



REPORT FOR THE HEARING

in Case E-18/24

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 Borgarting Court of Appeal (*Borgarting lagmannsrett*), in the case between

the Norwegian State, represented by the Ministry of Energy,

and

Greenpeace Nordic and Nature and Youth Norway,

concerning the interpretation of 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, in particular Article 3(1) thereof.

I INTRODUCTION

1. The case pending before the referring court concerns the validity of decisions by the Ministry of Energy to approve plans for development and operations for three petroleum projects in the North Sea. The parties in the main proceedings disagree on whether the greenhouse gas (“GHG”) emissions that will be released from end user consumption of the extracted petroleum for which development consent is sought are environmental effects of the projects within the meaning of Directive 2011/92/EU. They also disagree on what consequences a potential breach of Directive 2011/92/EU may have in the circumstances of the present case.

II LEGAL BACKGROUND

EEA law

2. 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 (OJ 2012 L 26, p. 1, and Norwegian EEA Supplement 2017 No 29, p. 826) (“the Directive”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 230/2012 of 7 December 2012 (OJ 2013 L 81, p. 32, and Norwegian EEA Supplement 2013 No 18, p. 38) and is referred to at point 1a of

Annex XX (Environment) to the EEA Agreement. The decision entered into force on 8 December 2012.

3. Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ 2014 L 124, p. 1, and Norwegian EEA Supplement 2019 No 77, p. 1017) (“Directive 2014/52/EU”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 117/2015 of 30 April 2015 (OJ 2016 L 211, p. 76, and Norwegian EEA Supplement 2016 No 42, p. 73) and is referred to at point 1a of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein, and the decision entered into force on 1 January 2016.

4. Article 1(1) of the Directive reads:

This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

5. Article 1(2) of the Directive reads, in extract:

For the purposes of this Directive, the following definitions shall apply:

(a) “project” means:

- the execution of construction works or of other installations or schemes,*
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;*

...

(c) “development consent” means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

6. Article 2(1) of the Directive, as amended by Directive 2014/52/EU, reads:

Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.

7. Article 3 of the Directive, as amended by Directive 2014/52/EU, reads:

1. The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

(a) population and human health;

(b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape;

(e) the interaction between the factors referred to in points (a) to (d).

2. The effects referred to in paragraph 1 on the factors set out therein shall include the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned.

8. Article 4(1) of the Directive reads:

Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

9. Article 5(1) of the Directive, as amended by Directive 2014/52/EU, reads:

Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:

(a) a description of the project comprising information on the site, design, size and other relevant features of the project;

(b) a description of the likely significant effects of the project on the environment;

(c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

(d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;

(e) a non-technical summary of the information referred to in points (a) to (d); and

(f) any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.

Where an opinion is issued pursuant to paragraph 2, the environmental impact assessment report shall be based on that opinion, and include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment. The developer shall, with a view to avoiding duplication of assessments, take into account the available results of other relevant assessments under Union or national legislation, in preparing the environmental impact assessment report.

10. Point 14 of Annex I to the Directive reads:

Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

11. Point 4 of Annex IV to the Directive, as amended by Directive 2014/52/EU, reads:

A description of the factors specified in Article 3(1) likely to be significantly affected by the project: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example hydromorphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape.

12. Point 5 of Annex IV to the Directive, as amended by Directive 2014/52/EU, reads, in extract:

A description of the likely significant effects of the project on the environment resulting from, inter alia:

...

(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;

(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;

...

The description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project.

13. The final subparagraph of point 5 of Annex IV to the Directive, as amended by Directive 2014/52/EU, reads:

The description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project.

National law

14. The first and second subparagraphs of Section 4-2 of Act No 72 of 29 November 1996 on Petroleum read, in extract:

If a licensee decides to develop a petroleum deposit, the licensee shall submit to the Ministry for approval a plan for development and operation of the petroleum deposit.

The plan shall contain an account of economic aspects, resource aspects, technical, safety related, commercial and environmental aspects, as well as information as to how a facility may be decommissioned and disposed of when the petroleum activities have ceased. ...

15. The first paragraph of Section 22a letter b of Regulation No 653 of 27 June 1997 on Petroleum (“the Petroleum Regulation”) reads, in extract:

An impact assessment in a plan for development and operation of a petroleum deposit shall state the reason for the effects that the development may have on ... environmental aspects, including measures to prevent and remedy such effects. The impact assessment shall, inter alia:

...

b. describe the environment which may be significantly affected, consider and make a balanced judgment with regard to the environmental impact of the development, including:

- describe emission to sea, air and soil. ...

16. The Petroleum Regulation is intended to implement the requirements of the Directive, as amended by Directive 2014/52/EU.

17. The Directive is also implemented through Regulation No 854 of 21 June 2017 on environmental assessments.

III FACTS AND PROCEDURE

18. The request for an advisory opinion has been made in proceedings between the Norwegian State, represented by the Ministry of Energy, as appellant, and Greenpeace Nordic and Nature and Youth Norway, as respondents.

19. According to the request, the case concerns the validity of decisions by the Ministry of Energy to approve a plan for development and operations for three petroleum projects in the North Sea. The decisions at issue are the following:

- decision of 29 June 2021 regarding the oil field Breidablikk;
- decision of 5 June 2023 regarding the oil field Tyrving; and
- three decisions of 28 June 2023 regarding the oil and natural gas project Yggdrasil.

20. The oil field Breidablikk has recoverable reserves that are estimated at over 30 million standard cubic metres of oil (approximately 190-200 million barrels of oil equivalents). Production started at the start of 2024 and the expected production time is 25 years (until 2052). Gross emissions from the field are around 87 million tonnes of CO₂. The total investment is around NOK 19 billion. The expected production period is 20 years, until around 2044.

21. The oil field Tyrving has recoverable reserves that are estimated at around 4.1 million standard cubic metres of oil equivalents. Production is expected to start in September 2024 and gross emissions are estimated at 11.3 million tonnes of CO₂.

22. Yggdrasil comprises the fields Hugin, Munin and Fulla in the North Sea. These three fields consist of oil and gas. Recoverable reserves are estimated at around 140 million standard cubic metres of oil equivalents (650 million barrels of oil equivalents). Total gross emissions are estimated at 365 million tonnes of CO₂. Total expected investments for the development of Yggdrasil are around NOK 115.1 billion. Production is expected to start in 2027 and the expected production time is 25 years (until 2052).

23. Tyrving and Yggdrasil were made subject to environmental impact assessments pursuant to national law implementing the Directive. Breidablikk was exempted pursuant to Section 22c of the Petroleum Regulation. The environmental impact assessments carried out did not assess the impact on the climate from GHG emissions arising from consumption.

24. Greenpeace Nordic and Nature and Youth Norway instituted legal proceedings and filed for a temporary injunction on 29 June 2023. Oslo District Court quashed the decisions in a judgment of 18 January 2024 and granted a temporary injunction. That judgment was appealed by the Ministry of Energy on 8 February 2024.

25. The referring court suspended the enforcement of the injunction on 20 March 2024. On 5 July 2024, the referring court decided to request an advisory opinion on the questions of EEA law raised by the case and severed the injunction case from the invalidity case. On 14 October 2024, the referring court lifted the injunction.

26. On 28 August 2024, the Ministry of Energy adopted two decisions upholding the approvals related to Tyrving and Yggdrasil. On 30 August 2024, Greenpeace Nordic and Nature and Youth Norway confirmed that also the validity of these two decisions will be challenged in the case before the referring court.

27. According to the referring court, the request for an advisory opinion concerns the interpretation of Article 3(1) of the Directive and what reparation obligations follow from EEA law. The parties to the case before the referring court disagree on whether the GHG emissions that will be released from end user consumption of the extracted petroleum for which development consent is sought are environmental effects of the project. They also disagree on what the consequences of a potential breach of the Directive may be.

28. Against this background, the referring court decided to refer the following questions to the Court:

- 1. Where a project is listed in Directive 2011/92/EU Annex I point 14, are the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, environmental “effects” of the project under Article 3(1)?**
- 2. If Question 1 is answered in the affirmative, is a national court required under Article 3 EEA, to the extent possible under national law, to eliminate the unlawful consequences of a development consent granted without a prior EIA of said effects?**
- 3. If Question 2 is answered in the affirmative and national law allows for the annulment and/or suspension of the unlawful consent, can a national court retroactively dispense with the obligation to assess these effects under Article 3(1) if it is shown that the failure has not influenced the outcome of the decision-making process?**

29. By order of 5 September 2024, the President of the Court held that none of the grounds put forward by the referring court, in requesting that the case be determined pursuant to an expedited procedure, justified the granting of that request. Accordingly, the request to apply an expedited procedure pursuant to Article 98 of the Rules of Procedure was denied.

IV WRITTEN OBSERVATIONS

30. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Greenpeace Nordic and Nature and Youth Norway, represented by Jenny Sandvig and Carl Victor Waldenstrøm, advocates;
- the Norwegian Government, represented by Fredrik Sejersted and Andreas Runde, acting as Agents;
- the Netherlands Government, represented by Mielle Bulterman, Joost Hoogveld and Emma Besselink, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Erlend Møinichen Leonhardsen, Kyrre Isaksen and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Geert Wils and Magnus Noll-Ehlers, acting as Agents.

V PROPOSED ANSWERS SUBMITTED

Greenpeace Nordic and Nature and Youth Norway

31. Greenpeace Nordic and Nature and Youth Norway submit that the questions referred should be answered as follows:

Question 1:

For projects listed in Directive 2011/92/EU Annex I point 14, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas are environmental effects of the project under Article 3(1) of the Directive.

Question 2:

If a development consent has been granted without a prior EIA of the GHG emissions from the extracted petroleum and natural gas, a national court is required under Article 3 EEA to eliminate the unlawful consequences, to the extent possible under national law, through suspension and annulment. That

applies notwithstanding any contrary interpretation which may arise from national case-law for the national rule.

Question 3:

A national court cannot retroactively dispense with the obligation to assess these effects on the factors listed in Article 3(1) if it is shown that the failure has not influenced the outcome of the decision-making process.

Norwegian Government

32. The Norwegian Government submits that the questions referred should be answered as follows:

1. The scope of the obligation under Article 3(1) of Directive 2011/92/EU cover all direct and indirect significant effects of the project for which a development consent is sought, but not the environmental effects of the use or consumption of end products after they have been sold. This applies both to the general interpretation of the Directive and to projects involving the extraction and sale of oil and natural gas.

2. It is permissible under EEA law for national courts not to annul a development consent granted in breach of the procedural rules in the EIA Directive, if the procedural defect invoked did not affect the outcome of the decision, as long as the burden of proof does not fall on the applicant and account is taken of the seriousness of the defect and the rights of the public concerned to have access to information and to be empowered to participate in the decision-making.

Netherlands Government

33. The Netherlands Government submits that the questions referred should be answered as follows:

1. Article 3(1) of the EIA Directive must be interpreted as meaning that, where a project is listed in Annex I, point 14 of the EIA Directive, the GHG emissions that will be released from the extracted petroleum and natural gas are not environmental effects of the project.

2. A national court is not required under Article 3 EEA to eliminate the unlawful consequences of a development consent granted without a prior EIA of the GHG emissions that will be released from the extracted petroleum and natural gas, if that decision has become final, and there are no particular reasons requiring a review of the decision.

3. If it is shown by the competent authority, after an assessment of omitted effects, that the failure has not influenced the outcome of the decision-making

process, national authorities are not obliged to take an entirely new EIA or decision, as long as the application and effectiveness of the EIA Directive are guaranteed.

ESA

34. ESA submits that the questions referred should be answered as follows:

1. Where a project is listed in Directive 2011/92/EU Annex I point 14, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, are “effects” of the project under Article 3(1).

2. National courts are required under Article 3 EEA, to the extent possible within the scope of their powers, to eliminate the unlawful consequences of a development consent granted without a prior environmental impact assessment which should have been carried out under Article 3(1) of the EIA Directive.

3. National courts cannot retroactively dispense with the obligations to carry out an environmental impact assessment in line with Article 3(1) of Directive 2011/92/EU.

European Commission

35. The Commission submits that the questions referred should be answered as follows:

Directive 2011/92 is to be interpreted as meaning that where a project is listed in point 14 of Annex I thereto, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas do not constitute environmental “effects” of the project within the meaning of Article 3(1) of that Directive.

Páll Hreinsson
Judge-Rapporteur