ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 05.07.2024

Written observations by the Kingdom of Norway

represented by Henrik Vaaler and Karen Mellingen, advocates at the Office of the Attorney General for Civil Affairs, submitted pursuant to Article 90(1) of the Rules of Procedure of the EFTA Court in the case of

> **E-13/24** ***Friends of the Earth Norway and Young Friends of the Earth Norway*** **v** ***the Norwegian Government, represented by the Ministry of Climate and Environment (Klima-og miljødepartementet) and the Ministry of Trade, Industry and Fisheries (Nærings- og fiskeridepartementet)***

in which Borgarting lagmannsrett (Borgarting Court of Appeal) has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") on the interpretation of Article 4(7)(c), first alternative, of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ("WFD").

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1 INTRODUCTION

(1) The proceedings pending before Borgarting Court of Appeal concerns the legality of four permits granted by Norwegian authorities to Nordic Mining ASA and its subsidiary Engebø Rutile and Garnet AS (previously "Nordic Rutile AS"; collectively "Nordic Mining"). The permits give Nordic Mining permission to operate a mine at Engebø in Sunnfjord municipality and conduct submarine tailings disposal in the Førdefjord.

(2) By decision 5 June 2015 the Ministry of Climate and Environment granted Nordic Mining a pollution permit pursuant to Section 11 of the Pollution Control Act of 1981 (*forurensningsloven*) which includes permission to conduct submarine tailings disposal. The Decision was affirmed by the King in Council's Royal Decree of 19 February 2016. Included in both decisions is a derogation from the obligation in Section 4 of Regulation no. 1446 of 15 December 2006 on a Framework for Water Management (*vannforskriften*, the "Water Regulation") pursuant to Section 12 of the same regulation. Section 12 of the Water Regulation transposes Article 4(7) WFD. The appellants argue that the condition in Article 4(7)(c), first alternative, WFD is not fulfilled.[1]

(3) Borgarting Court of Appeal has decided to refer the following questions to the Court:

> *1. What is the legal test when determining whether there is an "overriding public interest" within the meaning of Article 4(7)(c) of Directive 2000/60/EC?*
>
> > *a. Is a qualified preponderance of interest required and/or are only particularly important public interests relevant?*
> >
> > *b. What will be key factors in the assessment of whether the public interests that justify the measure are "overriding"?*
>
> *2. Can the following economic considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?*
>
> > *a. Purely economic considerations (i.e. the expected gross income generated by the planned mining operations)*
> >
> > *b. That a private undertaking will generate income for shareholders*
> >
> > *c. That a private undertaking will generate tax revenue for the state and municipality*
> >
> > *d. That a private undertaking will provide wage income for employees*

[1] The parties agree that the other conditions in Article 4(7) WFD are fulfilled. The derogation is based on Article 4(7) WFD, first alternative, ("new modifications to the physical characteristics of a surface water body").

3. Can the following considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?

a. That a private undertaking will generate employment effects (increased local business activity, employment and settlement)

b. Global supply of rutile

c. Ensuring Norway and Europe access to critical minerals

(4) In essence, the Court of Appeal needs an answer to one question in order to decide the case at hand, namely whether a mining project producing rutile and garnet for the global market, ensuring access to critical raw materials, generating income for the owners, workers and society (through taxation) and creating jobs in a remote region, may be of an «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD. The Government's short answer to this question is "yes".

(5) The Government nonetheless brings the Court's attention to the fact that the questions from the Court of Appeal are generally formulated and applies to *all* projects that may need a derogation pursuant to Article 4(7) WFD and where the second alternative in Article 4(7)(c) is not appropriate. The questions can therefore not be answered with reference to the Engebø project or the sea tailings disposal in the Førdefjord alone. In answering the questions, and particularly questions 1, 2 and 3(a), due regard must be had to the fact that the interpretation of «overriding public interest» will apply equally to all projects and plans EEA States have implemented or plan to implement in the future that negatively impact on the ecological status of one or more of the over 160 000 water bodies within the EEA.

2 FACTS OF THE CASE

(6) Pursuant to Article 34 SCA, the assessment of the facts and how national law is applied is a matter for the national courts.[2] The summary of the facts in the Request for an Advisory Opinion is however brief and on some instances not fully accurate, and the parties have different views on the relevant facts. It is therefore necessary for the Government to elaborate somewhat further on the facts of the case.

2.1 The Engebø mine

(7) Section 3.2 of the Request for an Advisory Opinion describes the planned processing of ore at Engebø but does not elaborate on the project itself. As the key question for the Court of Appeal is whether the project is of an «overriding public interest» pursuant to Article 4(7)(c) WFD, the Government finds it pertinent to describe it.

(8) The Engebø mine will produce the minerals rutile and garnet. The Engebø deposit is one of the largest unexploited rutile (TiO_2) deposits in the world and is the only rutile deposit of

[2] Judgment in *Fred Olsen and others*, E-3/13 and E-20/13, paragraph 202.

note within the EEA. Annual production at Engebø is forecasted at 35 000 tonnes of rutile and 180 000 tonnes of garnet.[3] This equates to approx. 8% of global rutile demand in 2023 and approx. 20% of Europe's rutile demand in a normal year. The mine is expected to meet around 30–40% of European demand for garnet.

(9) Rutile, along with ilmenite, is the main source for production of titanium metal and titanium compounds for other uses (such as white pigment and cosmetics). Rutile is preferable to ilmenite as it has a higher TiO_2-purity and the CO_2-footprint is significantly lower. Nordic Mining assesses that approximately half of the rutile extracted will be used for producing titanium metal.[4] It is therefore not accurate that all production will be used for colour pigment, as alleged by the appellants.[5]

(10) Titanium metal is included as both a «Strategic Raw Material» and a «Critical Raw Material» in the Critical Raw Materials Act (CRMA), primarily due to its importance for aerospace and defence industries, and a very geographically concentrated production.[6] CRMA is currently under scrutiny for incorporation into the EEA Agreement by Iceland, Liechtenstein and Norway. It follows from the recent JRC Science for Policy Report, *Supply chain analysis and material demand forecast in strategic technologies and sectors in the EU*:

> *The invasion of Ukraine by Russia changed the picture of the supply of titanium. During the Russian war on Ukraine, a coalition of 3D Printing companies have reportedly boycotted Russia (Molitch-Hou, M., 2022). It's not known to what extent this boycott has impacted the AM [Additive Manufacturing] sector in Russia. The war has put titanium metal supply at risk and threatens access to titanium products used in the aerospace sector.*[7] …
>
> *In the aerospace and defence sector as a whole, the ongoing demand for titanium metal is substantial. For example, about 81 000 tonnes of titanium is currently embedded in NATO fleets of aircraft and battle tanks as of 2022. In 2019, aerospace applications, in particular aircraft manufacturing, used about two thirds of the available titanium metal supplies in the EU.*[8]

(11) Nordic Mining has started extraction of ore at Engebø, and production is planned to commence in the latter half of 2024. Production is scheduled to last for at least 39 years and probably longer (perhaps up to 130 years). Nordic Mining has entered into off-take agreements for the first five years of production whereby some volumes of rutile will be sold to a customer in the EU and remaining volumes to a customer in Japan.[9] It is thus not

[3] District Court's judgment of 10 January 2024 page 4.
[4] Nordic Mining, *Waste Management Plan* (2023) page 27.
[5] Request for an Advisory Opinion page 15.
[6] EU Commission, *Study on the Critical Raw Materials for the EU 2023* (2023), pages 36 and 39.
[7] JRC Science for Policy Report, *Supply chain analysis and material demand forecast in strategic technologies and sectors in the EU – A foresight study* (2023), page 116.
[8] JRC Science for Policy Report, *Supply chain analysis and material demand forecast in strategic technologies and sectors in the EU – A foresight study* (2023), page 181. See also page 182.
[9] Nordic Mining, *Waste Management Plan* (2023) page 27.

correct that most of the production necessarily will be exported to Asia, as the appellants claim.[10]

(12) Nordic Mining estimates that the mine will directly employ 105 persons the first 13 years, and 145 persons the following 27 years. The research agency Sintef has calculated the indirect employment effects in an early production phase at 0.48–0.78 per directly employed in the Engebø region and 1.93 at the national level.[11] Indirect employment effects are expected to increase over time. Annual turnover is calculated at USD 70 million per annum with a net present pre-tax value of USD 350 million over the mine's lifetime, with a required rate of return of 8 percent.[12]

(13) The mine is located in the former Naustdal municipality in Western Norway. The area is designated as a 'c' area in Norway's regional aid map[13], and is included in the areas covered by regionally differentiated social security contributions[14].

2.2 The Engebø mine's impact on the "Førdefjorden-ytre" surface water body

(14) Section 3.3 of the Request for an Advisory Opinion describes the environmental impact of the submarine tailings disposal on the 'Førdefjorden-ytre' water body.[15] The description may leave an impression that the impacts are both more extensive and more uncertain than they in fact are, and some clarifications are therefore provided.

(15) Tailings from the mine will be disposed within a defined area at the bottom of the Førdefjord.[16] The tailings consist of waste rock from the processing of the ore (extraction of rutile and garnet). The tailings are inert, and the chemical status of "Førdefjorden-ytre" will remain «good».[17] [18] Submarine tailings disposal is neither included nor excluded as best available technique.[19]

(16) In its Decision of 5 June 2015, the Ministry of Climate and Environment assesses that the disposal will cause the ecological status of the water body to deteriorate from «good» (*god*) to «poor» (*dårlig*).[20] [21] The composition and abundance of benthic invertebrate fauna is the

[10] Request for an Advisory Opinion page 15.
[11] Sintef, *Økonomiske ringvirkninger av mineralbrudd i Engebøfjellet* (2013), page 72.
[12] Ministry of Trade, Industry and Fisheries' Decision of 6 May 2022 pages 1 and 21.
[13] Most recently approved by ESA through Decision No. 276/21/COL.
[14] Most recently approved by ESA through Decision No. 300/21/COL.
[15] The Førdefjord is divided in to three water bodies pursuant to the WFD. Information about the 'Førdefjorden-ytre' water body can be accessed here.
[16] See Request for an Advisory Opinion page 4.
[17] Ministry of Climate and Environment's Decision of 5 June 2015 page 21.
[18] Section 1.4.3 of Annex V to the Water Regulation and Section 1.4.3 of Annex V WFD.
[19] JRC Science for Policy Report, *BAT Reference Document for the Management of Waste from Extractive Industries in accordance with Directive 2006/21/EC (the Mineral Waste Directive*) (2018), pages 81–84 and 488.
[20] Ministry of Climate and Environment's Decision of 5 June 2015 page 20. Before the District Court, the parties agreed on the level of deterioration, see the judgment of 10 January 2024 page 21.
[21] Section 4 cf. Section 1.2 of Annex V to the Water Regulation and Article 4(1)(a)(i) cf. Section 1.2 of Annex V WFD.

quality element that will be most negatively affected, and thus determines the ecological status of the water body. The benthic invertebrate fauna in the area where tailings disposal will take place will be buried, and thus eradicated, while active disposal is in progress.[22] The seabed in most of the deposit area is expected to be recolonised within 10 years of disposal ending but may then have a different composition.[23] Tailings disposal will not take place within the entire disposal area at all times and recolonisation is expected to commence in parts of the deposit area during the mine's lifetime.[24]

(17) The Decision of 5 June 2015 further assesses that the ecological status of the waters above and the submarine areas outside the deposit area are *not* expected to be negatively affected.[25] To ensure that the ecological status of these areas does not deteriorate to a class below «good», Nordic Mining's pollution permit sets out maximum thresholds for the concentration of particles in the water above and at the edge of the disposal area, and for the annual rate of sedimentation at the edge of the disposal area.[26] The concentration thresholds are set below the lowest known impact levels on the most sensitive parts of the aquatic ecosystem. Particle concentration is to be monitored continuously, and disposal is to halt if the thresholds are exceeded.[27] The conditions in the pollution permit are legally binding on Nordic Mining.[28]

(18) The environmental impact of the Engebø mine has been assessed through more than 90 different environmental impact assessments of which approx. 60% are concerned with the impact of the submarine tailings disposal.[29] Oslo District Court found that the environmental impact assessments were adequate, and this is not contested before the Court of Appeal.[30]

(19) All six permit applications granted to Nordic Mining, including the environmental impact assessments, have been subject to a total of eight rounds of public consultations. More than 150 responses have been received and assessed. The District Court concluded that adequate public consultations had been conducted prior to the permits being granted.[31]

(20) The District Court also concluded that the Ministry of Climate and Environment's Decision of 5 June 2015 and Royal Decree of 19 February 2016 correctly assessed the environmental impact of the sea tailings disposal, and this is no longer contested by the appellants before the Court of Appeal.[32] It is therefore no longer accurate that the parties «disagree on how serious the environmental impacts will be».[33]

[22] Ministry of Climate and Environment's Decision of 5 June 2015 page 20.
[23] Ministry of Climate and Environment's Decision of 5 June 2015 pages 10–11.
[24] Nordic Mining, *Waste Management Plan*, pages 86–87 and 92–93.
[25] Ministry of Climate and Environment's Decision of 5 June 2015 pages 20–21.
[26] Section 9.4.2 of Nordic Mining's Pollution Permit.
[27] Ministry of Climate and Environment's Decision of 5 June 2015 pages 8–9.
[28] Section 16 of the Pollution Control Act.
[29] District Court's judgment of 10 January 2024 page 47.
[30] District Court's judgment of 10 January 2024 pages 47–67.
[31] District Court's judgment of 10 January 2024 pages 38 and 44.
[32] District Court's judgment of 10 January 2024 pages 47–67.
[33] Request for an Advisory Opinion page 4.

2.3 The derogation granted by Norwegian authorities to Nordic Mining

(21) Section 3.4 of the Request for an Advisory Opinion quotes from the derogation granted to Nordic Mining pursuant to Section 12 of the Water Regulation in the Royal Decree of 19 February 2016. The Government finds it pertinent to put the quote in some context.

(22) In its judgment of 10 January 2024, the District Court interpreted the Royal Decree, and concluded that it was based on the following considerations (unofficial translation):[34]

> *In addition, the Royal Decree also considers the 'benefits of the measure for society' separately in two sections. Here, the future income from mining operations is assessed as 'the dominant benefit for Norwegian society as a whole,' distributed among employees, shareholders, and municipal and state tax recipients. Additionally, the Royal Decree also points out that 'mining operations will also create employment,' and that 'extraction from the deposit in Engebøfjellet will be able to meet the demand for rutile in the global market for many years,' as the rutile deposit in Engebøfjellet represents one of the largest known occurrences in solid rock.*[35]

(23) The District Court concluded that the Royal Decree, when finding that the project furthered an «overriding public interest», relied on the following factors: income from mining activities (to shareholders, to government as taxes and to employees), employment generation and supply of rutile for the global market. How the Royal Decree is to be interpreted, and what legal consequences the different interpretations may have for the validity of the decisions are questions for the Norwegian courts.[36] However, for the sake of completeness, it is not accurate that employment effects and the global supply of rutile are «alternative arguments» first presented by the Government «before the courts».[37]

(24) The District Court concluded that all the identified benefits could constitute «overriding public interest» in the case at hand,[38] that the Royal Decree of 19 February 2016 fulfilled the obligation to state reasons,[39] and that there were no «significantly better environmental option[s]» to the submarine tailings facility pursuant to Article 4(7)(d) WFD.[40]

3 PRELIMENARY REMARKS

(25) All questions in the Request for an Advisory Opinion presuppose that Article 4(7)(c), first alternative, WFD applies *as such* to the case at hand. In the Government's view, this is not accurate.

[34] The case was heard over 10 days. It included over 9800 pages of documents and the oral testimony of 16 witnesses, most of them experts, cf. the District Court's judgment of 10 January 2024 page 6.
[35] District Court's judgment of 10 January 2024 page 23. See also pages 24 and 38.
[36] Request for an Advisory Opinion page 17.
[37] Request for an Advisory Opinion pages 6 and 15.
[38] District Court's judgment of 10 January 2024 page 38.
[39] District Court's judgment of 10 January 2024 pages 39–40.
[40] District Court's judgment of 10 January 2024 pages 67–88.

(26) Article 13(6) WFD provides that EU States shall publish river basin management plans at the latest within nine years after the entry into force of the WFD. For Norway, Iceland and Lichtenstein, the deadline in Article 13(6) WFD was 28 September 2016.[41]

(27) Article 4(1) first paragraph WFD establish a link between the measures states are bound to adopt under the provision and the prior existence of a river basin management plan covering the water body in question.[42] In the judgments in *Nomarchiaki Aftodioikisi Aitoloakarnanias* and *Commission* v *Austria ("Schwarze Sulm")*, the CJEU therefore held that the obligations in Article 4 WFD only applies to projects that are authorised *after* a river basin plan covering the relevant river basin has been adopted within the deadline prescribed by Article 13(6) WFD.[43] Article 4(7) WFD is therefore not applicable, as such, to projects that are authorised *prior* to the adoption of a river basin management plan.[44]

(28) Prior to the expiry of the deadline for adopting river basin management plans, the CJEU held that EU States were obliged to «refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive».[45]

(29) The Ministry of Climate and Environment approved the first river basin management plan for (the former) Sogn og Fjordane county, which covers the "Førdefjorden-ytre" water body, on 4 July 2016 within the deadline set for EEA EFTA States.[46] Article 4 WFD did therefore not apply, as such, at the time when the Ministry of Climate and Environment, and later the King in Council, authorised the deterioration of the ecological quality status of "Førdefjorden-ytre" in the case at hand.[47]

(30) The Government is of the opinion that the decisions by Norwegian authorities were not «liable seriously to compromise the attainment of the result prescribed by Article 4» WFD. Section 12 of the Water Regulation, which transposes Article 4(7) WFD, entered into force on 1 January 2007 and applied at the time the deterioration was authorised. It is, however, for the Norwegian courts to interpret the Water Regulation and the application of Section 12 to the case.

[41] Article 1(1)(b) of the EEA Joint Committee Decision No. 125/2007.
[42] Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and others*, C-43/10, EU:C:2012:560, paragraph 52.
[43] Judgments in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraph 56; and *Commission v Austria ("Schwarze Sulm")*, C-346/14, EU:C:2016:322, paragraph 49.
[44] Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraph 64.
[45] Judgments in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraph 60; and *Schwarze Sulm*, cited above, paragraphs 50–51.
[46] Decision by Ministry of Climate and Environment 4 July 2016.
[47] The latter permits granted to Nordic Mining do not authorise further deterioration in the status of the water body.

4 CONSIDERATION OF THE QUESTIONS REFERRED

4.1 The first question

4.1.1 The scope of the question

(31) The first question is very generally formulated but is sought clarified using sub-questions. Question 1(a) asks whether a «qualified preponderance of interest [is] required and/or are only particularly important public interests relevant» under Article 4(7)(c), first alternative, WFD. The Government does not agree with the premise underlying the question. The wording «overriding public interest» in Article 4(7)(c), first alternative, WFD refers to the *types* of interests that may justify a derogation, i.e., interests that are "overriding" and "public" (section 4.1.2 below). It does *not* in addition require a balance-of-interests test (section 4.1.3 below), *even less* does it require a «qualified preponderance of interest» (section 4.1.4 below). «Overriding public interest» is *neither* limited to «only particularly important public interests» (section 4.1.5 below). Question 1(b) is addressed in section 4.1.6 below.

4.1.2 Article 4(7)(c), first alternative, WFD refers to the type of interest that can justify derogation

(32) The Government is of the opinion that Article 4(7)(c), first alternative, WFD, refers to the *type* of interest furthered by a project or plan that may justify a derogation from Article 4(1) WFD. The interest must be both "public" and "overriding".

I. The wording of Article 4(7)(c), first alternative, WFD supports the Government's interpretation

(33) Article 4(7)(c), first alternative, reads in the English, German and French language versions:

> *the reasons for those modifications or alterations are of overriding public interest…*
>
> *die Gründe für die Änderungen sind von übergeordnetem öffentlichem Interesse…*
>
> *ces modifications ou ces altérations répondent à un intérêt général majeur…*[48]

(34) First, while somewhat differently structured, all three language versions contain one criterion. In all three versions the criterion narrows down the *type* of «interest» that can justify a derogation, namely the reasons for the new modifications or alterations «are of overriding public interest»/«sind von übergeordnetem öffentlichem Interesse»/«répondent à un intérêt général majeur».

[48] The German and French language versions use different terms in Article 4(7)(c), first alternative, and in recital 32 in the preamble to the WFD. In the German language version, the relevant part of recital 32 reads: «die aus Gründen des überwiegenden öffentlichen Interesses erfolgt sind». In the French language version, it reads: «en raison d'un intérêt public supérieur».

(35) The interest in question must be «overriding public»/«übergeordnetem öffentlichem»/«général majeur». The terms "overriding"/"übergeordnetem"/"majeur" and "public"/"öffentlichem"/"général" denotes the two characteristics of the relevant interests.

(36) Second, the condition is tied to the advantages of the new modifications or alterations. In the English and German language version, it is the reasons «for»/« für» the changes that must be of such a character that they «are of»/«sind von» overriding public interest. In the French language version, the changes must «répondent à» a major general interest. In all three language versions it is only the interest speaking in favour of the project that is relevant under the first alternative of Article 4(7)(c). The negative impacts of the project on the water body are addressed through the other cumulative criteria in Article 4(7) WFD.

(37) Third, the interpretation finds support in other language versions. Several, such as, the Italian, Spanish and Dutch language versions are structured in the same way as the English and German versions («le motivazioni di tali modifiche o alterazioni sono di prioritario interesse pubblico»/«que los motivos de las modificaciones o alteraciones sean de interés público superior»/«de redenen voor die veranderingen of wijzigingen zijn van hoger openbaar belang»). The Danish language version is structured in the same way as the French version («ændringerne eller forandringerne er begrundet i væsentlige samfundsinteresser»).

II. The Government's interpretation is supported by contextual arguments

(38) Article 4(7)(c), first alternative, WFD has to be construed in light of Article 4(7)(b) WFD which reads:

> *the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13…*

(39) The term "reasons for those modifications or alterations" is used in both provisions and must be presumed to have the same meaning. The only possible interpretation of Article 4(7)(b) WFD is that it refers to the reasons in *favour* of the project, as the Government cannot see what else should be «specifically set out and explained». Pursuant to Article 4(7)(c), first alternative, these reasons must also be of «overriding public interest» if derogation is to be allowed.

III. The Government's interpretation is in fully line with the objectives of the WFD

(40) The objectives of the WFD are set out in Article 1 WFD. Read in isolation the objectives support strict criteria for derogations from the obligations in Article 4(1) WFD. By providing that only "public" and "overriding" interests may justify a derogation, the first alternative of Article 4(7)(c) along with the other cumulative criteria in Article 4(7) ensures that the objective can be maintained.

IV. Case law supports the Government's interpretation

(41) In its case law on the first alternative of Article 4(7)(c) WFD, the CJEU has exclusively focused on the type of interest furthered by the project when assessing whether it was of «overriding public interest». In the judgment *Schwarze Sulm*, cited above, the CJEU held:

> *69. Next, it should be noted that the construction of a hydropower plant, such as the one envisaged through the contested project, may in fact be an overriding public interest.*
>
> *70. In that regard, the Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest....*
>
> *71. As part of that margin of discretion, the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.*

(42) The CJEU only assessed the character of the interest furthered by the project.[49] Likewise, in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the CJEU held that «consent was capable of being given to a project … if … that project served a general interest which might consist in, inter alia, the supply of water, electricity production or irrigation».[50] The only question was whether the project served a general interest.

V. The Government's interpretation is supported by the travaux préparatoires

(43) The CJEU has in its case law on the WFD employed the travaux préparatoires to interpret the meaning of the provisions in the Directive.[51] The earlier proposals for the wording of Article 4(7)(c), first alternative, WFD shows that it has always referred to the advantages of the alteration or modification in question. The first alternative was introduced in the Commission's amended proposal after the first reading of 17 June 1999 as part of Article 4(6), first paragraph. Derogation could here be allowed (our emphasis):

> *where Member States determine that there are reasons of overriding public interest for making these modifications or alterations especially for human safety, the protection of human health, environmental protection or environmentally sustainable development…*[52]

(44) The wording «determine that there are reasons of», clearly refer to the advantages of the project. The Council made some changes to the second part of the sentence, but retained the underlined part of the sentence in its common position of 22 October 1999.[53] In its

[49] Judgment in *Schwarze Sulm*, cited above, paragraphs 71–72.
[50] Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraph 67.
[51] Judgments in *Commission v Germany*, C-525/12, EU:C:2014:2202, paragraphs 41 and 47; and *Sweetman*, C-301/22, EU:C:2024:347, paragraph 38.
[52] COM(1999)271, page 8.
[53] 97/0067 (COD), page 25.

Recommendation to the second reading of 16 February 2000, the Committee on the Environment, Public Health and Consumer Policy's removed the express reference to the assessment by Member States.[54] The change primarily seems to have been motivated by technical reasons – the Committee was the first to move the criterion to a separate letter and the wording of the first alternative seems to have been modelled on Article 4(6)(b) (today Article 4(7)(b)). There is no indication that the meaning of the terms was to change.[55]

VI. Summary – Article 4(7)(c), first alternative, WFD refers to the type of interest that may justify derogation

(45) To summarise, the Government is of the view that the wording, context and purpose of the WFD, as well as case law and the travaux préparatoires, demonstrate that the first alternative of Article 4(7)(c) WFD refers to the types of interests that may justify derogation. The interests must be both "public" and "overriding". In the assessment of whether the interest by a project or plan are of «overriding public interest», case law holds that national authorities enjoy a certain margin of discretion.

4.1.3 Article 4(7)(c), first alternative, WFD does not call for a balance-of-interest test

(46) It's the view of the Government that «overriding public interest» in Article 4(7)(c), first alternative, WFD, does not *in addition* include a balancing of interests between the advantages of the project causing a deterioration in the status of a water body and the negative impact on the water body.

I. The wording of Article 4(7)(c), first alternative, WFD supports the Government's interpretation

(47) First, the wording provides one condition, namely referring to type of «interest» that can justify derogation.[56] Of all the language versions the Government has consulted, none apart from possibly the Swedish language version, refers to a balancing of interests.

(48) The Swedish language version provides that: «[s]kälen för dessa modifieringar eller förändringar är allmänintresse av större vikt». The wording is ambiguous. The term "greater weight" («större vikt») might either refer to the character of the public interest that may justify derogation, in which case it is line with other language versions, or it might refer to a balance-of-interest test. As the wording is ambiguous and the latter interpretation finds little support in other language versions, the first interpretation must be chosen. In any event, the Swedish language version cannot be determinative for the interpretation of Article 4(7)(c), first alternative, WFD.[57]

[54] A5-0027/2000, page 21.
[55] Section 3.7 in the Explanatory Statement to the Recommendation from the Committee on the Environment, Public Health and Consumer Policy of 3 February 2000 (A5-0027/2000) holds that: «new modifications or alterations to water bodies shall only be allowed if Member States establish that the respective changes outweigh the benefits» (our emphasis).
[56] Paragraph 34 above.
[57] Judgment in *A*, C-950/19, EU:C:2021:230, paragraph 37.

(49) As mentioned above, the word "overriding", along with "public", characterises the relevant interest that can justify derogation.[58] It does not in addition contain a balancing of interests. This is also supported by, among others, the German and French language versions which uses other terms that clearly relate to the character of the interest («übergeordnetem»/«majeur»).

(50) Second, the condition is tied to the «reasons for those modifications or alterations» and does not take into consideration the negative impact on the water body.[59] As only the advantages are relevant to consider under Article 4(7)(c), first alternative, a balancing of interests cannot be established.

II. The Government's interpretation is supported by contextual arguments

(51) First, Article 4(7)(c) provides two *alternative* grounds for derogation. Unlike Article 4(7)(c) WFD, first alternative, the *second* alternative explicitly calls for a balancing of interest. The second alternative reads (our emphasis):

> *and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development…*

(52) Had a balancing exercise also been required under the first alternative, one would expect this to have similarly clear support in the text. This is especially so as it transpires from the travaux préparatoires that the European Parliament added the condition «outweighed by…» in the second alternative *after* the Commission, and later the Council, had proposed the wording that was adopted as the first alternative in Article 4(7)(c).[60]

(53) Indeed, the difference between the two alternatives in Article 4(7)(c) must be presumed to be purposeful. The travaux préparatoires show that the European Parliament favoured the second alternative, while the Commission and Council favoured different versions of the first alternative in Article 4(7)(c).[61] The final text, which includes both alternatives («and/or») must be seen as a compromise.[62] For the same reason, it cannot be assumed that the threshold

[58] Paragraph 35 above.
[59] Paragraph 36 above.
[60] "Overriding public interest" was introduced in the Commission's amended proposal of 17 June 1999 (COM(1999)271), and included in in the Council's common position of 22 October 1999 (97/0067 (COD)). The balance-of-interest test in the second alternative was introduced in the Committee on the Environment, Public Health and Consumer Policy's recommendation to the second reading of 16 February 2000 (A5-0027/2000).
[61] Report from the Committee on the Environment, Public Health and Consumer Protection of 8 July 1998 (A4-0261/1998) amendment no. 49; the Commission's proposal of 17 June 1999 (COM(1999)271) page 8; and the Council's common position of 22 October 1999 (97/0067 (COD)) page 25.
[62] The use of two alternatives was introduced through the Committee on the Environment, Public Health and Consumer Policy's recommendation to the second reading of 16 February 2000 (A5-0027/2000) page 21. The amendment was accepted in full by the Commission in Opinion of 5 June 2000 (COM(2000)219).

for using the first alternative necessarily must be higher than in the second alternative – on the contrary a project may fulfil both conditions («and/or»).

(54) Second, Article 4(7)(c), first alternative, WFD has to be construed in light of Article 4(7)(b) WFD which uses some of the same terms.[63] The «reasons for those modifications or alterations» that may be of «overriding public interest» in the first alternative of Article 4(7)(c), must also be of such a character that they may be «specifically set out and explained» in the river basin management plan pursuant to Article 4(7)(b) WFD. This must refer to the advantages of the project, as it appears illogical to say that a balance-of-interest test is «specifically set out».

(55) Furthermore, it is only the reasons «for» the project that shall be set out and explained in the river basin management plan. It is not required that the disadvantages of approving the project transpire from the plan. The information contained in the river basin management plan therefore only supports an assessment of the types of interest served by the project, as it does not in itself contain sufficient information to support a balance-of-interest test.

III. The Government's view is fully in line with the objectives of the WFD

(56) As held above, the objectives in Article 1, read in isolation, support strict criteria for derogations from the obligations in Article 4(1) WFD. However, the purpose does not support a reading where a balance-of-interest test is required.

(57) First, the criteria in Article 4(7) WFD are already strict *as such*. The CJEU has held that it transpires «from the scheme of Article 4» that deterioration in the status of a water body pursuant to Article 4(1) «is authorised only subject to strict conditions».[64] Article 4(7) provides several cumulative criteria for derogation to be permissible. This includes the narrow entry criteria for when a derogation for new activities may be allowed, the obligation to take all practical steps to mitigate adverse impact on the water body, the criteria that derogation may only be granted where no accessible significantly better environmental option exists and the obligation to review derogations periodically. Several of the criteria in Article 4(7) already call for a weighing up of interests.[65] By providing cumulative criteria for derogation, including by deciding that only «overriding public interest» may justify derogation, the WFD itself provides sufficient protection for water bodies in the EEA in line with Article 1 WFD.

(58) Second, the threshold for deterioration in Article 4(1)(a)(i) WFD is already low. Article 4(1)(a)(i) WFD obliges states to avoid deterioration in the status of surface water bodies, unless derogation is granted.[66] The CJEU has held that the «threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be

[63] Paragraphs 38–39 above.
[64] Judgment in *Commission v Spain*, C-559/19, EU:C:2021:512, paragraph 48. See also the Council's common position of 30 September 1999 (085/99 ADD 1) page 7.
[65] Judgment in *Schwarze Sulm,* cited above, paragraph 74.
[66] Judgment in *Bund für Umwelt und Naturschutz Deutschland e.V.*, C-461/13, EU:C:2015:433, paragraph 50.

as low as possible».[67] The prohibition on deterioration also applies to deteriorations that are temporary in nature.[68] The low threshold for deterioration combined with the strict criteria for derogation ensures that the objectives in Article 1 WFD are protected.[69]

(59) Third, the objectives in Article 1 must not render Article 4(7) WFD moot. The WFD explicitly acknowledges that new modification or alterations may take place, provided that the strict criteria in Article 4(7) are fulfilled. Unduly limiting the scope of the already strict derogations would distort the balance maintained in the WFD between protecting water bodies on the one hand, while also allowing socioeconomic development on the other.

(60) As the conditions for derogation are strict as such, the Government cannot see that there is any reason to interpret Article 4(7) WFD strictly. Strict interpretation would in practice mean "double strictness", which is not supported by the objectives served by Article 4(7). The CJEU has never held that Article 4(7) WFD or the other derogations from Article 4(1) WFD should be interpreted strictly. Nor have any Advocates General opinions argued for such an approach. In any event, the requirement of strict interpretation does not go so far as to deprive the derogation in Article 4(7) WFD of its intended effects.[70]

(61) The low threshold for deterioration, combined with the obligation of EEA States to assess whether the conditions in Article 4(7) WFD are fulfilled prior to consent being granted, also ensure that the precautionary principle is respected.[71] The Government cannot see that the precautionary principle in addition influences the interpretation of Article 4(7).[72]

IV. Case law supports the Government's interpretation

(62) In its case law, the CJEU has never employed a balance-of-interests test under the *first* alternative of Article 4(7)(c) WFD. In *Schwarze Sulm*, cited above, the CJEU conducted no balancing of interests when concluding that Austrian authorities were entitled to consider that the project pursued an «overriding public interest».[73] This is in contrast to the CJEU's subsequent assessment of the *second* alternative in Article 4(7)(c) WFD:

> *Lastly, it should be noted that, in the present case, the national authorities weighed up the expected benefits of the contested project with the resulting deterioration of the status of the body of surface water of the Schwarze Sulm. On the basis of that weighing-up, they were entitled to find that the project would give rise to benefits for sustainable development…*[74]

[67] Judgment in *Association France Nature Environnement*, C-525/20, EU:C:2022:350, paragraph 37.
[68] Judgment in *Association France Nature Environnement*, cited above, paragraph 45.
[69] Judgment in *Association France Nature Environnement*, cited above, paragraphs 25 and 36..
[70] *Commission v Luxembourg*, C-274/15, EU:C:2017:333, paragraph 50.
[71] Opinion in *Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:391, points 45–47.
[72] In its case law on Article 4 WFD, the CJEU has only referred to the precautionary principle once in the operative part of a judgment, see the judgment in *Association France Nature Environnement*, cited above, paragraph 38. The CJEU has never employed the principle when interpreting Article 4(7) WFD.
[73] Judgment in *Schwarze Sulm*, cited above, paragraphs 69-72.
[74] Judgment in *Schwarze Sulm*, cited above, paragraph 74.

(63) Likewise, in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the CJEU held that consent could be given «if the project served a general interest». If the project served a general interest, no balancing of interests was required. This is in contrast to the *second* alternative.[75] It is noteworthy that the Grand Chamber did not follow the approach favoured by the Advocate General, who held that a balancing of interests was called for under both alternatives in Article 4(7)(c) WFD.[76]

III. The Government's interpretation is in line with the travaux préparatoires

(64) Neither the Commission nor the Council, which introduced the terms «overriding public interest», mentions a balancing of interests in the travaux préparatoires.[77]

(65) In the Explanatory Statement to its recommendation on the second reading of 16 February 2000, the Committee on the Environment, Public Health and Consumer Policy, however, held that «new modifications or alterations to water bodies shall only be allowed if Member States establish that the respective changes outweigh the benefits» (our emphasis).[78] The Committee must here be understood as referring to the *second* alternative in Article 4(7)(c) where the Committee added the exact terms («outweighed by the benefits»). The terms «reasons of overriding public interest» in the *first* alternative was not changed, indicating that its meaning was not meant to be altered.[79]

VI. Summary – a balancing of interests is not required

(66) In summary, there is no support in neither the wording, context and objective of the WTF, nor in case law and the travaux préparatoires for an interpretation whereby a balance of interests is required.

4.1.4 In any event, Article 4(7)(c), first alternative, WFD does not call for a "clear and qualified preponderance of interests" in favour of the project

(67) In the case that a balance-of-interest test is called for under the first alternative of Article 4(7)(c) WFD, the Government is of the view that it does not require a "clear and qualified preponderance of interests" in favour of the project.

[75] Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias* cited above, paragraph 67.
[76] Opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, C-43/10, EU:C:2011:651, points 89 and 91.
[77] COM(1999)271 and 97/0067 (COD) ADD 1 page 8.
[78] Section 3.7 in the Explanatory Statement to the Recommendation from the Committee on the Environment, Public Health and Consumer Policy of 3 February 2000 (A5-0027/2000).
[79] The Committee did not change the content of the first alternative as proposed by the Council in its common position of 22 October (1999 97/0067 (COD)). The Committee did, however, change the structure of the sentence and removed the reference to Sections 1.6 and 2.4 Annex II WFD.

I. The wording of Article 4(7)(c), first alternative, WFD supports the Government's interpretation

(68) As none of the language versions of Article 4(7)(c), first alternative, WFD provides support for a balance-of-interests test, there is even less support in the wording for an interpretation whereby a "clear and qualified preponderance of interests" is required.[80]

II. The Government's interpretation is supported by contextual arguments and the objectives of the WFD

(69) Article 4(7)(c), second alternative, WFD which explicitly requires a balance-of-interest test, does not require a clear and qualified preponderance of interests in favour of the project. There is no basis for an interpretation whereby the threshold under the first alternative is stricter, neither in the purpose behind the provision nor elsewhere.[81]

III. Case law supports the Government's interpretation

(70) First, the Government has not found any case law from the CJEU whatsoever that uses the terms «clear and qualified preponderance of interests», «qualified preponderance of interests» or «clear preponderance of interests». The absence of any such case law shows that there is no basis for interpreting Article 4(7), first alternative, WFD in this way.

(71) Second, the CJEU's case law on Article 4(7) WFD, referred to above, does not support such an interpretation. In *Schwarze Sulm*, cited above, the CJEU in paragraph 80 refers to the analysis carried out by the Governor of the Province of Styria and states that «he … found that … the appurtenant public interests clearly outweighed the negative impact on the objective of non-deterioration». The use of "clearly" is a rendition of the Governor's decision quoted in paragraph 78, and there is no sign that the CJEU meant that a clear preponderance of interests or the like is required. Paragraph 80 of the judgment does not concern the general interpretation of «overriding public interest», but the question whether the Governor had sufficient basis for reaching a decision.

(72) In her opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the Advocate General considered that a simple balancing of interests was sufficient.[82] As previously mentioned, the Grand Chamber did not consider that a balancing of interests was required.

IV. Summary – a «clear and qualified preponderance of interests» is not required

(73) Neither the wording, context or objective of the WFD, nor case law, supports that a "clear and qualified preponderance of interests" is required.

[80] Paragraphs 47–48 above.
[81] Paragraphs 56–59 above.
[82] Opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, points 89 and 91.

4.1.5 Article 4(7)(c), first alternative, WFD is not limited to "particularly important public interests"

(74) Article 4(7)(c), first alternative, WFD determines that the interest furthered by the project must be both "overriding" and "public" for derogation to be allowed. The provision requires neither less nor more. The Government does therefore not agree with the premise underlying Question 1a that "only particularly important public interests" may constitute «overriding public interest». As will transpire from below, the CJEU has not used the term «particularly important» when interpreting Article 4(7)(c) WFD and it is unclear what the terms are meant to signify in addition to "overriding" and "public".

I. The wording of Article 4(7)(c), first alternative, WFD supports the Government's interpretation

(75) First, the term "particularly important" is not used in any of the language versions the Government has consulted. Translated into English, the various language versions holds that the "public" interest in question must be «overriding»[83], «general»[84], «superior»[85], «higher»[86], «substantial»[87], «of priority»[88] or «of greater weight»[89].

(76) Second, the wording in Article 4(7)(c), first alternative, WFD is purposefully open-natured, which must be understood in light of the margin of discretion afforded to the EEA States. The WFD does not aim for complete harmonisation of the rules concerning water within the EEA. Instead, the Directive sets out common principles and a framework for action.[90] In recital 13 in the preamble to the WFD and the Joint Statement by the EEA Contracting Parties to the EEA Joint Committee Decision No. 125/2007 of 28 September 2007, it is therefore emphasised that due regard must be had to the diverse conditions and needs in various EEA States when implementing the Directive.[91]

(77) In its judgment in *Schwarze Sulm*, cited above, the CJEU referred to the abovementioned principles and held that: «Member States must be allowed a certain margin of discretion for determining whether a specific project is of such [overriding public] interest». As part of that margin, Austrian authorities were entitled to consider that the project, which aimed to promote the production of renewable energy through hydroelectricity, was of «overriding public interest» pursuant to Article 4(7)(c) WFD, first alternative.[92]

[83] German language version of Article 4(7)(c), first alternative, WFD.
[84] French language version of Article 4(7)(c), first alternative, WFD.
[85] Spanish, Portuguese and Polish language version of Article 4(7)(c), first alternative, WFD.
[86] Dutch language version of Article 4(7)(c), first alternative, WFD.
[87] Danish language version of Article 4(7)(c), first alternative, WFD.
[88] Italian language version of Article 4(7)(c), first alternative, WFD.
[89] Swedish language version of Article 4(7)(c), first alternative, WFD.
[90] Judgment in *Commission v Luxembourg*, C-32/05, EU:C:2006:749, paragraphs 41 *et seq*; and recital 18 in the preamble to the WFD.
[91] Request for an Advisory Opinion page 9.
[92] Judgment in *Schwarze Sulm*, cited above, paragraphs 70–71.

(78) EEA States are thus allowed a margin of discretion in the assessment of whether a project pursues an «overriding public interest».[93] This is well in line with the travaux préparatoires, where it transpires that it is for «Member States» to determine whether a project serves reasons of overriding public interest.[94] This understanding has later been confirmed by recital 27 in the preamble to the CRMA.[95]

(79) An interpretation whereby «only particularly important public interests are relevant» under Article 4(7)(c), first alternative, WFD would entail a significant limitation on the margin of discretion for which there is no legal basis.

II. The Government's interpretation is supported by contextual arguments and the objectives of the WFD

(80) No provision in the WFD uses the term «particularly important». Such an interpretation is also not supported by the purpose of the Directive.[96]

III. The Government's interpretation is supported by case law

(81) The CJEU has never interpreted «overriding public interest» as meaning «particularly important public interests» in its case law on the WFD, nor is it interpreted that way in any Advocates General opinions on Article 4(7)(c) WFD.[97]

IV. Summary – «overriding public interest» is not limited to "particularly important public interests"

(82) Neither the wording, context or objective of the WFD, nor case law, supports that Article 4(7)(c), first alternative, WFD is limited to "particularly important public interests".

4.1.6 What are the key factors in assessing whether an interest is "public" and "overriding" for the purposes of Article 4(7)(c), first alternative, WFD?

(83) "Overriding public interest" is not a term that easily lends itself to a precise definition, and in its case law, the CJEU has not sought to provide a definition of the term or an exhaustive list of the interests covered by it. Instead, the CJEU has assessed whether the benefits invoked by the state in the case at hand were eligible to constitute such interest.[98] The Government sees no reason for the EFTA Court to depart from the CJEU's approach.

(84) The Government will nonetheless make some short remarks in relation to Question 1(b). While the question only refers to the term "overriding", the Government finds it pertinent to

[93] See also 009/17/COL page 5 and 273/21/COL page 14.
[94] Paragraphs 43–44 above.
[95] Paragraph 135 below.
[96] Paragraphs 56–59 above.
[97] A similar term is used by the Advocate General in *Stadt Frankfurt (Oder)*, C-723/21, EU:C:2023:152, point 137 (see also question 8). Point 137 concerns Article 7(3) WFD and not Article 4(7)(c), first alternative. The case was withdrawn before a judgment was delivered.
[98] Judgments in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraph 66, *Schwarze Sulm*, cited above, paragraphs 67 and 71–73; and *Association France Nature Environnement*, cited above, paragraph 43.

comment on both "public" and "overriding" as the two terms must be understood in relation to each other:

- A "public" interest can be described as «public»[99], «general»[100], «common»[101], «societal»[102] or «social»[103].
- A "public" interest may be either a national, regional or local interest.[104]
- "Public" interests should be distinguished from "private" interests. It is, however, not decisive whether the project is carried out by a public body or a private actor.[105]
- In assessing whether a project implemented by a private actor constitutes a "public" interest, the type of project, the output generated, and their quantity and quality may be relevant.[106] Furthermore, indirect public benefits generated by the project may be relevant, such as employment generation, tax income, settlement and improved connectivity.
- An "overriding" interest can be described as overriding, general, superior, higher, substantial or of priority.[107]
- The assessment of whether a public interest is "overriding" is context specific. A public and transparent planning process, allowing for public participation can contribute to identify such interests.[108]
- EEA States are awarded a certain margin of discretion in determining whether a specific project is of «overriding public interest».[109]

(85) The Government disagrees with the appellants that derogation pursuant to Article 4(7)(c), first alternative, WFD is only permitted when «absolutely necessary to meet essential societal needs».[110] As transpires from the above, the view has no support in the wording, context,

[99] English, German, Italian, Spanish and Dutch language versions of Article 4(7)(c), first alternative, WFD.
[100] French language version of Article 4(7)(c), first alternative, WFD.
[101] Swedish language version of Article 4(7)(c), first alternative, WFD.
[102] Danish language version of Article 4(7)(c), first alternative, WFD.
[103] Polish language version of Article 4(7)(c), first alternative, WFD.
[104] Recital 13 in the preamble to the WFD.
[105] CIS Guidance Document No. 1 (2003) page 220.
[106] See rendition of feedback from states in CIS Workshop Issue Paper (2011) page 52.
[107] Paragraph 75 above.
[108] Article 14 WFD; recital 14 in the preamble to the WFD; and CIS Guidance Document No. 36 (2017) pages 59–60.
[109] Section 4.1.5 above.
[110] Request for an Advisory Opinion page 14.

purpose or case law from the CJEU. An assessment based on necessity was also explicitly abandoned for Article 4(7)(c), *second* alternative, WFD in the travaux préparatoires.[111]

4.2 The second and third questions

4.2.1 The relation between the second and third question

(86) The Government considers that the second and third question can be answered together. Both concern the various benefits furthered by the Engebø project, and essentially ask whether these may be of «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD.

(87) The Government sees no reason to divide the various interests into separate questions. Such an approach is neither supported by the wording of Article 4(7)(c) WFD which generally refer to «overriding public interest», nor the decisions from Norwegian authorities granting derogation.[112] The division between interests covered by Questions 2 and 3 is furthermore not clear. Generation of employment, which is included in Question 3(a), is by its nature closely connected to generation of wages for the same employees, which is included in Question 2(d). Production of rutile for the European and global market, covered by Question 3(b), will naturally also generate income for shareholders, public authorities and workers, which is included in Question 2(b).

(88) The Government will first show that economic considerations may constitute «overriding public interest» (section 4.2.2 below) and explain why the case law on restrictions on free movement is not of relevance to the case (section 4.2.3 below). The Government will then give its views on the various interests covered by the sub-questions in Question 2 (section 4.2.4 below) and Question 3 (sections 4.2.5 and 4.2.6 below).

4.2.2 Economic considerations may be of an «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD

(89) The Government is of the opinion that considerations of an economic nature may constitute «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD. The term "economic considerations", as used in Question 2 by the Court of Appeal, does not occur in the WFD and has no clear definition.

I. The wording of Article 4(7)(c), first alternative, WFD supports the Government's interpretation

(90) The wording of Article 4(7)(c) WFD, first alternative, does not exclude economic considerations. As held above, the wording is open-ended, and the EEA States enjoy a certain margin of discretion when determining whether a project pursues an «overriding

[111] Compare amendment no. 49 in the Committee on the Environment, Public Health and Consumer Protection's recommendation to the first reading of 8 July 1998 (A4-0261/1998) and amendment no. 34 in the Committee's recommendation to the second reading of 16 February 2000 (A5-0027/2000).
[112] Paragraphs 22–23 above.

public interest».[113] The view that economic considerations are *prima facie* irrelevant is hard to reconcile with that margin of discretion.

II. The Government's view is supported by contextual arguments

(91) First, it follows from the wording in Article 4(3) and 4(5) WFD that economic considerations are relevant when setting less stringent environmental criteria for water bodies *already* affected by human activity. The Government sees no reason why the same should not apply in the case of water bodies affected by *new* human activity in Article 4(7) WFD.

(92) Pursuant to Article 4(3) WFD, interests of an economic nature such as «port facilities»[114], «irrigation»[115] and other «beneficial objectives served by the artificial or modified characteristics of the water body»[116] may justify designating a water body as «artificial or heavily modified», with less stringent environmental obligations. Common Implantation Strategy ("CIS") Guidance Document No. 4 (2003) mentions «Fish farms» and «Urbanisation» as examples of types of use that can justify such a designation.[117] In *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the CJEU interpreted Article 4(7)(c) WFD in light of Article 4(3)(a) WFD[118] and this link is also supported by the travaux préparatoires.[119]

(93) Pursuant to Article 4(5)(a) WFD, less stringent environmental objectives may be set for water bodies that are heavily affected by human activity, based on among other things, an assessment of the «socioeconomic needs served by such human activity».

(94) Having regard to the strict cumulative criteria in Article 4(7) WFD, the Government cannot see why economic considerations should be relevant only for existing modifications or alterations to water bodies, but not for new modifications or alterations. Such an interpretation leads to a systemic preference for existing industries, compared to new industries, thus hindering economic transition to potentially more environmentally-friendly industries. Such an interpretation would run counter to the purpose of the Directive.

(95) Second, the balance between environmental protection and economic considerations can be seen to serve as the underlying scheme of the entire Directive. Article 5(1) WFD and recital 36 in the preamble to the WFD calls for «an economic analysis of water use» in each river basin district. The analysis shall contribute to making assessments about the most cost-effective combination of measures to be included in the programme of measures under Article 11 WFD.[120]

[113] Paragraphs 76–78 above.
[114] Article 4(3)(a)(ii) WFD.
[115] Article 4(3)(a)(iii) WFD.
[116] Article 4(3)(b) WFD.
[117] CIS Guidance Document No. 4 (2003) pages 31–32.
[118] Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraph 66.
[119] In the Council's common position of 22 October 1999, «overriding public interest» referred explicitly to the purposes given in Sections 1.6 (today Article 4(3) WFD) and 2.4 of Annex II WFD, see 9085/99 ADD 1 page 25.
[120] Annex III WFD.

III. The Government's interpretation is fully in line with the objectives of the WFD

(96) With the exception of the narrow criteria in Article 4(6), Article 4(7) WFD is the only derogation from Article 4(1) that applies to *new* alterations or modifications. Having regard to the low threshold for deterioration pursuant to Article 4(1), derogation pursuant to Article 4(7) is quite practical.[121]

(97) The obligations in Article 4(1) WFD applies to all rivers, coastal waters, lakes and groundwater within the EEA. In total, there are some 160 000 distinct surface and groundwater bodies in the EEA, of which more than 33 800 are located in Norway. Clearly, there is significant divergence between the various modifications and projects that may need derogation pursuant to Article 4(7) WFD in the future.

(98) To enable future beneficial projects, Article 4(7)(c), first alternative, should be interpreted to include economic considerations. Europe's surface water bodies are key for nearly all sectors of the economy as transportation links, sources of energy production, links for energy and telecommunications transmission, fisheries and aquaculture, irrigation, sand resources, land reclamation, as a source of leisure and more. To hold that economic considerations cannot constitute «overriding public interest» will have significant consequences for a range of sectors and industries.

IV. The Government's interpretation is supported by case law

(99) First, the CJEU's case law on Article 4(7)(c), first alternative, WFD supports the view that economic considerations may constitute «overriding public interest». In *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the CJEU held that the irrigation needs of the region of Thessaly in principle could serve a general interest.[122] In his opinion in *Bund für Umwelt und Naturschutz Deutschland e.V.*, Advocate General Jääskinen held that «projects meeting other requirements (economic, in particular)» might be covered by Article 4(7) WFD.[123]

(100) Second, CIS Guidance Document No. 36 "*Exemptions to the Environmental Objectives according to Article 4(7) WFD"* refers to case law on the notion of «imperative reason of overriding public interest» in Article 6(4) of Directive 92/43/EEC (the Habitats Directive). The CIS Guidance Documents are developed in collaboration between EU Member States, EFTA States and other stakeholders, including the Commission.[124] The documents constitute guidance and good practice for experts and stakeholders when implementing the WFD.[125]

[121] Paragraph 58 above.
[122] Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias*, cited above, paragraphs 30 and 67.
[123] Opinion in *Bund für Umwelt und Naturschutz Deutschland e.V,* C-461/13, EU:C:2014:2324, point 83 cf. points 18–20.
[124] Disclaimer to CIS Guidance Document No. 36 (2017). The guidance documents reflects «informal consensus position on best practice», and «does not necessarily represent the position of any of the partners» and «does not necessarily reflect the views of the European Commission».
[125] CIS Guidance Document No. 36 (2017) page 1.

The documents are not supposed to provide an authoritative reading of the law and EEA States are not legally required to follow the recommendations contained in it.[126]

(101) CIS Guidance Document No. 36 suggests that case law on Article 6(4) of the Habitats Directive may give «further perspectives» on which interest that mat be "public" and "overriding" pursuant to Article 4(7)(c) WFD.[127] The Habitats Directive is not part of the EEA Agreement. However, in light of the CIS Guidance Document, the Government will in the following include some observations on case law on Article 6(4) of the Habitats Directive.

(102) Article 6(4) of the Habitats Directive sets out when EU States may authorise plans or projects that are likely to negatively affect a Natura 2000 site. Pursuant to Article 6(4) of the Habitats Directive, authorisation may only be given where the project or plan «*must* nevertheless be carried out for *imperative* reasons of overriding public interest» (our emphasis).[128] The criterion for derogation is thus stricter than under the first alternative of Article 4(7)(c) WFD, and the difference in wording must be presumed to be purposeful.[129] Consequently, it is the view of the Government that if an interest may be an «*imperative* reason of overriding public interest» pursuant to Article 6(4) of the Habitats Directive, it may necessarily also be an «overriding public interest» pursuant to Article 4(7)(c) WFD.

(103) In its case law on Article 6(4) of the Habitats Directive, the CJEU has repeatably held that economic considerations may be an «imperative reason of overriding public interest». It is not determinative for the relevance of this case law that Article 6(4) of the Habitats Directive, unlike Article 4(7)(c) WFD, explicitly mentions «imperative reasons of overriding public interest, *including those of a social or economic nature*» (our emphasis). "Including" shows that social and economic interests are covered, as such, by the term «imperative reasons of overriding public interest» but are specifically mentioned for the purposes of clarification.

(104) The judgment by the CJEU in *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds ("Lappel Bank")* concerned the decision by British authorities to exclude Lappel Bank from the Medway Estuary and Marshes Special Protection Area ("SPA") due to the planned expansion of the port of Sheerness onto Lappel Bank. The development would allow increased commercial traffic to the port and provide for employment in an area where unemployment was high.[130]

(105) The first question concerned whether states were entitled to take account of «economic requirements» when designating SPAs pursuant to Article 4(1) and 4(2) of the Habitats Directive.[131] The CJEU answered the question in the negative, but held:

[126] CIS Guidance Document No. 36 (2017) disclaimer and page 1; and judgment in *Association France Nature Environnement*, cited above, paragraph 31.
[127] CIS Guidance Document No. 36 (2017) page 59. See also CIS Guidance Document No. 1 (2003) p. 220.
[128] The French language version reads: «raisons impératives d'intérêt public majeur».
[129] See also CIS Guidance Document No. 36 (2017) page 60 footnote 99.
[130] Judgment in *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds ("Lappel Bank")*, C-44/95, EU:C:1996:297, paragraphs 10–14.
[131] Judgment in *Lappel Bank*, cited above, paragraph 17.

> *Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.*[132]

(106) Economic considerations are thus relevant under Article 6(4) of the Habitats Directive, and the Government cannot see why such considerations should be *prima facie* excluded under Article 4(7)(c), first alternative, WFD.

(107) The judgment in *Commission* v *Spain* concerned permission for several mining projects within the 'Alto Sil' SPA and Site of Community Importance.[133] The CJEU held (our emphasis):

> *The Kingdom of Spain, which has invoked the importance of mining activities for the local economy, needs to be reminded that, whilst that consideration is capable of constituting an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive, that provision can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive…*[134]

(108) Mining projects' importance for the local economy may therefore justify a derogation.[135]

(109) The judgment in *Solvay*, concerned, among other things, a building permit for infrastructure intended to accommodate a management and training centre within a Natura 2000 site.[136] The CJEU held that it «cannot be ruled out» that projects of a «private character», and thus necessarily motivated by private economic considerations, may be of an «imperative reason of overriding interest».[137] Where the project aims to facilitate the location and expansion of an undertaking the threshold is however high («exceptional circumstances»).[138] «[T]he mere construction of infrastructure designed to accommodate a management centre» did not reach that threshold.[139] The assessment of whether a project carried out by private actors qualifies for derogation must therefore be context-specific. Unlike infrastructure for a management and training centre, which in principle can be located nearly anywhere, a mine naturally must be located at the site of the deposit.[140]

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[132] Judgment in *Lappel Bank*, cited above, paragraph 41.
[133] Request for an Advisory Opinion page 13.
[134] Judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 109. See also paragraphs 153–154.
[135] In the Advocate General's opinion «security of energy supply, jobs and the final nature of authorisations» are specifically mentioned, cf. EU:C:2011:425 point 154. The CJEU however uses the more general term «importance of mining to the local economy», which was the term used by Spanish authorities (see point 113 of the opinion).
[136] Request for an Advisory Opinion pages 13–14.
[137] Judgment in *Solvay*, C-182/10, EU:C:2012:82, paragraph 77.
[138] Judgment in *Solvay*, cited above, paragraph 76.
[139] Judgment in *Solvay*, cited above, paragraph 78.
[140] See paragraph 137 below.

V. The Government's interpretation is supported by supplementary means of interpretation

(110) First, the Commission has several times concluded that projects of an economic nature may serve «other imperative reasons of overriding public interest». Pursuant to Article 6(4), second paragraph, of the Habitats Directive, the Commission must in certain cases give an opinion if a project impacts on a priority natural habitat and/or a priority species. The Commission has concluded that various projects pursuing economic objectives such as the location and expansion of commercial ports, airports and large factories, has served «other imperative reasons of overriding public interest».[141] In the judgment in *IFAW Internationaler Tierschutz-Fonds*, the CJEU classified these interests as «economic considerations».[142]

(111) In the case of *Prosper Haniel*, the Commission found that the expansion of a coal mine in Germany pursued such an interest, despite the mining industry in Germany facing structural decline (meaning the workers would lose their job at some point anyway), coal being readily available on the world market (hence the mine neither produced a critical material nor was it critical for energy supply), and the Commission voicing concern about the compatibility of extending coal mining with the objective of reducing greenhouse gas emissions. The Commission did express that the opinion was not meant to set precedent.[143] The case nonetheless illustrates that mining projects, and the employment generated, may pursue «imperative reasons of overriding public interest», also where the mineral extracted is not critical and the employment impacts are short-term. In contrast, the Engebø mine will generate new long-term employment and will produce a critical raw material that is not readily available on the world market, and which can contribute to the green transition.

(112) Second, the view that economic considerations may be «imperative reasons of overriding public interest» pursuant to Article 6(4), first paragraph, of the Habitats Directive also has support in practice by EU States under the Directive. Among other things, national authorities in EU Member States have allowed for derogations to motorways, urban developments, wind farms, power stations, helipads, industrial areas, land consolidation, a logistics centre in military area and urban development related to tourist resorts.[144]

(113) Third, there is nothing in the guidance documents on non-energy extractive industries and Natura 2000 sites indicating that mining projects, including in marine areas, might not in and of themselves pursue «imperative reasons of overriding public interest» pursuant to Article

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[141] Opinions on the *Construction project of the new port of Granadilla (Tenerife)* 2006; *Extension of the Lübeck Blankensee airport (*5.5.09); *Widening of B173 between Lichtenfels and Kronach* (18.12.15); and *Construction of the container terminal at the external port of Świnoujście* (23.1.24). I

[142] Judgment in *IFAW Internationaler Tierschutz-Fonds gGmbH*, T-362/08, EU:T:2011:6, paragraph 137.

[143] Opinion *Concerning the approval of an operational master plan ("Rahmenbetriebsplan") of the Prosper Haniel Colliery* (24.4.03).

[144] *Implementation of Article 6(4), first subparagraph, of Council Directive 92/43/EEC – Period 2007-2011*, page 3 and *Implementation of Article 6(4), first subparagraph, of Council Directive 92/43/EEC during the period 2004-2006*, page 2.

6(4) of the Habitats Directive.[145] Indeed, the fact that specific guidance documents have been provided for the extractive industries sector strongly indicates that this is the case.

(114) CIS Guidance Document No. 36 holds that «It is reasonable to consider that imperative reasons of overriding public interest [under Article 6(4)] refer to situations where plans or projects envisaged prove to be indispensable within the framework of … carrying out activities of an economic or social nature, fulfilling specific obligations of public services».[146] The positions that the project must "prove to be indispensable" and "fulfilling specific obligations of public services" for it to be of imperative reason of overriding public interest has no support in case law or Advocates General opinions on Article 6(4) of the Habitats Directive. However, the Guidance Document is correct in holding that "economic considerations" may be relevant.[147]

(115) Fourth, ESA has in two decisions concerning submarine tailings disposal facilities in Norway, concluded that employment and revenues for society may serve an «overriding public interest» pursuant to Article 4(7)(c) WFD.[148]

VI. Summary – "economic considerations" may be of «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD

(116) To summarise, the Government is of the view that the wording, context and objective of the WFD, as well as case law, demonstrate that economic considerations may be of «overriding public interest» pursuant to Article 4(7)(c), first alternative WFD. Economic activity leads to improved living standards and economic resilience, benefiting society as a whole, interests which in turn may be both "public" and "overriding". This is especially so when the national authorities, based on comprehensive environmental impact assessments, have carried out an in-depth examination of the entire project, and public consultations have been diligently carried out at all relevant steps of the process.[149]

(117) In deciding whether a project pursuing economic interests is of «overriding public interest», EEA States have a certain margin of discretion. In general, the Government assumes that both the scale of the economic impact (size of earnings, tax income and jobs created) and the importance of the project for the wider local, regional, national, European and global economy may be relevant. Furthermore, it is relevant to consider the indirect public benefits generated by the project (i.e., increased connectivity, impact on regional policy and settlement, increased security of supply of important economic factors). The degree of geographic specificity of the project is also relevant.

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[145] Guidance Document: Non-energy mineral extraction and Natura 2000 (2010) and Guidance Document: Non-energy mineral extraction and Natura 2000 – A summary (2019). CIS Guidance Document no. 36 (2017) p. 60 holds that these «may shed some light» on Article 4(7)(c). The documents are not legally binding.

[146] CIS Guidance Document No. 36 (2017) page 60.

[147] See also CIS Guidance Document No. 1 (2003) p. 220.

[148] 009/17/COL pages 5–6 and 273/21/COL pages 14–15. 074/20/COL concerned the expansion of an industrial estate on to a riverbed. The derogation was justified in «facilitating food production and a large number of jobs» (page 4–5). ESA concluded that the condition in Article 4(7)(c) was met but did not clarify whether this was provided by the first or second alternative.

[149] Paragraph 84 above.

(118) In light of the above, the Government is of the opinion that the Court may conclude that the considerations in the case at hand may constitute «overriding public interest» without elaborating on each of the various interests listed in the second and third question. The open-ended nature of the first alternative in Article 4(7)(c) WFD, the great divergence in possible projects that may come under the derogation and the margin of discretion given to EEA States means giving a general answer to whether and when various considerations may constitute «overriding public interest» is very difficult, if not impossible.

4.2.3 Case law concerning justifications of restrictions on free movement is not relevant to Article 4(7)(c), first alternative, WFD

(119) The term «overriding public interest» is also one of the terms used to denote the interests that may justify indirectly discriminatory measures or *non*-discriminatory restrictions on free movement. As a starting point, such measures may not be justified by «economic aims, such as the protection of domestic business».[150]

(120) The Government is of the view that case law concerning justification of restrictions on free movement is not relevant to the interpretation of Article 4(7)(c), first alternative, WFD. The case law on restrictions must be understood in its context. Restrictions are measures that are liable to hinder or make less attractive the exercise of the fundamental freedoms.[151] The starting point when assessing whether such measures may be justified is therefore that there is a restriction on free movement. Allowing such restrictions to be justified based on economic aims, such as the protection of domestic business, would open the door to protectionism, which in turn would undermine the purpose and functioning of the internal market.[152]

(121) Derogations from the obligation to prevent the deterioration in the status of a water body pursuant to Article 4(1) WFD are not liable to hinder or make less attractive the exercise of the fundamental freedoms. There is therefore no element of restrictions. On the contrary, enabling economic development and facilitating increased intra-EEA trade might require derogation from the obligations in Article 4(1) WFD. Consequently, allowing derogations to be justified based on economic considerations, as such, entails no risk of protectionism.

(122) There is neither any element of discrimination. The party that benefits from the derogation may be a national company, a non-national company or both, as neither Article 4 WFD nor the Norwegian implementation in Section 12 of the Water Regulation distinguish between nationals and non-nationals.

(123) In the area of environmental protection, the term «overriding public interest» is used in a different context than when applied to restrictions on free movement. The existence of an «overriding public interest», or variations of the term, is here used as one of several conditions for when derogations can be made from environmental standards set by the

[150] Judgment in *STX*, E-2/11, paragraph 83.
[151] Judgment in *Holship*, E-14/15, paragraph 115.
[152] Peter Oliver, «When, if Ever, Can Restrictions on Free Movement be Justified on Economic Grounds?», *European Law Review* (2:2016) pages 147 and 149.

same directive (e.g., exceptions from protected areas or the prohibition on deterioration of a water resource).[153] The CJEU has therefore consistently interpreted «overriding public interest» in the area of environmental protection to include economic considerations.[154] The Government has not found any case law where the wording «overriding public interest» in the field of environmental protection has been interpreted with reference to case law on the justification of restrictions on free movement.

4.2.4 The interests included in Question 2(a)–(d) may, depending on the context, constitute «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD

(124) The wording of the first alternative in Article 4(7)(c) WFD holds that: «the reasons for those modifications or alterations *are of* overriding public interest» (our emphasis). The assessment of whether a project pursues an «overriding public interest» must therefore be assessed in light of the project as a whole.[155] The Government is therefore of the opinion that the various considerations listed in Questions 2 and 3 cannot be assessed separately.[156]

(125) The Government is of the opinion that «[p]urely economic considerations (i.e. the expected gross income generated by the planned mining operations)» (Question 2(a)) and generation of «income for shareholders» (Question 2(b)) *as such* will rarely constitute a «*public* interest».[157] However, industrial projects that generate income for its owners will often at the same time generate «public» interests such as income for society through taxation (Question 2(c)) and income for workers through wages (Question 2(d)). Through wage creation and creation of local demand, the project may also generate the «public» interests covered by Question 3(a) (see section 3.3.5 below). The Engebø-project is illustrative in that regard. These public interests may, in line with the CJEU's judgments in *Lappel Bank* and *Commission* v *Spain* and practice from ESA, be considered «overriding» depending on the context.[158] The Government is of the opinion that the factors listed in paragraph 117 above may be of relevance.

4.2.5 The interests included in Question 3(a) may, depending on the context, constitute «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD

(126) The Government is of the opinion that «[g]eneration of employment (increased local business activity, employment and settlement)», particularly in a remote region, may constitute an «overriding public interest».

(127) In relation to Article 6(4) of the Habitats Directive, the CJEU has already in *Lappel Bank* and *Commission* v *Spain* acknowledged that such interests may be «an imperative reason of

[153] Article 4(7) WFD, Article 6(4) of the Habitats Directive and Article 14(1)(d) of Directive 2008/56/EC.
[154] Paragraphs 99 and 104–109 above.
[155] See also the judgment in *Schwarze Sulm*, cited above, paragraph 71 where the CJEU held that « the contested project … is an overriding public interest».
[156] This also reflects the approach taken by Norwegian authorities when allowing derogation, see paragraphs 22–23 above.
[157] Judgment in *Solvay*, cited above, paragraphs 77.
[158] Judgments in *Commission v Spain*, cited above, paragraphs 109 and 154; and *Lappel Bank*, cited above, paragraph 41; and practice cited in paragraph 115 above.

overriding public interest».[159] ESA has done the same in 0009/17/COL and 273/21/COL in relation to Article 4(7)(c), first alternative, WFD.[160]

(128) In the assessment of whether employment generation constitutes an «overriding public interest», the Government is of the opinion that regard should be had to the number of (direct and indirect) jobs that the project is expected to generate and the expected longevity of the employment creation, as well as the location of the project.

(129) There is no support for the appellants' view that employment effects may only constitute an «overriding public interest» in «exceptional cases involving the closure of a business on which the local community is based, which could lead to mass unemployment and social unrest».[161] The interpretation has no basis in the wording and is difficult to reconcile with the fact that Article 4(7) WFD applies to *new* modifications and alterations (and thus not preexisting projects).

(130) Furthermore, the appellants' view has no basis in case law. While it transpires from the judgment in *Lappel Bank* that there was an unemployment problem in the region, this is not specifically mentioned in the operative part of the judgment.[162] The judgment in *Commission* v *Spain* contains no information about the rate of unemployment in the mining region, and the statements by the CJEU are general in nature.[163] In *Prosper Haniel*, prevention of unemployment was an important consideration in the Commission's opinion. However, the workers would be laid off at some point regardless of the extension of the mine. Derogation was nonetheless allowed.

(131) The interpretation by the appellants also leads to a systemic preference for employment in existing industries (that might be in gradual decline), compared to generating employment in new industries (which might create employment in a longer-term perspective), thus potentially prohibiting necessary economic transition. It could also lead to situations where a project could be considered to be of an «overriding public interest» one year, and then not the following year. This would lead to a lack of legal certainty for private actors who need a derogation pursuant to Article 4(7) WFD to operate their business.

(132) In the event that the current rate of unemployment is deemed relevant, the Government is of the view that due regard should be had to long-term employment and settlement trends. The fact that the unemployment rate is low at the time of authorisation cannot be decisive if the project is expected to generate long-term employment, and especially if new employment is beneficial for regional policy. Regard should also be had to the fact that long-term employment trends are difficult to forecast, especially with projects that have a horizon of decades, if not centuries.

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[159] Judgments in *Commission v Spain*, cited above, paragraphs 109 and 154; and *Lappel Bank*, cited above, paragraph 41.
[160] ESA decisions 009/17/COL pages 5–6 and 273/21/COL pages 14-15.
[161] Request for an Advisory Opinion page 15.
[162] Judgment in *Lappel Bank*, cited above, paragraph 14.
[163] The judgment concerned both expansion of existing mines and approval for new mines, see the Advocate General's opinion, cited above, paragraph 28.

4.2.6 The interests included in Question 3(b) and (c) may, depending on the context, constitute «overriding public interest» pursuant to Article 4(7)(c), first alternative, WFD

(133) The Government considers that both «[g]lobal supply of rutile» and «[e]nsuring Norway and Europe access to critical minerals» may be an «overriding public interest». As rutile can be used to produce titanium metal, which is a critical raw material, the Government sees no reason to distinguish between the two considerations.

(134) The importance of access to critical raw materials in the EU has been recognised for a long time. In 2008 the EU launched its first raw materials initiative.[164] The Commission provided the first list of Critical Raw Materials in 2011, which since has been renewed every third year.[165] Titanium was added to the list in 2020 and was replaced with titanium metal in 2023.[166] As of 2024, titanium metal is both a Strategic Raw Material and a Critical Raw Material in the CRMA.[167] The CRMA entered into force in the EU on 23 May 2024. The Act is under scrutiny for incorporation into the EEA Agreement by Iceland, Liechtenstein and Norway.

(135) The EU's critical raw materials policy is motivated by three overarching considerations: industrial policy and competitiveness (due to high supply risk)[168], the importance of strategic raw materials for the transition to a low-carbon economy (significantly increasing demand for several minerals)[169] and national security concerns (due to highly geographically concentrated extraction and production of many minerals)[170]. Increased mineral extraction and production will also contribute to employment generation.[171]

(136) Increased intra-EU extraction and production capacity has been a key pillar in the EU's critical raw materials policy since its beginning.[172] By 2030, the EU aims to have sufficient extraction capacity to produce at least 10% of the EU's annual consumption of Strategic Raw Materials, to the extent possible in light of EU reserves.[173] Under the CRMA, projects that will make a meaningful impact on the security of supply of Strategic Raw Materials may be designated as Strategic Projects.[174] Article 10(2) CRMA holds that (our emphasis):

> *With regard to the environmental impacts or obligations addressed in … Directive 2000/60/EC …, Strategic Projects in the Union shall be considered to be of public interest or serving public health and safety, and may be considered to have an overriding public interest provided that all the conditions set out in those Union legislative acts are fulfilled.*

[164] COM(2008)699.
[165] COM(2011)25.
[166] COM(2020)474.
[167] Annex I and II CRMA.
[168] COM(2011)25, COM(2014)297 and COM(2017)490.
[169] COM(2017)490, COM(2020)474 and recital 1 in the preamble to the CRMA.
[170] Recital 1 in the preamble to the CRMA.
[171] Recitals 11 and 14 in the preamble and Article 8 (c) Annex III CRMA
[172] COM(2008)699 page 9.
[173] Article 5(1)(a)(i) CRMA.
[174] Article 6 and Annex III CRMA.

(137) This is elaborated on in recital 27 in the preamble to the CRMA (our emphasis):

> *Given their role in ensuring the Union's security of supply for strategic raw materials, and their contribution to the Union's open strategic autonomy and the green and digital transition, Strategic Projects should be considered, by the permitting authority responsible, to be in the public interest. It should be possible to authorise Strategic Projects which have an adverse impact on the environment, to the extent they fall within the scope of Directives 2000/60/EC … where the permitting authority responsible concludes, on the basis of a case-by-case assessment, that the public interest served by the project overrides those impacts, provided that all relevant conditions set out in those legal acts are met. The case-by-case assessment should duly take into account the geological specificity of extraction sites, which constrains decisions on location due to the absence of alternative locations for such sites.*

(138) National authorities may thus consider Strategic Projects to be of «overriding public interest» per Article 4(7)(c), first alternative, WFD depending on the context.

(139) The CRMA first entered into force in the EU on 23 May 2024. The Act and the preceding communications from the Commission, however, confirm the importance of access to minerals for European businesses, consumers, the defence sector and more – a public interest that predates the adoption of the CRMA and is not only limited to raw materials that at any given time are deemed to be critical. Reference is made to the Communication on critical raw materials in 2014:

> *It is also worth emphasising that all raw materials, even if not classed as critical, are important for the European economy and that a given raw material and its availability to the European economy should therefore not be neglected just because it is not classed as critical.*[175]

(140) In assessing whether mineral extraction pursues an «overriding public interest», the Government is of the opinion that the type of mineral(s) extracted, their criticality in Europe and globally, production volumes and the expected longevity of the mine is of relevance. The assessment must be context-specific, having regard to the location specificity of mining operations. The decision primarily rests with the responsible national authorities, in line with the margin of discretion.

(141) The Government cannot see that it is of relevance that Norway is already a net exporter of titanium raw material (in the form of ilmenite). Many minerals have highly concentrated geographic production, and if national demand shall be determinative, the aims of the EU's raw minerals policy cannot be reached.

[175] COM(2014)297. Similarly: COM(2017)490.

5 ANSWERS TO THE REFERRING COURT'S QUESTIONS

(142) Based on the foregoing, the Government respectfully submits that the questions posed by the referring court should be answered as follows:

> *Question 1:*
>
> *The reference to «overriding public interest» in the first alternative in Article 4(7)(c) of Directive 2000/60/EC refers to the types of interests that may justify a derogation from Article 4(1) of the Directive, without requiring a balancing of interests.*
>
> *Question 2 and 3:*
>
> *Production of rutile and garnet for the global market, ensuring access to critical minerals, generation of income for owners, workers and society (through taxation) and creating jobs in a remote region may all constitute an «overriding public interest» pursuant to Article 4(7)(c) of Directive 2000/60/EC.*

• • •

Oslo, 05 July 2024

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