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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
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IN CASE E-18/24

Norway

v

Greenpeace Nordic, Nature and Youth Norway

in which Borgarting Court of Appeal (*Borgarting lagmannsrett*) requests an Advisory Opinion of the EFTA Court regarding the interpretation of Article 3(1) of Directive 2011/92/EU and Article 3 EEA.

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1 INTRODUCTION AND THE FACTS OF THE CASE

1. This case concerns interpretation of EEA law in a dispute before Norwegian courts on the validity of decisions taken by the Norwegian Ministry of Energy (**“the Ministry”**) to approve plans for development and operations (**“PDO”**) for three petroleum projects in the North Sea: the oil field “Breidablikk”, which was approved by decision 29 June 2021; the oil field “Tyrving”, which was approved by decision of 5 June 2023 and three decisions 28 June 2023 regarding the petroleum and natural gas project “Yggdrasil” (**“the Projects at Issue”**).¹
2. Given the approval of the PDOs, the Projects at Issue are in the third of three main faces of petroleum activities in Norway.² They are estimated to contain recoverable reserves in the amount of, respectively, 30, 4.1 and 140 million standard cubic metres of oil, with estimated gross emissions respectively of 87 million, 11.3 million and 365 million tonnes of CO₂.³
3. The projects “Tyrving” and “Yggdrasil” were made subject to environmental impact assessments pursuant to the Norwegian rules implementing 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*. Breidablikk, on the other hand, was exempted pursuant to Section 22 b of Regulation No 635 of June 1997 on Petroleum (**“the Petroleum Regulation”**).⁴
4. On 29 June 2023, Greenpeace Nordic *et al* instituted legal proceedings in Oslo District Court against the Norwegian Government. Following the judgment by Oslo District Court of 18 January 2024, in which the PDOs for the Projects at Issue were found to be invalid, the Ministry appealed that judgment to Borgarting Court of Appeals (**“the Referring Court”**), which submitted a request for an advisory opinion to the Court (**“the Request”**).
5. On 28 August 2024, the Ministry gave two decisions whereby its approvals relating to Tyrving and Yggdrasil would not be reversed. On 30 August 2024 Greenpeace Nordic *et al* confirmed that also the validity of the two decisions of 28 August 2024 will be challenged in the case.

¹ See the request for an advisory opinion, page 2.

² *Ibid.*

³ *Ibid.*

⁴ For the sake of good order, ESA notes that at page 3 of the request for an advisory opinion, the national court has referred to Section 22c of the Petroleum Regulation instead of Section 22b. ESA assumes that this is a clerical error.

6. In the following, the EFTA Surveillance Authority (“ESA”) will set out its observations on the questions from the Referring Court.

2 EEA LAW

7. 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 environment⁵ was incorporated into the EEA Agreement by way of a Joint Committee Decision on 7 December 2012.⁶ It was amended by 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.⁷ That amending directive was incorporated into the EEA Agreement by way of a Joint Committee Decision of 30 April 2015.⁸ Directive 2011/92/EU as amended by Directive 2014/52/EU is referred to as “**the Directive**” or “**the EIA Directive**”. Directive 2014/52/EU is referred to as “**the 2014 Directive**”.
8. Recital 2 of the Directive reads:
- “Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.” (emphasis added)*
9. Recital 7 of the Directive reads:
- “Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects*

⁵ OJ L 26, 28.1.2012, page 1.

⁶ Incorporated in Annex XX (Environment) to the EEA Agreement by Decision of the EEA Joint Committee No 230/2012 of 7 December 2012, OJ L 81, 21.3.2013, page 32. Compliance date in the EEA was 8 December 2012.

⁷ OJ L 124, 25.4.2014, page 1.

⁸ Incorporated in Annex XX (Environment) to the EEA Agreement by Decision of the EEA Joint Committee No 117/2015 of 30 April 2015, OJ L 211, 4.8.2016, page 76. Compliance date in the EEA was 16 May 2017.

has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.” (emphasis added)

10. Recital 16 of the Directive reads:

“Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.”

11. Recital 19 of the Directive reads:

“Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.”

12. Article 1 as amended reads in the relevant part:

“Article 1

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

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

(a) ‘project’ means:

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

(b) ‘developer’ means the applicant for authorisation for a private project or the public authority which initiates a project;

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

(...)

(g) 'environmental impact assessment' means a process consisting of:

(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);

(ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;

(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and

(v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a." (emphasis added)

13. Article 2(1) of the Directive as amended reads:

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

14. Article 3 of the Directive as amended reads:

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

(a) population and human health;

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

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

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

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

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

15. Article 4 reads in relevant part:

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

16. Article 5 as amended reads in relevant part:

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

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

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

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

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

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

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

17. Annex I point 14 reads:

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

18. Annex IV of the Directive as amended is entitled “*Information referred to in Article 5(1) (Information for the Environmental Impact Assessment Report)*”. Point 4 of Annex IV reads:

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

19. Point 5 of Annex IV of the Directive as amended reads in relevant part:

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

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

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

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

3 NATIONAL LAW

20. Section 4-2 of Act No 72 of 29 November 1996 on Petroleum reads:

“If a licensee decides to develop a petroleum deposit, the licensee shall submit to the Ministry for approval a plan for development and operation of the petroleum deposit. The plan shall contain an account of economic aspects, resource aspects, technical, safety related, commercial and environmental aspects, as well as information as to how a facility may be decommissioned and disposed of when the petroleum activities have ceased. (...)”

21. **The Petroleum Regulation** and Regulation No 854 of 21 June 2017 on environmental assessments implements the Requirements of the Directive.⁹

22. Section 22a, first paragraph, subparagraph b, of the Petroleum Regulation reads as follows:

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

(...) b. describe the environment which may be significantly affected, consider and make a balanced judgment with regard to the environmental impact of the development, including: - describe emissions to sea, air and soil, (...)”

Section 22b, entitled, “*Exemption from the requirement for impact assessment*”, reads as follows:

“The Ministry may, upon application from the licensee, grant an exemption from the requirement for an impact assessment if the development will not lead to the extraction of oil and natural gas for commercial purposes where the amount extracted exceeds 4,000 barrels per day for oil and 500,000 m³ of natural gas per day for gas, and it otherwise does not is assumed to have significant nutritional or environmental effects.

⁹ See Request, page 3-4.

If the development cannot be assumed to have significant cross-border environmental effects, the requirement for an impact assessment in exceptional cases may be waived in whole or in part, even if the development exceeds the threshold values in the first paragraph. Before an exception is granted, the ministry must notify the EFTA Surveillance Authority of the reasons for the exception.”¹⁰

4 THE QUESTIONS REFERRED

23. The following questions have been asked by the Referring Court:

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

¹⁰ Translation by ESA. In Norwegian: “§ 22b. Fritak fra kravet om konsekvensutredning
Departementet kan etter søknad fra rettighetshaver gi fritak fra kravet om konsekvensutredning
dersom utbyggingen ikke vil medføre utvinning av olje og naturgass i kommersiell hensikt der
utvunnet mengde overstiger 4.000 fat per dag for olje og 500.000 m³ naturgass per dag for gass,
og den ellers ikke antas å ha vesentlige næringsmessige eller miljømessige virkninger.
Såfremt utbyggingen ikke kan antas å ha vesentlige grenseoverskridende miljøvirkninger, kan
kravet om konsekvensutredning i unntakstilfeller fravikes helt eller delvis, selv om utbyggingen
overskrider terskelverdiene i første ledd. Før unntak gis, skal departementet underrette EFTAs
Overvåkningsorgan om begrunnelsen for unntaket.”

5 LEGAL ANALYSIS

5.1 Introduction

24. The EIA Directive is one of the cornerstones for implementing the EEA law principle that precautionary and preventive action should be taken with regard to the environment.¹¹ It provides for environmental impact assessments (“EIAs”) as a process defined in Article 1(2)(g) of the EIA Directive for specific individual projects, such as dams, motorways, airports, factories, or, as the case may be, production platforms, subsea installations, pipelines and other infrastructure for oil and natural gas extraction.
25. The Court of Justice of the European Union (“CJEU”) has found that the requirement to undertake an EIA in advance of a project is justified by the fact that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to deal with their effects.¹²
26. The EIA Directive operates alongside Directive 2001/42/EC,¹³ often referred to as the Strategic Environmental Assessment Directive or the SEA Directive, which provides for the assessment of the effects of public plans or programmes on the environment. Directive 2001/42 explicitly sets out rules on its relationship with the EIA Directive. Pursuant to Article 11 of Directive 2001/42, it is “*without prejudice to any requirements under Directive 85/377/EEC [the predecessor to the EIA Directive]*¹⁴ *and any other Community law requirements*”. The CJEU has held that an EIA report completed under the EIA Directive “*cannot be used to circumvent the obligation to carry out the environmental assessment required under the SEA Directive in order to address environmental aspects specific to that directive*”.¹⁵ The rationale for this is that EIAs should be carried out as soon as possible so that its findings may still influence on any potential decision-making.¹⁶ The EIA Directive,

¹¹ See recital 2 of the EIA Directive. See also recital 9 of the Preamble to the EEA Agreement, as well as Article 73 EEA.

¹² Case C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 73 and case law cited.

¹³ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, page 30. Incorporated in Annex XX (Environment) to the EEA Agreement by Decision of the EEA Joint Committee No 90/2002 of 25 June 2002, OJ L 266, 03.10.2002, page 63. Compliance date in the EEA was 20 July 2004.

¹⁴ See recital 1 of the EIA Directive.

¹⁵ Case C-671/16 *Inter-Environnement Bruxelles and Others*, EU:C:2018:403, paragraph 65.

¹⁶ *Ibid.* paragraph 63.

on the other hand, does not explicitly set out rules on the relationship between its requirements and other EEA law requirements. For the sake of good order, ESA observes that the mere absence of a provision in the EIA Directive such as Article 11 of the SEA Directive does not in itself provide any indication on the relationship with requirements in the EIA Directive and requirements in other EEA law. Given that the Referring Court has limited itself to asking about the EIA Directive and Article 3 EEA and given that the facts of the dispute at issue in the main proceedings do not clearly appear to give rise to other secondary EEA law instruments being applicable, ESA will limit its substantive observations to the EIA Directive and Article 3 EEA.

27. ESA notes that the geographical scope of the EEA Agreement is not contested in the present case. *First*, the Referral does not mention any dispute between the parties to the national proceedings regarding the relevance of the EIA Directive or the EEA Agreement more generally. *Second*, the Referring Court's Questions of interpretation of EEA law are based on the assumption that the EEA Agreement applies. Thus, ESA understands that the parties to the national proceedings accept that the EEA Agreement applies to the Projects at Issue, and that the Referring Court does not have doubts in this regard.

28. ESA shares the view that the EIA Directive and the EEA Agreement more generally apply to the Projects at Issue. For the sake of completeness, ESA will set out its observations on the applicability of the EIA Directive and Article 3 EEA to projects which are located in whole or in part on the continental shelf, such as may be the case for the Projects at Issue. It follows from Article 126 EEA that the EEA Agreement "*shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway*".

29. Without prejudice to whether the continental shelf as such is part of the "*territories*" referred to in that provision, it is settled case law that "[l]egal acts incorporated into the EEA Agreement apply, in principle, to the same area as the EEA Agreement".¹⁷ It is moreover settled case law that "*the geographical scope of the EEA Agreement*

¹⁷ Case E-11/20 *Eyjólfur Orri Sverrisson and The Icelandic State*, judgment of 15 July 2021, paragraph 63, referring to Case E-8/19 *Scanteam AS v The Norwegian Government*, judgment of 16 July 2020, paragraphs 65 and 66.

does not preclude EEA law from having effects outside the territory of the EEA".¹⁸

The European courts have in that respect focused on EEA law being applicable "*in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the*" EEA.¹⁹ In Case E-8/19 *Scanteam* the Court held that "*procurement within the meaning of the Directive, will necessarily come within the scope of the EEA Agreement if it is sufficiently closely linked to the EEA*".²⁰

30. There are consequently at least two ways in which EEA law can be applicable outside the territory of the EEA. In this case, ESA submits that EEA law applies by virtue of the EIA constituting a legal relationship between the developer and the State which is entered into and has effects within the territory of the EEA. Alternatively, ESA submits that EEA law applies because EIAs within the meaning of the EIA Directive come within the scope of the EEA Agreement by virtue of being sufficiently closely linked to the EEA. EIAs of any project, but in particular those which will produce products which are in whole or in part to be exported to other EEA States, are "*liable to have a direct impact on the functioning of the internal market within the EEA*".²¹ Such EIAs must therefore, "*be considered sufficiently closely linked to the EEA and will, therefore, come within the scope of the EEA Agreement*."²²

5.2 Question 1

5.2.1 Introduction

31. By its first question, the Referring Court asks whether greenhouse gas emissions that will be released from petroleum and natural gas which is extracted of a project listed in Annex I point 14 of the Directive, i.e. "*for commercial purposes*", constitute "*effects of a project*" within the meaning of Article 3(1) of the Directive. If greenhouse gas emissions of extracted petroleum and gas are effects of the extraction project, the consequence is that they must be identified, described and assessed in an EIA. In essence, ESA understands that this question concerns whether greenhouse gas emissions that, following combustion at a later time and place, will be released from

¹⁸ Case E-8/19 *Scanteam AS v The Norwegian Government*, judgment of 16 July 2020, paragraph 66.

¹⁹ *Ibid.*, paragraph 67.

²⁰ *Ibid.*, paragraph 68.

²¹ *Ibid.*

²² *Ibid.*

petroleum and natural gas extracted from a project falling within the scope of the Directive are themselves to be considered part of the “*direct and indirect significant effects*” of that project, pursuant to Article 3(1) of the Directive.

32. At the outset, ESA acknowledges that the wording of Article 3(1), in and of its own, does not specifically refer to greenhouse gas emissions of oil and gas extracted from projects. Therefore, in proposing an answer to the question, ESA will have recourse to the “*literal, systematic and teleological methods of interpretation upon which*” the European Courts normally rely.²³ ESA notes in this respect also that the CJEU has “*pointed out on a number of occasions that the scope of the EIA Directive is wide and its purpose very broad*”.²⁴

33. In the following, ESA will first, for context, set out in which situations an EIA is required. Second, ESA will assess the question of whether an EIA should have included greenhouse gas emissions that will be released from the extracted petroleum and natural gas.

5.2.2 When an EIA is required

34. The EIA Directive ties the environmental assessment obligations to “*development consent*.”²⁵ Before such “*development consent*” is given, the EEA States are pursuant to Article 2(1) required to “*adopt all measures necessary to ensure*” that “*projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to a requirement for development consent*” as well as “*an assessment with regard to their effects on the environment*.” This is “*the EIA Directive’s fundamental objective*”.²⁶

35. Further pursuant to that Article 2(1), “[t]hose projects are defined in Article 4.” Article 4(1) in turn provides (subject to a specific exemption in Article 2(4), which is not at issue here), that the “*projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10*.” The “*assessment*” referred to in Article 4(1) is, pursuant to Article 5, “*an environmental impact assessment*”, as defined in Article 1(2)(g), and the contents of which are further set out in Article 3.

²³ Case C-166/23 *Naturvårdsverket*, EU:C:2024:465, paragraph 44. See also Case E-2/23 A Ltd, judgment of 25 January 2024, paragraph 43.

²⁴ Case C-329/17 *Gerhard Prenninger*, EU:C:2018:640, paragraph 36.

²⁵ “*Development consent*”, as defined in Article 1(2)(c), “*means the decision of the competent authority or authorities which entitles the developer to proceed with the project*”.

²⁶ Case C-329/17 *Gerhard Prenninger*, EU:C:2018:640, paragraph 35.

Articles 5 to 10 provide further procedural and substantive rules governing both the development consent and such EIAs.

36. Pursuant to recital 7 of the Directive, for “*public and private projects which are likely to have significant effects on the environment*” development consent “*should be granted only after an assessment of the likely significant environmental objects has been carried out*”. This is part of the “*very broad*” purpose of the Directive, which also includes achieving “*the objectives of the [EEA] in the sphere of the protection of the environment and the quality of life.*”²⁷

37. The term “project” is referred to in both Article 2(1) and Article 4(1) and delineates the scope of the Directive. It is defined in Article 1(2)(a) and means:

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

38. The projects listed in Annex I include, at point 14, “*Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.*” It appears to be common ground that the Projects at Issue fall under this point 14.²⁸

39. As a result, both a development consent and an EIA were required for the Projects at Issue. They were given and carried out. It also appears to be common ground that the EIA did not include an assessment of the greenhouse gas emissions that will be released from the extracted petroleum and natural gas.

5.2.3 Inclusion of greenhouse gas emissions in the EIA

40. In order to determine whether the EIAs should have included an assessment of greenhouse gas emissions which will be released from the extracted petroleum and natural gas, it is necessary to examine Article 3 of the Directive. It sets out the scope of the requirements for such EIAs. In particular, Article 3 requires that the “*direct and indirect significant effects of a project*” on various factors, including “*climate*”, are identified, described and assessed “*in an appropriate manner*”.

²⁷ See recital 4 of the Directive. See also recital 14 of the Directive. On this purpose (although with respect to Directive 85/337), see C-420/11, *Jutta Leth v Republik Österreich, Land Niederösterreich*, EU:C:2013:166, paragraph 28.

²⁸ Request, page 4 and the formulation of question 1.

41. In other words, the question to be answered is whether “*the direct and indirect significant effects of a project*” encompass the greenhouse gas emissions which will be released from the petroleum and natural gas which is extracted from the Projects at Issue at a later time when those products have been processed (refined) and are then made subject to combustion. To ESA, this is, in essence, a question of which causal effects will be encompassed by the obligation under Article 3(1).
42. First, it is apparent that the obligation in Article 3(1) is limited to the “*effects of a project*”. This entails a causal limitation. As a result, only those effects which fall within this limitation will be encompassed. On the one hand, this wording, in context of the definition of a “project” in Article 1(2)(a), could indicate a strict causal relationship with the project to be necessary for a particular effect to be encompassed under Article 3(1). This could in turn suggest that the EIA includes effects that are immediate consequences of the project, for example pollution from its construction and operation, which are closely linked in place and time.
43. On the other hand, ESA considers that the words “*direct and indirect*” in Article 3(1) clearly indicate that the legislator intended a broader scope of causation. This entails that it is also necessary to consider effects that do not occur as an immediate consequence “*of the project*”, as long as they are “*direct*” or “*indirect*”. For instance, this could be effects that occur at a different place or later in time.
44. In that context, it is notable that Article 5(1) further specifies the scope of the EIA, by imposing an obligation in the form of “*an environmental impact assessment report*”, which the developer is to “*prepare and submit*” in the event that “*an environmental impact assessment is required*”.²⁹ By specifying the information required in the report, Article 5(1) also elucidates what must be encompassed by the obligation under Article 3(1). In that context, Article 5(1)(b) requires “*a description of the likely significant effects of the project on the environment*”.
45. When examining Article 3(1) in the context of Article 5(1)(f), ESA finds further support for this broad approach to causation. Article 5(1)(f) provides that the EIA report must also contain “*any additional information*” which is specified in Annex IV. Thus, Annex IV point 5 second paragraph states that “[t]he description of the likely significant effects on the factors specified in Article 3(1) should cover the direct

²⁹ This obligation also relates to the purpose of the EIA Directive, i.e. to achieve “*an assessment of the effects of public and private projects on the environment in order to attain [EEA] objectives in the sphere of the protection of the environment and the quality of life*”, see Case C-420/11, *Jutta Leth v Republik Österreich, Land Niederösterreich*, EU:C:2013:166, paragraph 28.

effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project". Accordingly, indirect effects should be supplemented with (or understood to encompass) secondary, cumulative, transboundary effects, including those which are long-term or temporary. Consequently, as long as they are "significant" and "likely" (which must be determined on a case-by-case basis), the indirect effects to be included are apparently independent of temporal and spatial limitations. Further, Annex IV point 4 refers to description of factors likely to be significantly affected by the project, referring e.g. to "*climate (for example greenhouse gas emissions(...))*" and Annex IV point 5 f) refers to the likely significant effects of the project on the environment resulting from "*the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)(...)*".

46. Moreover, as already noted above, the projects encompassed in Annex point 14, are determined on the basis of the amount of petroleum and natural gas which they extract. If the effects of those products were not important, it would have seemed more logical for the legislature to focus on the scale of the project itself, rather than the amount of the products which it can extract. While there may often be a correlation between the amount extracted from the project and the scale of the project, this correlation is in ESA's understanding not inevitable.
47. In the same vein, such a broad interpretation of the causal effect intended by Article 3(1) is supported by the purpose of the EIA Directive,³⁰ i.e. to achieve "*an assessment of the effects of public and private projects on the environment in order to attain [EEA] objectives in the sphere of the protection of the environment and the quality of life.*"³¹ Moreover, the 2014 Directive made important changes affecting the depth of the assessments required under the of the Directive, both in general

³⁰ And, conversely, a more narrow interpretation of the causal effect intended by Article 3(1) may go counter to the broad purpose of the EIA Directive, see footnote 27 above. Moreover, as Advocate General Kokott stated in *Gruber* with respect to "*the purposes of environmental impact assessments. The fourth and fourteenth recitals in the preamble to the EIA Directive indicate that it is intended to realise one of the objectives of the Union in the sphere of the protection of the environment and the quality of life. The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life and to maintain the reproductive capacity of the ecosystem as a basic resource for life.*" See Case C-570/13 *Karoline Gruber*, Opinion of Advocate General Kokott, EU:C:2014:2374, paragraph 51. ESA agrees.

³¹ Case C-420/11, *Jutta Leth v Republik Österreich, Land Niederösterreich*, EU:C:2013:166, paragraph 28.

and specifically with respect to greenhouse gas emissions.³² These included the incorporation of greenhouse gas emissions as specified factors in Annex IV that must be described by developers in EIA reports.³³

48. It follows from the recitals to the 2014 Directive that the purpose of these amendments was to reflect that environmental issues, such as “*climate change (...) have become more important in policy making*”.³⁴ Therefore, they should “*constitute important elements in assessment and decision-making processes*”.³⁵ Further, it is emphasized that “[c]limate change will continue to cause damage to the environment and compromise economic development”, and that it is therefore “*appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) (...)*”.³⁶

49. ESA submits that this indicates that the amendments introduced by the 2014 Directive were intended to ensure that the EIAs under the Directive encompasses effects on climate change such as greenhouse gas emissions in EIA. Interpreting Article 3(1) in a manner where greenhouse gas emissions from combustion are not “*effects of*” projects such as the Projects at Issue, would run counter to that purpose and that objective. Conversely, interpreting Article 3(1) in manner where such greenhouses gas emissions are considered to be “*effects of*” projects such as the Projects at Issue, would contribute to making that objective effective. This is because a key purpose of oil and gas extraction for commercial purposes is that the product is eventually combusted. Indeed, ESA assumes that such effects often have a much more significant effect on the climate than other, more “direct” effects of the project on the climate.

50. Thus, it appears to ESA that the legislator has intended to introduce a broad notion of causation in Article 3(1). With respect to products such as petroleum and natural gas, their very purpose is for the ultimate purchaser in ESA’s understanding typically that they should eventually be burned in order to be used as fuel. It seems

³² For example, in general, it added the requirements in point 5 second paragraph to Annex IV that “[t]he description of the likely significant effects should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-, medium- and long-term, permanent and temporary, positive and negative effects of the project.”

³³ With respect to greenhouse gas emissions specifically, it added Annex IV point 5 (f) requiring a “description of the likely significant effects of the proposed project on the environment resulting from, *inter alia*, (...) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)”

³⁴ Recital 7 to the 2014 Directive.

³⁵ *Ibid.*

³⁶ Recital 13 to the 2014 Directive.

clear to ESA that they must be encompassed by the causation intended by Article 3(1), in such a manner that they will be part of the “*direct and indirect significant effects of a project*”, i.e. of the Projects at Issue.

51. This interpretation also holds true in light of the more narrow context of the phrase “*of a project*” and the causation it implies. While it is clear that the combustion of the petroleum and natural gas may take place only following several complex industrial processes, typically long after and far away from extraction at the point of the project, that extraction is nonetheless a necessary factor for the combustion. It is therefore also causally related to it. To ESA, this particular causal link appears robust, foreseeable, even expected or inevitable and at the very least one which encompasses effects which are indirect, significant and likely.
52. This is true even if one shifts the causal focus away from the project and directly onto the products, i.e. oil and natural gas. Thus, while the greenhouse gas emissions which are released upon combustion of petroleum and natural gas may directly be caused by those products, this does not exclude that they can also, further behind in the causal chain, at least indirectly be caused by the project which enabled the extraction of those products. ESA considers for the above reasons that it is sufficient to be encompassed by the wording of Article 3(1), which also covers indirect effects.

5.2.4 The scope of a potential inclusion of greenhouse gas emissions in the EIA

53. ESA agrees, as the Norwegian Government argues in the Request,³⁷ that the Directive as amended by the 2014 Directive did not indicate an “*intention to bring all end user downstream*” greenhouse gases within the ambit of the Directive. In its reasoning above, submitting that greenhouse gas emissions that will be released from the extracted petroleum and natural gas constitute direct or indirect “*significant effects of the project*” within the meaning of Article 3(1), ESA has in particular emphasized that the scope of that provision, when read in its context, is very broad.
54. In addition to the reference to “*indirect*” and “*significant*” effects in Article 3 (which means that the Directive only encompasses those “*indirect*” effects which are “*significant*”), ESA has also referred to for example recital 7 and Annex IV, where points 4 and 5 refer to “*likely significant effects*”. In other words, an indirect effect of a project must be “*significant*” and it must be “*likely*” in order to be encompassed by

³⁷ The Request, page 8.

Article 3(1). In ESA's understanding, these factors all entail that there must be a sufficiently close causal link between the project and the effect in question. With respect to being "*likely*", ESA has for example pointed out that the greenhouse gasses at issue here appear entirely foreseeable.

55. The corollary of this is that far from all end user downstream greenhouse gasses will be encompassed by this reading. ESA considers at any rate that the scope of the Directive with respect to other significant, indirect and likely effects, should be left for other cases. The assessment is therefore specific to the activities in Annex I, point 14 of the Directive.

56. In any event, while the exact scope of Article 3 in all circumstances may not be clear, this is inherent in legal provisions which uses indeterminate language such as "*indirect significant effects*". In this respect, ESA notes that EEA law, like in the legal traditions of the EEA States, such as for example tort law, often encounter such questions of scope and causation. ESA considers that the case law of the European Courts expresses a general principle of remoteness, which entails that effects that are "*too uncertain and indirect*" need not fall within the scope of EEA law,³⁸ because in such circumstances the necessary "*causal link*" cannot be established.³⁹

57. However, in the present case, as set out in point 5.2.3 above, ESA submits that the causal link is sufficiently close.

58. Consequently, ESA submits that where a project is listed in the EIA Directive Annex I point 14, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, are "effects" of the project under Article 3(1) of the Directive.

5.3 Question 2

59. The second question concerns, if question 1 is answered in the affirmative, to what extent a national court is required under Article 3 EEA to eliminate the unlawful consequences of a development consent granted without a prior EIA of the environmental "effects" of greenhouse gas emissions that will be released from the

³⁸ See e.g. Case E-8/20 *Criminal proceedings against N*, judgment of 5 May 2021, paragraph 87 (by analogy).

³⁹ Case C-291/09 *Francesco Guarnieri & Cie v Vandeveld Eddy VOF*, EU:C:2011:217, paragraph 17 (by analogy).

extracted petroleum and natural gas of the project under Article 3(1) of the EIA Directive.

60. ESA notes that Article 11 of the EIA Directive requires EEA States to ensure that, in accordance with the relevant national legal system, members of the public concerned have the right of access to a review procedure before a court of law or another independent and impartial body. The Directive does however not set out the consequences of a failure to carry out an EIA in accordance with the Directive.⁴⁰ In the absence of specific EEA rules on remedies in a particular field, it is up to the national legal order of each State to lay down procedural rules governing actions for safeguarding the rights of individuals and economic operators under EEA law. Such national rules must, firstly, in situations covered by EEA law, not be less favourable than in similar domestic situations (the principle of equivalence) and, secondly, not make it excessively difficult or impossible in practice to exercise the rights conferred by EEA law (the principle of effectiveness).⁴¹
61. From the principle of loyalty and sincere cooperation set out in Article 4(3) TEU, the CJEU has derived an obligation on the EU Member States to remedy breaches of EU law.⁴² This duty is owed, within their sphere of competence, and subject to the limits resulting from the procedural autonomy of the Member States, by every organ of the State concerned, including, for matters within their jurisdiction, national courts.⁴³ National courts are obliged, so far as possible, to interpret and apply the relevant provisions of national law in such a way that it is possible duly to nullify the consequences of the breach of EU law.⁴⁴ ESA submits that under the principle of sincere cooperation laid down in Article 3 EEA, the EFTA States are under a parallel obligation to eliminate the unlawful consequences of breaches of EEA law.

⁴⁰ See, as regards Directive 85/337, Case C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 74.

⁴¹ See e.g., from the CJEU, Case C-72/12 *Altrip*, EU:C:2013:712, paragraph 45 and Case C-177/20 '*Grossmania*', EU:C:2022:175, paragraph 49 with further references, and from the EFTA Court, Cases E-11/12 *Beatrix Koch and Others*, [2013] EFTA Ct. Rep. 272, paragraph 121, E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz*, [2015] EFTA Ct. Rep. 512, paragraph 82 and E-6/17 *Fjarskipti hf. v Síminn hf* [2018] EFTA Ct. Rep. 78, paragraph 31. More generally on the principles of equivalence and effectiveness in the EEA, see Case E-11/12 *Beatrix Koch and Others*, [2013] EFTA Ct. Rep. 272, paragraph 121 following.

⁴² See e.g., from the CJEU Cases C-201/02 *Wells*, EU:C:2004:12, paragraph 64, C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 75 and C-177/20, '*Grossmania*', EU:C:2022:175, paragraph 63.

⁴³ See e.g., Cases C-201/02 *Wells*, EU:C:2004:12, paragraph 64, Case C-215/06 *Commission v Ireland*, EU:C:2008:380, paragraph 59 and Case C-64/20 *UH*, EU:C:2021:207, paragraph 31.

⁴⁴ Joined Cases C-378/07 to C-380/07 *Angelidaki*, EU:C:2009:250, paragraph 203.

62. First, ESA notes, that one of the main objectives of the EEA Agreement is to create a homogeneous EEA, and that a homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and EC law are to be construed in the same way.⁴⁵
63. Second, in Case E-9/97 *Sveinbjörnsdottir*, the Court noted that an important objective of the EEA Agreement is to ensure individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement.⁴⁶ Furthermore, the Court has also emphasised protection of individual rights when deriving obligations from Article 3 EEA. The Court has on several occasions held that national courts are bound under Article 3 EEA, for the matters within their jurisdiction, to ensure the full effectiveness of EEA law when determining the disputes before them.⁴⁷
64. Lastly, in ESA's understanding, the homogenous interpretation of Article 3 EEA entailing an obligation to eliminate unlawful consequences of breaches of EEA law has been confirmed by the Court in Case E-11/22 *RS*. In that judgment, the Court held that the national court was "*required to draw the necessary consequences from the breach of EEA law, and within the scope of its powers grant an effective remedy, including the repayment with interest of any taxes already paid in breach of EEA law*".⁴⁸
65. The extent and details of the requirement to eliminate unlawful consequences depends, in ESA's view, on the specific breach of EEA law and on national procedural law. ESA reiterates that any national remedies must comply with the principle of effectiveness.⁴⁹ Moreover, national courts are bound to interpret

⁴⁵ Joined Cases E-9/07 and E-10/07 *L'Oréal*, [2008] EFTA Ct. Rep. 259, paragraph 27.

⁴⁶ Case E-9/97 *Sveinbjörnsdottir*, [1998] EFTA Ct. Rep. 95, paragraph 57.

⁴⁷ Case E-11/22 *RS*, judgment of 4 July 2023, paragraphs 41 and 44 and case law cited.

⁴⁸ Case E-11/22 *RS*, judgment of 4 July 2023, paragraph 20.

⁴⁹ Moreover, as the Court has held, "*any provision of national law that is contrary to a provision of the EEA Agreement, which is or has been made part of the respective national legal order, must be disapplied if the provision of EEA law in question is unconditional and sufficiently precise*", see Case E-11/22 *RS*, judgment of 4 July 2023, paragraph 41. ESA submits that Article 3 of the Directive is sufficiently unconditional and precise for this obligation to arise. Further, as the Court has also held, where it is not within the scope of the national court's power to grant an effective remedy, "*in cases of violation of EEA law by an EEA State, the EEA State would also be obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement*", see paragraph 57.

national law as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.⁵⁰ This is generally referred to as the principle of EEA conform interpretation.

66. As regards the failure to carry out an EIA, ESA's understanding of the Case Law from the CJEU is that a consent already granted is, as a main rule, to be revoked or suspended in order to carry out such an assessment.⁵¹
67. The CJEU has however held that EU law does not preclude national rules which, *in certain cases*, permit the *regularisation* of operations or measures which are unlawful in the light of EU law, provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception.⁵² The CJEU has also underlined that a remedial EIA, undertaken to remedy the failure to carry out an assessment, cannot be equivalent to an EIA preceding issue of the development consent, since the project has already been carried out.⁵³
68. In ESA's understanding, regularisation entails the possibility of eliminating the unlawful consequences of a decision *ex post*. In the present case, this would require what the CJEU has referred to as a remedial EIA.⁵⁴ The request does not contain information about such a possibility under Norwegian law. In ESA's understanding, under Norwegian administrative law, an administrative body could, upon certain conditions, regularise its own decision or that of a subordinate body. To what extent Norwegian law allows for regularisation in the present case, is however for the referring court to assess. A possible regularisation must not circumvent the requirement to carry out an EIA pursuant to Article 3 of the EIA Directive or dispense with the application of that provision, and that it should remain the exception.⁵⁵

⁵⁰ Case E-1/07 *Criminal proceedings against A*, [2007] EFTA Ct. Rep. 246, paragraph 39.

⁵¹ Case C-215/06 *Commission v Ireland*, EU:C:2008:380, paragraph 59 and Joined cases C-196/16 and C-197/16 *Comune di Corridonia and Others*, EU:C:2017:589, paragraph 35. See also Opinion of AG Kokott in Case C-411/17, *Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen vzw*, EU:C:2018:972, paragraph 200.

⁵² Case C-215/06 *Commission v Ireland*, EU:C:2008:380, paragraph 57, Joined cases C-196/16 and C-197/16 *Comune di Corridonia and Others*, EU:C:2017:589, paragraphs 37 and 38, and Case C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 76.

⁵³ Case C-215/06 *Commission v Ireland*, EU:C:2008:380, paragraph 60.

⁵⁴ *Ibid.*

⁵⁵ Case C-215/06 *Commission v Ireland*, EU:C:2008:380, paragraph 57, Joined cases C-196/16 and C-197/16 *Comune di Corridonia and Others*, EU:C:2017:589, paragraphs 37 and 38, and Case C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 76.

69. Consequently, ESA submits that national courts are required under Article 3 EEA, to the extent possible within the scope of their powers, to eliminate the unlawful consequences of a development consent granted without a prior EIA which should have been carried out under Article 3(1) of the EIA Directive.

5.4 Question 3

70. The third question concerns whether a national court could retroactively dispense with the obligations under Article 3(1) of the Directive to carry out an EIA, if it is demonstrated that the failure has not influenced the outcome of the decision making-making process.

71. As set out in paragraph 65 above, what the obligation to eliminate unlawful consequences of breaches of EEA law more specifically entails, depends on what the breach of EEA law consists of, the effect it has and the situation at hand and on national procedural law. Notably, the national court must consider which rights have been disregarded and what measures need to be taken to safeguard these rights.

72. As regards the EIA Directive, ESA recalls that it is procedural in nature. Hence, the Directive does not concern the substance of a development consent, such as whether it should be granted or rejected. One of the objectives of the Directive is to ensure the informed decision-making and effective public consultation, as set out *inter alia* in Recitals 16 and 19.

73. The CJEU has found that the failure to carry out an EIA could be remedied by revoking or suspending consent already granted, in order to carry out such an assessment.⁵⁶ As set out above, the CJEU has also accepted, as an exception, national rules which, *in certain cases*, permit the *regularisation* of operations or measures which are unlawful in the light of EU law, provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of EU law **or to dispense with their application.**⁵⁷

74. Retroactively dispensing with the obligation to assess certain effects under Article 3(1) would precisely dispense it its application. Such a remedy would in ESA's view

⁵⁶ Case C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 75, Joined cases C-196/16 and C-197/16 *Comune di Corridonia and Others*, EU:C:2017:589, paragraph 35, and Case C--278/21 *Dansk Akvakultur v Miljø- og Fødevareklagenævnet*, EU:C:2022:864, paragraph 39.

⁵⁷ Case C-215/06 *Commission v Ireland*, EU:C:2008:380, paragraph 57, Joined cases C-196/16 and C-197/16 *Comune di Corridonia and Others*, EU:C:2017:589, paragraphs 37 and 38, and Case C-261/18 *Commission v Ireland*, EU:C:2019:955, paragraph 76.

be irreconcilable with the purpose and the effectiveness of the EIA Directive. Retroactively dispensing with the obligation would clearly not safeguard the disregarded rights, notably the right of the public to be informed of and participate in the decision-making process.

75. Consequently, ESA submits a national court could not retroactively dispense with the obligations under Article 3(1) of the Directive to carry out an EIA, as this would dispense with the application of that provision, which the CJEU has not permitted.
76. ESA notes that the Government of Norway has referred to the principle under domestic law, whereby a procedural defect, as a main rule, does not require the annulment of a decision if it is demonstrated that there is no real possibility that the procedural defect could have influenced the outcome of the decision-making process. This general principle is set out in Section 41 of the Public Administration Act.⁵⁸ In the Government's view, it must be permissible under EEA law to apply this principle in cases where an EIA has been carried out pursuant to the EIA Directive, but where it is considered partially deficient.⁵⁹
77. ESA agrees that, in line with the case law referred to, not every procedural defect, however minimal, should necessarily lead to the annulment of a decision.⁶⁰ More specifically, the CJEU has held that "*in the case where a procedural defect has no consequences that could possibly affect the purport of the contested decision, it cannot be regarded as impairing the rights of the party relying on it*".⁶¹ In ESA's view, a failure to carry out an EIA pursuant to the Directive is not among such minimal procedural defects, that could not possibly have affected the decision. The same, in ESA's view, applies to, as in the present case, an EIA not including the greenhouse gas emissions from the extracted petroleum and natural gas, in breach of Article 3(1) the EIA directive.
78. The CJEU held in Case C-72/12 *Altrip* that one of the objectives of that EIA Directive is "*to put in place procedural guarantees to ensure the public is better informed of,*

⁵⁸ Act relating to procedure in cases concerning the public administration (Public Administration Act), LOV-1967-02-10. English translation of Section 41: "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."

⁵⁹ Reference is made to cases C-72/12 *Altrip*, EU:C:2013:712, paragraphs 49-54, C-137/14 *Commission v Germany*, EU:C:2015:683, paragraphs 59-61 and C-535/18 *Land Nordrhein-Westfalen*, EU:C:2020:391 paragraphs 58-63.

⁶⁰ Case C-72/12 *Altrip*, EU:C:2013:712, paragraph 49 and Case C-137/14 *Commission v Germany*, EU:C:2015:683, paragraph 60.

⁶¹ Case C-535/18 *Land Nordrhein-Westfalen*, EU:C:2020:391, paragraph 58.

and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with.”⁶²

79. Furthermore, CJEU found in Case C-72/12 *Altrip* that the national court must take into account *“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”*.⁶³

80. Hence, In ESA’s view, the assessment by the national court does not only relate to the outcome of the decision, but also to whether the public concerned has been deprived of their guarantees under the EIA Directive which could have impacted the decision-making procedure. The objective of Article 3 of the EIA Directive is precisely to allow the public to have access to information and to be empowered to participate in the informed decision-making.

81. Consequently, ESA finds it almost inconceivable that the EIA carried out in breach of Article 3 of the EIA Directive in the present case could be considered a minimal procedural defect, not possibly affecting the decision.

82. First, an EIA including the environmental effect of the greenhouse gas emissions released from the extracted petroleum and natural gas could evidently have led to the contested decision being different or even rejected. A different conclusion would in fact indicate that complying with Article 3 of the EIA Directive is a purely procedural exercise, or a ticking of a box, without any actual impact on the decision or the decision-making process. Second, the breach of Article 3 of the EIA Directive in the present case has clearly 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.⁶⁴ Even though

⁶² Case C-72/12 *Altrip*, EU:C:2013:712, paragraph 48.

⁶³ Case C-72/12 *Altrip*, EU:C:2013:712, paragraph 54.

⁶⁴ ESA further understands that the Norwegian Government shares this interpretation of the Directive. In a letter to ESA of 20 June 2023, the Government confirmed that: “As the contents of an EIA or a SEA cannot be predicted beforehand, a failure to carry out an EIA or a SEA should in most cases lead to the conclusion that the error may have affected the contents of the decision and that the decision is invalid [...]” ⁶⁴ Publicly available at: <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Letter%20to%20the%20Authority%20-%20status%20and%20next%20steps.pdf>

not specifically part of the request, ESA reiterates that the national court is under an obligation to interpret and apply Section 41 of the Public Administration Act, referred to above, as well as any applicable general principles which it reflects, as far as possible in conformity with EEA law. In ESA's view, such an interpretation would make it possible to arrive at the conclusions set out in the paragraphs above.

83. For completeness, ESA notes that Case C-72/12 *Altrip* concerned Article 10b of Directive 85/337, now found in Article 11 of the EIA Directive, which requires that EEA States are to ensure that, in accordance with the relevant national legal system, members of the public concerned have the right of access to a review procedure before a court of law or another independent and impartial body. ESA submits that Case C-72/12 *Altrip* must be distinguished from the present case in two regards. First, in Case C-72/12 *Altrip*, the CJEU noted that its interpretation would not compromise the objective of the Directive to put in place procedural guarantees to ensure that the public is better informed of, and more able to participate in EIAs of projects.⁶⁵ That is not transferrable to the present case. A breach of Article 3 of the EIA Directive, such as in the present case, would in ESA's view precisely compromise procedural guarantees ensuring that the public is better informed of, and more able to participate in EIAs of projects. Second, unlike Article 11, Article 3 of the Directive does not leave the EEA States with a "*significant discretion*", as referred to by the CJEU in Case C-72/12 *Altrip*.⁶⁶ Instead, Article 3 of the Directive sets out that the 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 various factors mentioned in that Article.

84. Lastly, ESA notes that the CJEU has allowed for, in exceptional circumstances, to maintain a decision where an environmental impact assessment has not been carried out. In Case C-41/11 *Inter-Environnement Wallonie*, the CJEU ruled that a national court can, **given the existence of an overriding consideration relating to the protection of the environment**, exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of a national measure which it has annulled, in so far as certain conditions are met.⁶⁷

⁶⁵ Case C-72/12 *Altrip*, EU:C:2013:712, paragraphs 48-49.

⁶⁶ Case C-72/12 *Altrip*, EU:C:2013:712, paragraph 50.

⁶⁷ Case C-41/11 *Inter-Environnement Wallonie*, EU:C:2012:103, paragraph 58 to 62. This case specifically concerned the SEA Directive. ESA submits that the same considerations are relevant under the EIA Directive.

85. Furthermore, in case C-24/19 *A and others*, the CJEU found that:

*“where it appears that an environmental assessment, within the meaning of Directive 2001/42, should have been carried out prior to the adoption of the order and circular on the basis of which a consent, which is contested before a national court, relating to the installation and operation of wind turbines was granted with the result that those instruments and that consent are incompatible with EU law, that court may maintain the effects of those instruments and that consent only if the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy that illegality.”*⁶⁸

86. These exceptions are, ESA submits, very narrow, and can only be applied on a temporary basis, for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.⁶⁹

87. Consequently, ESA submits that national courts cannot retroactively dispense with the obligations to carry out an EIA in line with Article 3(1) of the Directive.

6 CONCLUSION

Accordingly, ESA respectfully suggests that the questions asked by Borgarting lagmannsrett should be answered as follows:

1. Where a project is listed in Directive 2011/92/EU Annex I point 14, the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, are "effects" of the project under Article 3(1).
2. National courts are required under Article 3 EEA, to the extent possible within the scope of their powers, to eliminate the unlawful consequences of a development consent granted without a prior environmental impact

⁶⁸ Case C-24/19 *A and Others v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen*, EU:C:2020:503, paragraph 95. This case specifically concerned the SEA Directive. ESA submits that the same considerations are relevant under the EIA Directive.

⁶⁹ Case C-41/11 *Inter-Environnement Wallonie*, EU:C:2012:103, paragraph 62.

assessment which should have been carried out under Article 3(1) of the EIA Directive.

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

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