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EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

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in Case E-13/24

Friends of the Earth Norway and Young Friends of the Earth Norway

in which the *Borgarting lagmannsrett* (Borgarting Court of Appeal), Norway, has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice concerning Article 4(7)(c) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.[1]

[1] OJ L 327, 22.12.2000, p. 1, ELI: http://data.europa.eu/eli/dir/2000/60/oj.

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I. INTRODUCTION

1. This request for an Advisory Opinion of the EFTA Court concerns Article 4(7)(c) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (Directive 2000/60/EC, or the Directive).

2. The request is made in the course of proceedings in which two environmental NGOs (Friends of the Earth Norway and Young Friends of the Earth Norway, together the appellants) took legal action against the Norwegian Government. They contested the granting of four mining permits to Nordic Mining, arguing that those permits are invalid.

3. The mining permits authorise, in essence, the discharge of 170 million tonnes of mining waste, capped at maximum 4 million tonnes per year, into an area of 4.4 square km of seabed in the Førdefjord, on the southerly western coast of Norway.

4. The Commission takes note of the background to the case as set out by the national court at section 3 of the request for an Advisory Opinion. In particular, the Commission notes that it is undisputed, before the national court, that "*the other conditions in Article 4(7) of the [Water Framework Directive] are satisfied*", i.e. that the dispute is limited to the question whether the requirement in Article 4(7)(c) that there be "reasons […] of overriding public interest" is fulfilled.

5. By way of context, the Commission notes the existence of Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (the Critical Raw Materials Act). While there is no suggestion that that act can be applied in the present case, the Commission will explain below the general relevance of that act in circumstances such as those at hand.

II. THE QUESTIONS ASKED

6. The *Borgarting langmannsrett* refers the following questions to the EFTA Court:

    1. What is the legal test when determining whether there is an "overriding public interest" within the meaning of Article 4(7)(c) of Directive 2000/60/EC?

        a. Is a qualified preponderance of interest required and/or are only particularly important public interests relevant?

        b. What will be key factors in the assessment of whether the public interests that justify the measure are "overriding"?

    2. Can the following economic considerations constitute an "overriding public" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?

        a. Purely economic considerations (i.e. the expected gross income generated by the planned mining operations)

        b. That a private undertaking will generate income for shareholders

        c. That a private undertaking will generate tax revenue for the state and municipality

        d. That a private undertaking will provide wage income for employees

    3. Can the following considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?

        a. That a private undertaking will generate employment effects (increased local business activity, employment and settlement)

        b. Global supply of rutile

        c. Ensuring Norway and Europe access to critical minerals

III. ANALYSIS

III.1. First question: determining the existence of an overriding public interest

7. By its first question, the national court is asking, in essence, whether Article 4(7)(c) of Directive 2000/60/EC requires, in all cases, a balancing of the interests at stake. More specifically, the national court asks whether, when determining the existence of an overriding public interest, there must be a qualified preponderance of interest, or particularly important public interests at stake.

8. The national court asks this question because in the proceedings before it, the Norwegian government has argued that when there is an overriding public interest, the analysis can stop there, i.e. there is no need for any balancing.

9. It appears appropriate at the outset to recall the broader context of Article 4(7) of the Directive before considering the precise terms of subparagraph (c).

10. Article 4(7) must be read against the basic environmental objective laid down in Article 4(1)(a)(i) that EEA States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water. EEA States will not be in breach of that obligation – to prevent deterioration – when the conditions in paragraph 7 are fulfilled. In the first place, the failure to prevent deterioration of surface water bodies must be as a result of either "*new modifications to the physical characteristics of a surface water body*" or, when the failure is to prevent deterioration from high status to only good status, "*new sustainable human development activities*" (Article 4(7) first and second indents). In the second place, a series of conditions must also be met (Article 4(7)(a) to (d)). Those conditions pertain to the need to take all practicable steps to mitigate the adverse impact on the status of the body of water (subparagraph (a)), the obligation to record in the river basin management plan the reasons for the modifications (subparagraph (b)), and the demonstration that no other "significantly better environmental option" exists to achieve the beneficial objectives served by those modifications (subparagraph (d)). Subparagraph (c) requires that the reasons for the modifications "*are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1* [i.e. the environmental objective of preventing

deterioration in the status of surface water bodies] *are outweighed by the benefits of the new modifications [...] to human health, to the maintenance of human safety or to sustainable development*".

11. In other words, the purpose of Article 4(7) is to create an exception to the obligation to prevent deterioration in the status of surface water bodies. Like any exception, it should be interpreted strictly.

12. The Commission notes that the parties agree that "the other conditions in Article 4(7) of the [Water Framework Directive] are satisfied.

13. Turning to the specific question of the national court, the Commission is of the view that, before focussing on the specific phrase "overriding public interest", it is first useful to read subparagraph (c) as a whole. Indeed, the use of "and/or" in the middle of the point deserves comment. If the text is read literally, it has the effect of taking the emphasis off the first part (the existence of an overriding public interest) in favour of the second part (that the benefits of a particular project outweigh the negative impact on the status of the water body in question). Indeed, while the former would be neither necessary, nor sufficient, the latter would in all cases have to be established in order to trigger the protection afforded by Article 4(7). And yet, such a reading would appear contrary to the purpose and context of the rule (or rather, the possibility to make an exception to the rule). It is clear from recital 32 to the Directive that one of the grounds for derogating from the requirement to prevent deterioration in the status of a water body is "reasons of overriding public interest" – if the text in Article 4(7)(c) is read literally then such overriding public interests are rendered entirely irrelevant to the assessment of the conditions for granting a derogation because the second leg of the text is, as noted above, both necessary and sufficient. In fact, this reading would even call into question the admissibility of the request for an Advisory Opinion because the answer would not be helpful in deciding the case before it – the case would turn simply on whether "*the benefits to the environment and to society of achieving the objectives set out in paragraph 1* [i.e. the environmental objective of preventing deterioration in the status of surface water bodies] *are outweighed by the benefits of the new modifications [...] to human health, to the maintenance of human safety or to sustainable development*". If yes,

the derogation can be granted (without any need to establish the existence of an overriding public interest), if no then it cannot.

14. The Commission is therefore of the view that the provision must be read as setting two alternative scenario in which a derogation could be granted: either there is an overriding public interest (i.e. another public interest objective is set against the environmental objective of the Directive), or the benefits to human health, the maintenance of human safety or sustainable development are greater than the benefits of preventing deterioration of the water body in question (i.e. two environmental objectives are set against one another. The case law of the Court supports that reading of Article 4(7)(c) of Directive 2000/60/EC: in its judgment in C-525/20, the Court ruled that the projects in question "*will serve an overriding public interest* ***or*** *that the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) of Directive 2000/60 will, in the case of such projects, be outweighed by the benefits to human health, the maintenance of human safety, or the sustainable development resulting from those projects, as required by Article 4(7)(c) thereof*" (emphasis added). ([2])

15. It is in this sense that the question of the national court appears useful to the outcome of the proceedings and a request for an advisory opinion as to how to interpret the term "overriding public interest" is capable of being answered.

16. By way of preliminary observation and for the avoidance of doubt, the Commission notes that while in the English version of the Directive, the phrase used is 'reasons of overriding public interest', which is a well-established concept of EEA law, the other language versions use wording that differs from that used in the context of the free movement rules (see, for example, the defined term set out in Article 4(8) of Directive 2006/123/EC). There would therefore appear to be a deliberate intention of the legislator to differentiate between the term as used in Directive 2000/60/EC and that used more generally when assessing restrictions to free movement. That said, while there is no reason to interpret the expression in an identical manner in

([2]) Judgment of 5 May 2022 in *Association France Nature Environnement v Premier ministre and Ministre de la Transition écologique et solidaire*, C-525/20, EU:C:2022:350, para 43.

the context of Directive 2000/60/EC, it must also be acknowledged that the notions remain similar.

17. In any event, it appears clear that what may constitute an overriding public interest may vary from one EEA State to the other and may also vary over time such that there is no exhaustive or definitive list of what amounts to an overriding public interest.

18. It also appears clear that the requirement that there be an overriding public interest is necessary precisely because of the existence of (another) legitimate objective, namely that of protection of the environment, and more specifically of the prevention of deterioration of the status of surface water bodies.

19. Indeed, like the prohibition on restrictions to free movement, the obligation to prevent such deterioration itself pursues an objective that is inscribed in the TFEU. It is in this sense that, in order to derogate from that obligation, there must be a similarly important "conflicting" objective at play. It also then follows logically that such an objective can only prevail over the environmental objective pursued by the Directive when the measures taken to achieve that objective are necessary and proportionate to the aim in question.

20. That interpretation is supported by the existing case law on Article 4(7) of Directive 2000/60/EC. Indeed, in both C-43/10 and C-346/14, the CJEU only entered into a consideration of the conditions for granting a derogation after having ascertained the existence of objectives in the general interest. ([3]) And in the former, the CJEU specifically considered, at paragraph 68 of the judgment, the necessity of the measures in question to meet those objectives: the CJEU admitted that when there was no other way to ensure the supply of water for drinking, the production of electricity and irrigation, a derogation could, in principle, be envisaged, but it also accepted that even something less than "impossibility" could suffice. The Commission understands this passage of the judgment as a manifestation of the

([3]) Judgments of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and others*, C-43/10, EU:C:2012:560, paras 66 and 67, and of 4 May 2016 in *Commission v Austria*, C-346/14, EU:C:2016:322, paras 71 to 73.

principle of proportionality, designed precisely to balance the need for the measures in question (and therefore the relative weight of the objective they serve) against the objectives inscribed in the Directive. The second judgment is even clearer in requiring not only that an objective such as promoting the production of renewable energy through hydroelectricity is identified but that the specific measures being taken in the name of that aim are weighed against the deterioration that they will cause to the status of the water body in question; it is only when that second step is performed that the objective being pursued can be confirmed as being, *in casu*, overriding in the sense that it prevails over the environmental objective that underpins the Directive in general, and Article 4 in particular. ([4])

21. That interpretation is also supported by relevant case law on the Habitats Directive. ([5]) Indeed, that act contains a similar provision to Article 4(7) of the Water Framework Directive and in particular uses the notion of "imperative reasons of overriding public interest" when setting the parameters for derogating from the main obligation that is the conservation of natural habitats. ([6]) The CJEU has interpreted that notion as follows:

([4]) Judgment in *Commission v Austria*, C-346/14, paras 69, 71 and 74.

([5]) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7. For the avoidance of doubt, the Commission notes that the indication in Guidance Document No 36, referred to by the national court, as to the usefulness of "case law on the corresponding conditions in Article 6(4)" cannot permit interpretations that ignore the specific differences that exist in the wording of that provision and Article 4(7) of Directive 2000/60/EC (such as, for example, the express reference in the former to "*imperative reasons [...] of a social or economic nature*".

([6]) For the sake of completeness, the Commission notes that there is not always a perfect match in the terms used in both directives: Directive 92/43/EEC uses, for example, "raisons impératives d'intérêt public majeur" in French, "razones imperiosas de interés público de primer orden" in Spanish or "zwingenden Gründen des überwiegenden öffentlichen Interesses" in German, where Directive 2000/60/EC uses "intérêt général majeur", "interés público superior", and "übergeordnetem öffentlichem Interesse".

"An interest capable of justifying […] the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective […]". ([7])

22. The Commission is of the view that that passage must be understood as implying that the "weighing up" produces an outcome that is favourable to the 'other' interest.

23. However, it cannot be deduced from that conclusion that any specific "*qualified preponderance of interest*" is required, nor indeed can "*key factors in the assessment*" be identified in the abstract. It is clear from the case law of the CJEU that Article 4(7) presupposes the existence of interests that can be qualified as "public" in the sense that they are not of purely private nature, and that those interests must be of such an importance that they can outweigh the objectives pursued by the Directive. In determining whether this is the case, one element will be the necessity and proportionality of the measures to the objective they pursue: only measures that are necessary and proportionate to the objective they pursue will be capable of having an overriding public interest. Another element will be the effect of achieving that objective and its relative importance when weighed against the objective of the Directive: this will require a case-by-case assessment that considers the competing interests in the context of the Water Framework Directive, including its role in safeguarding human health, and the general principles that govern Union environmental policy such as the preservation, protection and improvement of the quality of the environment, the protection of human health, the prudent and rational use of natural resources and the precautionary principle.

24. In light of the foregoing considerations, the Commission finds it appropriate to answer the first question as follows:

The notion of reasons of overriding public interest, referred to in Article 4(7) of Directive 2000/60/EC, must be interpreted in the sense that it includes public interests of such an importance that they can outweigh the objectives pursued by the Directive. Ascertaining whether such reasons exist requires a case-by-case

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([7]) Judgment of 16 February 2012 in *Solvay and others*, C-182/10, EU:C:2012:82, para 75.

balancing of the advantages of a project causing a deterioration in the status of a water body and its negative impact on that water body.

III.2. Second and third questions: the actual interests invoked

25. By its second and third questions, which may be taken together, the national court asks, in essence, whether certain economic or other considerations may constitute an overriding public interest. More specifically, the national court seeks to ascertain whether the reasons such as those invoked by the Norwegian government, be it in the Decree itself or before the courts, are capable of constituting reasons of overriding public interest within the meaning of Article 4(7)(c) of Directive 2000/60/EC.

26. In the Royal Decree, the reasons given for granting the derogation and allowing the deterioration of the Førdefjord related mainly to the benefits deriving from future revenues generated as a result of the mining activities (income for employees, income for shareholders, and tax revenues for the State and municipality).

27. In the same way that "*purely economic grounds [...] cannot serve as justification for an obstacle to one of the fundamental freedoms*", purely private economic advantages (for example in the form of income for employees or shareholders, or for the company more generally in the form of expected gross income) cannot constitute a reason for derogating from one of the main obligations laid down in the Water Framework Directive, i.e. the obligation to prevent deterioration. ([8])

28. Similarly, while the Court has held on numerous occasions that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions of the exercise of the fundamental freedoms, the reference to generating/increasing public income through taxes does not seem to amount to an overriding public interest either. ([9])

([8]) See, for example and by analogy, judgment of 13 July 2023 in *Xella Magyarország*, C-106/22, EU:C:2023:568, para 64.

([9]) See, for example and by analogy, judgment of 22 September 2022 in *Admiral Gaming Network*, C-475/20 to C-482/20, EU:C:2022:714, para 54.

29. That said, it should be acknowledged that the existence of economic advantages, including of a private nature, does not in itself mean that a project is not capable of representing an overriding public interest. This appears to be a matter of case law already in relation to the Habitats Directive and is certainly true in relation to restrictions of the exercise of fundamental freedoms – there appears to be no reason to interpret Directive 2000/60/EC more restrictively. ([10])

30. It should also be acknowledged that certain considerations linked to the social or economic situation of a particular area may, in certain circumstances, constitute reasons of overriding public interest. This can be seen, for example, in C-404/09 *Commission v Spain*: the CJEU considered – in the context of the Habitats Directive, which contains a provision similar in scope and effect to Article 4(7) of the Water Framework Directive – that the importance of mining activities for the local economy is capable of constituting an imperative reason of overriding public interest. Similarly, the CJEU has held that "*reasons of an economic nature in the pursuit of an objective in the public interest or the guarantee of a service of general interest may constitute an overriding reason in the public interest capable of justifying an obstacle to one of the fundamental freedoms enshrined in the Treaties*". ([11]) On that basis, it cannot be excluded that a project is authorised pursuant to Article 4(7) of Directive 2000/60/EC for reasons pertaining to the need to ensure employment and settlement in regions experiencing depopulation, for instance, and going beyond a simple desire to generate/increase employment.

31. Similarly, ensuring access to so-called "critical minerals" is something that may be in the public interest. Indeed, arguments relating to security of supply more generally have often been assessed as capable of being taken into account when establishing the existence of an overriding public interest. However, it is important, in this context, to emphasise first, the qualification of the good access to which is being ensured, and second, the purposes for which that supply is being ensured.

([10]) See, for example and in relation to the Habitats Directive, judgment in *Solvay and others*, C-182/10, cited above, paras 76-78.

([11]) Judgment in *Xella Magyarország*, C-106/22, cited above, para 65.

32. On the first point, it appears to be a matter of common ground that the quality of the good in question is of particular relevance: the reliance placed by the national court on the nature of the good being mined as a 'critical mineral' supports this understanding of the debate. The Commission agrees that it is only possible to consider arguments relating to security of supply when the good in question is of such a nature as to justify specific measures being taken to that effect. It must also be acknowledged that access to raw materials is essential for the EEA economy and the functioning of the internal market and that there exists a set of non-energy, non-agricultural raw materials that are considered to be critical due to their high economic importance and their exposure to high supply risk. The Union legislator has established a framework for ensuring secure and sustainable supply of these 'critical raw materials'. Annex II to Regulation (EU) 2024/1252 contains a list of critical raw materials and includes, at point (af) of section 1, titanium metal. Annex I to that Regulation contains a (shorter) list of strategic raw materials: titanium metal also figures on that list (point (p)).

33. Rutile, which is the commodity that will be mined in accordance with the permits that are challenged before the national court, is the main source for production of titanium metal. At a very abstract level, this fact would tend to suggest that an argument relating to security of supply of that commodity may at least be entertained, i.e. that supply of the good in question may indeed be something that it is in the public interest to protect.

34. Indeed, the Commission notes that the Union legislator has decided that the raw materials, including in unprocessed form, at any stage of processing and when occurring as a by-product of other extraction, processing or recycling processes, listed in Annex I, section 1, to Regulation (EU) 2024/1252 shall be considered to be strategic raw materials (Article 3(1) of Regulation (EU) 2024/1252). That act then sets out criteria for the recognition of Strategic Projects, the first of which is that the project would "*make a meaningful contribution to the security of the Union's supply of strategic raw materials*" (Article 6(1)(a)). It is explicitly stipulated that recognition as a Strategic Project "*may be considered to have an overriding public interest provided that all the conditions set out in [inter alia, Article 4(7) of Directive 2000/60/EC] are fulfilled*" (Article 10(2) of Regulation (EU) 2024/1252).

35. Which brings us to the second point highlighted at paragraph 31 above: simply being concerned with a ‘critical mineral’ – indeed, even one that qualifies as “strategic” within the meaning of Regulation (EU) 2024/1252 – is not sufficient to conclude that a project qualifies as having an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC. There must, in addition, be some meaningful contribution to the security of supply of the commodity in question. It should also be understood that arguments linked to security of supply are premised on the importance, for the functioning of the internal market and the EEA economy, of that commodity – in that context, the considerations set out by the national court in relation to the global supply of rutile do not, as such, appear relevant to the assessment. On the basis of the information provided in the request for an Advisory Opinion, it is not clear that this is the case in relation to the mining activities in question. It is, in any event, something that would be for the national court to ascertain.

36. On the basis of the foregoing considerations, it appears clear that while purely private economic advantages are not capable of being taken into account when establishing whether an overriding public interest exists, that same cannot be said of considerations linked to the social or economic situation of a particular area, or to arguments related to the security of supply of critical minerals.

37. The Commission therefore suggests that the second and third questions should be answered as follows:

    Article 4(7) of Directive 2000/60/EC must be interpreted in the sense that:

    - Income generated as a result of an economic activity, including for employees, shareholders or the State through taxes, cannot be considered to have an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC;

    - certain considerations linked to the social or economic situation of a particular area, or the contribution of a project to the security of supply of strategic raw materials in the Union, may be considered to have an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC, provided that all the other conditions set out therein have been fulfilled.

IV. CONCLUSION

38. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court by *Oslo tingrett* should be answered as follows:

1. The notion of reasons of overriding public interest, referred to in Article 4(7) of Directive 2000/60/EC, must be interpreted in the sense that it includes public interests of such an importance that they can outweigh the objectives pursued by the Directive. Ascertaining whether such reasons exist requires a case-by-case balancing of the advantages of a project causing a deterioration in the status of a water body and its negative impact on that water body.

2. Article 4(7) of Directive 2000/60/EC must be interpreted in the sense that:

- **Income generated as a result of an economic activity, including for employees, shareholders or the State through taxes, cannot be considered to have an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC;**

- **certain considerations linked to the social or economic situation of a particular area, or the contribution of a project to the security of supply of strategic raw materials in the Union, may be considered to have an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC, provided that all the other conditions set out therein have been fulfilled.**

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