

Case handler: Marcus Navin-Jones  
Tel: +32 2 286 18 11  
e-mail: [Marcus.Navin-Jones@eftasurv.int](mailto:Marcus.Navin-Jones@eftasurv.int)

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Case No: 86939  
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Norwegian Ministry of Climate and Environment  
Postboks 8013 Dep  
N- 0030 Oslo  
Norway

Dear Sir/Madam,

**Subject: Request for Information concerning the requirements to carry out environmental assessments and environmental impact assessments under the SEA and EIA Directives**

On 11 June 2021, the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) opened an own initiative case to investigate the application of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“SEA Directive” or “Strategic Environmental Assessment Directive”)<sup>1</sup> and Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“EIA Directive”)<sup>2</sup> in Norway.

It would be helpful if the Norwegian Government could clarify the position and current practices of the Norwegian authorities concerning the transposition, interpretation and conformity with, the requirements set out in the SEA and EIA Directives, in particular the requirement to carry out environmental assessments (“EAs”) in accordance with the SEA Directive, and environmental impact assessments (“EIAs”) in accordance with the EIA Directive.

In order for the Authority to further examine and assess the case, the Authority would be grateful if the Norwegian Government could reply to the following questions and provide any further information or input as the Norwegian authorities deem relevant.

For the avoidance of doubt, please note that the objective of this request for information, is to help assess whether there is a concern regarding the implementation of the requirements to conduct assessments under the SEA and EIA Directives in Norway. In order to illustrate the potential concerns which the Authority would like to assess, the Authority has decided to reference, in this request for information, certain rulings. For the avoidance of doubt, the individual rulings cited in this request for information, have been included only as a tool to illustrate potential concerns. Neither the individual cases cited in this request for information, nor the facts or subject matter of the cases referenced in this request for information, are, per se, of relevance to the Authority. The Authority is not reviewing, and shall not review, in this Case 86939, any individual case or ruling handed down in Norway alone or in isolation. Instead the Authority is assessing the broad implementation and application of the requirements to carry out assessments under the SEA and EIA Directives in Norway, as reflected in the case-law and actions taken by the Norwegian judiciary and Norwegian enforcement agencies. This request for information is structured to focus on potential concerns which primarily relate to the SEA Directive first, and the EIA Directive second.

### ***Illustrative case-study 1***

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<sup>1</sup> The Act referred to at point 1g of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 12/2006 of 28 January 2006.

<sup>2</sup> The Act referred to at point 1a of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 230/2012 of 7 December 2012.

Reference is made to the ruling of the Supreme Court of Norway of 22 December 2020 *Natur og Ungdom and others vs Norway* (HR-2020-2472-P)<sup>3</sup> (“the NoU Judgment”). The NoU Judgment concerns decisions to award licences allowing petroleum activities in certain blocks in the Barents Sea in the 23<sup>rd</sup> Licensing Round.

1. The NoU Judgment provides an overview of the regulation of petroleum activities in Norway and the requirements to carry out EAs and EIAs under the SEA and EIA Directives. Is it correct that the following points accurately reflect the current Norwegian legal framework concerning petroleum activities?
  - a. Phase 1 of petroleum activities concerns the “opening of a field” (paragraphs 65 and 188-191 NoU Judgment). This Phase is primarily regulated under Sections 6a to 6c of the Norwegian Petroleum Regulations<sup>4</sup> which must be interpreted in accordance with the SEA Directive. It is settled case law that provisions which determine the scope of application of the SEA Directive should be interpreted broadly, and that provisions that limit the scope of application should be interpreted strictly (paragraphs 210-211, 265 NoU Judgment). These requirements set out in the Norwegian Petroleum Regulations include an obligation for an EA to be carried out before a decision to open a field is adopted. The EA must be conducted “*as early as possible in the process*”<sup>5</sup> and regardless of whether certain information or estimates may become more accurate later in time.<sup>6</sup> The EA must contain information on, for example, climate effects which includes “*environmental effects of the petroleum activities*”.<sup>7,8</sup>
  - b. Phase 2 of petroleum activities concerns the “exploration phase” (paragraphs 65 and 188-191). Norway takes the view that this Phase is not subject to the SEA or EIA Directives. As such this Phase is not regulated under national provisions which seek to transpose the SEA or EIA Directives.
  - c. Phase 3 of petroleum activities concerns the “production phase” (paragraphs 65 and 188-191 NoU Judgment). This Phase is primarily regulated under Section 4-2 of the Norwegian Petroleum Act<sup>9</sup> and Sections 22 to 22c of the Norwegian Petroleum Regulations<sup>10</sup> and requires a licence holder to prepare a plan for development and operation of the petroleum deposit (“PDO”) (paragraphs 27, 70, 160, 191-192 etc NoU Judgment). The PDO Phase is governed by the EIA Directive (paragraph 262 NoU Judgment). As such, an EIA must be carried out in accordance with the EIA Directive before production is approved.
2. The NoU Judgment assesses, amongst other things, certain allegations and arguments brought before the Court which the Court has referred to as potential “*procedural errors*” and issues concerning “*administrative proceedings*” (see, for example, paragraphs 179-185 NoU Judgment). The Court states that the SEA Directive has been implemented in Norwegian law via certain provisions of the “*Norwegian Petroleum Regulations*” which the Court states contain “*procedural rules*”

<sup>3</sup> Case 20-051052SIV-HRET.

<sup>4</sup> FOR-1997-06-27-653 *Forskrift til lov om petroleumsvirksomhet*.

<sup>5</sup> Paragraph 269 of the NoU Judgment.

<sup>6</sup> Paragraph 271 of the NoU Judgment.

<sup>7</sup> Paragraph 263 of the NoU Judgment.

<sup>8</sup> i.e. It must therefore include emissions of greenhouses gases during the petroleum activities in Norway (production emissions) and emissions as a result of the petroleum that is produced being burned (combustion emissions) - Paragraphs 259 and 266 NoU Judgment, NB paragraph 241 NoU Judgment.

<sup>9</sup> LOV-1996-11-29-72 *Lov om petroleumsvirksomhet [petroleumsloven]*.

<sup>10</sup> Paragraph 70 of the NoU Judgment.

for opening new maritime areas for petroleum (paragraph 185).<sup>11</sup> At paragraph 276 of the NoU Judgment it states:

*(276) The starting point in Norwegian law is that a decision does not become invalid as a result of procedural error unless the error may have affected the substance of the decision, see the principle in Section 41 of the Norwegian Public Administration Act. The decision will be invalid if there is a not entirely remote possibility that the error may have affected the decision, see HR-2017-2247-A, paragraph 93 et seq.*<sup>12</sup>

- a. Does Norway regard the requirement to carry out an EA pursuant to the SEA Directive as a procedural and/or administrative requirement? Or, alternatively, does Norway regard the obligation to carry out an EA under the SEA Directive as a substantive legal requirement? For example, if there is a failure to carry out an EA under the SEA Directive – is it automatically treated as falling within the scope of the Norwegian Public Administration Act, and therefore a breach of a procedural and/or administrative requirement?
- b. Does Norway regard the requirement to carry out an EIA pursuant to the EIA Directive as a procedural and/or administrative requirement? Or, alternatively, does Norway regard the obligation to carry out an EIA under the EIA Directive as a substantive legal requirement? For example, if there is a failure to carry out an EIA under the EIA Directive – is it automatically treated as falling within the scope of the Norwegian Public Administration Act, and therefore a breach of a procedural and/or administrative requirement?
- c. If a legal action is brought before the Norwegian Courts, and if the Norwegian Courts conclude that the requirement to carry out a valid EA or EIA under the SEA / EIA Directives has been breached – when (i.e. in what situations if any) would the Court consider that breach as an infringement of a substantive legal requirement (not an infringement of breach of a procedural requirement) and therefore outside the scope of the Norwegian Public Administration Act?
- d. If a legal action is brought before the Norwegian Courts in the area of petroleum activities, and if the Norwegian Courts conclude that the requirement to carry out a valid EA or EIA under the SEA / EIA Directives has been breached:
  - i. Is the decision to approve or deny a plan or project, where no valid EA / EIA has been carried out, still regarded as “*valid*” unless the failure to conduct a valid EA / EIA “...*may have affected the decision* [to grant or deny approval of the plan/project in question]”?<sup>13</sup>
  - ii. Is the legal onus, and the burden of proof, on the applicant/claimant to prove that the failure to conduct a valid EA / EIA did affect, or may have affected, the decision in question?
  - iii. Are the Norwegian Courts able to take action (and for example annul decisions where no valid EA / EIA has been carried out) if the decision in question is still regarded as “*valid*” pursuant to principle set out in Section 41 of the Norwegian Public Administration Act or similar Norwegian provisions? If so, please explain what action the Norwegian Courts are able to take.
  - iv. How many cases have there been where the Norwegian Courts have concluded that the requirement to carry out a valid EA or EIA under the SEA / EIA Directives has been breached – but the decision is still “*valid*” pursuant to principle set out in Section 41 of the Norwegian Public Administration Act or similar Norwegian provisions?

<sup>11</sup> See also paragraph 241 “*procedural errors*”, and paragraph 274 “*procedural error*” etc).

<sup>12</sup> This is an unofficial Directorate translation.

<sup>13</sup> Paragraph 276 of the NoU Judgment.

- e. EEA States are required to remedy failures to carry out EAs and EIAs under the SEA and EIA Directives.<sup>14</sup> Please explain how Norway ensures that failures to carry out EAs and EIAs under the SEA and EIA Directives are remedied particularly in those situations where there has been a breach of the requirement to carry out a valid EA / EIA, but the corresponding decisions granting or denying development consent are still regarded as “*valid*” under the principle set out in Section 41 of the Norwegian Public Administration Act.
  - f. EEA States must ensure that a failure to carry out valid EA / EIA “*does not offer the persons concerned the chance to circumvent the rules of [EEA] law or to dispense with their application*” and that breach of the requirement to carry out an EA / EIA “*remains the exception*”.<sup>15</sup> Please explain how, in those situations where there is a failure to carry out a valid EA / EIA under the SEA / EIA Directives but the corresponding decisions are still regarded as “*valid*” under the principle set out in Section 41 of the Norwegian Public Administration Act – Norway ensures that the relevant persons concerned are still required to adhere to the rules, not circumvent them or dispense with their application.<sup>16</sup>
  - g. The SEA Directive and the EIA Directive have been incorporated into the EEA Agreement. EEA States are required to transpose Directives and to ensure the results to be achieved under the Directive are realised in practice. In this case, it appears that it was not necessary to comply with the requirement carry out a valid EA / EIA under the SEA and EIA Directives. Please explain how the results to be achieved under the SEA and EIA Directives are realised in practice in those situations where a valid EA / EIA is legally required under the SEA and EIA Directives, but is not carried out and is not regarded as necessary pursuant to the principle set out in Section 41 of the Norwegian Public Administration Act.
3. It would be helpful if the Norwegian authorities could please indicate whether it is correct that, according to the NoU Judgment, and according to current Norwegian national law, a failure to carry out an EA under the SEA Directive has no legal consequences per se in those situations where an EIA may be conducted, at a later stage, under the EIA Directive (paragraphs 283-284 NoU Judgment). Please explain how Norwegian law ensures that the requirements under the SEA Directive are achieved, if, in Norway, the requirement to carry out an EA under the SEA at Phase 1 of petroleum activities has no legal consequences per se – if an EIA may or could be conducted at Phase 3 of petroleum activities (paragraph 272 NoU Judgment). Please explain how the requirements under the SEA Directive, as opposed to the requirement under the EIA Directive, are implemented and applied in Norway? Are the requirements under the SEA Directive considered by the Norwegian authorities to be effectively the same as the requirements set out under the EIA Directive? In Norway, if an assessment is carried out, or will be carried out, in accordance with the EIA Directive, is there any requirement to conduct an environmental assessment in accordance with the SEA Directive?
4. The NoU Judgment raised questions concerning EEA law relating, in part, to the interpretation of the provisions contained in the SEA and EIA Directives (see, for example, paragraph 284-285 NoU Judgment).<sup>17</sup> If possible please provide details of

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<sup>14</sup> Judgment of 25 June 2020 of the Court of Justice of the European Union (“CJEU”), *A. et al*, Case C-24/19, EU:C:2020:503, paragraph 83.

<sup>15</sup> Judgment of 12 November 2019 of the CJEU, *European Commission v Ireland*, Case C-261/18, EU:C:2019:955, paragraph 76.

<sup>16</sup> See paragraphs 242-243 of the NoU Judgment.

<sup>17</sup> Other questions concerning the interpretation and application of EEA law were also raised in this case. For example, one question that arose during this case was whether the impacts from emissions of greenhouse gases after combustion of exported oil and gas, in the EU/EEA countries or other countries, come within the scope of the SEA Directive (paragraph 211).

how many cases have been brought before the Norwegian Courts relating to the SEA and EIA Directives and, of those, how many also raised questions concerning the validity of the act in question pursuant to Section 41 of the Norwegian Public Administration Act.

### **Illustrative case-study 2**

Reference is made to the ruling of the Supreme Court of Norway 28 November 2017 *Reinøy Reinbeitedistrikt and others vs Troms County Municipality* (HR-2017-2247-A) (“the Reinøy Judgment”). The Reinøy Judgment concerns a decision by the Norwegian Public Roads Administration to expropriate land (“Contested Decision”) pursuant to Section 50 of the Norwegian Roads Act<sup>18</sup> for an infrastructure project. The infrastructure project involves the construction of a road outside the town of Stakkvik on the island of Reinøy, a tunnel from Ringvassøy under Langsundet to the island of Reinøy, and a ferry port at Sætervika (north Reinøy) for ferries to service Vannøy and Karlsøy, (“Infrastructure Project”). The Reinøy Judgment followed the earlier Court rulings before the Nord-Troms District Court (THHER-2014-86089) (“Nord-Troms District Court Ruling”) and the Hålogaland Court of Appeal (LH-2016-47410) (“Hålogaland Court of Appeal Ruling”).<sup>19</sup>

Reference is also made to the ruling of the Supreme Court of Norway 29 May 2009 *The Norwegian Society for the Conservation of Nature in Oslo and Akershus and others vs Norway (The Norwegian Ministry of Environment) and Oslo Municipality “The US Embassy Case”* (Rt-2009-661).<sup>20</sup>

5. The Reinøy Judgment provides an overview of the regulation of the expropriation of land for infrastructure projects in Norway and the requirements to carry out an environmental impact assessment (“EIA”) under the EIA Directive. Is it correct that the following points accurately reflect the Norwegian legal framework concerning the transposition of the EIA Directive in Norway, and the expropriation of land for infrastructure projects?
  - a. At the time the Contested Decision was adopted, the EIA Directive was transposed in Norwegian national law primarily by way of the Norwegian Regulation on Impact Assessments of 26 June 2009<sup>21</sup> (“Old Norwegian EIA Regulation”). Today, the EIA and SEA Directives are primarily transposed by way of the Norwegian Regulation on Impact Assessments of 1 July 2017 FOR-2017-06-21-854 (“Current Norwegian EIA Regulation”).
  - b. Article 4(1) and points 7(b)-(c) and 8(b) of Annex I of the EIA Directive provides that the following projects likely to have significant effects on the environment must be made subject to an EIA:
    - “[7](b) Construction of motorways and express roads;
    - [7](c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road or realigned and/or widened section of road would be 10 km or more in a continuous length. [...]
    - [8](b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tonnes.”

<sup>18</sup> LOV-1963-06-21-23 *Lov om vegar (veglova)*.

<sup>19</sup> It is noted that the Nord-Troms District Court Ruling of 18 January 2016 concluded that the expropriation decision was “invalid” (paragraphs 34, 49 and 70 of the Reinøy Judgment). That decision was overturned by the Hålogaland Court of Appeal Ruling (paragraphs 50-51 of the Reinøy Judgment).

<sup>20</sup> See paragraphs 72, 74, 77, 94, 98 and 143 of the Reinøy Judgment.

<sup>21</sup> FOR-2009-06-26-855 *Forskrift om konsekvensutredninger*.

Article 4(2) and point 10(e), Annex II of the EIA Directive provides that EEA States must determine whether the following projects likely to have significant effects on the environment must be made subject to an EIA:

“(e) Construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I),”

These provisions are transposed under Norwegian national law primarily by way of point 7(b) and (c) of Annex I, and point 10(e) of Annex II of the Current Norwegian EIA Regulation – and points 26 and 27 of Annex I, and points 24 and 26 of Annex II to the Old Norwegian EIA Regulation.

- c. At the time the Contested Decision was adopted, the planning and execution of infrastructure projects was regulated under, amongst other national legislation, the Old Norwegian Planning and Building Act of 14 June 1985,<sup>22</sup> which has since been repealed and replaced by the New Norwegian Planning and Building Act of 27 June 2008<sup>23</sup> (paragraphs 69, 73 and 143 of the Reinøy Judgment). These provisions are to be interpreted in light of, amongst other provisions, the Norwegian Ministry of Local Government and Modernisation Guidance Notes and the Norwegian Public Roads Administration Handbook (paragraph 88 Reinøy Judgment).
- d. Decisions to expropriate land to construct or expand roads are regulated primarily under the Norwegian Roads Act, particularly Section 50 of the Norwegian Roads Act.<sup>24</sup>
- e. Decisions to expropriate land to construct or expand roads in Norway are taken as follows:
  - i. First, the Norwegian Public Roads Administration carries out an assessment and provides a recommendation to the relevant Norwegian municipality (paragraph 29 of the Reinøy Judgment).

<sup>22</sup> LOV-1985-06-14-77 Plan- og bygningslov.

<sup>23</sup> LOV-2008-06-27-71 Lov om planlegging og byggesaksbehandling (plan- og bygningsloven).

<sup>24</sup> Section 50 of the Norwegian Roads Act provides that: «Mot vederlag etter skjønn til den det råkar, kan eigedomsinngrep settast i verk etter vedtak av vegstyremakta så langt ho finn at det trengs til bygging, utbetring, vedlikehald og drift av riksveg, fylkesveg eller kommunal veg. Slikt eigedomsinngrep kan òg gjelde grunn og rettar til bate for tredjemann så langt det trengs for vegen eller ferdsla på vegen eller for å skaffe tredjemann tilgjenge til offentlig veg.

Til bate for ein som lyt tola eigedomsinngrep etter første leden, kan vegstyremakta gjere vedtak om at det skal gjerast eigedomsinngrep hjå ein annan eigar eller rettshavar, så framt skaden og ulempene då alt i alt vert monaleg mindre.

I vedtak om eigedomsinngrep kan vegstyremakta heilt eller delvis overlata til skjønnet å ta avgjerd om kva inngrepet skal gå ut på eller kva omfang det skal ha. Skjønnet kan då òg gjere vedtak etter andre leden i paragrafen her. Skjønnet kan fastsette at det ved eigedomsinngrep etter denne paragrafen skal ytast grunn som vederlag for grunn og rettar som blir avstått.

Departementet kan gi føresegner om saksføreavinga etter paragrafen her.»

Unofficial translation:

“For compensation based on discretion to the person in question, property expropriations may be implemented following a decision by the road authority to the extent that it finds it necessary for the construction, improvement, maintenance and operation of national roads, county roads or municipal roads. Such expropriations on property may also apply to land and rights which benefits third parties as far as is necessary for the road or traffic on the road or to provide third parties with access to public roads.

For the benefit of a person who has to tolerate property expropriation after the first paragraph, the road authority may make a decision that property expropriation must be carried out on another owner or right holder, as long as the damage and inconvenience are then less in total.

In decisions on property expropriation, the road authority may leave all or part of the discretion to decide whether the expropriation is to be or to what extent it should be. The discretion may then also make a decision pursuant to the second paragraph of this section. The discretion may stipulate that in the event of property expropriation pursuant to this Section, land shall be granted as compensation for land and rights that are waived.

The Ministry may provide Regulations for the proceedings pursuant to this section”.

- ii. Second, the relevant Norwegian municipality adopts a ‘zoning plan’ (paragraph 29 of the Reinøy Judgment) under ‘the municipal master plan’ (paragraphs 38 and 100 of the Reinøy Judgment).
  - iii. Third, the Norwegian Ministry of Local Government and Modernisation approves the zoning plan (paragraph 32 of the Reinøy Judgment).<sup>25</sup>
  - iv. Fourth, the Norwegian Public Roads Administration adopts a decision to expropriate land, on the basis of the zoning plan, under Section 50 of the Norwegian Roads Act (paragraph 36 of the Reinøy Judgment).
6. The Reinøy Judgment states that, under Norwegian law, an absence of a valid EIA in breach of the requirements set out under the EIA Directive, constitutes “a procedural error”<sup>26</sup>, and that a failure or “error” to carry out a valid EIA does not “lead to [the] invalidity” of a subsequent decision allowing or denying an infrastructure project or expropriating the land for an infrastructure project (paragraphs 90-98 Reinøy Judgment). According to the Reinøy Judgment, under Norwegian law, a failure to carry out a valid EIA in accordance with the EIA Directive must be assessed within the scope of Section 41 of the Norwegian Public Administration Act (paragraphs 90-98 and 147 of the Reinøy Judgment). The Reinøy Judgment cites to a previous ruling of the Supreme Court of Norway, namely the *US Embassy Case* (Rt-2009-661).<sup>27</sup>
- a. Under Norwegian law, does the requirement to carry out an EIA in accordance with EIA Directive, and the requirement to carry out an EA under the SEA Directive, constitute a “procedural requirement” in all circumstances? Or, alternatively, are there situations where the requirement to carry out an EIA in accordance with the EIA Directive, and the requirement to carry out an EA under the SEA Directive, would not be regarded as a “procedural requirement”? If there are situations where the requirement to carry out an EIA or EA would not be regarded as a “procedural” or administrative requirement, please explain and provide examples of those.
  - b. Under Norwegian law, does the failure to carry out an EIA or EA in accordance with the EIA or SEA Directives, constitute a breach of a “procedural requirement” – and therefore an issue within the scope of Section 41 of the Norwegian Public Administration Act – in all circumstances? Or, alternatively, are there situations where the absence of an EIA or EA does not constitute a breach of a “procedural requirement” and/or does not constitute an issue falling within the scope of Section 41 of the Norwegian Public Administration Act? If there are situations where the absence of an EIA or EA does not constitute a breach of a “procedural requirement” and/or does not constitute an issue falling within the scope of Section 41 of the Norwegian Public Administration Act – please explain and provide examples of those.
7. Section 41 of the Norwegian Public Administration Act provides that: “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 [to adopt a “project”, plan” or “programme”] 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” (emphasis added) (see paragraphs 93 and 99 of the Reinøy Judgment).<sup>28,29</sup> According to the Reinøy Judgment, when assessing whether or not the failure to carry out a valid EIA or EA has had a “decisive effect” on the decision – the core question is whether there is “a real possibility” that the content of the contested act would have differed had a valid EIA/EA been conducted which is

<sup>25</sup> Applicable in those cases where the decision is contested or appealed.

<sup>26</sup> See, for example, paragraphs 59, 64, 93, 95, 98, 140 and 142 of the Reinøy Judgment.

<sup>27</sup> See paragraphs 72, 74, 77, 94, 98 and 143 of the Reinøy Judgment.

<sup>28</sup> Unofficial translation.

<sup>29</sup> “Er reglene om behandlingsmåten i denne lov eller forskrifter gitt i medhold av loven ikke overholdt ved behandlingen av en sak som gjelder enkeltvedtak, er vedtaket likevel gyldig når det er grunn til å regne med at feilen ikke kan ha virket bestemmende på vedtakets innhold.”

supported by evidence (emphasis added) (paragraph 97 Reinøy Judgment).<sup>30</sup> Reference is made to paragraphs 70-72 of the US Embassy Judgment (paragraph 95 of the Reinøy Judgment).<sup>31</sup> If a legal action is brought before the Norwegian Courts, and if the Norwegian Courts conclude that the requirement to carry out a valid EA or EIA under the SEA / EIA Directives has been breached:

- a. Is the decision to approve or deny a plan or project, or the decision to expropriate land for an infrastructure plan, where no valid EA/ EIA has been carried out, still regarded as “*valid*” unless the failure to conduct a valid EA / EIA has a “*decisive effect*” on the decision to grant or deny approval of the plan/project in question and/or expropriate land?
  - b. Is the legal onus, and the burden of proof, on the applicant/claimant to prove – and provide sufficient evidence – that the failure to conduct a valid EA/ EIA did have a “*decisive effect*” on the contents of the administrative decision and that there was a “*real possibility*” that the content of the contested act would have differed had a valid EIA/EA been conducted?
8. The Reinøy Judgment states that in those cases where there is an absence of any EIA/EA, or where there is a defective EIA/EA which has not been carried out in accordance with the EIA / SEA Directives, there is still no “*presumption*”, under Norwegian national law, that these flaws impact the subsequent decision to expropriate land for an infrastructure project and/or the subsequent decision approving or denying the development of an infrastructure project. As such, there is no presumption, under Norwegian law, that the subsequent decision(s) are “*invalid*” (paragraph 98 Reinøy Judgment).
- a. Please explain whether, in those situations where there is an absence of an EIA or EA, but the subsequent decisions to expropriate land or approve an infrastructure project are “*valid*” pursuant to the principle codified in Section 41 of the Norwegian Public Administration Act - there is a breach of the Norwegian EIA Regulation or other Norwegian law. If so, please explain what the legal consequences of that breach would be. Please explain whether the Norwegian authorities and Courts could take action, and if so what action, in these circumstances. Please explain how Norwegian authorities and Courts ensure the requirements to carry out an EIA or EA pursuant to the EIA and SEA Directives, are respected and complied with these circumstances.
  - b. Please explain whether, in those situations where an EIA or EA has been carried out but it is defective or has not been carried out in accordance with the EIA and/or SEA Directives, but the subsequent decisions to expropriate land or approve an infrastructure project are “*valid*” pursuant to the principle codified in Section 41 of the Norwegian Public Administration Act - there is a breach of the Norwegian EIA Regulation or other Norwegian law. If so, please explain what the legal consequences of that breach would be. Please explain whether the Norwegian authorities and Courts could take action, and if so what action, in these circumstances. Please explain how Norwegian

<sup>30</sup> As a consequence, the Reinøy Judgment assessed the “*validity*” of the Contested Decision in light of a “*validity assessment*” under Article 41 of the Norwegian Public Administration Act (paragraphs 91-116 Reinøy Judgment).

<sup>31</sup> “*I then turn to some remarks about the invalidity assessment when mandatory impact assessment has not been carried out [...] The Planning and Building Act does not regulate this separately, and I have not found evidence in underlying EEA-legal material that provides binding guidelines in this respect. It then follows from the general rule in Section 41 of the Public Administration Act that the regulatory decision is still valid “when there is reason to expect that the error would not have influenced the content of the decision” (emphasis added) paragraphs 70-71 of the US Embassy Judgment. “Jeg går da over til noen bemerkninger om ugyldighetsvurderingen der pliktig konsekvensutredning ikke er gjennomført. Plan- og bygningsloven regulerer ikke dette særskilt, og jeg har ikke funnet holdepunkter i det underliggende EØS-rettslige materialet som gir bindende føringer i så måte. Det følger da av den alminnelige regel i forvaltningsloven § 41 at reguleringsvedtaket likevel er gyldig «når det er grunn til å regne med at feilen ikke kan ha virket bestemmende på vedtakets innhold”.*”



authorities and Courts ensure the requirements to carry out an EIA or EA pursuant to the EIA and SEA Directives, are respected and complied with these circumstances.

9. According to the Reinøy Judgment, when assessing whether there has been a breach of Article 41 of the Norwegian Public Administration Act it is important to assess whether “*there was a real possibility that the municipal council would have taken another decision [...] had an impact assessment been carried out*” (paragraphs 99, 110-116 Reinøy Judgment). The Reinøy Judgment makes clear that, when assessing whether the municipal council would have taken another decision, the Norwegian Courts take into account the subjective views and desired outcome of the municipality in question and, for example, whether the municipality “*consistently*” and/or “*repeatedly*” advocated for a specific project to go-ahead (paragraph 111 of the Reinøy Judgment).
  - a. Please explain whether, in those situations where there is an absence of an EIA or EA, but where the municipality’s desire to ensure an infrastructure project goes-ahead, and that land is expropriated for the infrastructure project, is decisive in the decision-making process, with the legal consequence that the subsequent decisions to expropriate land and approve the infrastructure project are “*valid*” pursuant to the principle codified in Section 41 of the Norwegian Public Administration Act - there is a breach of the Norwegian EIA Regulation or other Norwegian law. If so, please explain what the legal consequences of that breach would be. Please explain whether Norwegian authorities and Courts could take action, and if so what action, in these circumstances. Please explain how Norwegian authorities and Courts ensure the requirements to carry out an EIA or EA pursuant to the EIA and SEA Directives, are respected and complied with these circumstances.
  - b. Please explain whether, in those situations where there is an EIA or EA has been carried out but it is defective or has not been carried out in accordance with the EIA and/or SEA Directives, but where the municipality’s desire to ensure an infrastructure project goes-ahead, and that land is expropriated for the infrastructure project, is decisive in the decision-making process, with the legal consequence that the subsequent decisions to expropriate land and approve the infrastructure project are “*valid*” pursuant to the principle codified in Section 41 of the Norwegian Public Administration Act - there is a breach of the Norwegian EIA Regulation or other Norwegian law. If so, please explain what the legal consequences of that breach would be. Please explain whether Norwegian authorities and Courts could take action, and if so what action, in these circumstances. Please explain how Norwegian authorities and Courts ensure the requirements to carry out an EIA or EA pursuant to the EIA and SEA Directives, are respected and complied with these circumstances.
10. Please explain whether it is correct that, if a municipality in Norway strongly desires for an infrastructure project to go-ahead – and that desire is decisive in the decision-making process – the issue of whether an EIA or EA has been carried out at all, and/or in accordance with the EIA or SEA Directives, would not have a bearing on the ‘validity’ of the Norwegian municipality’s decisions to expropriate land and/or approve an infrastructure project pursuant to the principle codified under Article 41 of the Norwegian Public Administration Act.
11. Under Norwegian law, please explain whether it is correct that natural and legal persons must first prove, with sufficient evidence, that there has been a breach of Article 41 of the Norwegian Public Administration Act, in order to then seek annulment of decisions taken in breach of the requirements to carry out EIAs and EAs in accordance with the EIA and SEA Directives. Please explain how this approach guarantees the full scope and effectiveness of the legal provisions set out in the EIA

and SEA Directives, in particular the effective protection of these EEA rights and the effective enforcement of this EEA law in Norwegian national courts.

12. Protecting the environment constitutes one of the essential objectives of the EEA and is both fundamental and inter-disciplinary in nature.<sup>32</sup> Carrying out EIAs is one of the “*fundamental environmental protection mechanisms*” in that it enables the creation of pollution or nuisances to be prevented at source rather than subsequently trying to deal with their effects.<sup>33</sup> Please explain how, by treating the requirements to carry out EIAs/EAs as procedural requirements, and by treating breaches of these requirements as within the scope of Article 41 of the Norwegian Public Administration Act – with the consequence that an absence of a valid EIA or EA can, in principle and in practice, be disregarded presuming it is not deemed to have a decisive effect on the substance of the decision or decision-making process – Norway ensures that EIAs are carried out in all situations as legally required under the EIA and SEA Directives.

### **Illustrative case-study 3**

Reference is made to the ruling of the Oslo District Court of 7 April 2020 *National Association of Norwegian Architects and Society for the Preservation of Ancient Norwegian Monuments v Norway / Norwegian Ministry of Local Government and Modernization* (20-041571TVI-OTIR / 04) (“the Y-Blokka Judgment”). The Y-Blokka Judgment concerns a petition for a temporary injunction made pursuant to Section 34-1 of the Norwegian Disputes Act, to prevent the demolition of a building in Norway (“Y-Blokka”) pending the outcome of the Oslo District Court’s decision in the main proceedings.

13. Please indicate whether the following summary correctly portrays the factual background surrounding the decision-making process leading to the demolition of the Y-Blokka building.
- In May 2014, the Norwegian Government adopted a decision to create a new governmental district in Oslo, in particular by pursuing the “Concept East” plan, with some adaptations, which envisioned the demolition of Y-Blokka (“2014 Governmental Quarter Decision”).
  - On 10 February 2017 the Norwegian Ministry of Local Government and Modernization adopted a state zoning plan (“2017 Zoning Plan Decision”) based on the premise that Y-Blokka would be demolished.
  - On 5 July 2019 the City of Oslo granted a permit to the Nordic Office of Architecture to demolish Y-Blokka (“2019 Framework Permit Decision”).
  - In December 2019, the City of Oslo granted a start-up permit to the Nordic Office of Architecture for the demolition of the Y-Blokka. The Norwegian state announced that irreversible demolition work would begin on 15 April 2020.<sup>34</sup>
14. Please indicate whether it is correct that, in February 2017, at the time the 2017 Zoning Plan Decision was adopted, the requirement to carry out impact assessments vis-à-vis urban development schemes, was implemented in Norwegian law primarily by way of: (i) Section 4(2) of the Norwegian Planning and Building Act (LOV-2008-06-27-71),<sup>35</sup> and (ii) the Norwegian Regulation on Impact Assessments 2014 (FOR 2014-

<sup>32</sup> Judgment of the Court of Justice of the European Union (“CJEU”) of 12 November 2019, *European Commission v Ireland*, Case C-261/18, EU:C:2019:955, (“Case C-261/18, *European Commission v Ireland*”) paragraph 115 and the case-law cited therein.

<sup>33</sup> Case C-261/18, *European Commission v Ireland*, paragraph 116.

<sup>34</sup> Page 7 of the Y-Blokka Judgment.

<sup>35</sup> Article 4(2) of the Norwegian Planning and Building Act 2014 provides that a plan must “...provide a special assessment and description - impact assessment – of the plan’s effects on the environment and society” (Unofficial translation).

- 12-19-1726). Please indicate whether the requirement to carry out an impact assessment under Section 4(2) of the Norwegian Planning and Building Act seeks/sought to implement and transpose the requirements to carry out an EIA in accordance with the EIA Directive or, alternatively, the requirements to carry out an EA in accordance with the SEA Directive.
15. Please indicate whether the Norwegian legal framework concerning urban development schemes and the Norwegian national requirements to carry out EAs under the SEA Directive, and EIAs under the EIA Directive, has changed since February 2017 and, if so, how. Please explain how the requirements to carry out EAs under the SEA Directive and the requirements to carry out EIAs under the EIA Directive, are currently implemented and transposed in Norwegian law vis-à-vis urban development schemes. Is it correct that, under Norwegian law, one impact assessment must be carried out vis-à-vis urban development schemes? If so, please explain how the requirement to carry out one impact assessment for urban development schemes transposes the requirements to carry out an EIA in accordance with the EIA Directive and the requirements to carry out an EA in accordance with the SEA Directive.
16. Please indicate whether, under Norwegian law, the environmental effects of demolition must be taken into account before a plan or programme is adopted, or, alternatively, before a specific project is approved. If the environmental effects of demolition must be taken into account primarily before a plan or programme is adopted (and therefore before the Norwegian planning process starts), please explain how, this would not, as referenced in the Y-Blokka Judgment, undermine “*the whole [Norwegian building and planning] process*”.<sup>36</sup> If the environmental effects of demolition must be considered both in an impact assessment conducted before a plan or programme is adopted, and, in addition, in an impact assessment conducted before a specific project is approved – please explain what precisely must be considered within each impact assessment. If the environmental effects of demolition are presumed or mentioned in a ‘plan’ or ‘programme’ does that mean that the actual environmental effects relating to a specific ‘project’ would not need to be considered?
17. Please indicate whether it is correct that, under Norwegian law, if the environmental effects of the demolition of a building or structure are not considered in an impact assessment, this will not call into question the validity a subsequent decision to permit demolition or urban development, unless a claimant or applicant in Norway is able to prove, with sufficient evidence, there has been a breach of Article 41 of the Norwegian Public Administration Act, i.e. that there is a “*real possibility*” that the failure to assess the environmental effects arising from the demolition would have changed the decision allowing demolition.<sup>37</sup> Please indicate whether it is correct that, if, from the outset, there is a presumption that a building or structure will be demolished, a failure to assess the environmental effects of the demolition is unlikely to call into question the validity of the decision to allow demolition under Section 41 of the Norwegian Public Administration Act.
18. According to the Y-Blokka Judgment, under Norwegian law, a temporary injunction can only be granted if, either, there is a “*danger*” or imminent threat - or, alternatively, if it is probable that the main action will succeed (Article 34(2) Norwegian Disputes Act and page 7, Y-Blokka Judgment). According to the Y-Blokka Judgment, in this case, the Court agreed that there was a “*danger*” or imminent threat,<sup>38</sup> however, as

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<sup>36</sup> Unofficial translation. See page 15 of the Y-Blokka Judgment.

<sup>37</sup> See pages 19-21 of the Y-Blokka Judgment where the Court concluded, amongst other things, that there was no “*real possibility*” that the 2017 Zoning Plan Decision would have differed and therefore held that “*...the validity of the [2017 Zoning Plan Decision] is therefore not affected*” (page 21 Y-Blokka Judgment).

<sup>38</sup> Irreversible demolition works were due to commence on the Y-Blokka in mid-April 2020.

the claimants and applicants had not “*explicitly invoked*” these grounds<sup>39</sup> the Court was barred from basing its decision on them.<sup>40</sup> As such, the Court assessed whether it was probable that the main action would succeed. In this regard the Court stated that it was required to undertake a “*general*” probability assessment taking into account the assertions made in the main action, and based on the balance of probabilities. In this assessment, the Court assessed, amongst other things, whether there had been breach of a procedural rule and, if so, whether that breach constituted a breach of Article 41 of the Norwegian Public Administration Act.<sup>41</sup>

- a. Please explain whether, under Norwegian law, it is correct that a natural or legal person must prove, with sufficient evidence, that there is a probability that a decision or act is “*invalid*” under Article 41 of the Norwegian Public Administration, in order to successfully obtain a temporary injunction in relation to an alleged breach of the requirements to carry out EIAs and EAs in accordance with the SEA and EIA Directives. Please explain how this approach guarantees the full scope and effectiveness of the legal provisions set out in the EIA and SEA Directives.
- b. In the Y-Blokka Judgment, the Court expressly noted the limitation in the Court’s competencies when reviewing decisions pursuant to Article 25 of the Norwegian Planning and Building Act.<sup>42</sup> Moreover, when assessing the probability of success of the main action, the Court did not expressly refer or take into account the legal requirements to carry out EAs and EIAs in accordance with the SEA and EIA Directives. Please explain whether, when assessing whether a temporary injunction should be granted under the Norwegian Disputes Act, the Norwegian Courts have limited competencies in reviewing decisions in this area regarding urban development schemes. Please explain whether, when assessing whether a temporary injunction should be granted under the Norwegian Disputes Act, the Norwegian Courts can take into account the legal requirements codified under EEA law, such as the requirements to carry out EAs and EIAs in accordance with the SEA and EIA Directives.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, before 17 December 2021.

Yours faithfully,

Marco Uccelli  
Deputy Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Marco Uccelli.*

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<sup>39</sup> Pursuant to Article 32(11) Norwegian Disputes Act.

<sup>40</sup> Article 11(2) Norwegian Disputes Act.

<sup>41</sup> The Y-Blokka Judgment references the Norwegian Supreme Court Judgment of 29 May 2009 (Rt-2009-661) (“US Embassy Judgment”) and the Norwegian Supreme Court Judgment of 28 November 2017 (HR-2017-247-A) (“Reinøy Reinbeitedistrikt Judgment”) (pages 9, 11, 12 and 16 of the Y-Blokka Judgment).

<sup>42</sup> Page 6 of the Y-Blokka Judgment.