ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 5 November 2024

Written Observations by the Kingdom of Norway

represented by Fredrik Sejersted, Attorney General for Civil Affairs, and Andreas Runde, advocate at the Office of the Attorney General for Civil Affairs, submitted pursuant to Article 90 (1) of the Rules of Procedure of the EFTA Court in case

E-18/24 The Norwegian State v Greenpeace Nordic, Nature and Youth Norway

in which Borgarting lagmannsrett (the Borgarting Court of Appeal) has requested the EFTA Court to give 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.

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1 INTRODUCTION

(1) The Borgarting Court of Appeal ("the Referring Court") has, by a reference sent 2 September 2024, requested the EFTA Court ("the Court") to give an advisory opinion regarding Directive 2011/92/EU as amended by Directive 2014/52/EU ("the EIA Directive").

(2) The questions read as follows:

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

2. *If Question 1 is answered in the affirmative, is a national court required under Article 3 EEA, to the extent possible under national law, to eliminate the unlawful consequences of a development consent granted without a prior EIA of said effects?*

3. *If Question 2 is answered in the affirmative and national law allows for the annulation and/or suspension of the unlawful consent, can a national court retroactively dispense with the obligation to assess these effects under Article 3(1) if it is shown that the failure has not influenced the outcome of the decision-making process?*

(3) The Government holds that the first question by the Referring Court should be answered in the negative. It follows from a literal reading of Article 3 (1), as well as the rest of the EIA Directive, that the obligation to conduct an environmental impact assessment covers all direct and significant indirect effects of the "*project*" for which a given approval or consent is sought. This may include effects of the production processes over the life span of the project. But it does *not* cover effects of the end *product*, after it has been sold, exported and used or consumed elsewhere, by someone else.

(4) The Government holds that the distinction between the effects of the *project* for which a development consent is sought, and the effects of the subsequent use or consumption of the end *product*, is essential to the understanding of the EIA system – and is in itself sufficient to answer the legal question raised in the case. It's the project, not the product.

(5) Such a literal interpretation is furthermore supported by contextual and teleological arguments, as well as by the drafting history of the 2011 EIA Directive and the 2014 amendments, and the subsequent interpretation, implementation and application of the Directive. There are no legal sources indicating that the EIA Directive has ever been understood or applied so as to require an assessment of the effects of the end products of a given project, which would fundamentally transform and extend the nature and general scope of the EIA assessments in a way that has not been envisaged by the EU legislator, and which would make the EIA system much more complicated and controversial.

(6) The distinction between the project and the end product applies to the general interpretation of the 2011 Directive (and the previous 1985 Directive) – and there is no legal or factual reason why oil and gas as an end product should be considered otherwise. On the contrary, there are several arguments against such a distinction. First, there is nothing in the

drafting history or the wording of the text to indicate that this was the intention when the Directive was amended in 2014 to make it clear that greenhouse gases and climate change was covered. Second, it would be very difficult to distinguish and draw a line between oil and gas on the one hand, and on the other hand other end products the consumption of which typically have environmental consequences. Third, placing the responsibility for assessing global climate consequences of burning oil and gas on the producer (exporter), instead of the consumer (importer), would go against the basic principles on which the international climate change regime is founded, and how the regulations on international, EU and national level are structured.

(7) The Paris agreement is structured on the principle that each state is responsible for emissions from its own territory. Hence, the responsibility for reporting, assessing and reducing greenhouse gas emissions under the Paris agreement falls on the state in which consumption, and therefore also emissions, occur. This is also the foundation on which the EU climate change framework is based, as well as national legislation on reducing emissions. It would therefore be in contrast to the principles that the climate change regime is founded on to hold that the EIA directive should shift the burden for reporting and assessing emissions from the consumers to the producers and authorities in the exporting states (of which only a few besides Norway are European).

(8) In addition, it is difficult and contested how to correctly assess the effects on global warming and climate change of a new given oil or gas development project, as such assessments would be different from, and more complex and controversial, than most other forms of environmental impact assessments. While it is fairly easy to assess the *gross* emissions from burning the estimated amount of oil and gas from a given reservoir, it is much more difficult to assess the *net* consequences for global emissions of allowing (or denying) a specific new oil and gas project. This is partly because the alternative to a new (say Norwegian) petroleum project will be that other (mostly non-European) producers will increase their exports, and partly because petroleum – and in particular gas – often serves as an alternative to other energy forms that produce considerably more emissions, such as coal.

(9) In the academic and political debate there is disagreement on how to correctly assess the net effects on global emissions of new petroleum projects, with estimates ranging from very small or even positive consequences for climate change to clearly negative effects (although never one-to-one) – and this is a disputed issue in the case at hand before the national courts. As for the understanding of the EIA directive, the point is simply that the complexity and controversy of correctly assessing the environmental effects of the end use of oil and gas produced from a given new development project clearly speaks against introducing this by way of (dynamic) interpretation, without any guidance in the text or any other relevant legal source as to how to actually carry out such an assessment.

(10) The Government is not aware of any case law from the Court of Justice of the European Union (CJEU) or the EFTA Court that solves the question at hand. There are no cases on how to apply the EIA Directive to new oil and gas projects – and indeed there are no cases known to us in which anyone has ever proposed that the obligation to assess environmental consequences should cover the effects of subsequent use or consumption of any kind of

end product after it has been sold by the producer. While there are several cases on the exact scope of the Directive, and in particular on the notion of "indirect effects" of a given project,[1] there are no cases in which it has been argued that there is a duty to assess the (direct or indirect) effects of the use or consumption of the products after they have been sold. Rather the existing case law of the CJEU clearly supports the Government's view that this falls outside of the scope of the Directive.

(11) There are furthermore no other relevant legal sources known to the Government under EU or EEA law that supports the interpretation put forward by Greenpeace and Nature and Youth in the case at hand.

(12) There is in international policy and practice on greenhouse gas (GHG) emissions a concept known as "scope 1, 2 and 3". This is a terminology first introduced by the so-called "Greenhouse Gas Protocol Initiative", which has later been widely acknowledged and used in various contexts.[2] It is not a legal concept under EU or EEA law and does not apply to the interpretation of the EIA Directive. Furthermore, it usually refers to "reporting" of information, which is less far-reaching than the impact assessments required by the Directive. We will therefore not apply this terminology in the following, but it is nevertheless of some interest, since it is often referred to. Under this classification, "scope 1" cover direct emissions from a given project, "scope 2" some specific indirect emissions, and "scope 3" all other indirect emissions, including from sources not owned or controlled by the entity. Applied to oil and gas companies, reporting on "scope 3" may cover emissions resulting from the consumption of the end product, after it has been sold and exported.

(13) As for the relevance of the "scope 3" debate for the interpretation of the EIA Directive there is no indication in the text or in the drafting history that this was meant to cover "scope 3" emissions, although the concept was well known and established when the amendments were made in 2014. This is a strong argument against such an interpretation.

(14) Furthermore, it is also of some interest to note that the notion of "scope 3" assessments has recently been introduced for the first time in EU law in a related field, namely in the Corporate Sustainability Reporting Directive (CSRD) of 2022 and the Directive on Corporate Sustainability Due Diligence (CSDDD) of 2024.[3] This is, however, a more gradual and careful approach. The new obligations related to "scope 3" are focused on reporting and planning, which is different from the full impact assessments required by the EIA Directive. In any case, the relevant provisions under the CSRD and the CSDDD illustrate that to the extent that EU and EEA law will put obligations on companies and national authorities to include "scope 3"

[1] In particular C-2/07 Abraham and C-142/07 Ecologistas, cf. also C-275/09 Brussels Airport, which are discussed below in section 3.2.
[2] This is a "multi-stakeholder partnership of businesses, non-governmental organizations (NGOs), governments, and others convened by the World Resources Institute (WRI), a U.S.-based environmental NGO, and the World Business Council for Sustainable Development (WBCSD), a Geneva-based coalition of 170 international companies" that was first launched in 1998 cf. About Us | GHG Protocol
[3] CF. Directive - 2022/2464 - EN - CSRD Directive - EUR-Lex and Directive - EU - 2024/1760 - EN - EUR-Lex Neither of them have so far been incorporated into the EEA agreement.

emissions in their reporting and planning, this will be by way of clear and specific regulations, and not by dynamic interpretation of existing legal acts.

(15) In addition to the Norwegian case at hand there are two other recent cases from national courts that are of interest – one from the Irish Supreme Court in February 2022 (*Kilkenny Cheese*) and the other from the UK Supreme Court in June 2024 (*Finch*).[4] While such national judgments have no formal status as sources of law under EU or EEA law, they may nevertheless be of some interest depending on the reasoning and the persuasive power of the argument. In this regard the Government holds that the Irish Supreme Court was correct in holding that the scope of the "project" under the EIA directive did not cover emission caused by the previous production of input materials (milk) – and this is relevant also with regard to the later end products. The scope of a given "project" under Article 3 must be defined both against an earlier stage and against a later stage after the product has been sold and consumed – in order for the EIA requirements to be manageable and meaningful.

(16) As for the 2024 *Finch* judgment from the UK Supreme Court, which was delivered under a 3:2 dissent, the Government respectfully holds that the legal argument put forward by the minority is much more persuasive than that of the majority. As pointed out by the minority in its conclusion, the majority in effect argues for "an artificially wide interpretation", that "has not been stipulated in the text of the EIA Directive, is not in line with its purpose and would distort its intended scheme".[5]

(17) In April 2024 the European Court of Human Rights (ECtHR) held in *KlimaSeniorinnen* that Article 8 of the ECHR puts positive obligations on national authorities to undertake measures to reduce their GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. The ECtHR also formulated a number of requirements for the ECtHR to consider when assessing whether a State had remained within its margin of appreciation. None of these cover the issue of reporting on "scope 3" emissions from petroleum projects. Furthermore, the ECtHR emphazised that it is first and foremost for the national authorities to choose which measures to take in order to protect the citizens against the effects of climate change and global warning. The approach of the ECtHR clearly builds on the principles laid down by the (UN) Paris Agreement, under which the responsibility for reporting, assessing and reducing greenhouse emissions are on the state in which the emissions take place, not on the producing states. Finally, new and dynamic interpretation by the ECtHR of Article 8 of the ECHR in the climate context cannot in any case be used in order to introduce new obligations into existing EU/EEA legal acts.

(18) On this basis the Government holds that the obligation under Article 3 (1) of Directive 2011/92/EU covers all direct and indirect significant effects of the project for which a development consent is sought, but not effects of the use or consumption of end products

[4] Cf. *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, notice Party)* ("the Kilkenny Cheese case"), available here, and *R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents)* (the "Finch case") available here. They are discussed below in section 3.5.

[5] Cf. Finch para. 332, and below in section 3.5 for a more detailed analysis of the judgment.

after they have been sold. This applies both to the general interpretation of the Directive and to projects involving the extraction of oil and natural gas.

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(19) If, in the alternative, the Court should hold that there is an obligation under the EIA Directive art 3 (1) to assess the effects of end consumption of exported oil and gas, then the next question will be how to interpret and formulate the requirements for such an assessment under Article 5, cf. Annex IV points 4 and 5, with regards to such projects.

(20) On this point, the Government holds that any such requirements must be interpreted in light of the specific challenges in assessing the net effects for greenhouse gas emissions and global warming of granting or denying an individual oil and gas project – which calls for flexibility and a certain margin of discretion as to how the national requirements are formulated by the authorities and applied by the private companies concerned.

(21) With regard to the case at hand, the Government holds that any obligation under Article 3 (1), cf. Article 5, of the EIA Directive must in any case be considered fulfilled by the reforms introduced by the Ministry of Energy in 2022, and even more so by the assessments that have recently been done on a voluntary basis by the two companies which were given the approvals for development and production of the three oil and gas fields. But this is for the national courts to review and decide.

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(22) If the 1st question is answered in the negative, then there is clearly no breach of the EIA Directive. The 2nd and 3rd questions then become hypothetical, and it will not be necessary for the Court to assess them in the present case.

(23) If, however, the Court chooses to address the 2nd and 3rd questions, the Court must consider which legal consequences a national court must draw from the fact that a consent for development has been granted based on an EIA that did not fully comply with all the requirements stemming from Article 3 (1) of the Directive.

(24) It is unquestionable that national courts are required, to the extent possible under domestic law, to eliminate the unlawful consequences of breaches of EEA law.[6] The simple answer to the second question is therefore yes – national courts are under such an obligation. However, this obligation does not, in the Government's view, apply in a situation where a breach of Article 3 (1) of the Directive does not have any impact on the outcome of the decision of the national administrative body.

(25) What the referring court in essence wants to know by its second and third question is whether it is permissible under EEA law to apply the general principle in Section 41 of the

[6] See e.g. C-201/02 *Wells* para. 64.

Norwegian Public Administration Act,[7] under which, in order for an administrative decision to be annulled, there must be a reason to assume that the procedural defect in question has affected the outcome of it.[8]

(26) The Government holds that this should clearly be answered in the affirmative. It follows from the basic principle of procedural autonomy that EEA states are free to apply such a condition for annulment, and it is not contrary to the principles of equivalence and effectiveness as long as the burden of proof does not fall on the applicant and account is taken of the seriousness of the defect and the rights of the public concerned to have access to information and to be empowered to participate in the decision-making.

(27) While the substantive rules of the EIA Directive are quite detailed, there are no provisions governing the legal consequences of any given deficiencies (great or small) in concrete cases. In such cases, the main principle of EEA law is that of national procedural autonomy, under which it is for national administrative law to determine the consequences, including the conditions for deciding whether a development consent must be annulled. This legal starting point is then modified by the principles of equivalence and effectiveness, under which the national provisions at issue must not be less favourable than those governing similar domestic situations (equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EEA law (effectiveness).

(28) Since the principle in Section 41 of the Public Administration Act applies in the same manner regardless of whether the procedural rule in question is of an EEA or domestic nature, the principle of equivalence is not called for in the present case. The question is only whether the principle of effectiveness prohibits the application of an impact requirement such as the one in Section 41 of the Public Administration Act, in the context of an EIA procedure.

(29) In the Government's view, the answer to that question is no. The effectiveness of the rules in the EIA Directive will not be adversely affected if a national court refuse to annul a development consent in situations where the procedural defect invoked may not have impacted the outcome of the decision. To require an annulment in such a situation will not provide for an effective and meaningful review procedure by national courts, but instead lead to unnecessary time-consuming and costly processes where the administrative body upon reconsideration adopts the same decision again.

(30) Furthermore, the question has already been resolved in case-law from the CJEU. It follows from the *Altrip* judgment that "not every procedural defect will necessarily have

[7] In full, Section 41 of the Public Administraton Act reads: *"If the rules of procedure set out in this Act or regulations made in pursuance thereof have not been observed in dealing with a case concerning an individual decision, the administrative decision shall nevertheless be valid when there is reason to assume that the error cannot have had a decisive effect on the contents of the administrative decision."* It follows from the preparatory works of that provision that it is applicable by analogy on infringements of other procedural rules (such as EIAs).

[8] More on this in section 4.1 below.

consequences that can possibly affect the purport of a decision" and, therefore, such defects "cannot be considered to impair the rights of the party pleading to it".[9]

(31) The CJEU thus accepted that actions for annulment of a consent for development under the EIA Directive, may be declared inadmissible by national courts if the procedural defect in question could not impact the outcome of the decision. In *Commission v. Germany* the Court accepted that national courts may reject such an action also on its *merits*.[10] It is explicitly held in these judgments that neither the principles of effectiveness nor the objective of the EIA Directive requires an annulment in such cases.[11]

(32) On this basis the Government holds that the second and third question from the referring court has already been quite clearly resolved by the CJEU.

(33) The referring court has not asked for any guidance as to which reparation obligation that follows from the duty of loyalty under Article 3 EEA if it concludes that the procedural defects invoked by the respondents have affected the outcome of the contested decisions, and if so whether the procedural defects invoked may be repaired by other means than an annulment – for example by conducting a new assessment followed by a new public consultation and a new consideration by the competent authorities.

(34) If the Court nevertheless chooses to provide the referring court with guidance on those questions, the Government submits that article 3 EEA does not provide for any absolute obligation on the referring court to annul the contested development consents, even if the procedural defect invoked has impacted their outcome.

(35) First, in addition to the basic principle of national procedural autonomy in this field, the obligation to provide remedies under article 3 EEA is limited by important principles of legal certainty and protection of legitimate expectations. Consequently, an annulment is not required if it will amount to an infringement of these principles, which may be the case dependent on the time lapsed and arrangements made by the operator relying on the lawfulness of the decision. [12]

(36) Second, as long as the unlawful consequences of a breach of EEA law are remedied, it is up to each EEA state to decide on the basis of national law which remedy is correct and appropriate in a particular case. One way of repairing a deficient EIA procedure is, in the Government's view, by the competent authorities supplying the missing assessments *a posteriori*, as long as the proper procedures are followed.[13]

[9] Cf. C-72/12 *Altrip*, para. 51, as discussed in later detail below in section 4.2.1.
[10] Cf. Case C-137/14 *Commission v. Germany* paras. 58-61. More on this in section 4.2.1 below.
[11] More on this in section 4.2.1 below.
[12] More on this in section 4.4 below.
[13] More on this in section 4.5 below.

2 FACTS

(37) The basic facts of the case, as set out very briefly in the referral, are as follows:

(38) The case concerns the validity of decisions by the Ministry of Energy to approve plans for the development and operations (PDOs) for three petroleum projects in the North Sea, respectively a decision 29 June 2021 regarding the oil field «Breidablikk», a decision 5 June 2023 regarding the oil field «Tyrving», and three decisions 28 June 2023 regarding the oil and natural gas project «Yggdrasil».

(39) The fields are located in the North Sea, on the Norwegian continental shelf. Breidablikk and Tyrving are oil fields, while Yggdrasil consists of three fields (Hugin, Munin and Fulla) that contain both oil and gas. Production started on Breidablikk in October 2023, on Tyrving in September 2024, and is expected to start on Yggdrasil in 2027.

(40) Legal proceedings against the decisions were instigated in June 2023. Judgment was given by the Oslo City court in January 2024, which declared the decisions invalid. The case was brought before the Borgarting Court of Appeal in February 2024, where it is still pending,

(41) In the national case the decisions are challenged on several legal grounds – article 112 of the Norwegian constitution, Article 8 of the ECHR, article 3 of the EIA Directive, as well as national procedural grounds. The referral to the EFTA court thus only covers one out of several questions before the national courts.

(42) There is also a parallel process on the question of whether activities on the projects should be halted pending the final outcome of the case. In its judgment in January 2024 the Oslo City Court granted a temporal injunction, but this was first suspended by the Borgarting Court of Appeal in March 2024, and then turned down by the same court after extensive oral hearings over the course of six days in September, followed by a decision 14 October 2024. Greenpeace and Nature and Youth have appealed this decision to the Supreme Court, where it is currently pending consideration.

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(43) It is not for the EFTA Court to assess the facts of the case in a referral for an advisory opinion on the interpretation of EEA law, and the Court should be particularly careful in cases like this, where the relevance and analysis of the facts are contested between the parties. The Court should however be aware that the amount of documentary evidence presented before the national courts is very substantial. In the latest round (on the temporary injunction) before the Borgarting Court of Appeal in September 2024 the compilation of documents ("*faktisk utdrag*") reached more than 7.800 pages. While this is not of legal relevance to the interpretation of EEA law, it is nevertheless of some interest in order to understand the context in which the EIA Directive functions in national law and policy, and in particular the special challenges when applying it to the oil and gas sector and the possible effects of projects such as these for global emissions and climate change. For that reason, it may be

useful to provide a short overview of the most relevant facts, while stressing that these are not issues that the Court is in a legal or actual position to address or evaluate.[14]

(44) As is generally known, the production of oil and gas is Norway's largest industry, and of vital national importance. It is also of vital importance to the European energy market, as well as the global market, as a stable, predictable and democratic energy supplier.[15] Oil is an international commodity, which is sold on the world market – but Norwegian oil is still of vital interest to the Western world. Norwegian gas production is for the most part exported in pipelines that go to EU Member States and the UK. The geopolitical and strategic importance of this export greatly increased following the 2022 invasion of Ukraine and subsequent energy crises in Europe, following sanctions on Russian oil and gas. Today Norway supplies more than 30 % of the gas consumed in the EU and the UK.

(45) Following Russia's full-scale invasion of Ukraine in 2022, leading to an energy crisis in Europe, Norway has played a vital part in continuing its long-standing role as a stable, predictable and democratic supplier of energy – and in particular natural gas – to the EU and UK. Norway maintains that this role is in full conformity with Norway's ambitious domestic efforts to become a low-emissions society and contribute to global efforts to combat climate change. Norway also fully supports the EU's efforts to accelerate the renewable energy transition as part of the transition away from dependence on Russian gas, and fully supports the agreement at the COP28 in December 2023 where Parties, among other things, agreed to contribute to the global efforts to the transitioning away from fossil fuels in energy systems and ambitious efforts on accelerating renewables and energy efficiency.

(46) At the same time, Norway holds that specific policy considerations in relation to energy and climate, such as the three contested decisions in the present case, fall well within the wide margin of appreciation afforded to States in their choice of means and in defining their own pathways when pursuing the aims and objectives for combatting climate change.

(47) Since early 2022, the EU has repeatedly called on Norway to increase production of oil and gas, and to continue exploration and development. This includes the joint statement from Energy Minister Terje Aasland (Ap) and the then Vice-President of the European Commission Frans Timmermans from June 2022, where it is stated: "Norway has significant remaining oil and gas resources and can [...] continue to be a large supplier to Europe also in the longer term beyond 2030. The EU supports Norway's continued exploration and investments to bring oil and gas to the European market", and the report by former European Central Bank

[14] Rather than attaching a number of documents to these written submissions, we have chosen to present links in the footnotes to documents of particular relevance. The presumption is not that the Court should study these documents but simply that it should be aware of them – so as to be aware of the context in which the EIA Directive functions.

[15] CF. Eksportverdier og volumer av norsk olje og gass - Norskpetroleum.no

president Mario Draghi in September 2024 suggests that the EU should enter into long-term agreements for gas supplies with Norway and that piped gas should be preferred.[16]

(48) The production from existing Norwegian oil and gas fields will decrease from 2025, and new investments are needed both in existing fields and in exploration and development of new discoveries if the aim is to uphold exports from the Norwegian Shelf. In recent years there has been an increased debate in Norway on how to combine the fact that the country is a major exporter of oil and gas – and at the same time deeply and sincerely committed to working against global emissions and climate change, both under the UN regime (including the Paris agreement), under EU and EEA law, and as a matter of national law and policy.

(49) This is a continuous open and democratic debate in all parts of the public and civil domain ("offentligheten"), with all major views represented in Parliament. The role and function of Norwegian oil and gas exports is often debated, and there has been a number of proposals in Parliament that new production licenses should no longer be awarded and that new development projects should not be approved. So far this has been turned down by a broad political majority. The present case may be seen as part of these much wider processes, and to a large extent involve arguments that are also central to the democratic debate.

(50) As of January 2024, Norway had 92 fields on the continental shelf producing oil or gas, of which Breidablikk is one.[17] Tyrving started production later in 2024, while Yggdrasil is expected to start in 2027. Breidablikk will account for between 1-2 % of Norwegian oil production in 2024, and Tyrving for approx. 0,09 %.

(51) The approvals that are contested in the present case thus only constitute a minor part of the overall Norwegian production and export of oil and gas. However, the arguments put forward by Greenpeace and Nature and Youth are to a large degree directed against the industry as such, and may be seen as a general challenge to Norway as an energy producing and exporting country. It should also be noted that none of the approvals of plans for any of the other fields in operation were ever subject to an assessment of export emissions.

(52) The projects for which the contested approvals were granted are described in so called PDOs (Plans for Development and Operation). The system is that the commercial operators (in this case Equinor and Aker BP) draw up a PDO on how to develop and operate the field. The PDO consists of (i) an impact assessment and (ii) a development section. The impact assessment is subject to public consultation. The PDO is assessed and approved by the Ministry of Energy. The decision-making process is regulated in great detail, including the criteria for what a PDO shall contain. This includes extensive requirements for the impact

[16] Cf. the Joint EU-Norway statement and (for the Draghi report) ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en On the new geopolitical importance of Norwegian gas for Europe, see also inter alia NATO - News: Secretary General off the coast of Norway: NATO is stepping up protection of critical infrastructure, 17-Mar.-2023 For the importance of exports to the UK, see North Sea gas is almost four times cleaner than LNG imports

[17] For a detailed map of Norwegian oil and gas fields, see Sokkelkart - Sokkeldirektoratet (sodir.no)

assessment.[18] If the project is above a certain size, it must also be presented to Parliament for consideration before the PDO is approved by the Ministry of Energy.

(53) The impact assessment under a PDO will always include "emissions to air", which covers emission of all greenhouse gases. This applies both to emissions from the development and construction of the infrastructure, and emissions from the subsequent operation of the project, meaning everything connected to the production of oil and gas over the life span of the field, as well as decommissioning after production has ceased. Drilling and extraction of oil and gas requires a lot of energy, which is supplied for the most part by turbines on the platforms.[19] This, combined with the fact that Norway's electricity is mostly produced from renewable sources, is the reason why as much as a quarter of Norway's national greenhouse gas emissions, as reported and assessed under the Paris agreement and EU/EEA law, come from the petroleum sector. Reducing these emissions is a priority both to the government and to the energy companies operating on the Norwegian Shelf.[20] Emissions from the Norwegian petroleum sector is part of the European trading scheme (ETS) and are also subject to a national carbon tax.

(54) However, what the governmental approval of the project (as stated in the PDO), does not cover, is the subsequent transport, processing, sale, export and eventual consumption of the oil and gas. As for the processing, this may include refinery of oil, or the making of LNG from gas, which are separate industrial processes, for which separate public approvals are needed, with new and separate EIAs. As for transport, almost all of the Norwegian production of oil and gas is exported abroad, either on oil tankers, LNG ships or through gas pipelines to the EU and the UK. Again, these are activities that fall outside of the scope of the PDO for the fields. The same of course applies to the final use of the exported oil and gas – whether this is used for providing energy to industrial facilities, transport, private consumption, or other uses, such as the petrochemical industry, or making plastic, asphalt or other products.[21] None of this is part of the project for which the PDO is drawn up and assessed.

(55) In the case at hand, the emissions "to air" of greenhouse gases resulting from the projects concerned were extensively assessed in all the projects, as part of the overall EIAs, and reported by the companies to the authorities as well as subjected to public consultations. The impact assessments, including consultation input, formed an integral part of the administrative and political decision-making process.

(56) As regards Breidablikk (previously Grand) the operator (Equinor) applied for development of the project in 2020, and a new report of consequences for the project was submitted to the Ministry in December 2018. This included a summary of previous EIAs as well as updated information, including a new assessment of estimated "emissions to air", covering inter alia

[18] See The Petroleum Act and the licensing system - Norwegianpetroleum.no (norskpetroleum.no) , Regulations - The Norwegian Offshore Directorate (sodir.no) and pdo-and-pio.pdf (sodir.no)
[19] In some cases the energy required is supplied by cables from the mainland (so called "electrification"). In the future it may also be supplied by floating windmills.
[20] See Emissions to air - Norwegianpetroleum.no (norskpetroleum.no)
[21] As much as 19 % of crude oil is not burned, but used for petrochemical and other industrial purposes, and the percentage is rising – cf. OED_RåOlje_norsk.png (1920×1079)

all greenhouse gas emissions from the development and operation of the project.[22] This was assessed by the relevant national authorities, and the project was then approved by the Ministry of Energy in June 2021.

(57) As regards Tyrving (previously Trell and Trine), the program for conducting an EIA was submitted to a public hearing in January 2020, and the program was then decided by the Ministry of Energy in October 2021. The full EIA drawn up by the operator (Aker BP) was sent on a public consultation in March 2022. It is a 65-page document, in which "emissions to air" is assessed in section 5.3.[23] Following an assessment of the EIA, including submissions from the public consultation, and the development section, the PDO was approved by the Ministry of Energy on 5 June 2023.

(58) As regards Yggrdasil (previously Krafla, NOA, and Fulla) there were two separate EIA processes, which were conducted in parallel.[24] The programs for conducting the EIAs were submitted to public consultations in October 2021, and then decided by the Ministry of Energy in May 2022. The two EIAs drawn up by the operator (Aker BP and Equinor) – one on Munin (Krafla) and the other on Hugin (NOA) and Fulla – were sent on a public consultation in June 2022. Both included detailed assessments on "emissions to air" from all the estimated phases of the projects.[25] In December 2022 summaries were made of all the submissions from the consultation. Given the size of the project, it was then presented to Parliament in a white paper in March 2023.[26] Following thorough evaluation and debate, including on greenhouse gas emissions and potential effects on the climate, a broad majority in Parliament expressed approval of the project in May 2023.[27] The PDOs were then approved by the Ministry on 27 June 2023.

(59) Legal proceedings against the decisions approving the PDOs were then instigated by Greenpeace and Nature and Youth a few days later, on 29 June 2023.

(60) It is not disputed between the parties that the (otherwise very extensive) EIAs submitted by the energy companies (Equinor and Aker BP) as part of the PDOs for the three projects did not contain assessments of the emissions that will arise from the subsequent use and consumption of the oil and gas produced, or the possible (although disputed) effects this may have on global warming and climate change. Indeed, this has never been a requirement under the PDO process for any oil and gas project, and until recently there have been no calls for such assessments in the national political or legal debate. Nor has it been proposed,

[22] The application from Equinor on the EIA requirements, dating 19 December 2018, is not on the internet, but it is publicly available. It is included in the documents before the national courts. Emissions to air (greenhouse gases) are covered in section 5.1.
[23] Cf. Strukturell beskrivelse styringssystem (akerbp.com), in particular section 5.3 (pp 48-50). None of the NGOs involved in the case at hand had any comments on the report at the time, and there were no other reactions during the hearing on the scope of the assessment of "emissions to air".
[24] All the documents from the EIA processes regarding Yggrasil are to be found at Konsekvensutredninger Yggdrasil (tidligere kalt NOAKA) - Aker BP
[25] See for example the 138-page EIA for Fulla of 17 June 2022 section 5.3 (pp 88-94), 2-noa-fulla-konsekvensutredning-1.pdf
[26] Cf. Prop. 97 S (2022–2023) (regjeringen.no)
[27] Cf. Innst. 459 S (2022-23) Innstilling (stortinget.no)

even by the environmental organisations (such as Greenpeace) that otherwise participate in the public consultations which are part of the EIA processes as part of an PDO.

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(61) In addition to the EIAs and the decision-making processes in the case at hand, there has also been a recent parallel process in the Norwegian debate and practice that the Court should be aware of. Regardless of whether there is a legal obligation (under national or EEA law) to report and assess "export emissions" – which is disputed – both the authorities and other actors have recognised that these are figures and assessments that might be of legitimate interest to the ongoing national debate on energy and climate policy.

(62) On that basis the Government has proposed to include reporting and assessment of the consequences for global warning and climate change in the EIA for new oil and gas projects in Norway, and as regards the three contested projects, such analyses have now quite recently been made and presented. It should be underlined that the Government does not see this as the result of a legal obligation under EEA or national law, but as a free and voluntary process. The result is, however, that the kind of assessments of "emissions from the end product" that the respondents call for have now been made for the three contested projects, and will be made also as part of future processes in other cases.

(63) In the Government's view this should from a legal perspective be seen as a national supplement to the requirements stemming from the Directive 2011/92/EU, and not as part of the interpretation of the Directive, which is what the Court is concerned with. We will therefore only very briefly sketch out the main elements.

(64) As the Court might be aware, there was in 2016-2020 a big case before the Norwegian courts that is often referred to in popular terms as "The Climate Case".[28] The main question was whether an individual legal and judiciable right to protection against the effects of climate change could be interpreted into article 112 of the national constitution, and there was also extensive argument on article 8 of the ECHR. In addition, there were also arguments on various procedural issues, and one of these concerned the interpretation of Directive 2001/42 and whether a correct strategic environmental assessment (SEA) had been made. This was, however, only very briefly mentioned in the written observations submitted by the parties, and it was not addressed or argued during the otherwise extensive four days of oral hearings before the Supreme Court in plenary sessions in late 2019. A minority of 4 judges nevertheless found that there had been a breach of that Directive. The majority of 11 judges did not agree, and only gave a short statement on the issue, the meaning and importance of which has been debated, and which is contested between the parties before the national court in the case at hand. In the view of the Government, it should be read in light of the fact that there was no contradiction on this issue between the parties, and that the Supreme

[28] The case ended in the Supreme Court, where it was heard in plenary, resulting in a judgment of 22. December 2020, cf. hr-2020-2472-p.pdf (domstol.no)

Court was not presented with the relevant legal sources or arguments. But this is for the national courts to decide.

(65) Regardless of the legal interpretation of the passages in the judgment from the Supreme Court, the very fact that the issue of assessing "export emissions" had been raised started a debate on this issue – which was also by some seen in conjunction with the fact that some market actors have started to request "scope 3" reports from the energy companies.

(66) Against this background, and in order to accommodate those that called for information on the potential consequences for global emissions and climate change of Norwegian oil and gas exports, the Ministry of Energy started in the autumn of 2021 to integrate concrete assessments of emissions from combustion ("forbrenningsutslipp") as part of the decision-making process for evaluating requests for approval of new PDOs, including both Yggdrasil and Tyrving (which were pending at the time) and a number of other projects. This new policy was summed up in detail in an announcement from the Ministry on 1 July 2022.[29]

(67) In May 2024 the Ministry went one step further and prepared an amendment to the official guidelines for PDOs, stating that "Global combustion emissions from oil and gas extracted from a project as well as the effects of such combustion emissions on the environment in Norway, should be described".[30] The proposal was put to a public consultation, with a number of submissions received by the end of June, and a decision is expected soon.

(68) While it is easy to calculate the *gross* emissions from combustion of petroleum resulting from developing a given oil and gas field (depending on the estimated size of the reservoir) it is altogether more complex and contested how to assess the *net* effect on global emissions and climate change of approving (or denying) an application to develop and produce a new field. This has for some time been a subject of discussion in the national Norwegian energy and climate debate, and it was contested and argued during "The Climate Case" before the national courts in 2016-2020. At the time, there were a lot of differing opinions, but very few academic or professional studies.

(69) Against this background, the Ministry of Energy commissioned, through public procurement, a report on the net climate effects of further Norwegian production of oil and gas, in light of all relevant information and literature on the subject. The energy research and intelligence consultancy firm Rystad Energy received the assignment after competition and a report was presented in February 2023.[31] The main conclusion was that increased production of *oil* from Norway will result in limited net reduction of global emissions of greenhouse gases, while increased production of *gas* will result in significant net reduction of global emissions of

[29] Cf. Vurderinger av forbrenningsutslipp fra norsk petroleum - regjeringen.no See also Beregninger av utslipp ved PUD-behandling - regjeringen.no
[30] Cf. Høring - endringsforslag til veileder for PUD/PAD - regjeringen.no and vedlegg-forslag-til-endringer-i-veileder-til-pud_pad.pdf
[31] Cf. netto-klimagassutslipp-fra-okt-olje-og-gassproduksjon-pa-norsk-sokkel_hovedrapport.pdf (regjeringen.no)

greenhouse gases, as natural gas will replace other sources of energy with much higher emissions, primarily coal on the European market.

(70) The "Rystad Report" has been the subject of debate since its publication and has drawn both approval and criticism. It was soon countered by four environmental NGOs (WWF, Naturvernforbundet, Natur og Ungdom and Greenpeace) who commissioned another report from the consultancy firm Vista Analyse. This report was presented in March 2023.[32] The analysis and findings differ to a certain degree from the Rystad report, with the conclusion being that an increase in Norwegian production of oil will result in a certain net increase of global emissions of greenhouse gases, while an increase in gas production will result in "some increase" in global emissions of greenhouse gases.

(71) To facilitate future considerations and decision-making procedures, there is a need for a coordinated and consistent approach to this complex issue. The Ministry of Energy is therefore presently preparing a new study of "combustion emissions from oil and gas extracted from the Norwegian continental shelf", the tentative program for which has recently been on a public consultation.[33] Both the Rystad and the Vista reports will be taken into account in this study. This study is initiated to ensure further transparency, input from the public and stakeholders, as well as to shed even greater light on the consequences of combustion emissions from Norwegian oil and gas production. The study will be submitted to public consultation and will be an important input to the private companies in connection with upcoming development projects on the Norwegian Continental Shelf.

(72) In the case at hand, one of the two operators concerned – Aker BP ASA – followed up on this of its own initiative, and in the spring of 2024 made their own assessments of combustion emissions from Tyrving and Yggdrasil, which were submitted to a public consultation on 19 June 2024, and presented to the Ministry on 21 august 2024.[34]

(73) In the EIAs the company included both the gross emissions as well as the net emissions, and the estimated effects on global warming, depending on both the two major analyses – the Rystad report and the Vista report. Unsurprisingly, one analysis led to the conclusion that the net effect would probably be a (very, very marginal) increase in global warming, while the other predicted a (very, very marginal) decrease.[35] The company did not attempt to choose between the different analyses, but presented both alternatives to the Ministry, as the basis for an informed evaluation.

[32] Cf. Norsk olje, globale utslipp (vista-analyse.no)
[33] Cf. Høring - faglig utredning av forbrenningsutslipp fra olje og gass utvunnet på norsk kontinentalsokkel - regjeringen.no and horingsnotat_forslag-til-utredningsprogram-forbrenningsutslipp.pdf (regjeringen.no)
[34] Cf. the report on export emissions from Yggdrasil at 20240619-utredning-av-forbrenningsutslipp-som-tillegg-til-konsekvensutredningene-for-yggdrasil-omradet.pdf, and the report on Tyrving at horing---utredning-av-forbrenningsutslipp-som-tillegg-til-konsekvensutredningene-for-feltene-i-yggdrasil-omradet-og-for-tyrving-feltet-horingsnotat.pdf
[35] The conclusion as regards Tyrving was that the net effect from the project as regards global warming would either be -0,0000002 or +0,0000011 degrees Celsius, depending on the method. As regards Yggdrasil the estimate was either –0,000026 or +0,000012 degrees Celsius.

(74) Based on the new assessments of combustion emissions from the Tyrving and Yggdrasil fields the Ministry has come to the conclusion that there has not emerged any new information that provides a basis for overturning the decisions made in June 2023 regarding the approval of PDOs for Yggdrasil and Tyrving. This is stated in a letter to the operator 28. August 2024.

(75) Equinor later followed up and published an assessment of combustion emissions from the Breidablikk field on 9 October 2024, with a deadline for comments on the consultation 11. November 2024.[36]

(76) The current status at the national level is thus (i) an ongoing legal process before the courts on whether there is a legal obligation under the Constitution, ECHR or EEA law to include assessments of "export emissions" in the EIAs for PODs, while (ii) at the same time a factual development under which such assessments are introduced in a flexible and voluntary manner, tailored to the specific challenges in the sector – which in the Government's view in effect should meet the demands put forward by Greenpeace and Nature and Youth.

3 LEGAL ANALYSIS – THE 1ST QUESTION

3.1 Introduction

(77) The first question from the Referring Court reads as follows: "Where a project is listed in Directive 2011/92/EU Annex I point 14, are the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, environmental "effects" of the project under Article 3(1)?".

(78) This is in essence a question on the scope of Directive 2011/92/EU, both in general and specifically as regards oil and gas projects. The general question is of relevance to all kinds of projects, and therefore to all EEA States. The specific question is first and foremost of great importance to Norwegian authorities, and companies operating on the Norwegian Continental Shelf, since Norway is by far the largest producer – and the only major exporter – of oil and gas within the EEA. But there are oil and gas projects also in some of the EU Member States, for which the specific issue is relevant, and there is also ongoing exploration on the Icelandic Continental Shelf.

(79) The way in which the question is formulated by the referring court requires one clarification. There is no disagreement between the parties that as long as oil and gas extracted under a given project is *used in the project itself*, then the effects of this on the environment and climate must of course be assessed in the EIA for the project. This is an important point. The energy required for offshore drilling and extraction is to a large extent supplied by turbines on the platforms, using gas from the project itself, and there are also other emissions from the production processes, such as occasional flaring of gas. These emissions may be quite

[36] Cf. the report on "Breidablikk: Tilleggsutredning om forbrenningsutslipp", at 0dd5904b3b34efcdd6b746bf12b2dd9a90a0723f.pdf as well as a7ee4de166fffe967cb481940b981f7a470e4087.pdf and f5efdafa1f5a5588de715c6da7ad3f3d15478c55.pdf

significant, as explained above, and they are always covered by the scope of the "project" for which an approval of a PDO is given. The legal disagreement between the parties is only with regard to the assessment of the effects of the oil and gas that will be sold to third parties and exported elsewhere for final use or consumption – in short "the export emissions".

(80) A more precise way of putting the question would therefore be to ask "Where a project is listed in Directive 2011/92/EU Annex I point 14, are the greenhouse gas emissions that will later be released from the end use or consumption of the extracted petroleum and natural gas, after it has been sold, environmental "effects" of the project under Article 3(1)?"

(81) The same legal question can be formulated in various ways, so as to shed light on different nuances. Another way of putting it would be to ask whether the "direct and indirect significant effects of a project" under Article 3 (1) of Directive 2011/92/EU includes not only the environmental effects of the "project" as such, for which the "development consent" is sought, but also effects of the later use or consumption of the end products after they have been sold to the end-user – and (in the case of oil and gas) processed and exported?

(82) Or in other words, do the scope of the Directive, as defined by the concept of the "project" in Article 3 (1), cover not only the environmental consequences of the planned activities that are subject to the application for a "development consent", or may it also cover effects of later activities on the part of the buyers and final consumers of the end product?

(83) The Government holds that the proper way of approaching this legal question should be a two-stage process. The first question is on the *general* interpretation of the scope of Directive 2011/92/EU, and whether there is any legal ground for holding that the effects of a given project must also cover effects of the later use or consumption of the end product after it has been sold. If the general answer is in the negative, as it clearly is, then the next question must be the *specific* one, whether there are any legal grounds for interpreting the scope of the Directive *differently* – and much *wider* – for oil and gas projects than for other kinds of products the subsequent use and consumption of which may have causal consequences on the environment or the climate.

(84) In the following, the Government will therefore first explore the general interpretation of the scope of the Directive with regards to the consumption of end products (3.2), and then turn to the specific scope of EIAs regarding oil and gas projects (3.3). The discussion is focused on the legal sources that should be decisive to the interpretation, namely the text of the Directive as well as the purpose and context, as seen in light of the drafting history and subsequent implementation and application. In addition, there are also some other factors and elements that might be of relevance or interest (3.4 and 3.5).

3.2 General interpretation of the scope of the EIA Directive

(85) When directive 2011/92/EU was adopted in December 2011 it replaced the earlier directive 85/337/EEC, which had been amended several times.[37] The obligation to do EIAs under EU and EEA law thus goes a long way back, and the main principles have been the same the whole way, even if they have been developed and extended over time. The same applies to the main concepts used in the text for regulating the scope of the assessments to be made.

(86) In the wording of Article 3 (1), as laid down in 2011, an environmental impact assessment "shall identify, describe and assess in an appropriate manner, in light of each individual case, ... the direct and indirect effects of a project" on a number of factors, including "soil, water, air, climate and the landscape". The inclusion of the climate was thus there already in 2011, even if it was later developed further in the 2014 amendment, as we will return to.

(87) A main concept in the directive is that of the "*project*" (in French "projet", in German "Projekt"). This is defined in Article 1 (2) litra a as "the execution of construction works or of other installations or schemes" as well as "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".

(88) The notion of the "project" as the concept defining the subject and scope of the directive is clear in the text, starting in the title, and going on throughout the preamble and the articles.

(89) Article 1 (1) starts with stating that the directive "shall apply to the assessment of the environmental effects of those public and private *projects* which are likely to have significant effects on the environment". Article 3 (1) refers to the "the direct and indirect significant effects of a *project*", and Article 4 to "*projects* listed" in the annexes, and that "the *project* shall be made subject to an assessment". Article 5 states that the assessment shall include at least "a description of the *project* comprising information on the site, design, size and other relevant features of the *project*" as well as "a description of the likely significant effects of the *project* on the environment".

(90) The "project" as the defining concept is further illustrated by Annex I on projects that must always be subjected to an EIA and Annex II on projects that may be subjected to this. These are long lists of different projects of all kinds. The "extraction of petroleum and natural gas for commercial purposes" was specified already in the 2011 version of the directive, in Annex I point 14 – with other related projects specifically regulated in point 1 on "crude-oil refineries", point 16a on "pipelines ... for the transport of gas, oil, chemicals", and point 21 on "installations for storage of petroleum...". This shows that the EU legislator considered such activities as refining, transport and storage (of oil and gas) to be *separate* "projects" from that of drilling and extraction – with a need for separate EIAs to be conducted.

[37] For the original (2011) version, cf. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environmentText with EEA relevance (europa.eu) This was amended in 2014, cf. DIRECTIVE 2014/•52/•EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 16 April 2014 - amending Directive 2011/•92/•EU on the assessment of the effects of certain public and private projects on the environment - (europa.eu) For a consolidated version, cf. EUR-Lex - 02011L0092-20140515 - EN - EUR-Lex (europa.eu)

(91) Two other basic concepts are those of the "developer" and the "development consent". In Article 1 (2) the *'developer'* "means the applicant for authorisation for a private project or the public authority which initiates a project" (litra b), while '*development consent*' "means the decision of the competent authority or authorities which entitles the developer to proceed with the project".

(92) Read in conjunction, it is clear that the subject of an EIA under the directive shall be the direct and indirect significant effects *of the "project" for which a "development consent" is sought*.[38] The project thus defines the scope of the obligation. If the project is large (wide) then the scope of the EIA will be wide. If the project is small (limited) then the EIA will be limited. If the project for which an application is made only concerns construction, then only the (direct and indirect) effects of the construction shall be assessed. If a given project covers both the construction and later use of infrastructure (such as later development and production), then the EIA must also cover effects of the later use (as is the case with the PDOs in the present case).

(93) The premise (raison d'être) behind this appears logically to be that the effects of the project cover the elements that are under the control or possible influence of the developer (applicant) and that the competent authorities must assess when deciding on the application, on the basis of the EIA and other relevant factors – and which they can reasonably influence. This is also logically in line with the requirements in Article 5 (1) that the developer shall describe reasonable alternatives or features that may avoid, prevent, reduce or offset adverse effects of the project on the environment.

(94) The legal definition of the "project" in Article 1 (2) litra a is relatively narrow according to the text, and focusses primarily on "construction works", "installations and "other interventions in the natural surroundings and landscape". However, this is made wider by the concept of "direct and indirect significant effects" in Article 3, as well as the more specified requirements in Article 5 and the annexes. The notion of "indirect significant effects" clearly widens the scope of the obligations under the directive, as do the specific requirements. But it still only covers the indirect effects *of the project itself*.

(95) The legal definition in the Directive corresponds to the ordinary meaning of the word "project", which in the Cambridge dictionary is defined as "a piece of planned work or an activity that is finished over a period of time and intended to achieve a particular purpose".[39] The "project" here is something that is defined in time and scope.

(96) In other words, the "project" must clearly be seen as something else than the "product" – which can be the result of the project, but not the project itself. The product is something

[38] Or, as precisely put by the minority in the Finch case, para. 257: "The information to be provided in the EIA process pursuant to the EIA Directive *is intended to inform the decision whether to grant development consent for a project*, and if so on what conditions, in a way that enables the decision-making authority – typically a local authority – *to engage in practical decision-making within the remit of its own competence under existing procedures for development consent*" (emphasis added).
[39] Cf. PROJECT | English meaning - Cambridge Dictionary For a French definition of "projet", see Définitions : projet - Dictionnaire de français Larousse

that is made by the producer, and then sold, to be modified, used or consumed by others, outside of the control of the producer (developer).

(97) Looking closer at Directive 2011/92/EU it is striking that the otherwise quite detailed text hardly mentions the word "product", except a few places in the annexes, in order to define the projects.[40] There is no concept at all of "product effects", and the specific challenges of introducing such a wide notion, and making it operational, are not addressed or discussed anywhere in the drafting history of the Directive, nor in the later guidelines on interpretation and implementation drawn up by the Commission.

(98) In the Government's view this is – in itself – sufficient to conclude, that the obligation to conduct EIAs under the Directive only covers the direct and indirect effects of projects – not effects of the end use or consumption of the products after they have been sold.

(99) Furthermore, there are no other relevant legal sources under EU and EEA law known to the Government that indicate another interpretation.

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(100) As for relevant case law, the Government holds that the current jurisprudence from CJEU is of limited relevance to the question of interpretation the EFTA Court has before it.

(101) First, general statements from the CJEU relied on by Greenpeace and Nature and Youth, such as that "the scope of the EIA Directive is wide and its purpose very broad" are of limited relevance, and, in any event, as the CJEU held in C-275/09 *Brussels Airport* para. 29: "a purposive interpretation of the directive cannot disregard the clearly expressed intention of the legislature of the European Union".

(102) Second, there is no judgment from CJEU or the EFTA Court courts specifically addressing the question of whether effects of the later use or consumption of the end product of a project may be regarded as an «effect» of the «project» within the meaning of Article 3 (1) of the Directive. In fact, to the Government's knowledge, there are no judgments clarifying what may qualify as an "effect" of a "project" under Article 3 (1) of the Directive at all.

(103) There are, however, two judgments by the CJEU that deserves mentioning, mainly because they are (mistakenly) relied on by the respondents to support the view that the later use or consumption of the end product of a given project may be regarded as an effect of the project under Article 3 (1) of the EIA Directive.

(104) In the first of these, C-2/07 *Abraham*, the CJEU ruled that in the assessment of whether an EIA was required for works to modify the infrastructure of an existing airport, the projected increase in the activity of the airport was to be taken into consideration. In the reasoning preceding that conclusion (paras. 41-46), the CJEU held that it would be contrary to the approach to be taken in that assessment "*to take account […] only of the direct effects of the*

[40] Cf. Annex I points 5 and 6 (d) and (e), and Annex II points 5-9.

works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works." (para. 43).

(105) In light of the project at issue (alteration of an airport) and the question referred (if the increased activity on the airport resulting from the modified airport must be assessed), it is clear that the phrase "end product of those works" in this context referred to the modified airport after the construction works were completed. The Court thus ruled that the assessment to be carried out may not be limited to the effects of the construction works themselves but must also include an assessment of the effects of the activity taking place after the construction works are finished – in the airport scenario, the increased activity on the modified airport.[41]

(106) In other words, the "end product of those works" in the Abraham case was the modified airport itself, as it will typically be with infrastructure projects. That is something else entirely from projects that end up with making products that are then sold, to be used or consumed elsewhere. And it is not contested in the present case that the "project" may often cover not only development but also the later production processes (as it did when the PDOs were approved).

(107) The respondents are therefore wrong in holding that the phrase "*the use and exploitation of the end product of those works"* is applicable to the use and consumption by third parties of the end products from a project similar to the one in the main proceedings, which consists of the production of products which are then sold, exported and used elsewhere.

(108) The same goes for the second judgment relied on by Greenpeace and Nature and Youth, C-142/07 *Ecologistas* where the court repeated para. 43 of *Abraham* in the context of whether various projects forming part of the refurbishment and improvement of the Madrid urban ring road, should have been subject to an EIA. The Court only confirmed the *Abraham* interpretation in the context of road works, which means that the effects to be taken into consideration are not only those of the construction works of those roads, but also the increased volume of transport caused by the improvement of the motorway. In other words, the increased activity of the project itself.

(109) Consequently, to the extent these judgments may be applied to the interpretation of what is an "effect…of a project" under Article 3 (1), they only clarify that the effects of a project which must be covered by an EIA are not limited to the (direct) effects of construction works themselves but also include the (indirect) effects which may be caused to the environment due to the subsequent activity which takes place after such works have been executed (i.e. activities in the operational phase of the project).

(110) By analogy, in the context of a project consisting of the extraction of oil and gas for commercial purposes, the environmental effects of the project covers not only emissions from the construction works of the oil and gas platform/infrastructure, but also the emissions from the subsequent production of oil and gas on that platform. That is not

[41] That is also confirmed in the paragraph 44 of that judgment, where the CJEU holds that the EIA does not only cover the impact of the works envisaged *"but also […] the impact of the project to be carried out"*.

disputed by the Government. But this is something different entirely from an obligation to assess the effects of the subsequent end use or consumption of the oil and gas after it has been transported, refined and sold to third parties.

(111) Rather, in clarifying the outer limits of the scope of the Directive, these judgments should, if anything, be seen as an argument that the scope of the project under Article 3 (1) cannot be extended even further, so as to encompass also the effects of the use of end products.

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(112) As for the general interpretation, implementation and application of Directive 2011/92/EU, the Government is not aware of any practice on the European or national level under which it has ever been understood as to place an obligation on producers (developers) to assess subsequent "product effects" as part of the EIA. At the European level, this has not to our knowledge been addressed or argued in the otherwise very extensive and detailed general guidelines that the Commission has issued on the EIA system,[42] and we are not aware that the Commission or the EFTA Surveillance Authority has ever interpreted it in this way when supervising the national implementation and application of the directive in the 13 years following its adoption. While we have not studied the practice in all other EEA States, we can safely say that the Directive was not interpreted in this way when it was taken into the EEA Agreement, nor when it was implemented into national law and practice in Norway, neither with regard to the oil and gas sector, nor any other sector of industry or mining that result in products that will subsequently have environmental effects when they are later used.

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(113) Finally, there is the substantial argument that interpreting article 3 of Directive 2011/92/EU - so as to potentially cover direct or indirect significant effects of the subsequent use or consumption of end products, after they have been sold, would be to introduce huge new burdens and obligations on developers and national authorities in all cases to be considered, and in general to widen the scope of the EIA system enormously, raising a number of new questions that are not dealt with in the directive, both on how far the obligations should go, and how such assessments should actually be done.

(114) In a case like the present one, which concerns new oil and gas projects, there may be a natural inclination to see this as a special sector, because of the presumed strong causal link between extraction and later emissions.[43] But on a closer look, this is something that applies to a large number of other industries, that involves the extraction or making of products that

[42] Cf. in particular the 2017 general "Environmental Impact Assessments of Projects: Guidance on the preparation of the Environmental Impact Assessment, Environmental Impact Assessment - European Commission (europa.eu) In the previous and more specific 2013 "Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment" there is no mention that this should place an obligation to assess subsequent emissions on the original producers of oil and gas, cf. Guidance on integrating climate change and biodiversity into environmental impact assessment - Publications Office of the EU

[43] This is for example the approach of the majority in the UK Finch case of 2024, as we shall return to.

will later have clear casual effects on the environment. It is not either-or, but a spectre. The number of relevant examples is too large to list, but a few can illustrate the general point.

(115) As for mining and extraction, the clearest parallel to an oil and gas project with regard to "product effects" would be other projects to extract metals or other substances that will have environmental effects when they are later used. As for metals, the obvious example would be those metals that are in themselves especially harmful from an environmental perspective, such as lead, nickel, mercury, cadmium, chromium, uranium and many others. When extracting metals like these, it is clear that their subsequent use by industry and consumers will impact the environment, with a clear causal link. But this will be very difficult for the original producer (mining company) to assess in any meaningful way.

(116) Another example could be extraction and production of nitrate and phosphate. These are substances that are of huge importance for food production (making fertilizer) while at the same time giving rise to grave environmental concerns. But it would not be constructive or reasonable to put an obligation the original producers to also assess the full scale of potential effects from the use of fertilizer by the end consumers (the farmers).

(117) Another example could be the production of aluminium, which is a big industry in Norway and Iceland. The production in itself requires a lot of energy, with potential emissions, and there are also other environmental effects, which must of course be assessed as part on the EIA when applying for a new aluminium project to be approved. But it would be something else entirely to require the original producers to also assess the environmental effects of the later end use of the product – which is massively used for making cars and airplanes – that will in turn have other environmental effects and cause emissions of greenhouse gases.

(118) Another obvious example would be the chemical industry. There are a number of chemicals that are essential to modern society but at the same time have serious environmental effects. Often the production has negative effects in itself, which must of course be assessed when applying for a new project (such as pollution and emissions from a new chemical factory). But as to the environmental effects of the later use of the chemicals, after they have been sold to other industries, this is something that the original producer and local or national authorities are not in position to assess in any meaningful and operative way.

(119) At a closer look, the same challenges arise not only for extraction and production of raw materials and chemicals, but also all other industrial products the later use of which may have direct or significantly indirect environmental effects. Take for example the production of small plastic toys, such as Lego. When applying for permission to open a new factory to produce Lego, the company will of course have to make an EIA for the development and production, which (in the case of coloured plastic) may have various environmental effects. But it would be difficult indeed for the Lego company, or the national planning authorities to assess in any meaningful way the potential effects on the environment of exporting billions and billions of small plastic bits all over the globe.

(120) Similar examples could be made for a whole range of industrial goods, from simple to advanced end products, made through a number of manufacturing stages, all of which may

have environmental effects – and all of which have a clear casual link back to the original producers of the raw materials needed. The only meaningful way of assessing and analysing the environmental effect of such products is to look at each stage (or project) as such – and do separate EIAs for each defined project – whether it is extraction, transport, refinery, semi-finished products or the eventual end product, and how it is used or consumed.

(121) While it may in principle be possible to envisage a call for increased assessments of environmental "product effects", it is obvious that this would be very complicated and controversial, and would raise a number of new questions, both as regards methods and requirements and as regards the outer limits of the obligations.

(122) What is also quite clear, is that this is not at present covered by Directive 2011/92/EU. It was not envisaged by the EU legislator, and it is not mentioned or regulated in the text, nor in the preparatory works, nor in the later guidelines. Furthermore, it should not be introduced by way of dynamic interpretation, which would open up for many more disputes and litigation, and which would place new and unpredictable obligations both on producers (developers) and on the national authorities tasked with applying the EIA system.

3.3 Should the EIA Directive be interpreted differently for the effects of oil and gas than for other products?

(123) Given that environmental effects of the later use of end products are not covered by the *general* interpretation of the scope of Article 3 (1), the question remains whether there is a *specific* legal basis for interpreting this differently with regard to projects involving the extraction of oil and gas and the later effects on greenhouse gas emissions?

(124) The Government holds that this is clearly not the case, and that there are neither legal sources nor a factual basis for introducing such a particular obligation on a specific industry. If anything, it is on the contrary clear from the sources that the directive cannot be interpreted so as to put an obligation for assessing end user emissions on the original producers of oil and natural gas.

(125) Firstly, there is no factual basis for drawing a clear distinction between on the one hand the extraction of oil and gas, and on the other hand the extraction or production of other sorts of goods or materials that will also have effects on the environment, including emissions of greenhouse gases, when they are later used or consumed. If seen simply as a matter of casual links, then there will be a huge number of such examples, as illustrated above. And many of them will have connections to later environmental effects that are at least as clear as those from the oil and gas industry.

(126) Furthermore, the actual link between a specific new individual oil and gas project and later greenhouse gas emissions and effects on the climate is much more complex and controversial than most people are aware, as earlier shown in section 2. While it is fairly easy to assess the *gross* emissions from a new project, given the size of the reservoir, it is much more difficult to assess the *net* consequences for global warming of allowing (or denying) a

new project – as illustrated by the fact that new gas projects in the North Sea may actually contribute to *reducing* European (and global) emissions, by replacing the use of coal.

(127) In addition, there is also the factual argument that in the case of a new oil and gas project, the developer may influence and reduce the amounts of emissions from the project itself in various ways, such as "electrification" of the production (by cables from the mainland), new and more efficient techniques for drilling and extraction, further limiting "flaring" and so on. But the developer (producer) has no control on how the buyers and end consumers will choose to use the product – whether for example it will be used for industry, heating, cooking, private transport, electricity production, asphalt or making petrochemicals – and whether it will be consumed and reported inside or outside of relevant EU regulation, such as the European Trading System (ETS), or the Effort Sharing Regulation of 2018.[44] As for gas to Europe, the producer does not control to what extent it will substitute other forms of energy, such as coal, which, if so, is *beneficial* to the environment.

(128) Secondly, there are no legal sources to indicate that Directive 2011/92/EU, as amended in 2014, must be interpreted differently with regard to emissions of greenhouse gases from the oil and gas industry than from other projects covered by the directive. This requires a closer look at Directive 2014/62/EU,[45] which clarified the obligation to assess emissions of greenhouse gases and their effect on climate change.

(129) As already mentioned, the obligation under Article 3 (1) to assess effects on "climate" was there in the original 2011 wording of the directive. However, there was reason to believe that this was not fully implemented and applied in practice, and there were also other processes at the time to strengthen the climate aspect of EU environmental legislation.

(130) In October 2012 the Commission therefore presented a proposal for an amendment to Directive 2011/92 that was designed to strengthen, inter alia, the obligation to report on greenhouse gas emissions and their effects on climate change.[46] In advance of the amendment, the Commission also in 2013 published a "Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment".[47]

[44] Other variables outside of the control of the original producer (developer) may include whether the end user (say a factory) has access to carbon capture and storage from production, or for example the level of recycling of petrochemical products.
[45] Cf. Directive - 2014/52 - EN - EIA - EUR-Lex (europa.eu)
[46] Cf. COM(2012) 628, EUR-Lex - 52012PC0628 - EN - EUR-Lex This "2012 Proposal" was accompanied by a lengthy Impact Assessment which identifies certain shortcomings with regard to the existing EIA regime, inter alia in the field of climate change and GHG emissions. The drafting history is presented in detail by the minority in the UK Finch judgment paras. 232-237.
[47] Cf. Guidance on integrating climate change and biodiversity into environmental impact assessment - Publications Office of the EU (europa.eu) As pointed out by the minority in the Finch judgment in para. 236, the 2013 guidance had a specific section on "Understanding key climate mitigation concerns", with a number of examples. The focus was on the increase of emissions of greenhouse gases closely associated *with the project itself*, such as increased energy consumption because of production or increase in transport to which the project would give rise.

(131) As for the actual changes in the Directive, those regarding climate change and greenhouse gas emissions are primarily to be found in recital 13 of the preamble and in Annex 4.

(132) In the preamble a new recital was introduced:

(13) Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change.

(133) Furthermore, Annex IV was amended, such as to specify in paras. 4 and 5 that an EIA must include:

4. A description of the aspects of the environment factors specified in Article 3(1) likely to be significantly affected by the proposed project, including in particular: [...] climate (for example greenhouse gas emissions, impacts relevant to adaptation) ...

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

(134) In this way the wording was changed so as to make the obligation to assess the effects of emissions of greenhouse gases on the climate more explicit and precise. This was an important amendment, which has presumably had great effect on the application of the directive in the member states, by industry and authorities. However, the wording is still very clear that it is the effects of the *projects* that are the subject of the EIA. Both the recital in the preamble and the text in the annex refers to "the impact of the project", and para. 4 refers to aspects "affected by the proposed project".

(135) It is thus clear that the amendment did not introduce any kind of new concept of "product emissions", or "scope 3". There is no mention in the text of any such notion, and it was not introduced or discussed in the preparatory works.

(136) In this regard it is also striking that nowhere in the text or in the drafting documents are there any mention of the "scope 3" debate, which at the time (2012-14) was a familiar concept with regard to greenhouse gas emissions, both in general and in particular for the oil and gas industry. The fact the preparatory works do not even mention this is a clear indicator that the EU legislator did not intend to introduce this concept.

(137) The text furthermore kept the distinction in Annex 1 between "extraction of petroleum and natural gas for commercial purposes" in point 1, "crude-oil refineries" in point 14, "pipelines ... for the transport of gas, oil, chemicals" in point 16a, and "installations for storage of petroleum..." in point 21. This shows that the EU legislator considered such activities as refining, transport and storage (of oil and gas) to be *separate* "projects" from that of drilling and extraction – with a need for separate EIAs to be conducted.

(138) In 2017 the Commission issued a new guidance entitled "Environmental Impact Assessments of Projects: Guidance on the preparation of the Environmental Impact Assessment report".[48] A section under the subtitle "*Climate change mitigation: Project impacts on climate change*" deserves to be quoted in full:

Most Projects will have an impact on greenhouse gas emissions, compared to the Baseline (see the section on Baseline), through their construction and operation and through indirect activities that occur because of the Project. The EIA should include an assessment of the direct and indirect greenhouse gas emissions of the Project, where these impacts have been deemed significant:

- *direct greenhouse gas emissions generated through the Project's construction and the operation of the Project over its lifetime (e.g. from on-site combustion of fossil fuels or energy use)*
- *greenhouse gas emissions generated or avoided as a result of other activities encouraged by the Project (indirect impacts) e.g.*
    - *Transport infrastructure: increased or avoided carbon emissions associated with energy use for the operation of the Project;*
    - *Commercial development: carbon emissions due to consumer trips to the commercial zone where the Project is located.*

The assessment should take relevant greenhouse gas reduction targets at the national, regional, and local levels into account, where available. The EIA may also assess the extent to which Projects contribute to these targets through reductions, as well as identify opportunities to reduce emissions through alternative measures.

(139) In this passage the Commission gives guidance to national authorities on how to implement and apply the directive with regard to projects that will generate carbon emissions, such as for example extraction of oil and gas. And it is quite clear which elements are included (and which are not). Included are emissions from the construction of the project, and from the operation of the project (in particular on-site combustion,) as well as "emissions generated or avoided as a result of other activities encouraged by the Project", such as transport. But there is no way in which emissions from the later end use or consumption of the products resulting from the project, after they have been sold, can be read into this passage.

(140) This is illustrated also by referral in the next paragraph to take the "relevant greenhouse gas reduction targets at the national, regional, and local levels into account". As for emissions from oil and gas that has been exported to other countries, this will not be subject to reduction targets on the national or regional level in the country where extraction takes place, but in the state where combustion occurs, and the emissions are released.

(141) This is probably also how the 2014 directive was understood and implemented by national authorities in the EU Member States, and later in the EFTA States after it was incorporated in

[48] Cf. Environmental Impact Assessment - European Commission (europa.eu)

the EEA Agreement in 2015.[49] It was certainly the case in Norway. When the 2014 directive was implemented in national law, it was done so in the Regulations relating to impact assessments pursuant to the Planning and Building Act.[50] For the sector-specific regulations for petroleum, it was assessed that the 2014 directive did not entail any necessary changes in the existing wording. Impact assessments of emissions to air (including GHGs) was already a part of the exciting practice long before the changes to the directive were made. There was no mention or even suggestions by anyone that the directive would entail an obligation to include emissions in other countries resulting from exports of oil and gas when conducting EIAs before the approval of PDOs. This would have been a completely new concept, and a big shift in existing practice, of particular importance to Norway as the only major exporter of oil and gas in the EEA area, and would clearly have entailed changes in the national petroleum regulations. But the idea that the directive could be argued to introduce such an obligation probably did not as much as cross anyone's mind. It was not argued at the time by environmental NGOs (including Greenpeace and Nature and Youth), who otherwise follow such issues closely, and it was not raised as an issue by the EFTA Surveillance Authority (ESA) or any other supervisory bodies.

(142) The Government holds that this is clearly sufficient as a legal basis to conclude that Directive 2014/52/EU did not introduce an obligation to include "export emissions" in EIAs in the oil and gas sector.

* * * * *

(143) In addition, such an approach would be very different from that taken in all other international and European law on greenhouse gas emissions and climate change – all of which builds on the basic principle that the responsibility for identifying and reporting emissions – and implementing instruments to reduce them – lies on the states in which the emissions (consumption) take place, not on the providers of energy (exporters).

(144) This is first and foremost a basic principle of the 2015 UN Paris Agreement, under which the parties undertake to prepare and communicate "nationally determined contributions that it intends to achieve" in order to reduce national greenhouse gas emissions.[51] Nowhere in the Paris Agreement is there any notion of allocating emissions to exporting countries.

(145) The same goes for the extensive regulation on climate law, including greenhouse gas emissions, that has been laid down in the EU in recent years,[52] which are to a large extent incorporated into the EEA Agreement. One important example is the so-called "Effort Sharing Regulation" of 2018,[53] which lays down minimum obligations on each member state

[49] Cf. DECISION OF THE EEA JOINT COMMITTEE - No 117 / 2015 - of 30 April 2015 - amending Annex XX (Environment) to the EEA Agreement [2016/ 1300]
[50] Cf. Miljøvirkningsdirektivet (2011): endringsbestemmelser | europalov and Høring - forslag til endringer i regelverket om konsekvensutredninger - regjeringen.no, as well as Prop. 110 L (2016–2017) - regjeringen.no
[51] Cf. ADOPTION OF THE PARIS AGREEMENT - Paris Agreement text English (unfccc.int)
[52] Cf. European Climate Law - European Commission (europa.eu)
[53] Cf. Regulation (EU) 2018/ of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013

to reduce greenhouse gas emissions, as well as annual emission allocations. The whole regulation is based on the principle that each state is responsible for GHG emissions on its own territory (but not on that of others).

(146) The same applies to all national climate law that the Government is aware of, and certainly all climate law and regulation of emissions under Norwegian law. The basic Norwegian Climate Change Act of 2017 for example, sets out a legal framework for Norway's climate policy, including statutory economy-wide climate targets for reducing greenhouse gas emissions, including from Norwegian oil and gas projects on the Continental Shelf, which is a big source of national emissions. These targets, as well as the other provisions of the Act, cover Norway's emissions, but not "export emissions" from oil and gas produced in Norway but consumed elsewhere.

(147) On this basis, it would be strange indeed if the EIA Directive should introduce a completely different basic principle – based on a notion of "export emissions" – and especially if this was done without explicitly mentioning it or regulating the issues that would arise.

(148) In conclusion, the Government holds that the whole international and European system for regulating climate law is an argument against interpreting an obligation to include "export emissions" into Article 3 (1) of Directive 2011/92/EU.

3.4 Recent developments in introducing "scope 3" reporting in EU law

(149) As mentioned in the introduction it is also of some interest to note that the notion of "scope 3" assessments has recently been introduced for the first time in EU law in a related field, namely in the Corporate Sustainability Reporting Directive (CSRD) of 2022 and the Directive on Corporate Sustainability Due Diligence (CSDDD) of 2024.[54]

(150) The reporting requirements and other obligations that have been linked to "scope 3"-emissions in the CSRD and the CSDDD are less far-reaching than that of the EIA system and serve other purposes. It does nevertheless raise issues of a similar kind, since the directives set out requirements for assessments, reporting and planning in relation to environmental matters. The CSRD explicitly refers to "scope 3" emissions in its provision on climate-related reporting and covers the company's entire value-chain. Similarly, the CSDDD explicitly clarifies that the transition plans for climate change mitigation that large companies are required to adopt under the directive, should include targets for "scope 3" emissions, but has a narrower definition of the chain of activities downstream which is relevant when implementing such due-diligence procedures. Whilst previous drafts of the CSDDD referred to the entire value chain, the final version refers to production of goods or provision of services by "upstream" business partners and to distribution, transport or storage of "downstream" business partners. The disposal of products is excluded.

(151) In this way, both directives set out instructions (for reporting and targeting) by explicitly referring to the concept of "scope 3". The choice of framing and wording indicate, however,

[54] CF. Directive - 2022/2464 - EN - CSRD Directive - EUR-Lex and Directive - EU - 2024/1760 - EN - EUR-Lex Neither of them have so far been incorporated into the EEA agreement.

that it was not taken for granted that such emissions would be seen as relevant under the directives without this being clearly expressed. A more general wording, such as for example «direct and indirect effects", as used in the EIA directive, was obviously not clear enough. In order for "scope 3" information to be covered by the CRSD and the CSDDD it was deemed necessary to specify this explicitly – and it was only done after much debate and consultation.

(152) On this basis, the Government holds, firstly, that the introduction of the concept of "scope 3" emissions in the CRSD and CSDDD in 2022 and 2024 demonstrates that this was then a new concept under EU climate law, which was introduced for the first time. Secondly, these directives illustrate that when the concept was introduced, it was in a gradual and careful manner, which clearly falls short of any obligation to do a full impact assessment.

(153) In other words, the CSRD and CSDDD illustrate that to the extent that EU and EEA law will put obligations on companies and national authorities to report on "scope 3" emissions, this should be by way of clear and specific regulations, and not by way of dynamic interpretation of existing legal acts such as the EIA Directive of 2011.

3.5 Other elements of potential relevance and interest

(154) The question of interpretation referred to the Court must obviously be resolved on the basis of the relevant legal sources in EU and EEA law. There are, however, other elements that could be of some interest or inspiration for the Court. In this section we will briefly comment on two of these – namely (i) national case law and (ii) the ECHR.

National case-law

(155) As mentioned in introduction, there are two other recent cases from national courts that are of particular interest – the *Kilkenny Cheese*-case from the Irish Supreme Court in February 2022 and the *Finch*-case from the UK Supreme Court in June 2024.[55]

(156) The 2024 *Finch* judgment from the UK Supreme Court concerned the expansion of an existing onshore well site to add four new wells for the production of crude oil over a 20-year period. The question of interpretation was the same as in the present case – whether the relevant authority needed to assess greenhouse gas emissions that would subsequently follow as a result of the use of the oil produced. With a three to two majority, the Supreme Court answered the question affirmatively.

(157) As mentioned in the introduction, the Government respectfully holds that as a matter of interpreting EU law the legal argument put forward by the minority is the correct one.

(158) One of the main weaknesses of the majority's reasoning is its widespread focus on simple causation, spanning over paras. 65-100. It reasons that regardless of which conception of

[55] Cf. *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, notice Party)* ("the Kilkenny Cheese case"), available here, and *R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents)* (the " Finch case") available here.

causation is applied, the GHG emissions from the end user consumption must be considered as caused by the oil production, and consequently as an "effect" of the project.

(159) In the Government's view, the approach to be taken is not whether there is a causation (either strong or weak) between the project and later effects, but the outer limits of the project as such, which is what the operator of that project may influence and assess.

(160) The majority's interpretation is also based on the wrongful approach that production of oil differs from other projects under the EIA Directive, because of the strong connection between the production and end user emissions, as apparent already in the introduction (paras. 2, 4 and 7), as well as later on in the argument (see for example para. 121). The Government does not agree. First, there is no support in the text, context or purpose of the directive that oil and gas is in a special position compared to other products. Second, it is not possible to draw a line between oil/gas and other products that may have direct environmental effects when used or consumed. Third, there is in fact no direct and corresponding causation between oil and gas and the (net) effects on global emissions, as the majority wrongfully holds in paras. 7 and 72. In this regard, the majority does not seem to have a correct conception of the difference between net and gross emissions from the production of oil and gas and builds its reasoning on the gross emissions – which in turn may be the reason for why it focuses so hard on the causation.

(161) The minority, on the other hand, rightfully held that the Directive should not be given "an artificially wide interpretation", that "has not been stipulated in the text of the EIA Directive, is not in line with its purpose and would distort its intended scheme" (para. 332). The minority then provides a very extensive and meticulous analysis of the text and preparatory works of the Directive (paras. 251-295) and finds no support for the view that all scope 3 or downstream greenhouse gas emissions should be included within the concept of "indirect effects of a project" and brought within the EIA regime. The minority also correctly points at the difficulties and problems that such an interpretation would have for a range of other production processes (see paras. 271, 272 and 202).

(162) The majority's reasoning in the UK Finch case stands in contrast to the other national judgment that is of interest – the (unanimous) judgment by the Irish Supreme Court in the Kilkenny Cheese case in June 2022.

(163) In the Kilkenny Cheese case, the question was whether the indirect environmental impacts of a proposed cheese factory under article 2(1) of the EIA Directive had to include an assessment of the environmental impact of the GHG emissions deriving from the off-site production of milk which would be needed to supply the factory. Consequently, that case also concerned the scope of the "project" – but not with regards the later use and consumption of the products produced by the project, but with regards the *earlier* production of input materials to the project.

(164) The Irish Supreme Court offered two general interpretations of Article 3 (1): First, the obligation to assess indirect effects could be read in an open-ended fashion and that any effects on the environment have to be considered. The second interpretation was that

indirect effects must only be those which the development itself has on the environment. After an extended discussion, the court concluded that the latter interpretation was the correct one, of which the Government agrees. Just like the minority in the Finch case, the Irish Supreme Court held that the open-ended approach would be too remote and impractical, which could not be intended. If such an interpretation were to apply, it would mean that there were "hardly any limits but the sky" (para. 100).

(165) On this basis the Government holds that if the Court should at all look at national case law on the interpretation of the scope of Directive 2011/92/EU, then it should take inspiration from the general approach of the Irish Supreme Court, as well as from the precise and meticulous approach to the legal sources taken by the minority of the UK Supreme Court.

Article 8 of the ECHR in light of the 2024 Klimaseniorinnen judgment

(166) On April 2024 the European Court of Human Rights (ECtHR) held in *Klimaseniorinnen* that Article 8 of the ECHR *inter alia* requires that States undertake measures to reduce their GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. The ECtHR also formulated a number of requirements to consider when assessing whether a State had remained within its margin of appreciation.[56]

(167) With reference to *KlimaSeniorinnen*, the EFTA Court noted in the recent case E-12/23 *Norwegian Air Shuttle ASA* that "combating climate change is an objective of fundamental importance given its adverse effects and the severity of its consequences, including the grave risk of their irreversibility and its impact on fundamental rights."

(168) The Government remains deeply committed to the efforts in reducing emissions and finding solutions to the global problem of climate change. The judgment by the ECtHR in *Klimaseniorinnen* is, however, legally without relevance to the questions raised by the referring court in the case at hand, on the interpretation of the scope of an EIA under art 3 (1) of directive 2011/92/EU. There are a number of reasons for this, which shall be briefly mentioned.

(169) First, the general interpretation of ECHR Article 8, has no direct legal relevance for the detailed interpretation of an EU directive, especially not one dating back to 2011/2014. A new and dynamic interpretation by the ECtHR of Article 8 of the ECHR cannot be used in order to introduce new obligations by way of interpretation in existing EU and EEA legal acts.

(170) Second, the ECtHR emphasized that it is first and foremost for the national authorities to choose which measures to take in order to protect the citizens against the effects of climate change and global warming, see paras. 547, 548 and 545. This tailored approach is intended to be "in line with international commitments undertaken by member states", cf. *KlimaSeniorinnen* para. 546.

[56] Cf. *Verein Klimaseniorinnen v. Schweiz and others v. Switzerland* [GC], no. 53600/20, VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS v. SWITZERLAND

(171) Third, none of the positive obligations construed by the ECtHR in the judgment covers the issue of reporting on "scope 3" emissions from petroleum. And as for the "procedural safeguards" referred to in para. 554 these are clearly already covered by the traditional interpretation and application of Directive 2011/92/EU, as well as other parts of EU (and EEA) regulation and by domestic legislation.

(172) Furthermore, the approach of the ECtHR in *KlimaSeniorinnen* clearly builds on the principles laid down by the (UN) Paris Agreement, under which the responsibility for reporting, assessing and reducing greenhouse emissions are on the state in which the emissions take place, not on the producing states.[57] This is further supported by the EctHR's rejection in its decision *Duarte Agostinho and others against Portugal and 32 others* of any notion of extraterritorial jurisdiction.[58] In para. 207, the ECtHR emphasised that the "major sources of GHG emissions are in fields such as industry, energy, transport, housing, construction and agriculture and arise in the context of basic human activities within a given territory", ie. related to energy demand and imports. Combatting climate change through the reduction of GHG emissions at source is therefore "chiefly a matter of exercise of territorial jurisdiction".[59]

(173) Accordingly, the ECtHR rejected the notion of any extraterritorial jurisdiction as regards the consequences of GHG emissions occurring in another country's jurisdiction, as such a notion would be without any identifiable limits. Again, this illustrates that interpreting Directive 2011/92/EU so as to place an obligation for assessing greenhouse gas emissions on the actors in the producing (exporting) countries, rather than seeing this as a challenge to be met within the countries where consumption, combustion and emissions actually take place, is against the whole structure and logic of climate change litigation, not only at the UN and EU level, but also according to the new interpretation of Article 8 ECHR.

(174) On this basis the Government holds that the positive obligations conferred upon the States following the judgment in *KlimaSeniorinnen,* cannot have any bearing, neither directly nor indirectly, on the interpretation of Directive 2011/92/EU.

3.6 Conclusion – the 1st question

(175) There are different ways in which to formulate a legally precise answer to the 1st question, and it can be done either as a general interpretation on the scope of an EIA under Article 3 (1), or more narrowly just on the scope as regards new oil and gas projects.

(176) The Government would propose an answer that cover both aspects:

[57] Indeed, with the exception of Norway, almost all major oil producing countries are outside of Europe, and outside of the jurisdiction of the ECHR. The biggest exporter is Saudia Arabia, followed by Russia, Canada, United States, Iraq, UAE, Kuwait, and Norway (at place 8), cf. The World's 10 Biggest Oil Exporters (investopedia.com)

[58] C. *Duarte Agostinho and others against Portugal and 32 others*, [GC], no 39371/20, DUARTE AGOSTINHO AND OTHERS v. PORTUGAL AND 32 OTHERS

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

(177) An alternative, that is narrower and more directly in line with the wording of the question posed by the Referring Court, could be:

The scope of the obligation under Article 3 (1), cf. Annex I point 14, to assess all direct and indirect significant effects of a project to extract petroleum and gas covers all relevant consequences and emissions related to the construction, development and operation of the project for which an approval or consent is sought. But it does not cover subsequent emissions from petroleum and gas after it has been sold and used or consumed elsewhere.

3.7 In the alternative – given that emissions from the end product is covered

(178) If, in the alternative, the Court should find that emissions from the oil and gas sold, exported and burnt elsewhere should be part of the EIA obligations on the original producer (developer), when applying for the project, and the national authorities, before granting it – then the next question before the national courts will be how to apply the general requirements for the content of a proper EIA to the specific challenges of assessing possible effects on the climate arising from a concrete new oil and gas project.

(179) As pointed out in the referral, the general requirement for an EIA as regards effects on the climate are specified in art 3 (1), cf. Article 5 (1), cf. Annex IV points 4 and 5 of the Directive.

(180) Under Article 3 (1), an EIA "shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project" on "land, soil, water, air and climate" (litra c). Under Article 5, this must include, inter alia, "a description of the likely significant effects of the project on the environment" (litra b), as well as a description of features that might "avoid, prevent or reduce and, if possible, offset likely significant adverse effects" (litra c) and "reasonable alternatives" (litra d).

(181) Under Annex IV point 4 it is further stated that the EIA should include a description of factors "likely to be significantly affected by the project", including "climate (for example greenhouse gas emissions...)". In Annex IV point 5 litra e it is stated that this should include, inter alia, "the cumulation of effects with other existing and/or approved projects,", and in litra f "the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change". In the last subparagraph of point 5 it is stated that the description of the likely significant effects "should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project" and "take into account the environmental protection objectives established at Union or Member State level which are relevant to the project".

(182) These are the general requirements under the EIA Directive of interest to all new projects that may result in emissions of greenhouse gases and thereby affect the climate.

(183) The Government holds that it is not necessary for the Court to elaborate further on these criteria in order to answer the questions from the referring court. The requirements are already quite specific, and it will be for the national courts to apply them to the case at hand. This should be seen as a review of the facts, not a question of interpretation.

(184) If, however, the Court should venture further into an interpretation on the requirements in Article 5, cf. Annex IV, then it should be aware of the specific challenges when assessing the effects of a new individual oil and gas project on global warming and climate change.

(185) The first question is whether it is correct simply to report and assess the estimated *gross* emissions from the later consumption of the oil and gas produced and sold – or in the alternative, that the correct subject for the EIA must be the *net* possible emissions arising from the project, and the possible net effects on global warming and climate change.

(186) The Government holds that the correct answer clearly must be the latter. As earlier pointed out, the only logical reading of the Directive is that the EIA should be of the effects on the environment of the "project" for which a "development consent" is sought. And that can only be the net effect. If a given project includes both activities that produce greenhouse emissions and activities that reduce them, then the issue of interest must be the net combined (positive or negative) effect of the project as such.

(187) The next question, then, is whether it is possible to determine, as a matter of law, what is the correct way of analysing the net effects of a given new oil and gas project for global emissions and climate change. The Government holds that the answer is no. This is not a legal question, but a factual one, and it is deeply contested, both on an academic and a political level. Few, if any, hold that there is a one-to-one relationship between gross and net emissions from a new project. The market for oil and gas is run by the demand for energy, and it has many special characteristics, one of them being that if Norway reduces exports, then other producing states (mainly the OPEC countries and Russia) will increase theirs. This applies both to oil and gas. Another important element is that Norwegian gas to some extent functions as an alternative to coal, especially on the European market. Gross emission effects are therefore never the same as net emission effects. But the size of the difference is a matter of academic and professional dispute, as earlier explained – between those who argue that new Norwegian projects will have a certain negative effect on global emissions, to those who argue that, on the contrary, the effects of new projects may actually be to reduce overall emissions.[60] There may legitimately be different views on this. But it is not something that can be resolved by way of interpretation of Directive 2011/92/EU.

[60] As illustrated by the recent two main analyses in the Vista Report and the Rystad Report, as explained above in section 2. The recent EIAs conducted by Aker BP and Equinor for the three fields in the case at hand cover both the gross emissions and the net emissions under both alternative models.

4 LEGAL ANALYSIS – THE 2ND AND 3RD QUESTIONS

4.1 Introduction

(188) It is probably not disputed (i) that extensive EIAs were carried out before PDOs for the three disputed projects in the case were adopted, (ii) that these EIAs included assessments of greenhouse gas emissions from the project itself (construction, development and production), and (iii) that the EIAs at the time did not include assessments of emissions from the end use of the products, i.e. consumption of the oil and gas after it has been sold.

(189) Should the lack of such an element in the EIAs be considered incompatible with Article 3(1) of the Directive, the next question for the national courts will be the consequences of such a procedural defect for the validity of the three PDOs at issue. That is the background for the second and third question from the referring court.[61]

(190) However, the way in which these two questions are set out in the order for reference, does not properly reflect the actual guidance the referring court needs in order to resolve that problem.

(191) The second question is framed in a general manner, and concerns whether national courts under Article 3 EEA are obliged to eliminate, to the extent possible under national law, the unlawful consequences of the failure to perform a prior EIA. Although that question, pursuant to consistent CJEU case-law,[62] clearly must be answered in the affirmative, it does not answer the question of whether a procedural defect of the kind in the main proceedings must necessarily lead to the *annulment* of the three PDOs at issue, which is the claim put forward by the applicants in the main proceedings.

(192) The third question, on the other hand, is closer to the actual point of disagreement between the parties. That question concerns whether a national court may "*retroactively dispense*" with the obligation to conduct an EIA "*if it is shown that the failure to perform an EIA has not influenced the outcome of the decision-making process*". The latter part of that question must be read in light of the principle set out in Section 41 of the Norwegian Public Administration Act, under which, in order for an administrative decision to be annulled, there must be a reason to assume that the procedural defect in question has affected the outcome of the decision ("impact requirement").[63] Contrary to what the first part of the third question may indicate, that provision does not provide for any "retroactive dispension" of procedural requirements, but for the administrative decision in question to be declared valid despite of having a procedural defect. This is a general principle in Norwegian administrative law with

[61] See point 6 of the order for reference.
[62] See inter alia C-201/02 *Wells* para. 64 and C-24/19 *A and others* para. 83.
[63] In full, Section 41 of the Public Administraton Act reads: *"If the rules of procedure set out in this Act or regulations made in pursuance thereof have not been observed in dealing with a case concerning an individual decision, the administrative decision shall nevertheless be valid when there is reason to assume that the error cannot have had a decisive effect on the contents of the administrative decision."* It follows from the preparatory works of that provision that it is applicable by analogy on infringements of other procedural rules (such as EIAs).

long traditions, and is based on the basic rationale that procedural errors that have not affected the content of an administrative decision should not lead to annulment.

(193) Consequently, what the referring court essentially wants to know by its second and third question is whether it under EEA law may lawfully apply the general principle in Section 41 of the Public Administration Act when assessing the validity of the contested development consents.

(194) Another way of putting it is whether procedural defects in an EIA, under EEA law must lead to the annulment of a development consent even in those situations where a national court is in a position to take the view (based on a thorough assessment of all relevant factual evidence) that the decision would not have been different without the procedural defect.

(195) In the Government's view, that question must clearly be answered in the negative. It follows from the CJEU case-law in C-72/12 *Altrip* paras. 49-54, C-137/14 *European Commission v. Federal Republic of Germany* paras. 59-61 and C-535/18 *Land Nordrhein-Westfalen* paras. 58-61 that national courts may refuse to annul a development consent with procedural defects not having affected the outcome of it.

4.2 Procedural defects not affecting the outcome of a development consent under the EIA Directive, do not require annulment from national courts

4.2.1 The clarifications in Altrip, Commission v. Germany and Land Nordrhein-Westfalen

(196) The *Altrip* case was a referral from a German court concerning the admissibility of a claim for annulment of a development consent approving the construction of a flood retention scheme in Germany. The basis for the applicant's claim for annulment was that the EIA carried out prior to the development consent was inadequate.[64] The referring court asked, inter alia, whether it was compatible with the EIA Directive to declare such an action inadmissible on the ground that the procedural defect invoked by the applicant had not affected the outcome of the decision.[65]

(197) The CJEU assessed this question under Article 10a of Directive 85/337. That provision, which is mirrored in Article 11 of Directive 2011/92, stipulates that members of the public concerned either having a "sufficient interest" or maintaining the "impairment of a right" must have "access to a review procedure before a court […] to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive".

(198) Referring to the third paragraph of that provision, the CJEU first held that the conditions for deciding whether a right was impaired (which was the alternative chosen in the national provisions at issue) lies within the national procedural autonomy of the member states. However, the CJEU emphasised that this procedural autonomy needed to be exercised in

[64] See para. 16 of the judgment.
[65] Para. 16 and 39.

line with the principles of effectiveness and equivalence, and in light of the objective of the EIA Directive of giving the public concerned wide access to justice.[66]

(199) Referring to the latter objective and previous case-law, the CJEU then held that the public concerned must be able to invoke "any procedural defect in support of an action challenging the legality of decisions covered by that article".[67] However, in paragraph 49, the CJEU qualified that statement:

> *"Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision, and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be comprised if, under the law of the Member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision*"

(200) However, referring to the fact that under the national provision in question it was on the applicant to prove that the contested decision would have been different without the procedural defect invoked, the CJEU found it "excessively difficult" for the applicant to exercise the rights conferred by the Directive. In order to comply with the principle of effectiveness, the court held in para. 53 and 54 that:

> *"…impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.*
>
> *In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."*

(201) Consequently, as long as the burden of proof does not fall on the applicant, and the cited considerations are taken into account, the CJEU clarified that neither the purpose of the EIA directive of giving the public concerned wide access to justice, nor the principle of effectiveness, prohibits national courts from disregarding procedural defects that do not affect the outcome of the decision, in the assessment of the *admissibility* of an action.

[66] See para. 43-46 of the judgment.
[67] Para. 48.

(202) As the case before Borgarting Court of Appeal concerns the substance and not the admissibility of the action for annulment, the question arises whether the same holds true for national courts' assessment of the substance of such an action for annulment.

(203) In light of the objective of Article 11 of the EIA Directive of giving the public concerned wide access to justice, it would – in the Government's view – not make sense if a national court's ability to declare such actions inadmissible was wider than its ability to reject such actions on its merits. The considerations in *Altrip* should therefore logically also apply to a national courts' assessment of the substance of such an action.

(204) That was exactly what the CJEU confirmed in *Commission v. Germany*, rendered two years after the Altrip case.

(205) It is clear by the subject matter of the Commission's application in that case, as well as the contested German provisions, that the German requirement of causal link, just like the Norwegian, related to the substance of the action and not its admissibility.[68] Consequently, it was the German conditions for a substantive annulment of an administrative decision that the Commission held to be contrary to Article 11 of the EIA Directive.

(206) In the assessment of the application from the Commission, the CJEU first repeated its statements in para. 53 of *Altrip* (cited above), where the CJEU set out the extent of which national courts may disregard procedural defects not having affected the outcome of the decision in the assessment of the admissibility of an action for annulment. In the next paragraph, the CJEU held that:

> *"Although it is true that those considerations relate to just one of the conditions for admissibility of legal proceedings, they remain relevant to any condition laid down by the national legislature which has the effect of restricting the review of the courts of the substance of the case".*

(207) The CJEU thus made it clear that national courts may disregard procedural defects not having affected the outcome of the administrative decision both when assessing the admissibility of an action, and when assessing its substance.

(208) As regards the extent of national court's ability to disregard those kinds of procedural defects, it is worth noting that the General Advocate in both *Altrip* and *Commsission v. Germany* had argued that "*in the case of particularly important procedural provisions, the requirement of causal link for the purposes of the outcome of the administrative procedure must be dispensed with entirely*".[69] The CJEU did not follow up on this qualification, and the statements given in the later *Land Nordrhein-Westfalen* indicates that this was a deliberate choice. In para. 60 the court held that national legislation making actions for annulment admissible even when it is based on a procedural defect that has had no impact on the tenor

[68] See para. 1, second bullet point, and para. 8 and 45.
[69] Opinion of Advocate General Cruz Villalón in C-72/12 Altrip, para. 106 and Opinion of Advocate General Wathelet in C-147/14 Commission v. Germany paras. 96-98.

of the decision at issue "*enables an action to be brought also in situations where this is not required under Article 11 of the EIA Directive*."

(209) Drawing the lines together, the CJEU ruled in *Altrip* that a procedural defect not affecting the purport of the contested decision, cannot be regarded as impairing the rights of the party relying on it. It inferred from this that national courts may refuse to admit standing to challenge decisions of that kind. In *Commission v. Germany* the CJEU clarified that this will also apply in the assessment of the merits of such an action for annulment. Together with *Land Nordrhein-Westfalen* it is clear that, as long as the burden of proof does not fall on the applicant, and account is taken of the seriousness of the defect and the rights of the public concerned to have access to information and to be empowered to participate in the decision-making, this applies to all procedural defects within an EIA procedure.

4.2.2 The obligation under Article 3 EEA to provide remedies to unlawful consequences of breaches of EEA law, does not provide anything more of relevance to the questions referred

(210) In clarifying that national courts are not required to annul – or even provide standing to challenge – development consents with procedural defects not affecting the outcome of a development consent, the above judgments are sufficient to answer the second and third question from the referring court. This means that there is nothing left to assess with regards the case-law on the obligation to repair breaches of EU law under Article 4 TEU (Article 3 EEA).

(211) Since the respondents rely heavily on that case-law, the Government will nevertheless give a more detailed explanation of the latter, although, in the Government's view, it should not be necessary.

(212) It follows, first, from a contextual interpretation of *Altrip* and *Commision v. Germany* that its conclusions may not be read with any reservation for what would otherwise follow from Article 4 TEU. A national court cannot be free to hold procedural defects completely outside the scope of judicial review (Altrip), while still being obliged to provide remedies for those defects under Article 4 TEU. Such an understanding of the rulings in *Altrip* and *Commission v. Germany* would render its conclusions meaningless. The fact that *Commission v. Germany* was a direct-action case, under which the Commission (obviously) could include any provision of EU law needed to assess the German provision on causal-link, further supports that conclusion.[70]

(213) As for the case-law under TEU Article 4, the CJEU has, to the Government's knowledge, never held that the obligation to provide remedies to breaches of the EIA Directive (or the SEA

[70] However, the same goes for the preliminary ruling in *Altrip*, as the CJEU may (and must) apply the EU law relevant to resolve the question it has before it, regardless of which provisions of EU law the referring court have referred to in the order for reference.

Directive) applies to breaches that has not affected the outcome of the decision.[71] It follows from a literal interpretation of the standard phrase from the CJEU on this particular issue (elimination of "*the unlawful consequences of a breach of EU law*") that not every procedural defect leads to an obligation to provide remedies, only those having *unlawful consequences*. When the CJEU in *Altrip* ruled that procedural defects not having affected the outcome of a decision, does not impair the rights of a party pleading to it, it ruled, in effect, that such defects are to be categorised in the group of breaches of EU law that do not have unlawful consequences (and consequently, do not need to be remedied by national courts).

(214) For the sake of completeness, the Governments adds that this is also in line with the Commission's interpretation of *Altrip* in Commission's "Notice on access to justice in environmental matters" (2017)[72], where the Commission provides an overview of the obligation to provide remedies to unlawful consequences of breaches of the EIA and SEA Directive. In para. 158, the Commission refers to para. 51 of *Altrip* and holds that *"effective remedies such as revocation need not arise if a contested decision would not have been different without the procedural defect invoked"*.

(215) Consequently, procedural defects not affecting the outcome of a development consent under the EIA Directive, do not require remedies under Article 3 EEA. That is why, in the Government's view, the conclusions in *Altrip* and *Commission v. Germany* are sufficient to conclude that such procedural defects do not require annulment of a development consent by national courts, without any need for a subsequent analysis under Article 3 EEA.

4.3 Conclusion on the second and third question

(216) Based on the above, the Government submits that the second and third question from the referring court should be answered as follows:

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

4.4 Other procedural defects: national courts must provide remedies on the basis of national law, but not necessarily annul the contested development consent

(217) It follows from the above that the question of which reparation obligations that follows from Article 3 EEA, will only arise if the referring court concludes that (i) the EIAs adopted should have included an assessment of emissions from the end use of the products, i.e.

[71] It has not been held, or been discussed at all, in inter alia C-201/02 *Wells*, C-348/15 *Stadt Wiener Neustadt*, C-411/17 *Bond Beter Leefmilieu Vlaanderen ASBL*, C-117/17 *Commune di Castebellini*, C-261/18 *Commission v. Irland,* joined cases C-196/16 and C-197& *Commune di Corridonia* (EIA Directive) and C-24/19 [GC], C-379/15 Association Nature France Environment, C-41/11 [GC] Inter-Environmental Wallone ASBL, C-463/11 (SEA Directive)

[72] Cf. EUR-Lex - 52017XC0818(02) - EN - EUR-Lex .

consumption of the oil and gas after it has been sold and (ii) that the three contested PDOs would have had a different content if that element had been a part of the EIAs conducted.

(218) Since the referring court does not ask for guidance for that situation, the Court may – and perhaps should – refrain from elaborating on the state of law for those kinds of procedural defects under Article 3 EEA.

(219) If the Court nevertheless want to elaborate on the EEA requirements in such a situation, the Government submits that Article 3 EEA does not necessarily require an annulment of an administrative decision in such a situation. In this respect, the Court should know that under general principles of Norwegian administrative law, procedural defects having affected the outcome of an administrative decision will as a main rule lead to it being annulled. However, the decision may be upheld in exceptional cases. This will typically be out of consideration of the private party concerned, depending on an overall assessment of inter alia the character of the administrative decision, the time lapsed, arrangements made by the person concerned and other considerations relevant in the specific case. In the Government's view, these principles are in line with the requirements under Article 3 EEA.

(220) It follows from *Wells* that every organ of the state, including national courts, pursuant to Article 4 TEU (3 EEA) must nullify the unlawful consequences of breaches of EEA law.[73] The CJEU held that the competent authorities must take, "*within the sphere of its competence, all the general or particular measures necessary to ensure that projects […] are subject to an impact assessment*", which may include, "*subject to the limits laid down by the principle of procedural autonomy […] the revocation or suspension of a consent already granted in order to carry out an assessment of the environmental effects of the project*".[74]

(221) Consequently, it appears that the revocation or suspension of a consent is seen by the CJEU as examples of means of eliminating the unlawful consequences of a breach of EU law.[75] As long as the unlawful consequences of the breach of EEA law are remedied, it is up to each EEA state to decide which specific remedy that must be applied in a particular case, and the annulment of an administrative decision is not necessarily the only possible remedy. As further explained in section 4.4 below, a breach may also be remedied, in the Government's view, by the making of a new EIA followed by a new consideration by the competent authorities outside the context of judicial review.

(222) Even in cases where annulment is the only available remedy before a national court, the obligation to apply that remedy is not an absolute one. In addition to the limits laid down by national law, the principles of legal certainty and the protection of legitimate expectations, forming part of the general principles of national law, provide for an outer limit of the obligation to provide remedies under Article 3 EEA.

[73] C-201/02 Wells para. 64.
[74] C-201/02 Wells paras. 65. See also E-3/15 para. 83.
[75] See, in this regard, also paras. 67 and 69 of *Wells*, and C-24/19 para. 83 and C-261/18 para. 75 where the suspension, revocation and annulment is characterized as examples of measures to repair the unlawful consequences of the breach of EEA law.

(223) In the context of EIA Directive, this is evident from inter alia C-261/18 *Commission v. Ireland*, where Ireland held that these principles precluded the authorities from withdrawing the consents unlawfully granted to the operator in that case. The CJEU rejected that argument in that specific case, but as a matter of principle, it still held that (para. 92) "*the withdrawal of an unlawful measure must occur within a reasonable time and regard must be had to how far the person concerned might have been led to rely on the lawfulness of the measure*".

(224) Consequently, it appears that the CJEU recognises that a decision may be upheld due to an overall assessment of inter alia the time lapsed and the arrangements made by the person concerned having relied on the lawfulness of the measure. This will be for the national court to assess on a case by case-basis, based on all the relevant facts of the case.

(225) Based on the above, the Government submits that in situations where a procedural defect in an EIA has impacted the outcome of the development consent, national authorities must take all measures necessary, within their competence, to repair that breach of EEA law. This may include the annulment of a decision by a national court, but is not restricted to it. In cases where annulment is the only available remedy before a national court, an annulment is not required if this would infringe the principles of legal certainty or legitimate expectations, which may be the case dependent on the time lapsed and arrangements made by the operator relying on the lawfulness of the decision.

(226) Should the EFTA Court find that the referring court seeks guidance on this particular issue, the Court should therefore answer that it is permissible under EEA law to refuse to annul a development consent with a procedural defect having affected its outcome, based on the principles of legal certainty and the protection of legitimate expectations.

4.5 In the alternative: the alleged procedural defect may be repaired by a subsequent assessment

(227) The question of whether the alleged procedural defects in the EIAs may be repaired by conducting new assessments, followed by new decisions from the competent authorities, fall outside the scope of the order for reference. This is first and foremost a question that arises for the competent authorities in the aftermath of a possible judgment in favour of the respondents.

(228) However, this question may be relevant for the referring court in resolving the dispute in the main proceedings. As described in section 2 above, there has been a parallel procedure to the present proceedings where the (alleged) lacking elements in the EIAs have been assessed, with a subsequent public consultation and a new decision by the authorities to uphold the former decisions. These decisions have been brought in to the main proceedings, which means that the referring court may need to decide whether these new decisions are valid because the alleged procedural defect in the EIA nevertheless have been repaired.

(229) In the Government's view, that question must be answered in the affirmative, not only under Norwegian law but also under EEA law.

(230) As held earlier, the suspension, revocation or annulment of a development consent by national courts is seen by the CJEU as examples of means of eliminating the unlawful consequences of a breach of EEA law. This implies that a deficient EIA may not only be remedied by an annulment of the development consent by national courts, but also by a subsequent assessment of the missing points by the administrative authorities, as long as the proper procedure is followed.

(231) This is further supported by the CJEU statements that EU law does not preclude national rules which, in certain cases, permit a "regularisation" of an omission to carry out a prior EIA, by carrying out such an assessment *a posteriori*.[76] The CJEU has held that this option is open also after the project concerned has been constructed and has entered into operation, provided that (i) national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and (ii) an assessment carried out for regularisation purposes is not conducted solely in respect of the project's future environmental impact, but must also take into account its environmental impact from the time of its completion.[77]

(232) These conditions must be read in light the cases which gave rise to them, which concerned national provisions allowing a project to be regularised by the issuing of substitute consents, without requiring a later assessment and even where no exceptional circumstances were proved.[78] Such national provisions differ fundamentally from the circumstances in our case, where it was decided to uphold earlier development consents after the operators had made a new assessment of the combustion effects abroad, which was sent to a public consultation where the public concerned provided their viewpoints.

(233) In the Government's view, such a procedure does not allow for any circumvention of EEA law of the kind in the judgments referred to above and must therefore be considered a permissible way of regularising or repairing the breach of EEA law.

(234) Similarly, if such a procedure is followed if the referring court should decide to annul the contested development consents, that would also be a permissible way of repairing or regularising the breach of EEA law.

(235) Should the EFTA Court find that the referring court seeks guidance on this particular issue, the Court should therefore answer that in situations where a development consent is granted without a prior EIA having all the elements required under Article 3 (1) of the Directive, EEA law does not preclude that breach of EEA law to be repaired by the supplying of the missing assessments a posteriori, when these assessments are followed by a public hearing and a new assessment made by the competent authorities of whether the development consent should be upheld.

[76] C-261/18 *Commission v Ireland* para. 76.
[77] C-196-16 and C-197-16 *Comune di Corridonia* para. 43.
[78] C-215/06 *Commission v. Ireland* (a regularisation permission with the same effects as a development consent) and C-348/15 *Stadt Wiener Neustadt* (provisions allowing for a project to be deemed to have been subject to such an assessment).

5 ANSWER TO THE REFERRING COURT'S QUESTION

(236) Based on the foregoing, the Government submits that the question posed by the Referring Court should be answered as follows:

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

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

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