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**To the President and members of the EFTA Court**

**Observations of the Government of the Netherlands**

submitted in accordance with Article 20 of the Statute of the EFTA Court, in the case of

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

The Government of the Netherlands, represented by Mielle Bulterman, Joost Hoogveld and Emma Besselink, head and staff members, respectively, of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, has the honour to bring the following observations to the Court's attention in this case.

## I. Introduction

1. By decision of 19 August 2024 the *Borgarting Lagmannsrett* (Borgarting Court of Appeal, hereinafter: the referring court) requested an advisory opinion from the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.
2. This request contains three questions concerning the interpretation of Article 3(1) of Directive 2011/92/EU regarding environmental impact assessments<sup>1</sup> (hereinafter: EIA Directive), as amended by Directive 2014/52/EU,<sup>2</sup> and Article 3 of the EEA Agreement.
3. The questions were raised in proceedings between the Norwegian State, on the one hand, and Greenpeace Nordic and Nature and Youth Norway, on the other, concerning the validity of decisions by the Norwegian Ministry of Energy to approve plans for development and operations for three petroleum projects in the North Sea.
4. Two of the three petroleum projects were made subject to an environmental impact assessment (EIA) pursuant to the domestic regulations implementing the EIA Directive. These EIAs did not assess the impact on the climate of greenhouse gas emissions (hereinafter: GHG emissions) arising from end user consumption of the extracted petroleum.
5. The parties disagree on whether these GHG emissions are environmental effects of the project, within the meaning of Article 3(1) of the EIA Directive (first question). Furthermore, they disagree on the consequences of a potential breach of the EIA Directive (second and third questions).

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<sup>1</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. The EIA Directive was incorporated into the EEA Agreement by Joint Committee Decision No 230/2012 of 7 December 2012 (OJ 2013 L 81, p. 32, and EEA Supplement No 18, p. 38).

<sup>2</sup> 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. This Directive was incorporated into the EEA Agreement by Joint Committee Decision No 117/2015 of 30 April 2015 (OJ L 211, 4.8.2016, p. 76).

6. The Government of the Netherlands is submitting observations in this case because it takes the view that the GHG emissions that will be released from the extracted petroleum are not environmental effects of a petroleum project within the meaning of the EIA Directive. In regard to the consequences of a potential breach of the EIA Directive, the Government of the Netherlands stresses that the principle of legal certainty must be respected.

## II. Position of the Government of the Netherlands

### The first question

7. By its first question, the referring court has asked whether Article 3(1) of the EIA Directive must be interpreted in such a way that, where a project is listed in Annex I, point 14 of the EIA Directive, the GHG emissions that will be released from the extracted petroleum and natural gas are environmental effects of the project.
8. The Government of the Netherlands takes the view that this question must be answered in the negative. It submits that the environmental effects of a project concern only the effects which arise from the construction and operational phases of the project, and not the effects of further downstream products of the project. This is explained below.
9. Article 3(1) of the EIA Directive requires the EIA to identify, describe and assess “*the direct and indirect significant effects of a project*” (emphasis added). This provision clearly limits the envisaged effects to those “*of a project*”. Therefore, only the effects that can be attributed to a project must be taken into account.
10. The concept of “*project*” is defined in Article 1(2)(a) of the EIA Directive as “*the execution of construction works or of other installations or schemes*” or “*other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*”. From this definition, the Government of the Netherlands infers that a project concerns construction works or installations and the operation of that construction or installation.

11. This is supported by Article 5 (1) of the EIA Directive, read in conjunction with Annex IV, point 1 of the EIA Directive, which concerns the description of a project. The description of the project must include:

*“(a) a description of the location of the project;*

*(b) a description of the physical characteristics of the whole project, including, where relevant, requisite demolition works, and the land-use requirements during the construction and operational phases;*

*(c) a description of the main characteristics of the operational phase of the project (in particular any production process), for instance, energy demand and energy used, nature and quantity of the materials and natural resources (including water, land, soil and biodiversity) used;*

*(d) an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation) and quantities and types of waste produced during the construction and operation phases. ”*

(emphasis added)

12. In addition, the description of the project “*should explain the extent, to which significant adverse effects on the environment are avoided, prevented, reduced or offset, and should cover both the construction and operational phases*” (Annex IV, point 7 of the EIA Directive).
13. In the view of the Government of the Netherlands, these provisions indicate that the scope of the EIA is limited to the construction and operational phases of the project. If it was the intention of the Union legislature to require that other activities, too, such as the downstream use of products, be described, this would have been clearly stipulated in the EIA Directive (see also below point 21 et seq.).
14. With regard to the effects of the operational phase, the Court of Justice of the European Union (hereinafter: CJEU) has ruled that national authorities must take into account not only the direct effects of the planned works, but also the environmental impact liable to result from the “*use and*

*exploitation of the end product of those works*” (CJEU judgment of 17 June 2010, *Inter-Environnement Wallonie*, C-105/09 and C-110/09, EU:C:2010:355, paragraph 50). From the different language versions of this ruling, it is clear that the “*end product*” means the constructed works or installations (Dutch: “*met deze werkzaamheden aangelegde installaties*”, French: “*ouvrages issus de ces travaux*”, German: “*aus diesen Arbeiten hervorgegangenen Anlagen*”).

15. This means, for example, that when a road is built, the environmental effects also concern the use of this road by vehicles. When an airport is built, the effects resulting from the exploitation of the airport must also be taken into account.
16. However, it does not follow from the aforementioned case law of the CJEU that an EIA should also include effects resulting from further downstream products of a project. After all, these effects are the result of other activities, beyond the scope of the “*use and exploitation*” of the constructed works or installations.
17. A petroleum project as listed in annex I, point 14 of the EIA Directive is a project that concerns the “*extraction of petroleum*” where the amount extracted exceeds 500 tonnes/day. The Court of Justice has clarified that such a project does not include other activities, such as exploratory drillings (see CJEU judgment of 11 February 2015, *Marktgemeinde Straßwalchen*, C-531/13, EU:C:2015:79, paragraph 23). The effects of the “*use and exploitation of the end product*” of this project therefore concerns the construction works or installations needed for the extraction of petroleum. This can include for example the operation of a drilling platform (emissions, noise, vibrations, et cetera), residual waste and transport to and from the platform by sea or helicopter.
18. In the view of the Government of the Netherlands, the GHG emissions that will be released from the extracted petroleum cannot be attributed to the construction and operation of a petroleum project.
19. First, this interpretation raises the question why a petroleum project as listed in annex I, point 14 of the EIA Directive is limited to the extraction of petroleum where the amount extracted “*exceeds 500 tonnes/day*”. If all the emissions released from the extracted petroleum should be attributed to the petroleum project, this threshold would have been much lower. Combustion of just 100 tonnes of petroleum per day could lead to substantial GHG emissions, let alone 500

tonnes/day. In the view of the Government of the Netherlands, this threshold also indicates that for the purpose of an EIA the environmental effects are limited to the construction and operation of the extraction installations. Only if the volume of petroleum extracted meets a certain threshold, the effects of the extraction itself are such that it always must be made subject to an EIA within the meaning of article 4(1) of the EIA Directive.

20. Second, the Government of the Netherlands takes the view that these kind of “*downstream emissions*” are not within the scope of the operation of the project, not even in a way that is indirect or secondary. More specifically, the operation of a petroleum project does not determine:
- whether emissions will be released. The petroleum project only extracts and supplies (crude) petroleum, which is then further processed or used by other parties. GHG emissions could be avoided by methods such as “*carbon capture and storage*” (CCS), whereby GHG are captured and stored underground. Such a project is also subject to an EIA (Annex I, point 23 of the EIA Directive). Another method is the idea of reusing GHGs in new chemical, industrial or biological applications (see Annex I, point 6). These types of measures would be highly relevant for the purposes of an EIA (see Articles 5(1)(c) and 8a(1)(b) of the EIA Directive), were it not that they are beyond the scope of the petroleum project.
  - the volume of emissions released. This depends on the type of product that is produced with the (crude) petroleum. This could be jet fuel, diesel, gasoline, asphalt, plastic, et cetera. For example, the combustion of fuel in automobiles produces different amounts of GHGs than the use of petroleum for the fabrication of plastics. The emissions also depend on the measures taken by the producers of fuels to avoid, prevent and reduce GHG emissions. A petroleum extraction project does not determine whether and how this is done.
  - where emissions are released. This means, for instance, that it is not possible to assess the extent to which the emissions contribute to national or local GHG reduction targets (see also point 26 below).
21. As the EIA Directive stands, downstream GHG emissions are not covered by the scope of the Directive. If the EU legislature had intended to include those emissions, it should have been clearly stipulated in the EIA Directive, as it would have been a major change in policy.

22. This change would have resulted in project developers having to identify, describe and assess all the downstream environmental effects of their products, which would have placed a substantial administrative burden on them. In this regard, the Government of the Netherlands sees no distinction of principle between downstream GHG emissions and other downstream environmental effects, such as PM10 emissions or nitrogen emissions. Such downstream environmental effects are difficult or even impossible to identify, describe and assess in a meaningful way. Developers cannot adhere to these obligations, without incurring substantial costs and delays in the development of projects. If this is what the EU legislature intended to introduce in the EIA Directive, it would have been made explicit.
23. By contrast, the Union legislature has explicitly included downstream emissions (referred to as “*scope 3 emissions*”<sup>3</sup>) in other Union instruments, such as Directive 2013/34<sup>4</sup> (the “CSRD” Directive, see Article 29b) and Regulation 2016/1011<sup>5</sup> (see Annex III (1)(e)(iii)). If this had also been intended for the EIA Directive, there would have been a clear opportunity and frame of reference to do so, as the concept of “*scope 3 emissions*” has existed for more than twenty years.<sup>6</sup>
24. There are also no indications that this was intended by the 2014 amendment of the EIA Directive, which further integrated climate change assessment into the EIA Directive. In its Impact Assessment<sup>7</sup> accompanying the proposal for the 2014 amendment, the European Commission (hereinafter: Commission) states:

*“As part of the climate assessment, depending on the character of the project, in some cases not only direct greenhouse gas emissions (e.g. from on-site combustion of fossil fuels) would*

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<sup>3</sup> An explanation of scope 3 emissions can be found on the website of the GHG Protocol: <https://ghgprotocol.org/sites/default/files/2022-12/FAQ.pdf>.

<sup>4</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29/06/2013, p. 19–76).

<sup>5</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29/06/2016, p. 1–65).

<sup>6</sup> See the GHG Protocol: <https://ghgprotocol.org/about-us>.

<sup>7</sup> SWD(2012)355.

*have to be assessed, but also indirect impacts of the projects on climate change. For example, for transport infrastructure this could include increased or avoided carbon emissions associated with energy use for the operation of the project, as well as costs of pollutions and nuisances and possible benefits for the society at large; for a commercial development this could include carbon emissions due consumer trips. Member States have legally binding greenhouse gas reduction targets and many Member States have also defined greenhouse gas reduction targets at the local level (main cities, regions, etc.), so the EIA could assess to what extent projects contribute to the achievement of these targets and could identify relevant mitigation and/or offsetting measures that would need to be implemented. It could also help identify possible measures to better exploit some opportunities offered by the natural environment e.g. use of a locally abundant source of renewable energy. Such information is especially important for the projects that will not be covered by the EU Emissions Trading Scheme (ETS).”*

25. All the elements mentioned in the above-mentioned clarification relate to the construction or operational phases of a project (directly or indirectly). There is no indication in these documents that emissions resulting from further downstream products of the project should be included in the EIA.
26. The reference to GHG reduction targets does not mean, in the view of the Government of the Netherlands, that downstream GHG emissions can be attributed to a project. There is no indication that GHG reduction targets, resulting from the Paris Agreement on climate change or otherwise, should include all GHG emissions that are released from petroleum that is produced in a certain country. This would inevitably mean that countries that produce petroleum or gas would have very high reduction targets, compared to countries where emissions take place. That is not in accordance with the scheme of GHG reduction targets as agreed at international or EU level.
27. The view outlined above is echoed by the guidance documents that have been issued by the Commission. In its 2013 “*Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment*”, the Commission describes the GHG emissions to be considered for an EIA as follows (page 29):



- *direct GHG emissions caused by the construction, operation, and possible decommissioning of the proposed project, including from land use, land-use change and forestry,*
- *indirect GHG emissions due to increased demand for energy;*
- *indirect GHG emissions caused by any supporting activities or infrastructure which is directly linked to the implementation of the proposed project (e.g. transport, waste management).*

28. This guidance was largely maintained after the 2014 amendment of the EIA Directive. In the document entitled “*Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU)*” from 2017, the Commission recommends as follows (page 39):

*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.*

29. As the Government of the Netherlands has explained, the reference to GHG reduction targets does not mean that downstream GHG emissions can be attributed to a project (see point 26 above). There is nothing to suggest that the effects of downstream GHG emissions were intended by the EU legislature.
30. Lastly, the Government of the Netherlands considers that the effects of GHG emissions of downstream products will, in large part, be taken into account by other projects, such as oil refinement facilities (Annex I, point 1), chemical installations (Annex I, point 6) or infrastructural projects (Annex I, point 7). For those projects, the emissions are actually part of the construction and operational phases of the project and must be part of the EIA. Thus, the position of the Government of the Netherlands does not mean that these effects will be overlooked or missed.
31. Considering all of the above, the Government of the Netherlands concludes that Article 3(1) of the EIA Directive must be interpreted in such a way that, where a project is listed in Annex I, point 14 of the EIA Directive, the GHG emissions that will be released from the extracted petroleum and natural gas are not environmental effects of the project.

#### The second question

32. The second question needs to be answered only if the first question is answered in the affirmative. As the Government of the Netherlands has answered the first question in the negative, the following observations express an alternative view, should the EFTA disagree with the position taken by the Government of the Netherlands.
33. In its second question, the referring court has asked whether a national court is 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 the GHG emissions that will be released from the extracted petroleum and natural gas.

34. In response to this question, the Government of the Netherlands submits that a distinction must be made between situations where the development consent granted has become final, and situations where the development consent granted is not final.
35. For the latter situation, reference is made to the *Nevele* judgment of the CJEU (judgment of 25 June 2020, C-24/19, EU:C:2020:503, and the case law cited), in which the CJEU ruled that the competent national authorities, including national courts hearing an action against an instrument of national law adopted in breach of EU law, are under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment. That may consist, for example, in adopting measures to suspend or annul that plan or programme, or in revoking or suspending consent already granted, in order to carry out such an assessment (see paragraph 83 of the *Nevele* judgment).
36. For situations where the development consent granted has become final, the Government of the Netherlands stresses that the principle of legal certainty must be taken into account. According to the settled '*Kühne & Heitz*'- case law of the CJEU (judgment of 13 January 2004, C-453/00, EU:C:2004:17), the finality of an administrative decision, which is acquired upon expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies, contributes to legal certainty, and it follows that EU law does not require that an administrative body be, in principle, under an obligation to reopen an administrative decision which has become final (*Kühne & Heitz*, paragraph 24).
37. Nonetheless, the CJEU has held that, under the principle of loyal cooperation, an administrative body has an obligation to review a decision if the following four cumulative conditions apply:
- (i) under national law, it has the power to reopen that decision;
  - (ii) the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
  - (iii) that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of EU law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 267 TFEU and
  - (iv) the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.
- (see in this regard the *Kühne & Heitz* judgment, paragraph 28).

38. For the sake of completeness, the Government of the Netherlands submits that under Union law particular circumstances may require a national administrative body to review an administrative decision that has become final, in particular to take account of the interpretation of a relevant provision of EU law which the CJEU has given subsequently. These circumstances include a serious breach of fundamental rights, such as the right of free movement and the right to property (see CJEU judgments of 4 October 2012, *Byankov*, C-249/11, EU:C:2012:608, paras. 76-82 and of 10 March 2022, *Grossmania*, C-177/20, EU:C:2022:175, paras. 54-62).
39. It is for the referring judge to determine whether the development consent granted has become final or not, and whether the above-mentioned conditions have been met.
40. The Government of the Netherlands concludes as follows. There is no requirement under Article 3 EEA to eliminate the unlawful consequences of a development consent granted without a prior EIA of the GHG emissions that will be released from the extracted petroleum and natural gas, if that decision has become final, and there are no particular reasons requiring a review of the decision.

#### The third question

41. The third question is another subsidiary question and concerns the issue of whether a national court can 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. Again, the following observations express an alternative view, should the EFTA Court disagree with the position taken by the Government of the Netherlands.
42. The Government of the Netherlands would first submit that this question is only relevant in a situation in which the decision has not become final or if there are reasons requiring a national administrative body to review a final decision (see the answer to the second question).
43. In that situation, the Government of the Netherlands takes the following view. The omitted effects would still in some way have to be assessed in order to reach the conclusion whether the outcome of the decision-making process would have been different. However, national

authorities are not obliged to take an entirely new EIA or decision. According to the case law of the Court of Justice, member states must take “*all the necessary measures, within the sphere of their competence, to remedy the failure*” (see the Nevele judgment, point 83). EU law does not prescribe how this result should be reached. In the view of the Government of the Netherlands it is possible to restore the decision, as long as the application and effectiveness of the EIA Directive are guaranteed. For example, the national court could order the national authority to assess the omitted effects and supplement the EIA. The outcome of that process may be that the decision to grant development consent is upheld. This can be reviewed by the national court.

### III. Conclusion

44. For the reasons set out above, the Government of the Netherlands proposes the following answers to the questions of the referring court:

1. *Article 3(1) of the EIA Directive must be interpreted as meaning that, where a project is listed in Annex I, point 14 of the EIA Directive, the GHG emissions that will be released from the extracted petroleum and natural gas are not environmental effects of the project.*
2. *A national court is not required under Article 3 EEA to eliminate the unlawful consequences of a development consent granted without a prior EIA of the GHG emissions that will be released from the extracted petroleum and natural gas, if that decision has become final, and there are no particular reasons requiring a review of the decision.*
3. *If it is shown by the competent authority, after an assessment of omitted effects, that the failure has not influenced the outcome of the decision-making process, national authorities are not obliged to take an entirely new EIA or decision, as long as the application and effectiveness of the EIA Directive are guaranteed.*

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The Hague, 5 November 2024