreme Court of Norway (*Norges Høyesterett*) held that the association is a representative and natural party to safeguard the interest in preventing the establishment of hospitals elsewhere than at Ullevål, as a result of the close connection it has with preventing the closure of Ullevål Hospital.

The Norwegian State is represented in the proceedings by the Ministry of Local Government and Regional Development, which is the ministry responsible for inter alia zoning matters. The State is also the owner of the plot of land at Ullevål Hospital and sole owner of the health enterprise HSØ, which has been granted a permit to build and demolish within the framework of the two zoning plans.

2.2 The zoning plans

The zoning plans for both Gaustad and Aker were adopted by ministerial decision on 28 February 2023 by a joint State process.

The zoning plan for Gaustad provides for approximately 221 400 m^2 of new usable area, of which approximately 160 000 m^2 is allocated for hospital use. The total used area thus becomes 414 900 m^2 of usable area, plus the protected Gaustad Hospital. Alternative 1A, which was adopted, allows for building heights of up to 55 metres, corresponding to 12 stories, with two helicopter landing pads on the roof.

The plan proposal for Aker provides for building a total of 247 050 m^2 of usable area, of which 47 050 m^2 is the current construction, which is to be maintained. HSØ proposes placing the new hospital in the middle of the plot of land. With the two towers, the main building is 15 and 13 stories high. The highest tower is to have a helicopter landing pad on the roof and the maximum height is to be 77.2 metres above ground.

2.3 Further background

The parties have differing views as to which facts are relevant for the EFTA Court. For that reason, fact descriptions are reproduced as each of the parties has argued are relevant.

The plaintiff's input goes into somewhat greater detail than what is, strictly speaking, necessary for the EEA law questions on which the court is to rule. The court has nevertheless included it in the present request, taking the view that it provides the EFTA Court with a slightly broader background to the issues involved in the case.

3. The plaintiff's view of the facts which are relevant to the questions referred

It has long been clear that Oslo requires new, more modern hospital facilities. Various plans have been drawn up for that purpose since OUS was established in 2009 as a merger of several regional hospitals. OUS is a health enterprise owned by the regional health enterprise HSØ. Health enterprises are governed by the Health Enterprise Act No 93 of 16 May 2001 (*helseforetaksloven, lov av 16. mai 2001 nr. 93*).

In 2011, a report was tabled by then OUS Director Siri Hatlen who, following a thorough review of future functions and requirements as well as available areas, proposed maintaining and developing hospital operations at Ullevål Rikshospitalet and the Norwegian Radium Hospital (*Radiumhospitalet*). That report concluded that the area around Rikshospitalet (Gaustad) was not big enough to house a larger, merged hospital.

Following a change of OUS Director in 2011, the new Director, Bjørn Erikstein, tabled a report in 2012, setting out an entirely new proposal for Nye OUS, called Campus Oslo. Under that proposal, all operations were to be brought together at Gaustad and presupposed the construction of a large, wide cover over the four-lane road Ring 3, on which the hospital was to be built. For a number of reasons, it eventually became apparent that it was not feasible to build over the Ring 3 road.

A number of internal reports and papers ensued, setting out different location solutions for new hospital buildings. A common trait for them was that none of them contained environmental impact assessments for the various solutions under consideration.

In the winter of 2016, there were three main possible solutions for construction: 1) alternative 0, entailing continuation; 2) shared solution between Ullevål and Gaustad; and 3) partial concentration at Gaustad with local hospitals elsewhere: see, for example, document of 28 January 2016 on the future of OUS, ideas phase, more specific discussion following hearing ("*Fremtidens OUS, Idéfase, Konkretisering etter høring*"). The report indicates that alternative 3 at Gaustad fared somewhat better in the qualitative assessment than alternative 2, shared solution. Alternative 2 was deemed to be burdened by greater feasibility risks, due to the lengthy construction period in close proximity to existing hospital operations. The investment costs associated with alternative 3 are somewhat higher than with alternative 2, whilst operating costs will be somewhat lower in connection with alternative 3 than with alternative 2.

In a subsequent report of 11 February 2016 from Opak AS and Metier AS on external quality control of the ideas phase and the future OUS ("*Ekstern kvalitetssikring av Idéfase – Fremtidens OUS*"), a number of serious objections to alternative 3 were highlighted. It was stated inter alia that the Gaustad alternative carried a higher risk than what was apparent from the earlier document of 28 January 2016 ("*Fremtidens OUS, Idéfase, Konkretisering etter høring*") and that there was no basis for reducing the number of alternatives to be examined. Opak and Metier pointed out in particular that it was doubtful whether it would be possible to obtain a permit to build a cover over the Ring 3 road, as presupposed by the plan. They further stated that the City of Oslo' Agency for Planning and Building Services (*Plan- og bygningsetaten*) had flagged up a significant risk regarding the zooning plan, which could entail that the land areas were too small for establishing a hospital at Gaustad as outlined in alternative 3 (partial concentration at Gaustad).

On 24 June 2016, the State, represented by then Minister of Health and Care Services Bent Høie, held an enterprise meeting of HSØ. In his capacity as representative of the State as the 100% owner, he approved at that enterprise meeting on 24 June 2016 HSØ's target image of hospital structure, which included the location of the new university hospital. The approval of

the target image entailed selection of alternative 3, with concentration at Gaustad, assuming that the land at Ullevål would not be used for a hospital but instead would be sold to finance the plans under consideration. Although the decision formally related to hospital structure, it de facto also entailed a decision on land use.

On the basis of the decision of 24 June 2016 on location, further work focused solely on Gaustad and Aker as locations, and no environmental impact assessments were carried out that could provide a basis for comparing locations at Gaustad and Aker with the most obvious alternative, a shared solution between Ullevål, Aker and Gaustad.

The development affects nature locally on the land at Gaustad and Aker and adjacent areas. Large quantities of relatively new, well-functioning buildings must be demolished to make room for new construction, first at Gaustad and, presumably, subsequently at Ullevål, so as to make room for the presumed urban development on the Ullevål land, on which there are currently a number of buildings. Local and systemic environmental impacts have not been assessed.

On 29 May 2019, HSØ tabled a report on Ullevål as an alternative location to Gaustad (*"Rapport om Ullevål som alternativ lokalisering til Gaustad"*). The premiss for the assessment was not consistent with the alternatives considered feasible in the earlier document of 28 January 2016 (*"Fremtidens OUS, Idéfase, Konkretisering etter høring*). In the report, it was stated that the work in connection with the planning programme and environmental impact assessment for Ullevål as an alternative location to Gaustad would take two to three years. The report was not followed by any specific planning work. The document does not contain any environmental impact assessments that can form part of a location assessment in accordance with the SEA Directive.

In the further proceedings, HSØ began the work associated with the zoning plan for the two plots of land at Gaustad and Aker. In parallel with the work for the zoning plan, the Board of HSØ tabled a motion to apply for a loan for the construction project in the 2020 State budget. When the Norwegian Parliament (*Stortinget*) handled the matter of lending limits in October 2019, a loan guarantee capped at around NOK 29.1 billion was provided to HSØ for hospital construction.

In the document Prop. 1 s (2019-2020), under item 82, the conditions for the Parliament's loan guarantee are set out and it is stated that the sale of the plot of land at Ullevål is to finance stage 2 of the development at Gaustad. The Parliament assumes that the land at Ullevål, etc., is to be sold to purchasers who are willing to pay a high amount. The Parliament was not presented with the environmental impacts of any of the alternatives put forward at the planning stage, with the result that those impacts did not form part of the Parliament's assessment and decision-making.

On 21 February 2019, the planning programme for Gaustad was determined. The document shows that a regional hospital is to be built at Gaustad. The planning programme contains no conditions to the effect that any environmental impact assessments are to be carried out in the event of the shared solution between Ullevål, Aker and Gaustad being chosen, or any conditions about environmental impact assessments for urban planning purposes in the event of sale of plots of land at Ullevål.

In a letter of 1 April 2022, the Ministry of Health and Care Services (*Helse og omsorgsdepartementet*) stated that the matter had reached the point where there was a need to

establish that Nye OUS would be developed in accordance with the previously adopted structure, and requested the Ministry of Local Government and Regional Development to use the State zoning plan because it could not be expected that the ordinary municipal planning would lead to a result that could be accepted by the State.

On 28 February 2023, the Ministry of Local Government and Regional Development adopted a decision approving the State zoning plan for Gaustad and Aker, respectively.

4. The State's view of the facts which are relevant to the questions referred

On 24 June 2016, the HSØ health enterprise meeting adopted a target image for a new hospital structure for OUS, consisting of regional hospitals with local hospital functions at Gaustad, a local hospital at Aker and a specialised cancer hospital at Radiumhospitalet. At the same time, the health enterprise meeting endorsed that HSØ would start the conceptual phase for a regional security department and clinical building at Radiumhospitalet, and the first developments at Gaustad and Aker getting under way at the same time and progressing in parallel.

The target image entailed that the enterprise would work towards development of hospital operations at Gaustad and Aker, inter alia by submitting applications to public authorities for necessary permits for development of the plots of land (zoning plan proposals, building permit applications).

At the same time, the target image entailed closure of hospital operations at Ullevål. OUS owns the land at Ullevål. That land is earmarked for sale. At the current juncture it has not been clarified what the area is to be used for in future.

The work with the zoning plans for Gaustad and Aker began as a usual planning process with HSØ as proposer and the City of Oslo as the planning authority under the Planning and Building Act. The Ministry of Local Government and Regional Development took over as planning authority on 1 April 2022 and both zoning plans were finalised as State zoning plans. They have been processed in accordance with the rules in the EIA Directive, which is implemented in Norwegian law through Regulation No 854 of 21 June 2017 on environmental impact assessments (*forskrift av 21. juni 2017 nr. 854 om konsekvensutredninger*).

Both zoning plans (detailed plans) comply with the land use previously adopted by the City in the land use part of the municipality plan (master plan).

The State submits that the reports obtained by HSØ in any event satisfy the environmental impact assessment requirements of the SEA Directive. Since the District Court has not referred questions of interpretation on this point, the State does not address it in its submissions.

5. Brief remarks about the background to the request for an advisory opinion

Redd Ullevål sykehus submits that the SEA Directive applies to the decisions in the present case. The plaintiff observes that the purpose of the SEA Directive is to ensure a high level of protection of the environment by requiring environmental impact assessments of plans and programmes to be carried out before they are adopted. In the plaintiff's submission, the duty of loyalty laid down in Article 3 of the EEA Agreement entails a duty for Norwegian authorities, including the court, to implement the SEA Directive.

The plaintiff submits that the State may not circumvent the requirements of the SEA Directive by splitting up the decisions into stages (including the decision on hospital structure and

location, the City of Oslo's adoption of the planning programme, the zoning plans, and the Parliament's financing decision) without fulfilling the requirements of the SEA Directive at any time before construction commences.

The State submits that the SEA Directive does not apply to the decision of 24 June 2016 of the health enterprise's meeting, the two zoning plans, or the Parliament's loan limit decision. The defendant submits that the disputed zoning plans are detailed plans coming under the EIA Directive, whilst the master plan (the land use part of the municipality plan) comes within the scope of the SEA Directive. It is common for investment decisions to take place in several stages (decisions as to what is to be built and where construction is to take place are taken before applications and financing). That this has also been so in the present case is, in the State's submission, in no way a "circumvention".

The case raises questions of whether the SEA Directive applies, including the interpretation of Article 2(a) and Article 3(2) of the SEA Directive. The parties are in fundamental disagreement as to whether the environmental impact assessment requirements of the SEA Directive apply. Specifically, questions have been raised as to whether the State's interpretation is in accordance with Article 3 of the EEA Agreement, including the question of how it fits in with assessments under the EIA Directive.

There are also questions about the consequences of a potential lack of environmental impact assessment. The parties disagree as to whether it is compatible with Article 3 of the EEA Agreement to consider the State zoning plans as valid under section 41 of the Public Administration Act in the event that no environmental impact assessment has been carried out under the SEA Directive.

The court does not consider the questions of interpretation to be self-evident and has accordingly decided to make a request to the EFTA Court for an advisory opinion.

6. The SEA Directive (Directive 2011/42/EC)

The SEA Directive is implemented in Norway by the regulation on environmental impact assessment, the legal basis of which is section 4-2 of the Planning and Building Act, and requires environmental impact assessments to be carried out in respect of certain public plans and programmes before they are adopted. The same regulation also implements the EIA Directive (Directive 2011/92/EU).

The parties disagree as to the scope of the SEA Directive, of which the following provisions are key:

Article 2

Definitions

For the purposes of this Directive:

(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

– which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

– which are required by legislative, regulatory or administrative provisions;

[…]

Article 3

Scope

[…]

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

[…]

Article 5

Environmental report

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

[…]

7. Submissions of the parties

7.1 Redd Ullevål Sykehus has in the main submitted the following:

7. 2. General remarks

The plaintiff begins by submitting that the development of a new hospital is an infrastructure project of such a magnitude that the SEA Directive applies. The plaintiff observes that "reasonable alternatives" for where the development is to be located are to be assessed in accordance with the SEA Directive before a permit is issued to undertake the development and before a decision is taken on location.

The plaintiff claims that a shared solution between Ullevål and Gaustad (alternative 2) was a "reasonable alternative", under Article 5(1) of the SEA Directive, to the solution involving Gaustad and Aker (alternative 3). Alternative 2 was not assessed in accordance with Article 5 of the SEA Directive: see annex and related practice. An assessment under the EIA Directive

for the selected alternative 3 cannot by itself replace the requirement for assessment under the SEA Directive.

In the plaintiff's submission, in reality a decision was taken by the State at the health enterprise meeting on 24 June 2016. The decision was endorsed by the Parliament through the grant of funds for the development consistently with the State's decision at the health enterprise meeting, and then endorsed again through the establishment of a planning programme, followed by final confirmation when the two State zoning plans were adopted on 28 February 2023.

The plaintiff's principal submission is that it follows from the SEA Directive that the assessment of environmental issues must at any rate be carried out before a decision on location and, at the latest, before the adoption of the zoning plan. The State's decision to split up the decision-making process may not, in the plaintiff's submission, entail non-compliance with the assessment requirements of the SEA Directive, contrary to the purpose of the SEA Directive. The plaintiff accordingly submits that the EFTA Court must rule on whether a splitting-up of the process in which the State decides on location, financing, and planning through different State or State-run bodies may entail any relaxing of the assessment requirements set out in the SEA Directive.

7.3 Implications of infringement of the SEA Directive

The legal issue is whether national law governing procedural errors may entail that infringements of the SEA Directive are not to have any implications for the validity of the zoning plans. The relevant provision under national law is section 41 of the Public Administration Act.

7.4 Redd Ullevål Sykehus – more detailed submissions

The plaintiff's claim in the writ of summons is that the zoning plans for Aker and Gaustad and related permits are invalid. The principal reason for the claim of invalidity is that at no time before the planning decision was adopted was any environmental impact assessment carried out in accordance with the requirements of the SEA Directive.

The plaintiff has argued that the SEA Directive must be interpreted in the light of the provision stating that the objective of the directive is to provide for a high level of protection of the environment. The purpose of the SEA Directive is stated in Article 1 thereof and is summarised as follows in *Leth*, C-420/11, EU:C:2013:166, paragraph 28:

> "(…) the purpose of that directive is an assessment of the effects of public and private projects on the environment in order to attain one of the Community's objectives in the sphere of the protection of the environment and the quality of life ."

In paragraph 24 of the same judgment, it is stated that the SEA Directive must be given an autonomous interpretation and that regard is to be had to the purpose of the SEA Directive in the interpretation of its provisions.

The outcome of decisions which the State has adopted through three different State or State-run bodies (HSØ, the Parliament and the Ministry) is that at no time has an environmental impact assessment been carried out in accordance with the requirements of the SEA Directive. In the plaintiff's submission, the SEA Directive's objective suggests that nor may the State fragment the decision-making process, with the result that the environmental impact assessment requirements of the SEA Directive are circumvented and not observed. In the plaintiff's

submission, reasonable alternatives may not be omitted from the assessment as a result of the fragmentation of the decision-making process, without a prior environmental impact assessment.

The plaintiff has argued that such an approach, should it be accepted by the court, will be contrary to the fundamental objective of the SEA Directive. The environmental impact assessment must cover all environmental aspects of the shared solution between Gaustad and Ullevål, and how such a solution affects the use of the land at Aker and Gaustad, and those impacts must be weighed up against the impacts of choosing development at Gaustad and Aker.

The State, represented by the Ministry, exercises the highest authority in regional health enterprises: see section 16 of the Health Enterprise Act. The following is stated in the preparatory works for that act, Ot.prp 66 (2000-2001):

> "A key feature of the enterprise form is that corporate governance may be exercised only through the enterprise meeting, which is the enterprise's highest body: see proposal for section 16. In the regional health enterprises, the Ministry constitutes the enterprise meeting and adopts its decisions. In a health enterprise, the Board of the regional health enterprise or the party appointed by it constitutes the enterprise meeting and adopts its decisions.
>
> (...) It is nevertheless inherent in the overall nature of the enterprise meeting that it may issue instructions and reverse Board decisions in all matters.
>
> (...)
>
> In regional health enterprises, the recording of minutes may have implications for the minister's parliamentary and constitutional responsibilities for administration of the State's ownership of the enterprise. The consideration of public transparency also suggests that minutes of enterprise meetings are to be kept."

Redd Ullevål Sykehus submits that the decision on "target image" was not an exercise of autonomy under private law, but rather a State decision.

In the plaintiff's submission, the State's argument that the Minister sitting in the health enterprise meeting exercises autonomy under private law is not supported by relevant legal sources. The State's reference to the preparatory works in Prop. 55 L (2018–2019) part 8.5.4 is, in the plaintiff's submission, misleading. Those preparatory works concern other laws, and the subject-matter of the preparatory works referred to by the State concern the question whether or not there should be provision for administrative appeal. The plaintiff submits that those preparatory works cannot negate the State's duties under the SEA Directive, which is to be interpreted autonomously.

A necessary consequence of the decision on development at Gaustad and Aker was that the plots of land at Ullevål had to be sold to finance the development at Gaustad and Aker. The sale had to, moreover, result in "formidable urban development" at Ullevål in order to ensure sufficient financing. The consequences of having a new urban district at Ullevål must accordingly be included in the environmental impact assessment in accordance with the SEA Directive. Such a sale is a direct and necessary consequence of the location at Gaustad and Aker, which would not have taken place had the choice fallen on the shared solution between Gaustad, Aker and Ullevål. The SEA Directive requires a number of environmental impact

assessments to be carried out: see Annex I referred to Article 5(1), which gives an overview of relevant focus points for an environmental impact assessment.

The plaintiff submits that environmental impact assessments under the EIA Directive cannot replace environmental impact assessments under the SEA Directive: see judgments of the Court of Justice of the European Union (ECJ) in *Terre wallonne ASBL and Inter-Environnement Wallonie ASBL* v *Région wallonne*, C-105/09 and C-110/09, EU:C:2010:355; *Inter-Environnement Bruxelles and Others* v *Région de Bruxelles-Capitale*, C-567/10, EU:C:2012:159; and of the Supreme Court of Norway in Case HR-2020-02472-P, paragraph 192, which seem to concur in the plaintiff's position.

The reason for the plaintiff's argument is that the environmental impact assessment carried out for the chosen alternative (alternative 3) pursuant to the EIA Directive does not include an examination of the environmental impact of alternative 2. The lack of environmental impact assessments of alternative 2 have made it impossible to undertake any assessment – and nor has any been carried out – of the location of Nye OUS in which the environmental impact of other reasonable alternatives forms part of the assessment. This is in contravention of the fundamental objective of the SEA Directive.

The plaintiff submits that the mandatory environmental impact assessment must be carried out before a zoning plan is adopted: see Article 4 of the SEA Directive. In order for the objective of the SEA Directive to be attained, the environmental impact assessment must be carried out at the earliest possible stage: see *Inter-Environnement Bruxelles and Others* v *Région de Bruxelles-Capitale*, C-671/16, EU:C:2018:403, paragraph 63, in which it is stated that the environmental assessment is supposed to be carried out as soon as possible so that the assessment can have the intended effect. In that regard, the plaintiff submits that the environmental impact assessment should have been carried out before the State, through the HSØ enterprise meeting on 24 June 2016, decided on the location of Nye OUS and before the Parliament decided to finance Nye OUS, so that the objective of the SEA Directive could have been attained.

In any event, the State's approach of locating Nye OUS by a State decision in 2016 and adopting financing in a subsequent State decision in 2018 cannot entail that the alternative involving the shared solution between Ullevål and Gaustad (alternative No 2) is no longer a reasonable alternative under Article 5 of the SEA Directive, which must mandatorily be assessed. If a shared solution is deemed not to be a reasonable alternative under Article 5 as a result of a fragmented State decision-making process, this will, in the plaintiff's submission, entail circumvention of the requirements under the SEA Directive.

The plaintiff submits that, if there has been infringement of the requirements of the SEA Directive, they cannot be negated through national legislation, in this case section 41 of the Public Administration Act, without breaching the duty of loyalty laid down in Article 3 of the EEA Agreement.

The plaintiff is aware that the State has expressed its position to EFTA as being that the effect of section 41 of the Public Administration Act is that infringements of the rules on environmental impact assessments in a number of cases entails that decisions are nevertheless valid, despite the infringement. The State's preliminary position is apparent from an exchange of letters between the EFTA Surveillance Authority (ESA) and Norway in ESA document Nos 1218672 and 1270158.

The following is from ESA's letter to Norway dated 4 November 2021, in which it expresses its fundamental concern as to whether various bodies within the Norwegian State are complying with the environmental impact assessment requirements laid down in the SEA Directive:

> "(...) the Authority is assessing the broad implementation and application of the requirements to carry out assessments under the SEA and EIA Directives in Norway, as reflected in the case-law and actions taken by the Norwegian judiciary and Norwegian enforcement agencies. This request for information is structured to focus on potential concerns which primarily relate to the SEA Directive first, and the EIA Directive second."

The plaintiff's position relating to whether section 41 of the Public Administration Act may be used to negate the requirements laid down in the SEA Directive without breaching the duty of loyalty laid down in Article 3 of the EEA Agreement is consistent with the line of argument expressed by the minority of the Supreme Court of Norway in the plenary case HR 2020-02472-P, in particular paragraphs 282 to 286.

The majority in that case decided the case on other grounds and the majority's position on the significance of section 41 of the Public Administration Act in the event of infringement of the SEA Directive is, therefore, merely *obiter dictum*. Thus, the question whether section 41 of the Public Administration Act provides a sufficient domestic law basis to negate obligations under the SEA Directive has not been authoritatively decided under national law, which means that the EFTA Court's advisory opinion may be of decisive significance for the outcome in the present case.

8. Norwegian State, represented by the Ministry of Local Government and Regional Development, has in the main submitted the following

8.1 General remarks about the Norwegian health enterprises and the Health Enterprise Act

Health enterprises are governed by the Health Enterprise Act. The purpose of health enterprises is to provide good and equal specialist health services to anyone needing them when they are needed, irrespective of age, gender, place of residence, financial situation and ethnic background, and to facilitate research and teaching: see second paragraph of section 1.

According to the owner-issued guidelines, the regional health enterprises are to plan and organise specialist health services and facilitate research and teaching: see (1) of the first paragraph of section 1. They are to organise their hospitals and other health establishments as health enterprises ((2) of the first paragraph of section 1).

The regional health enterprises are owned by the State through the Ministry. Health enterprises are owned by the State through the regional health enterprises: see section 3(2).

The owner exercises the highest authority in the regional health enterprise in the enterprise meeting: see the first sentence of section 16.

Decisions of the enterprise meeting are adopted on the basis of the position as owner, that is to say, not on the basis of authority under public law, but rather on the basis of autonomy under private law. This is also expressed in the preparatory works: see Ot.prp. nr. 66 (2000–2001) part 4.3.3 and 4.5.3:

> "It has been a goal of the reform that, at the same time as the State assumes overall responsibility for specialist health services, the regional health enterprises are to be

> severed from the public administration. This has been expressed in the proposal for the enterprises' organisation and the relationship between the owner and the enterprise management. In order to safeguard the objective of making establishments responsible and their independence, in the Ministry's opinion the enterprises themselves must be able to have and assume rights and obligations under contract with other parties, sue and be sued, and be party to administrative law proceedings. The enterprises must dispose of their own assets and their own revenue. The Ministry further considers that they should not be subject to the State's budget and grant system. In order to safeguard those considerations, the proposal for section 6 entails that the enterprises become their own legal entities."

Decisions on establishment, development and location of hospitals is part of the health enterprises' autonomy under private law and is, therefore, not an administrative decision: see also Prop. 55 L (2018–2019) part 8.5.4:

> "The Ministry's basic position is that the regional health enterprises' decisions on, for example, which pharmaceutical products or medical equipment they are to be able to offer is contingent on their autonomy under private law (right of self-determination). This holds true in the same manner as it is part of the regional health enterprises' autonomy under private law to assess and take decisions on whether new hospital buildings are to be built, location of hospitals, whether agreements need to be concluded with private health service providers, etc."

8.2 The conditions for coming within the scope of the SEA Directive – with references to EU case-law

The ECJ has ruled on Article 2(a) and Article 3(2)(a) on a number of occasions, including in the Grand Chamber judgments in *A and Others*, C-24/19, EU:C:2020:503, and *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102.

There are four conditions for the SEA Directive to apply. All of the conditions must be met.

The first condition is that the plan or programme must be prepared by an "authority" (Article 2(a), first indent).

The Advocate General in *Bund Naturschutz in Bayern*, C-300/20, EU:C:2021:746, stated in point 37 that that condition "does not usually present interpretative problems". The reason for this is likely that the question whether or not a body is exercising public authority is rarely in doubt.

The scrutiny of the condition is often succinct: see *A and Others*, C-24/19, EU:C:2020:503, paragraph 34 ("adopted by the Flemish government, which is a regional authority"); *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102, paragraph 36 ("adopted by the Rural District of Rosenheim, which constitutes a local authority"), and *An Bord Pleanála and Others*, C-9/22, EU:C:2023:176, paragraph 28 ("adopted by Dublin City Council, which is a local authority").

The second condition is that the plan or programme must be "required by legislative, regulatory or administrative provisions" (Article 2(a), second indent).

The ECJ has held that plans "the adoption of which is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the

procedure for preparing them, must be regarded as 'required'": see *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102, paragraph 37. The requirement is fulfilled "where there exists, in national law, a particular legal basis authorising the competent authorities to adopt that plan or programme, even if such adoption is not mandatory" (paragraph 37).

Therefore, there must at a minimum be a specific legal basis conferring power on the planning authorities to adopt the plan or programme.

The third condition (Article 3(3) and (4)) is that the plan or programme must relate to either one of the sectors referred to in Article 3(2)(a) or another sector where it is likely to have significant environmental effects (Article 3(4)).

The fourth condition is that the plan must "set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC" (Article 3(2)). The ECJ has held that the plan or programme must be legally binding at least for the authorities with competence to grant such building consents: see *A and Others*, C-24/19, EU:C:2020:503, paragraph 77. The plan must lay down "a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment": see *A and Others*, C-24/19, EU:C:2020:503, paragraph 67, and *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102, paragraph 60. The requirement is not met in the case of a plan which does not lay down such "criteria and detailed rules": see *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102, paragraph 63.

In the State's submission, the SEA Directive does not apply, either individually or collectively, to: 1) the decision of 24 June 2016 of the enterprise meeting; 2) the two zoning plans; or 3) the Parliament's loan limit decision.

The two zoning plans are detailed plans coming under the EIA Directive, not the SEA Directive.

The Parliament's loan limit decision is clearly not a plan for the purposes of the SEA Directive.

Nor does the enterprise meeting's decision on the target image come within the scope of the SEA Directive, because a number of the cumulative conditions laid down in Article 2(b) and Article 3(2) are not met.

The first condition concerning "authority" is not met because the enterprise meeting's decisions are adopted not on the basis of authority under public law, but rather autonomy under private law. The enterprise meeting's decisions are not an exercise of public authority, but rather are a corporate law decision on how the enterprises are to organise the work of carrying out the tasks assigned to them under the Health Enterprise Act and the Specialist Health Services Act (*spesialisthelsetjenesteloven*). In this case, the health enterprise has decided that it wishes to reorganise its operations in Oslo and has accordingly applied for public permits from the planning and building authorities.

The regional health enterprises are not required to prepare plans that are binding under public law, and nor, therefore, does the Health Enterprise Act contain any provisions concerning such plans.

In the event of establishment, development or reorganisation of hospitals requiring a new zoning plan, the health enterprises must put forward a proposal for a new zoning plan, just like private builders.

It is, therefore, clear that regional health enterprises are not an "authority" for the purposes of the SEA Directive.

Nor is the second condition, to the effect that the plan must be adopted on "a particular legal basis", met, since the Health Enterprise Act does not contain rules conferring power to adopt binding plans under public law.

The same holds true for the condition to the effect that the plan must "set the framework for future development consent of projects". Decisions of the enterprise meeting are not binding for the planning authority's processing of the proposal for a new zoning plan, or for the processing of building applications based on the new zoning plan. Thus, it is not binding on the authorities having the power to issue "construction permits" (i.e., the Norwegian planning and building authorities).

Nor do the three decisions referred to by the plaintiff, when considered together, come within the scope of the SEA Directive. The wording of the directive suggests unambiguously that a plan consists of a single decision. An environmental impact assessment under the SEA Directive is to form part of a basis for decision-making in a process leading up to a single decision: the plan or the programme.

The State has not argued that the requirements of the SEA Directive are met because the zoning plans have been processed in accordance with the EIA Directive. The State simply submits that the zoning plans come solely within the scope of the EIA Directive and not the SEA Directive. It is the master plan (the land use part of the municipality plan) that comes under the SEA Directive.

As regards the second question of interpretation, the State submits that it is compatible with EEA law to apply section 41 of the Public Administration Act in national legal proceedings involving infringement of the environmental impact assessment rules laid down in the SEA Directive and the EIA Directive. The State refers to *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraphs 49–54, and *Commission* v *Germany*, C-137/14, EU:C:2015:683, paragraphs 59–61, in which the ECJ ruled on a German rule which is very similar to section 41 of the Public Administration Act. The ECJ held that such a rule was not contrary to EU law, provided that it did not place the burden of proof on the private party, and the national court took all relevant evidence into account in determining whether the error had affected the substance of the decision. Nor, therefore, can such national rules be contrary to EEA law.

9. Questions:

9.1. Question no 1: scope of the SEA Directive

The parties disagree as to whether the environmental impact assessment requirements of the SEA Directive apply.

The District Court is uncertain as to whether the conditions for coming within the scope of the SEA Directive are fulfilled for: 1) the two zoning plans; 2) the health enterprise meeting's decision of 24 June 2016 on the target image for the new hospital structure for Oslo University Hospital; 3) the Parliament's loan limit decision on stage 1 of the new hospital development, either individually or collectively.

The District Court requests the EFTA Court's general guidance as to how the conditions are to be construed, including as to how they fit in with assessments under the EIA Directive.

9.2 Question no 2: national rules on errors that have not affected the substance of a decision

The second question concerns whether it is compatible with EEA law for a Norwegian court to apply a rule, such as section 41 of the Norwegian Public Administration Act, providing that a decision may be upheld as valid despite a procedural error if the error could not have had a decisive effect on the substance of the decision, in a case where it is argued that there has been non-compliance with the SEA Directive's environmental impact assessment requirements.

The court is uncertain whether it is compatible with the duty of loyalty under Article 3 of the EEA Agreement to apply a national rule such as section 41 of the Public Administration Act in such a case.

9. 3 The specific questions

1. Which factors are relevant in the assessment of whether the following decisions (individually or collectively) constitute a "plan" under Article 2(a) and Article 3(2) of Directive 2001/42/EC: 1) a health enterprise's decision on a target image for a new hospital structure, adopted on the basis of its autonomy under private law; 2) a zoning plan; 3) State financing in the form of a loan limit decision?

For the assessment under question 1:

– Does it affect the assessment if a health enterprise's decision on a target image for a new hospital structure is adopted by the State as owner of the health enterprise on the basis of autonomy under private law (that is to say, not the State as planning and building authority)?

– In the assessment of the term "plans and programmes" under Article 3(2)(a), of what significance is the project's size and nature?

– Is the question whether or not the SEA Directive applies affected by whether an assessment has been carried out under the EIA Directive where the assessment under the EIA Directive does not include "reasonable alternatives" (see Article 5(1))?

2. Is it compatible with the EEA Agreement, including Article 3 thereof, for a national court, in proceedings involving alleged infringement of rules laid down in Directive 2001/42/EC, to apply a national rule providing that an administrative decision is valid if a court decides, on the basis of an overall assessment of the evidence in the case and without placing the burden of proof on the private party, that the error in question cannot have affected the substance of the decision?

In the assessment of question 2:

– which legal criteria are relevant in such an assessment?

Yours sincerely,

Torild Margrethe Brende
District Court Judge