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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT
WRITTEN OBSERVATIONS

submitted, pursuant to Article 90 (1) of the Rules of Procedure of the EFTA Court, by

Norges Naturvernforbund and Natur og Ungdom

Oslo, 19 July 2024

Case no.:	Case E-13/24
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1 INTRODUCTION

(1) On 23 May 2024, a request for an advisory opinion was submitted to the EFTA Court by Borgarting Court of Appeal ("**Request for Advisory Opinion**") concerning the interpretation 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 ("**WFD**" or "**the Directive**"), More precisely, the Request for Advisory Opinion concerns the interpretation of the "reasons […] of overriding public interest"-exemption in Article 4(7)(c) of the WFD.

(2) Since 2000, the WFD has been the main law for water protection in Europe. It applies to inland, transitional and coastal surface waters as well as groundwaters. The key objectives of the WFD are set out in Article 4 of the Directive. It requires Member States to protect and, where necessary, restore water bodies in order to reach good status, and to prevent deterioration.

(3) The case currently pending before the Borgarting Court of Appeal concerns the legality of permits granted by Norwegian authorities to a Norwegian mining company. The permits give the permission to operate a mine on the western coast of Norway and to deposit 170 million tons of mining waste in the sea.

(4) The outer part of the Førdefjord is currently in good condition, largely unaffected by industrial activity. The parties disagree on how serious the environmental impacts of the planned mining project will be, but it is undisputed that the deposit of mining waste will cause the ecological status to change from good to poor. It therefore clear and undisputed that the deposit will lead to a deterioration of the water status.

(5) Surface water bodies with a good status are very valuable. One of the key objectives of the WFD, is to ensure that such resources are not degraded unless it is absolutely necessary in order to satisfy fundamental societal needs.

(6) The parties agree that the deterioration of the fjord cannot be permitted unless the exemption test in the Norwegian Water Regulation section 12 is satisfied. The Norwegian government has confirmed, in correspondence with ESA, that the exemption test in the Norwegian Water Regulation section 12 shall be presumed to be identical to the exemption test in the WFD article 4(7)(c). Hence, the key question before the national courts is whether the derogation granted by Norwegian authorities can be justified due to "reasons [...] of overriding public interest", cf. WFD article 4(7)(c).

(7) The Request for Advisory Opinion concerns the threshold for making exemptions to a key provision in EU environmental law, namely the prohibition against the deterioration of water resources.

(8) The main justification in the Royal Decree is the "future revenues from mining activities". The environmental organisations will argue that a deterioration of water resources cannot be justified simply by the revenues that will be created by an industrial activity. If this is considered to be an adequate justification, the WFD will not serve as an effective protection of the water resources in Europe, and the goal of preventing deterioration in the status of waters at Community level will not be achieved.[1]

(9) Section 2, 3 and 4 of these written observations contain a brief description of the factual background, the transposition of the WFD into Norwegian law, and the justification given by Norwegian authorities for allowing the fjord to be deteriorated. The purpose of these sections is to provide some context and to explain why the questions are relevant and important.

(10) Section 5, 6 and 7 contains our legal analysis of the three questions that have been referred to EFTA Court. The second and third question are closely related, as they concern the types of interest that can be taken into consideration. Therefore, the legal analysis regarding question two will also apply, with some modifications, when assessing question three.

(11) We submit that the Court should answer the questions as proposed in section 8.

2 FACTUAL BACKGROUND

2.1 The current proceedings before the Norwegian courts

(12) Two Norwegian environmental organisations, Friends of the Earth Norway (*Norges Naturvernforbund*) and Young Friends of the Earth Norway (*Natur og Ungdom*), have initiated legal proceedings against the Norwegian government, arguing that four permits granted to Nordic Mining are invalid.

(13) An overview of the four permits is given in section 3.1 of the Request for Advisory Opinion. The Royal Decree of 19 February 2016, which is the original pollution permit, is of particular importance. In this decision, the Norwegian government sets out the reasons for applying the "overriding public interest"-exemption. The other three permits are based on a premise that The Royal Decree is valid.

(14) The case before Borgarting Court of Appeal is limited to the question of whether the "overriding public interest"-exemption in Article 4(7)(c) of the WFD is fulfilled.

[1] See, for instance, recital 25 in the preamble of the Directive.

2.2 A brief description of the mining project

(15) The planned mining project involves extraction and processing of rutile from Engebøfjellet in Sunnfjord municipality (formerly Naustdal municipality). Only a small fraction of the eclogite ore is estimated to contain rutile. The large quantities of waste from the mining activities are planned to be deposited into the outer part of the Førdefjord.

(16) The rutile extracted from Engebøfjellet will have properties that makes it well suited to produce titanium dioxide (TiO_2). Titanium dioxide is the most widely used whitening pigment in the world. It is commonly used in a range of industrial and consumer products, including paints, coatings, adhesives, paper and plastics.

(17) Titanium dioxide has been linked to adverse health effects, particularly genotoxicity and intestinal inflammation. Because of these health risks, France banned titanium dioxide as a food additive in 2020. Two years later, the European Union also banned titanium dioxide as a food additive. However, it is still used as a food additive in other parts of the world.

(18) The parties disagree as to whether the rutile can be extracted without depositing mining waste in the sea. The environmental organisations believe that the extraction can be achieved with means that are environmentally significantly better than the planned project. This will be technically feasible and will not entail disproportionate costs. Before the Oslo District Court, the environmental organisations argued that the government had not properly assessed whether the project could be implemented without open pit mining and sea disposal, cf. Article 4(7)(d) of the WFD. This argument was rejected by the Oslo District Court. Due to limited funding, the environmental organisations were not able to include these objections in the appeal to Borgarting Court of Appeal. Hence, the application and interpretation of Article 4(7)(d) of the WFD is not included in the Request for Advisory Opinion.

2.3 The environmental impact of the project

(19) The tailings will be disposed within a 4.4 square kilometre area at the bottom of the Førdefjord. Under the terms of Nordic Mining's revised pollution permit, up to 170 million tonnes of tailings (at a maximum rate of 4 million tonnes per annum) may be disposed at a depth from approximately 320 to a limit of 220 metres.

(20) The deposition of mining waste in the outer part of the Førdefjord will result in a deterioration of the ecological status of the water body from good to poor. It is anticipated that the condition of the water body will become irreversibly deteriorated. The benthic fauna is the ecological quality element that is most sensitive to the disposal of tailings, and the consequence of the disposal is that the benthic fauna in the deposit area will disappear.

(21) The parties agree that the environmental consequences will be serious. It is undisputed that the disposal will lead to a deterioration of the water status in the water body.

(22) The environmental organisations believe that the government has underestimated the negative environmental consequences, including:

- The risk of particle dispersion outside the designated area
- The risk of serious or irreversible damage to marine species
- The risk of impact on seafood safety and the reputation of Norwegian seafood

(23) Due to limited funding, the environmental organisations were not able to include these objections in the appeal to Borgarting Court of Appeal. However, it should be noted that the parties still disagree on whether the environmental consequences will be even more serious than anticipated in the Royal Decree. The leading scientific community in Norway, The Norwegian Institute of Marine Research (*Havforsknings-intituttet),* has stated in a public hearing that the planned mining project "is not a sustainable use of the fjord" (unofficial translation).[2]

3 THE TRANSPOSITION OF THE WFD INTO NORWEGIAN LAW

(24) The transposition into Norwegian law is described in section 4.2 in The Request for Advisory Opinion.

(25) The environmental organisations believe that the choice of wording in the Norwegian Water Regulation was very unfortunate and that this is the root cause of the mistakes made when the permission was given. It explains why the exemption test actually applied by the government was too lenient.

(26) As can be seen in the table on page 8 in The Request for Advisory Opinion. the wording in the current Norwegian Water Regulation is quite different from the wording in the WFD. This is summarized below in a simplified table:

WFD **art. 4(7)(c)**	**Water Regulation** **s. 12(2)(b)** **Current version**
the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and	*The benefits for society of the new intervention or activities shall be greater than the loss of environmental quality*

[2] https://www.hi.no/hi/nyheter/2019/oktober/hi-om-gruvedrift-i-fordefjorden-ikke-berekraftig

(27) A literal translation of the wording in the Norwegian Water Regulation indicates that an ordinary cost-benefit analysis is sufficient. If so, the legal test would be identical to the legal test in section 11 of the Norwegian Pollution Control Act (*forurensnings-loven*). The wording of Section 11 of the Pollution Control Act is quoted in in section 4.1 in The Request for Advisory Opinion. As can be seen, the legal test in Section 11 of the Pollution Control Act is an ordinary cost-benefit analysis.

(28) It seems that when the permit was given, the government did not take into account that the WFD establishes a different and higher threshold than section 11 of The Norwegian Pollution Control Act.

(29) In a letter of 26 October 2021, ESA raised the following question:

> *"Please explain whether, there is anything which expressly and clearly prevents interpretation of the Norwegian national law provisions transposing Article 4(7)(c) WFD as being wider in scope and application than the provisions in Article 4(7)(c) WFD."*

(30) In a letter of 15 December 2021, the Norwegian Government responded that:

> *"The interpretation of Norwegian national law is guided by a number of interpretation principles. Among these is the presumption principle, stating that Norwegian national law transposing EEA legislation (or other international law) is presumed to be in accordance with that legislation. If the wording of the national provision leaves any room for interpretation, the national provision shall be interpreted in such a way that a uniform application of the EEA rule is achieved. This principle is applied by the authorities and courts of law in Norway when practising national law, and the principle therefore applies also to the Water Regulation section 12, second paragraph, subclause (b)."*

(31) The parties agree that the "overriding public interest"-exemption is implemented in Norwegian law and that it should be presumed to be in accordance with the WFD. The parties also agree that the Water Regulation was in force when the permits were given, and that section 12 of the Water Regulation applied to the project.

(32) However, it seems that the risk described in the letter of 26 October 2021 from ESA materialised when the permits in this case was given. The authorities applied an ordinary cost-benefit analysis, due to an "interpretation of the Norwegian national law provisions transposing Article 4(7)(c) WFD as being wider in scope and application than the provisions in Article 4(7)(c) WFD".

(33) This explains why the permit describes all potential benefits of the project, without an assessment of whether they are "overriding" public interests. It also explains why the future revenue from the project is considered to a be sufficient justification.

4 THE JUSTIFICATION FOR ALLOWING A DETERIORATION

(34) The Royal Decree of 19 February 2016 summarises the advantages of the project on pp. 11-12 (unofficial translation):

> *The Ministry considers that the future revenues from mining activities are the dominant benefit for Norwegian society as a whole. The revenues are distributed between employees and shareholders, and as tax revenues to municipalities and the state. Naustdal municipality will receive increased tax revenues from the company through income and property tax, and from increased employment through taxes on general income, property tax and wealth tax. Other municipalities may receive increased revenue through income tax from employees who settle in their municipality. Corporate profits are taxed at 28%, which goes to the state. In addition, there is a state income from the employer's contribution, which for Naustdal is 10.6%.*
>
> *These increased revenues are considered to have a major positive effect. The mining operations will also generate employment. The price of rutile will vary over time, but these are factors that the company will take into account when assessing the profitability of the project. Extraction from the deposit in Engebøfjellet will be able to meet the demand for rutile on the world market for many years, as the rutile deposit in Engebøfjellet represents one of the largest known deposits in solid rock. This undertaking could therefore ensure increased employment in a long-term perspective. Locally, an increase in tax revenues and employment could have a significant impact. All in all, the project is expected to have a major positive effect on settlement locally, not least Naustdal, which is a relatively small municipality that has long been in a slightly declining population trend.*

(35) It is evident from the cited paragraphs in the Royal Decree that the decisive factor was the future revenues from the mining activities. In the second sentence of the first paragraph, it is stated that these revenues can be divided into three components:

- Income for employees
- Income for shareholders
- Tax revenue for the state and municipalities

(36) Before the courts, the Norwegian Government has argued that the pollution permit, in addition to the economic justification mentioned above, also can be justified on the following grounds:

- Employment effects (increased local business activity, employment and settlement)
- Global supply of rutile
- Ensuring Norway and Europe access to critical minerals

(37) The parties disagree as to what interests are relevant in the case at hand, what interests the Royal Decree is based upon, and whether the national courts are entitled to also consider interests that are not set out in the Royal Decree.

5 THE FIRST QUESTION

5.1 Introduction

(38) By its first question, the referring court asks what kind of legal test should be applied when assessing whether a particular activity or project is of an "overriding public interest" within the meaning of the WFD. The question is divided into two subquestions.

(39) Subquestion A raises a fundamental question regarding the anatomy of the exemption test. Is it a relevance test, a balancing test, or a combination? The Oslo District Court concluded that it is solely a relevance test.

(40) Subquestion B concerns the key factors that should be considered in the assessment of whether the public interests that justify the measure are "overriding".

5.2 Subquestion A – The anatomy of the exemption test

(41) The expression "overriding public interest" can be interpreted in two ways. One interpretation is that the "public interest" in carrying out a particular project must be so important that it overrides the environmental objectives set out in the WFD (*balancing test*). Alternatively, the term "overriding" can be understood to qualify which public interests that can be taken into account (*relevance test*).

(42) A review of the various language versions does not provide a clear answer. In some language versions, the importance of the interest is highlighted. This indicates that it is a relevance test. An example is the German version ("übergeordnetem offentlichem Interesse"). Other language versions highlight the importance of the public interest compared to other interests. An example is the Swedish version ("ett allmäninteresse av större vikt"). However, in preamble recital 32 in the Swedish version, it is stated that the public interest must be of "utomordentlig stor betydelse från allmän synspunkt". This can, unofficially, be translated to a requirement that the public interest is of "exceptional importance from a public viewpoint".

(43) It follows from the wording of the exemption test that it is necessary to distinguish between two types of interests:

i. Interests that are "public" and sufficiently important to be regarded as "overriding". Such interests can potentially justify a derogation.

ii. Other interests, such as private interests or ordinary public interests. Interests that fall into this category cannot under any circumstances justify a derogation.

This distinction is clearly a relevance test.

(44) The environmental organisations will argue that the relevance test should be supplemented with a balancing test. The expression "overriding" refers to the relative weight of certain interests compared to the weight of other conflicting interests. Hence, it follows from the wording that the benefits of achieving the public interest must be weighed against the disadvantages of not achieving the environmental objectives. In order to justify an exemption, the benefits of achieving the public interest must significantly outweigh the disadvantages of not achieving the environmental objectives.

(45) A supplemental balancing test will better reflect the purpose and interests that the WFD aims to protect. If the exemption test is limited to an isolated assessment of whether the public interest is relevant, there is a risk that the assessment is disconnected from the fundamental objective of the WFD.

(46) Regardless of the structure of the exemption test, it is evident that all the various language versions contain a form of materiality requirement or a qualifying element. The threshold for making an exemption should be very high. If an ordinary cost-benefit analysis is sufficient, the expressions "overriding", "übergeordnetem", "væsentlige", or "altoverveiende" would be devoid of real content.

5.3 Subquestion B – The key factors when interpreting and applying the exemption test

5.3.1 Introduction

(47) Subquestion B is an open question. It invites the EFTA Court to give a general description of factors that should be considered when interpreting and applying the "overriding public interest"-exemption. Below, the environmental organisations will describe three factors that we believe are relevant, namely the principle of contextual interpretation, the principle that exemptions should be interpreted strictly and the precautionary principle.

5.3.2 Contextual interpretation

(48) Article 4(7)(c) stipulates that:

> *"the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to **human health**, to maintenance of **human safety** or to **sustainable development**"*

(49) The requirement of an "overriding public interest" must be interpreted in light of the fact that Article 4(7) contains two alternative exemptions:

i. Alternative 1 (underlined in blue) requires an "overriding public interest".

ii. Alternative 2 (underlined in red) applies to three particularly important public interests (marked in bold), namely human health, human safety and sustainable development. It is stated that these interests must outweigh the benefits of achieving the environmental objectives. It is clear that Alternative 2 entails a weighing test (balancing test).

(50) The wording "public interest" in Alternative 1 is a broader term than the specific interests listed in Alternative 2. When applying Alternative 1, it must be required that the benefits of achieving the public interest *significantly* outweighs the disadvantages of not achieving the environmental objectives. Otherwise, Alternative 2 would be irrelevant. The principle of contextual interpretation implies a strict interpretation of Alternative 1, so that the entire wording of article 4(7)(c) becomes relevant.

5.3.3 Strict interpretation of exemptions

(51) In the EU and EEA law, there is a general principle that primary rules should be interpreted broadly, while exemptions should be interpreted strictly.[3] For instance, the CJEU stated in *Infopaq International v Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465, pragraph 56, that:

> *"For the interpretation of each of those conditions in turn, it should be borne in mind that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly […]"*

(52) The "overriding public interest" exemption is a derogation from the general principle established by the WFD regarding the prohibition of deterioration. In accordance with the principle articulated in *Infopaq International v Danske Dagblades Forening*, cited above, the exemption must be interpreted narrowly and rigorously. This will ensure that the purpose of the directive is not undermined.

5.3.4 The precautionary principle

(53) Article 174 (2) EC establishes the binding nature of the precautionary principle. It can be defined as a "general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests".[4] The principle is intended to be applied in order to ensure a high level of protection of the environment.

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[3] For examples of the application of the principles of interpretation, see Joined Cases C-401/15 *Depesme* og *Kerrou* and C-5/08 *Infopaq International*, paragraph 56.

[4] Se for example, Nicolas de Sadeleer, "The Precautionary Principle in EC Health and Environmental Law", *European Law Journal*, 2006, pp. 139-172, p. 142-143, with further references to Joined Cases T-74/00, T76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan*, paragraph 184.

(54) It is explicitly stated in the preamble of the WFD, recital 11, that the precautionary principle is relevant and should be taken into account when interpreting the Directive.

> *"As set out in Article 174 of the Treaty, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principles that preventive action should be taken, environmental damage should, as a priority, be rectified at source and that the polluter should pay."*

5.4 Conclusion

(55) The "overriding public interest"-exemptions involves a two-step assessment:

i. A relevance test where a distinction is drawn against ordinary public interests and private interests. Only fundamental public interests are relevant.

ii. A balancing test where the benefits of achieving the fundamental public interests is weighed against the disadvantages of not achieving the environmental objectives. In order to justify an exemption, the benefits of achieving the public interest must significantly outweigh the disadvantages of not achieving the environmental objectives.

(56) Regardless of whether a two-step test should be applied or not, the "overriding public interest"-exemption entails a strict qualification of which public interests that can justify a derogation from the prohibition against deterioration.

6 THE SECOND QUESTION

6.1 Introduction

(57) The second question concerns the relevance of certain economic interests and whether they can constitute an "overriding public interest". To address this question, it is necessary to place the notion of "overriding public interest" in a historical context. Following this, we will interpret the "overriding public interest"-exemption in Article 4(7)(c) of the WFD. Finally, we will summarise our answers to question 2(a) to 2(d) based on our legal analysis.

6.2 Historical context and purely economic considerations in EU law

(58) The term "overriding public interest" as a justification for a derogation is well-established in EU law. This basis for justification was introduced into EU law by the judgment in *Cassis de Dijon*, C-120/78, ECLI:EU:C:1979:42, which addressed the conditions for justifying interference with the four freedoms. In this judgment, the

CJEU established a non-statutory justification for interference with the fundamental four freedoms, now referred to as "matters of overriding public interest" or "mandatory requirements".

(59) Regarding "matters of overriding public interest" in the general EU law, it is clearly established by CJEU that purely economic interests, such as commercial income, financial returns to stakeholders, and government tax revenues cannot constitute an "overriding public interest". For example, in An*dreas Ingemar Thiele Meneses v Region Hannover*, C-220/12, ECLI:EU:C:2013:683, paragraph 43, the CJEU stated that:

> *"[…] Reasons of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see, by analogy, Case C-109/04 Kranemann [2005] ECR I-2421, paragraph 34 and the case-law cited, and Case C-384/08 Attanasio Group [2010] ECR I-2055, paragraph 55)."*

(60) This is also reflected in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ("**Bolkestein Directive**"). The concept of "overriding public interest" within the meaning of the Bolkestein Directive is defined in the preamble recital 40:

> *"The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy."*

(61) All of the listed considerations share a common purpose, namely the safeguarding of critical and fundamental social interests. An important point is that economic considerations are not included. The rationale for excluding economic considerations is explained in numerous judgments and textbooks. Allowing Member States to ignore the principle of free movement in favour of their own economic interests would contradict the goal of an integrated market, which should have the same characteristics as a domestic market. This principle must also be upheld within the EEA.

(62) The parties disagree as to whether the "overriding public interest"-exemption in Article 4(7)(c) of the WFD aligns with the interpretation of the notion in general EU

law. In any case, the general EU law must provide the starting point and the framework for the interpretation of the exemption in the WFD.

(63) The notion of "overriding public interest" was later introduced into EU environmental law in the judgment in *Leybucht*, C-57/89, ECLI:EU:C:1991:89. This case concerned whether Member States could take measures that might impair the special protection areas established under Article 4 of the Directive of 2 April 1979 on the conservation of wild birds ("**the Birds Directive**").[5] At the time of the judgment, the Birds Directive did not contain any explicit exemptions, and the CJEU established a non-statutory exemption – "superior general interest". The application of the concept "superior general interest", established in *Leybucht*, was limited to "public health" and "safety issues". It was explicitly stated that "economic and recreational requirements, do not enter into consideration".[6]

(64) Following the judgment in *Leybucht*, cited above, the notion of "overriding public interest" was introduced in Article 6(4) of the Council Directive 92/43/EEC of 21 May 1992 in the conservation of natural habitats and of wild fauna and flora ("**the Habitats Directive**"),[7] and later in the WFD.

(65) Also, as earlier mentioned, the exemption "overriding public interest" and other concepts in the WFD have to be interpreted in light of the precautionary principle. This is assumed in the preamble of the WFD, recital 11. The precautionary principle is a general principle in the EU environmental law and is defined in *Artegodan*, Joined Cases T-74/00, T76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, ECLI:EU:T:2002:283, paragraph 184, as:

> *"184. It follows that the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the abovementioned Treaty provisions."*

(66) The fact that environmental considerations and values shall be prioritised and take precedence over economic values is also expressed in the preamble, recital 1, of the WFD:

> *"Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such."*

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5 The Birds Directive is repealed and replaced with Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild bids.

6 C-57/89 *Leybucht*, paragraph 22.

7 The Habitats Directive is not incorporated into the EEA Agreement.

(67) To summarise, the "overriding public interest"-exemption is created by the CJEU and must be interpreted in light of its origins and historical context. The high threshold for applying this exemption was well known when it was included in the WFD. It is also noteworthy that the additional wording in the Habitats Directive, "including those of social or economic nature", which was adopted prior to the WFD, was not included in the WFD.

6.3 Preserving the internal market and preventing a "race to the bottom"

(68) The Norwegian government has argued, in its submission in section 6.2 of the Request for Advisory Opinion, that:

> *"The notion of "overriding public interest" serves a different purpose under the WFD and Habitats Directive than in the realm of free movement. Justifying derogations from Article 4(1)(a) based on economic aims entails no risk of protectionism, on the contrary."*

(69) This argument should be firmly rejected by the EFTA Court. The internal market and the objectives of the WFD would be seriously undermined if purely economic considerations on a national level were sufficient to deviate from the agreed environmental standards. It is stated in preamble recital 25 of the WFD that:

> *"Environmental objectives should be set to ensure that good status of surface water and groundwater is achieved throughout the Community and that deterioration in the status of waters is prevented at Community level."*

(70) Establishing minimum environmental standards is a key objective for the EU, both in relation to the internal market and the EUs trade policy. Minimum environmental standards at Community level will prevent a "race to the bottom". Such standards are an integral part of creating a level playing field and a well-functioning internal market. The case law from CJEU regarding restrictions in the four freedoms, establishing a high threshold for exemptions, should be applied correspondingly.

6.4 The distinction between ordinary public interests and qualified public interests

(71) The use of the term "overriding" in the English version, "superior" in the Spanish version, "übergeordnetem" in the German version and "altoverveiende" in the Norwegian translation of the Directive indicates that only qualified societal interests are relevant in the assessment. In other words, it is necessary to distinguish between ordinary public interests and qualified public interests.

(72) The dictionary definition of "overriding" is "more important than anything else".[8] This illustrates that only the most vital and critical social considerations can be considered an "overriding public interest".

[8] See for example, *Longman Dictionary of Contemporary English – The complete Guide to Written and Spoken English*, Pearson Education Limited, 2000, p. 1012.

(73) It is evident that purely economic considerations do not fall within the scope of the term “overriding public interest”. Even in instances where such considerations may be perceived as a “public interest”, they are not sufficiently important to constitute an “overriding” public interest.

6.5 The distinction between public interests and private interests

(74) A clear distinction must be drawn between public interests and interests that primarily benefit private companies or individuals. The mere fact that an undertaking is financially profitable cannot, under any circumstance, constitute an "overriding public interest."

(75) The term "public interest" distinguishes between considerations that solely benefit private undertakings or individuals, and those that serve the society and the broader public. The decisive factor is the social interest in the undertaking, as opposed to the interests of individuals or the industry itself. Significant private interests cannot justify an exemption under this condition. For instance, coastal protection against storm flood is clearly a public interest, while the construction of a private marina is clearly a private one.

(76) The Directive aims to facilitate the comprehensive protection and sustainable management of water bodies. To ensure the effective realisation of this objective, a clear boundary must be drawn against the normal benefits of a commercial undertaking, such as economic interests. As any commercial activity is driven by the expectation of future profits, such interests cannot constitute an "overriding public interest".

(77) Furthermore, the Guidance Document No 1, drawn upon as part of the Common Implementation Strategy (“CIS”) for the WFD, stipulates that for an undertaking to constitute an "overriding public interest," it cannot be solely in the interest of private companies or individuals; rather, it must be in the public interest.[9] It should be noted that this guidance document is not legally binding, as clarified in the judgment in *Association France Nature Environnement*, C-525/20, EU:C:2022:350, paragraph 31.

6.6 Case law of the CJEU regarding Article 4 (7) of the WFD

(78) Article 4(7)(c) of the WFD has been interpreted in three judgments from the CJEU. However, none of these judgments provide any guidance on the question raised in the present case.

(79) The exemption in Article 4(7)(c) of the WFD was first interpreted in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* **(«*Nomarchiaki*»), C-43/10**, EU:C:2012:560. The case concerned the partial diversion of the upper waters of a river in Greece. The project was justified by considerations such as water supply in urban areas, irrigation

[9] CIS Guidance Document No 1, p. 220.

and electricity production. In comparison with purely economic considerations, such as private company income, shareholder return on capital an employee salary, the considerations mentioned in the decision fulfil more fundamental and social critical functions.

(80) Even though the mentioned considerations to some extent serve fundamental and social critical functions, the General Advocate stated in her opinion that:

> *"84. Under the Article 4(7)(c) of the Water Framework Directive, the reasons for alterations must be of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in Article 4(1) must be outweighed by the benefits of the new alterations to human health, to the maintenance of human safety or to sustainable development.*
>
> *85. Adequate drinking water supply for the population is, as a rule, of overriding public interest and, moreover, is also generally of great importance for human health. Accordingly the 15th rectal in the preamble to the Water Framework Directive designates the supply of water as a service of general interest.*
>
> *86. Furthermore, the Prefectural Authorities of Karditsa and Trikala rightly point out that Article 4(3)(a)(iii) of the Water Framework Directive in principle recognises, alongside drinking water supply, power generation and irrigation as legitimate public interests. However, the latter two interests are less important than drinking water supply since they are primarily economic in nature."*

(81) The notion of "overriding public interest" did not play a decisive role of the judgment. However, the CJEU stated that:

> *66. As stated in recital 15 of the preamble to that directive, the supply of water is a service of general interest. As regards the production of electricity and irrigation, it is clear from Article 4(3)(a)(iii) of the directive that they also in principle serve a general interest.*

(82) In contrast to purely economic considerations, the production of electricity and irrigation may, following a detailed examination, be regarded as fundamental and socially critical interests. In Greece, where agricultural drought is a significant issue, irrigation is essential for food production. Although these activities have an economic dimension, it is evident that they are not purely economic considerations.

(83) Furthermore, the judgment in *Commission v Austria* ***("Schwarze Sulm"),*** **C-346/14**, EU:C:2016:322, does not allow for the emphasis on purely economic considerations. The case concerned the establishment of a hydropower plant, and the measure was likely to facilitate the transition from non-renewable to renewable energy sources. The CJEU stated that measures promoting energy supply and the transition to renewable energy sources "may" constitute an "overriding public interest". The exact content of this condition was not an issue in the case, as the question was whether the Austrian state had conducted a sufficient assessment and provided adequate justification that the condition was met.

(84) Article 4(7)(c) of the WFD was also interpreted by the CJEU in the judgment in **Association France Nature Environnement, C-525/20**, EU:C:2022:350.

(85) The case law from the CJEU regarding the WFD can be summarised as follows:

- The case law demonstrates that measures designed to secure critical social functions "may" – following a specific assessment – constitute an "overriding public interest".

- The case law does not support the assertion that purely economic considerations may constitute an "overriding public interest".

6.7 Case law of the CJEU regarding Article 6 (4) of the Habitats Directive

(86) In CIS Guidance Document No 36 (2017, drawn up as part of the Common Implementation Strategy for the Water Framework Directive ("CIS"), a process established by the EU Member States, Norway and the European Commission, it is stated that when interpreting "overriding public interest" in the WFD, reference may be made to case law on the corresponding conditions in Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 in the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").

(87) The wording in Article 6(4) of the Habitats Directive is slightly different to the wording in Article 4(7)(c) of the WFD. For example, the phrase "including those of social and economic nature" is not included in the Water Framework Directive even though the directive was adopted after the Habitats Directive.

(88) The following section will focus on three specific decisions related to the Habitats Directive; *Regina v Secretary of State for the Environment*, e*x parte Royal Society for the Protection of Birds ("Lappel Bank")*, C-44/95, EU:C:1996:297, *Commission v Spain*, C-404/09, EU:C2011:768, and *Marie-Noëlle Solvay and Others v Région Wallonne ("Solvay")*, C-182/10, EU:C:2012:82.

(89) The case of ***Lappel Bank,*** cited above, concerned the decision to exclude Lappel Bank from the Medway Estuary and Marshes Special Protection Area ("SPA") due to a planned expansion of the port of Sheerness. The port was one of the largest in the UK for the handling of cargo and freight and was also strategically located for maritime traffic and access to the domestic markets, located close to the English Channel and the continental Europe. The extension of the port was of paramount importance in order to maintain competitiveness with other harbours. Furthermore, the expansion of the port was driven by the fact that it was a significant employer in an area with a serious unemployment problem (see paragraph 13).

(90) One of the questions referred to the CJEU was whether Member States are entitled to take account of "economic requirements" when designating SPAs under Article

4(1) and 4(2) of the Habitats Directive. The CJEU answered the question in negative, but held in paragraph 41:

> *"41. Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitat Directive."*

(91) Although the CJEU has stated that economic requirements can be taken into account in certain instances, it has not explicitly defined the extent of the relevance of such considerations. Furthermore, it remains unclear what the CJEU means by "economic requirements". The judgment in *Lappel Bank* provides no additional guidance beyond what can be inferred from interpreting the wording of Article 6(4) of the Habitats Directive.

(92) However, when viewed in the factual context of the case, it can be argued that "economic requirements" refer to the significance of expanding an existing business to ensure the sustainability of key business in an area with high unemployment. This suggests that financial profitability or increased returns for private shareholders are not sufficient to constitute an "overriding public interest". Instead, the undertaking must address a social need or safeguard socially critical functions.

(93) The second judgment pertains to the case of ***Commission v Spain***, cited above. This case involved the Spanish government granting authorisation for mining activities without conducting an environmental impact assessment. As a result, the permits for both new and ongoing mining operations were deemed invalid. The issue of whether the expansion of existing mines and the establishment of new ones constituted an "overriding public interest" was not considered. However, the CJEU noted in paragraph 109 – even though it was not relevant to the outcome of the judgment – that:

> *"109. The Kingdom of Spain, which has invoked the importance of mining activities for economy, needs to be remined that, whilst that consideration is capable of constituting an imperative reasons of overriding public interest within the meaning of Article 6(4) of the Habitats Directive, that provision can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive."*

(94) In other words, the CJEU acknowledges that mining activities can be of such significant importance to the local economy that they may constitute an "overriding public interest" within the meaning of the Habitats Directive. However, the CJEU does not clarify the implications of this assertion, nor does it specify the circumstances in which these considerations would be applicable. Guidance and details of the CJEU's opinion can be inferred from the facts of the case.

(95) The mining industry was already a significant employer in the region. When the CJEU states that mining activities "is capable of" constituting an "overriding public interest", it is important to note that the case involved a large number of existing jobs and that the mining activity was a cornerstone business in the region.

(96) The closure of an existing mine in a small community can give rise to significant social issues, including mass unemployment. The decision concerned several existing mining projects that had been authorised prior to the enactment of the Habitats Directive. Should the mines be closed due to subsequent EU requirements, a significant number of jobs in the area would be lost.

(97) In our case, however, these considerations do not apply, since we are dealing with the creation of new jobs in an area with low unemployment and no need for job creation.

(98) The Advocate General reiterated the justification of the extensions of the mines in the Opinion paragraph 154:

> *"154. Consequently, the Spanish authorities cannot, in principle, be criticised for assuming that the continued operation of the mines was supported by imperative reasons of overriding public interest – namely security of energy supply jobs and the final nature of authorisations – and for ruling out alternatives."*

(99) In other words, the measure was justified by two considerations: energy supply and the maintenance of already established jobs. These two considerations are collectively referred to as "the local economy". Additionally, there was a special factor in this case, namely that several of the mining projects were established before the Habitats Directive was adopted ("the final nature of authorisations"). The judgment does not support the relevance of emphasising the total income from mining activities, including income to shareholders and the state. The significance of local employment will be further discussed in question three below.

(100) Lastly, the preliminary ruling in the judgment in ***Solvay***, cited above, concerned, inter alia, the establishment of a private management centre. The case before the national courts of Belgium involved, among other issues, the validity of the decree of the Walloon Parliament of 17 July 2008, which authorised and ratified construction work related to an airport and railway. The referring court in Belgium submitted a number of questions to the CJEU, including the following question:

> *"6. In the event of a negative reply to Queston 5, must Article 6(4) of [the Habitats] directive … be interpreted as permitting the creation of infrastructure designed to accommodate the management centre of private company and a large number of employees to be regarded as an imperative reason of overriding public interest?"*

(101) Even if the project in *Solvay* would generate "a large number of employees", the CJEU nevertheless found that:

> *"75. An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, 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 of the conservation of natural habitats and wild fauna and flora.*
>
> *76. Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.*
>
> *77. It cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions.*
>
> *78. In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive."*

(102) The aforementioned paragraphs in the judgment in *Solvay* do not indicate that purely economic factors, such as a private undertaking's revenue, shareholders' income, or increased tax revenues for the state and municipality, can be considered an "overriding public interest". Nor does the judgment provide any support for an authorisation being justified solely on the basis of such considerations. The project's potential to create and host a significant number of employees did not, in itself, constitute an "overriding public interest".[10]

(103) Similar to the case law regarding Article 4(7)(c) of the WFD, the referenced case law concerning Article 6(4) of the Habitats Directive does not allow purely economic interests—such as the revenue of a private undertaking, the income of shareholders, or increased tax revenues for the state and municipality—to justify an exemption.

6.8 Conclusion

(104) The CJEU established the concept of "overriding public interest" long before the WFD was adopted. It is undisputed that this concept, as it is applied in the realm of free movement, does not include purely economic considerations. It was a conscious decision to incorporate the same concept in the WFD. There are no good reasons and no legal basis for arguing that the concept should be applied more leniently in relation to minimum environmental standards.

(105) The notion of "overriding public interest" is an exemption to a clear general principle in the WFD, namely the environmental objectives and the prohibition against

[10] For the legal analysis regarding employment effects, please refer to chapter 5.4.2.

deterioration. Consequently, this condition must be subject to a strict interpretation. Furthermore, the condition must be interpreted in the light of the precautionary principle, which means that the protection of environmental interests should take precedence over economic interests.

(106) Finally, there is no case law regarding the WFD or the Habitats Directive that states or suggests that purely economic interest can constitute an “overriding public interest”.

(107) **Purely economic considerations** (i.e. expected gross income generated by the planned mining activities) cannot constitute an “overriding public interest”. The stipulation that the interest must be “public” implies that the measure must serve the public interest and that a distinction must be made between individual benefit and the public benefit of the measure. Economic considerations, such as business income, are not a “public interest”.

(108) Furthermore, case law from the CJEU in the realm of free movement clearly states that purely economic considerations are not relevant justifications under the notion of "overriding public interest."

(109) **The income of shareholders** of a private company cannot constitute an “overriding public interest”. Shareholders’ income is clearly a private interest, not a “public interest.” The WFD requires a distinction to be made between private interests and public interests.

(110) **Increased tax revenue** to state and municipality cannot constitute an “overriding public interest”. As the review of legal sources, and in particular case law from the CJEU, shows, economic considerations are not sufficiently important to constitute an “overriding public interest”. The consideration of increased tax revenue will solely be an economic consideration.

(111) Furthermore, there are numerous judgments from CJEU addressing the significance of fiscal considerations. The case law is unequivocal: such considerations cannot justify exemptions to the prohibition of discrimination. The only consideration that has been accepted is the need for coherence in the national tax system (“cohesion of the national tax system”). This consideration is not relevant in our case. This case law can also be applied to the exemption in the WFD.

(112) **Wage income for employees** cannot constitute an “overriding public interest”. Wage income is generally a private interest, not a “public interest”. The WFD requires a distinction to be made between private and public interests.

7 THE THIRD QUESTION

7.1 Introduction

(113) Similarly to question two, question three also concerns the relevance of specific considerations. Question tree concerns three justifications that the Norwegian government has invoked during the court proceedings, namely employment effects, global supply of rutile and the need for strategic minerals.

(114) The environmental organisations will argue, before the national courts, that the validity of the permits must be assessed based on the justifications given in the permits. As explained in section 4 above, the primary justification given in the Royal Decree is the future profits generated by the mining activity.

(115) The parties disagree as to what interests the Royal Decree is based upon, and whether the national courts are entitled to also consider justifications that are not set out in the Royal Decree. It is for the national courts to answer these questions.

(116) The position taken by the Norwegian government, that national courts are entitled to consider other justifications than those set out the Royal Decree, raises two important questions:

- Is it a requirement that the justification for allowing a derogation must be specifically set out and explained in the permits?
- If so, will this principle be undermined if the national courts can uphold a permit on other grounds than those that were set out and explained in the permit?

(117) The environmental organisations will argue that the justification for the permits must be explicitly set out and explained in the permits, see e.g. Article 4(7)(b) of the WFD and *Schwarze Sulm*, paragraphs 66 and 68. This can be viewed as a manifestation of the general obligation to provide reasons under EU and EEA law. This general principle of providing an adequate statement of reasons is essential to safeguard the right to effective legal protection, derived from the principle of effectiveness. Furthermore, the general principle of providing an adequate statement of reasons is essential for the judicial review of decisions made by the authorities.[11] It is therefore critical that the judicial review before national courts is limited to the original justification given in the permit. If that justification does not qualify as an "overriding public interest", the permit should be declared invalid.

(118) However, given the position of Norwegian government, it is relevant to ask the EFTA Court for guidance on the justifications listed in question 3.

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[11] See e.g. opinion in *LS Customs Services*, C-46/16, EU:C:2017:839, paragraphs 77–78, and *Watts,* C-372/04, EU:C:2006:325.

7.2 Subquestion A – Employment effects

(119) Employments effects are mentioned in the Royal Decree, but it is evident that those effects were not considered to be as important at the future revenues from the mining project. The reason why employment effects was considered less important, is clearly explained in a recommendation from the Norwegian Environment Agency of 13 February 2015, page 72 (unofficial translation):

> *"It must be expected that the project will largely have to attract labour from other parts of the country or abroad. Because there is very low unemployment in Norway, it is expected that Norwegian labour would otherwise largely have been employed in other projects. […]"*

(120) The environmental organisations will argue that the employment effects were never intended to be a stand-alone justification for the permit.

(121) As explained in section 3 above, a literal translation of the wording in the Norwegian Water Regulation indicates that an ordinary cost-benefit analysis is sufficient. It seems that when the permit was given, the government did not take into account that the WFD establishes a different and higher threshold. This explains why the permit describes all potential benefits of the project, without an assessment of whether they are sufficiently important to constitute an "overriding public interests".

(122) As per the legal analysis under question two, the exemption "overriding public interest" excludes purely economic considerations, such as commercial interest and a private company's ability to generate profit. Job creation, which is contingent upon the profitability of the undertaking, is an indirect consequence of economic considerations and cannot, in and of itself, constitute an "overriding public interest". The establishment of an industrial activity will always generate a certain number of new jobs. Relying solely on general employment effects for an exemption would circumvent the principle that private and purely economic considerations cannot constitute an "overriding public interest".

(123) The question of the significance of employment effects has not been addressed in case law related to Article 4(7)(c) of the WFD.

(124) However, paragraphs 75–78 in *Solvay*, cited above, may provide insight into the significance of general employment effects. The case questioned whether infrastructure intended to accommodate the management centre of a private company and a large number of employees could constitute an "overriding public interest" under Article 6(4) of the Habitats Directive.

(125) The CJEU stated in paragraph 75 that an interest must be both "public" and "overriding" to justify a project. Such undertakings can qualify as "overriding public interest" only in "exceptional circumstances". Although the project in *Solvay* was of private character, its "economic and social context" could constitute an "overriding

public interest". However, the mere construction of infrastructure and the creation of employment opportunities did not satisfy the exemption test of "overriding public interest".

(126) The CJEU judgment in *Solvay* highlights that employment considerations are relevant only when addressing a specific problem. These considerations apply in cases of significant regional or national unemployment, where it is critical for society to maintain or create a large number of jobs. Conversely, in times of low or negligible unemployment, the employment effects of a project are of minimal or no public interest.

(127) It is therefore evident that considerations such as employment effects are only relevant in times of high unemployment. This is demonstrated by the following example given by de Sadeleer (2016), p. 293:[12]

> *"In any case, it is evident from the wording of Article 6(4) that economic requirements cannot be directly equated with 'imperative reasons of overriding public interest'. This means that the enlargement of a harbour or the construction of a road network cannot be authorised for the simple reason that it satisfies particular economic requirements (e.g., job creation or local economic development) but rather because it is intended to satisfy an overriding public interest (e.g., the opening up of a particularly isolated region, the necessity of substantially raising the standard of living of the local population). This interpretation has been endorsed in Solvay."*

(128) Employment effects (increased local business activity, employment and settlement) are entirely ordinary effects of facilitating industrial activity. Such effects cannot constitute an "overriding public interest". The project must be assessed in a wider context in order to determine whether it meets a social need or secures critical social functions. To the extent that there are exceptions, they must be limited to exceptional cases, such as the closure of a business on which the local community is based, which could lead to mass unemployment and social unrest.

7.3 Subquestion B – Global supply of rutile

(129) The government argues that the project will contribute to the global supply of rutile and that this consideration can constitute an "overriding public interest".

(130) The global demand for rutile is mentioned in the Royal Decree, but not as an independent objective. It is stated that "extraction from the company will be able to meet the demand for rutile on the world market for many years", but the purpose of

[12] See Nicolas de Sadeleer, "Assessment and Authorisation of Plans and Projects Having a Significant Impact on Natura 2000 Sites" in B. Vanheudesen Et. L. Squintani (Eds.), *EU Environmental and Planning Law Aspects of Large-Scale Projects*, Intersentia, 2016, p. 293, and Nicolas de Sadeleer, "Habitats Conservation in EC Law – From Nature Sanctuaries to Ecological Networks", *The Yearbook of Europeans Environmental Law*, 2005, p. 215-252, pp. 249.

this statement is simply to explain why it is expected that the project will be profitable for many years to come. The purpose of the project is not to reduce the global price of rutile. On the contrary, the Norwegian Environment Agency in its recommendation expressed some concern that the global price of rutile could drop. This would have had a negative impact on profitability of the project. Global demand for the product is a prerequisite for the viability of the project.

(131) Furthermore, at the time the permits were granted, Norway was already a large net exporter of titanium raw materials. As a large net exporter, Norway had no interest in reducing the global market price of titanium raw materials.

(132) Earlier this year, the EU adopted Regulation (EU) 2024/1252 of the European Parliament and the council ("**Critical Raw Materials Act**"). The Critical Raw Materials Act sets out the conditions for defining a project as a "Strategic Project". This illustrates that the question of public interest is closely linked to the strategic importance of the project. The supply of minerals to countries outside the EU or the EEA cannot be regarded as a "Strategic Project", as it does not "make a meaningful contribution to the security of the Union's supply of strategic raw materials".[13]

(133) The new EU rules on critical minerals illustrate that it is ensuring strategic access to a critical material within a limited geographical area, such as Norway, Europe or NATO, that may constitute a "public interest". It must then be assessed on a case-by-case basis whether the public interest served by the project overrides the adverse impact on the environment. The justification must be specifically stated and explained in the permit. Contributing to the global supply of rutile cannot in itself constitute an "overriding public interest".

7.4 Subquestion C – Strategic supply of critical minerals

(134) The government argues that the project can ensure Norway and Europe access to critical minerals and that this consideration can constitute an "overriding public interest".

(135) As can be seen in section 4 above, the Royal Decree does not mention this objective at all. This is an entirely new justification that the government has invoked after the legal proceedings were initiated.

(136) It is not surprising that there is no mention of this objective in the original justification. Ensuring access to critical minerals has become an important objective in later years, long after the permit was given. Furthermore, the project was never designed to meet this objective.

(137) The project is designed to maximise profits by selling rutile to the global market. It is our understanding that the rutile in this case will be sold to a Norwegian company

[13] Article 6(1) of the Critical Minerals Act.

and a company based in Asia. The rutile sold to the Norwegian company will be entirely used to produce titanium dioxide, i.e. white colour pigment, for the global market. We do not have specific information regarding the production plans of the Asian company, but it is possible that a portion of the rutile will be used to produce titanium metal. However, to our knowledge, there are no plans to produce titanium metal in Norway or within the European Union. Furthermore, the mining project does not intend to ensure security of supply in the EU or to contribute to its independence from third countries. In fact, the undertaking will instead deplete the Norwegian reserves, leading to an increased the dependence on third countries in the long term.

(138) As mentioned above, the EU adopted the Critical Raw Materials Act earlier this year. It is not enacted in the EEA Agreement. The Critical Raw Materials Act is therefore not applicable in the EEA.

(139) The Engebø mining project has already been approved by Norwegian authorities and it is unlikely that it will ever apply to be considered as a "Strategic Project", even if the Critical Raw Materials Act is enacted in the EEA Agreement. However, we will give a brief description Critical Raw Materials Act and explain why it is unlikely that the Engebø project would be regarded as a strategic project.

(140) The overarching objective of the Critical Raw Materials Act is to enhance the EU's extraction capacity and to ensure that the EU and the internal market remain independent of third countries outside of the EU.[14] This implies that the critical raw materials extracted from the EU and EEA shall be retained within the internal market and not sold to third countries. This is particularly important during periods of geopolitical unrest, as is the case today. The sale of critical raw materials to third countries would go against the purpose of the Critical Raw Materials Act.

(141) The Critical Raw Materials Act regulates the management of critical raw materials that have been identified as either "strategic raw materials" or "critical raw materials".[15] Even if a specific project concerns the extraction of a strategic or critical raw material, this alone is not sufficient for the project to be prioritised under the regulation. In order for the project to be prioritised, the project must fulfil the conditions for "Strategic Projects".[16]

(142) In order for a project to be granted the status of a "Strategic Project", the operator must apply to the EU Commission. The EU Commission assesses, among other things, whether the conditions in Article 6 (1) are met. Article 6 (1) (a) states that the project must "make a meaningful contribution to the security of the Union's supply of strategic raw materials".

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14 Recital 1 of the preamble and Article 1 of the Critical Raw Materials Act.

15 Article 3 and 4 of the Critical Raw Materials Act.

16 Article 6 (1) of the Critical Raw Materials Act.

(143) If the conditions for a "Strategic Project" are met, the project will be given priority. This means that the project "shall be considered to contribute to the security of supply of strategic raw materials in the Union", and there are requirements as to how much time national authorities can spend on the authorisation process. In addition, "Strategic Projects" are considered to be in the public interest. However, the environmental standards still apply. It is stated in preamble recital 25 that:

> *"It should be possible to authorise Strategic Projects which have an adverse impact on the environment, to the extent they fall within the scope of [… the WFD …] where the permitting authority responsible concludes, on the basis of a case-by-case assessment, that the public interest served by the project overrides those impacts, provided that all relevant conditions set out in those legal acts are met."*

(144) Hence, a specific assessment according to Article 4(7)(c) of the WFD is required, regardless of whether the project is considered to a "Strategic Project" or not.

(145) It is highly unlikely that the Engebø mining project, as it is currently planned and approved, would have qualified as a "Strategic Project". Firstly, large parts of the rutile production will be shipped to Asia. This is not in line with the Regulation's objective of ensuring the self-sufficiency of critical raw materials in the EU. Secondly, the rutile sold to Norway and Asia will primarily be used to produce colour pigment, which is not important in the core industries the regulation aims to cover. The extraction of the raw material must be intended to be used in typical strategic sectors such as renewable energy, digital, aerospace and defence.

7.5 Conclusion

(146) **Employment effects** (increased local business activity, employment and settlement) are entirely ordinary effects of facilitating industrial activity. Such effects can, as a general rule, not constitute an overriding public interest. To the extent that there are exceptions, they must be limited to exceptional cases, such as the closure of a business on which the local community is based, which could lead to mass unemployment and social unrest.

(147) **Contributing to the global supply of rutile** cannot constitute an "overriding public interest". Global demand for the product is simply a prerequisite for the viability of the project. For the project to be of public interest, it must be specifically stated and explained in the permit that the production is of strategic importance. A case-by-case assessment would then be required to ensure that the public interest served by the project overrides the adverse impact on the environment. However, contributing to the global supply cannot be considered a project of strategic importance. This is clearly illustrated by the conditions for defining a project as a "Strategic Project" in the recently adopted Strategic Minerals Act.

(148) **Ensuring Norway's and Europe's access to critical minerals** may in principle be a relevant consideration, but the project must be designed to meet this objective and the reasons for the project must be specifically stated and explained in the permit. A case-by-case assessment is required to ensure that the public interest served by the project overrides the adverse impact on the environment.

8 PROPOSED ANSWERS TO THE QUESTIONS

The environmental organisations submits that the Court should answer the questions referred as follows:

As regards the first question:

a) The overriding public interest condition involves a two-step assessment:

A relevance test where a distinction is drawn against ordinary public interests and private interests. Only fundamental public interests are relevant.

A balancing test where the benefits of achieving the fundamental public interests is weighed against the disadvantages of not achieving the environmental objectives. In order to justify an exemption, the benefits of achieving the fundamental public interest must significantly outweigh the disadvantages of not achieving the environmental objectives.

b) Exemptions from the general prohibition against deterioration must be interpreted strictly, taking into account the precautionary principle.

As regards the second question:

a) Purely economic considerations (i.e. the expected gross income generated by the planned mining operations) can not constitute an “overriding public interest”.

b) Income for shareholders cannot constitute an “overriding public interest”. It is a private interest, not a “public” interest. Furthermore, it is a purely economic interest that does not qualify as “overriding”.

c) Tax revenue for the state and municipality cannot constitute an “overriding public interest”. This is a fiscal consideration. In line with case law from the CJEU in other areas of EU law, this public interest does not qualify as “overriding”.

d) Wage income for employees can not constitute an “overriding public interest”. It is a private interest, not a “public” interest. Furthermore, it is a purely economic interest that does not qualify as “overriding”.

As regards the third question:

a) Employment effects (increased local business activity, employment and settlement) are entirely ordinary effects of facilitating industrial activity. Such effects can, as a general rule, not constitute an overriding public interest. To the extent that there are exceptions, they must be limited to exceptional cases, such as the closure of a business on which the local community is based, which could lead to mass unemployment and social unrest.

b) Contributing to the global supply of rutile cannot constitute an "overriding public interest". For the project to be of public interest, it must be specifically stated and explained in the permit that the production is of strategic importance. A case-by-case assessment would then be required to ensure that the public interest served by the project overrides the adverse impact on the environment. Contributing to the global supply cannot be considered a project of strategic importance.

c) Ensuring Norway's and Europe's access to critical minerals may in principle be a relevant consideration, but the project must be designed to meet this objective and the reasons for the project must be specifically stated and explained in the permit. A case-by-case assessment is required to ensure that the public interest served by the project overrides the adverse impact on the environment.

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Oslo, 19 July 2024
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