



## JUDGMENT OF THE COURT

2 October 2015\*

*(Directive 2011/92/EU on environmental impact assessment of public and private projects  
– Article 11 – Right of access to a judicial review procedure – Effect of EEA law in  
national legal orders – Principles of equivalence and effectiveness)*

In Case E-3/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the State Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*), in the case between

**Liechtensteinische Gesellschaft für Umweltschutz**

and

**Gemeinde Vaduz (Municipality of Vaduz)**

concerning the interpretation of Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Gemeinde Vaduz (“the Municipality of Vaduz”), represented by Dr Peter Wolff, Rechtsanwalt, acting as Counsel;

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\* Language of the request: German

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, and Nadja Rossetini-Lambrech, Senior Legal Officer, EEA Coordination Unit, acting as Agents; and
- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Audur Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of Liechtensteinische Gesellschaft für Umweltschutz (“the appellant” or “LGU”), represented by Dr Stefan Becker, Rechtsanwalt; the Municipality of Vaduz, represented by Dr Peter Wolff, Rechtsanwalt; the Liechtenstein Government, represented by Dr Andrea Entner-Koch; ESA, represented by Markus Schneider, Acting Director, and Íris Ísberg, Temporary Officer, acting as Agents; and the European Commission (“the Commission”), represented by Günter Wilms, member of its Legal Service, acting as Agent, at the hearing on 3 July 2015,

gives the following

## **Judgment**

### **I Introduction**

- 1 The case before the national court concerns an action for the annulment of a decision of 19 and 20 November 2013 by the Liechtenstein Government finding a project for expanding a landfill site compatible with environmental law (“the contested decision”). LGU, a non-governmental organisation promoting environmental protection (“environmental NGO”), has instigated the action against the Municipality of Vaduz as project developer. The contested decision reserves certain matters relating to the assessment of the project’s environmental effects to subsequent authorisation procedures. Under those procedures, environmental NGOs have no access to a review procedure before a judicial body. Therefore, LGU claims that the decision infringes its right to review under Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1) (“the Directive”). Against that background, the referring court has requested an advisory opinion from the Court on the scope of Article 11 of the Directive, and its effect in the national legal order.

## II Legal background

### *EEA law*

- 2 The first paragraph of Article 3 of the Agreement on the European Economic Area (“EEA”) reads:

*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*

- 3 Article 7 EEA reads:

*Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*

...

*(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

- 4 Protocol 35 EEA reads:

*For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.*

- 5 The Joint Declaration to Protocol 35 EEA reads:

*It is the understanding of the Contracting Parties that Protocol 35 does not restrict the effects of those existing internal rules which provide for direct effect and primacy of international agreements.*

- 6 The Directive was incorporated into point 1a of Annex XX to the EEA Agreement by Joint Committee Decision No 230/2012 of 7 December 2012 (OJ 2013 L 81, p. 32, and EEA Supplement No 18, p. 38) (“Decision No 230/2012”). As none of the EFTA States indicated constitutional requirements for the purposes of Article 103 EEA, Decision No 230/2012 entered into force on 8 December 2012 according to Article 3 thereof. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

- 7 The Directive codifies and replaces Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) (“the former Directive”), as amended by Directives 97/11/EC, 2003/35/EC and 2009/31/EC.

8 The preamble to the Directive includes the following recitals:

(2) *Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.*

(3) *The principles of the assessment of environmental effects should be harmonised, in particular with reference to the projects which should be subject to assessment, the main obligations of the developers and the content of the assessment. The Member States may lay down stricter rules to protect the environment.*

...

(6) *General principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.*

(7) *Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be concluded on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.*

...

(12) *For projects which are subject to assessment, a certain minimal amount of information should be supplied, concerning the project and its effects.*

...

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

(17) *Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting*

*environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.*

9 Article 1(1) and (2) of the Directive reads:

1. *This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.*
2. *For the purposes of this Directive, the following definitions shall apply:*
  - (a) *'project' means:*
    - *the execution of construction works or of other installations or schemes,*
    - *other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;*
  - (b) *'developer' means the applicant for authorisation for a private project or the public authority which initiates a project;*
  - (c) *'development consent' means the decision of the competent authority or authorities which entitles the developer to proceed with the project;*
  - (d) *'public' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;*
  - (e) *'public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;*
  - (f) *'competent authority or authorities' means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.*

10 Article 2(1) and (2) of the Directive reads:

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

2. *The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.*

11 Article 3 of the Directive reads:

*The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:*

- (a) human beings, fauna and flora;*
- (b) soil, water, air, climate and the landscape;*
- (c) material assets and the cultural heritage;*
- (d) the interaction between the factors referred to in points (a), (b) and (c).*

- 12 Pursuant to Article 4 of the Directive, projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10 of the Directive, whereas projects listed in Annex II may be made subject to such an assessment if prescribed by the relevant EEA State. It is undisputed that, according to Liechtenstein law, the project at issue is subject to such an assessment.

- 13 Article 5 of the Directive requires the EEA States to ensure that the developer supplies sufficient information for an environmental impact assessment (“EIA”) to be carried out. Article 5(3) prescribes the following minimum requirements in this respect:

*The information to be provided by the developer in accordance with paragraph 1 shall include at least:*

- a) a description of the project comprising information on the site, design and size of the project;*
- b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;*
- c) the data required to identify and assess the main effects which the project is likely to have on the environment;*
- d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;*
- e) a non-technical summary of the information referred to in points (a) to (d).*

- 14 Articles 6 and 7 of the Directive require the EEA States to ensure that relevant authorities and the public are informed and consulted before the decision on the request for development consent is taken. In particular, Article 6(3)(a) requires the EEA States to ensure that any information gathered pursuant to Article 5 is made available to the public concerned within a reasonable time-frame. According to Article 6(4), the public concerned shall be entitled to express comments and opinions, when all options are open, before the decision on the request for development consent is taken.
- 15 Article 8 of the Directive provides that the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.
- 16 Pursuant to Article 9(1) of the Directive, following a decision to grant or refuse development consent, the public must be informed, inter alia, of the content of the decision, any conditions attached to it, and the main reasons and considerations on which the decision is based.
- 17 Article 11(1) to (3) of the Directive reads:
  1. *Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
    - (a) *having a sufficient interest, or alternatively;*
    - (b) *maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;*

*have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*
  2. *Member States shall determine at what stage the decisions, acts or omissions may be challenged.*
  3. *What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.*
- 18 Article 11 of the Directive has the same wording as Article 10a of Directive 85/337, which was introduced by Directive 2003/35/EC and incorporated into the EEA Agreement by Joint Committee Decision No 28/2012 of 10 February 2012 (OJ 2012 L 161, p. 34 and EEA Supplement No 34, p. 40). The entry into force

and the deadline for implementation of Directive 2003/35/EC in the EFTA States was 1 May 2012.

- 19 The United Nations Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters (“the Aarhus Convention”) has been ratified by the European Union (“EU”), and is specifically addressed in recitals 18 to 21 of the preamble to the Directive. The Aarhus Convention is not formally part of the EEA Agreement, nor has it been ratified by Liechtenstein. However, the relevant provisions in Article 11 of the Directive are identical in substance to Article 9(2) of the Aarhus Convention.

#### *National law*

- 20 In Liechtenstein law, a separate procedure is established for the EIA of public and private projects. In 2013, when consent for the project at issue was given, the Act of 10 March 1999 on Environmental Impact Assessment (*Gesetz vom 10. März 1999 über die Umweltverträglichkeitsprüfung, LGBl. 1999 Nr. 95*) (“the former EIA Act”) was in force.
- 21 Article 16 of the former EIA Act provides that consent must be granted to a project where compliance with environmental protection rules can be ensured, if necessary by imposing conditions. Complaints against such decisions must be brought before the Administrative Court within two weeks by the project developer, the municipality concerned, neighbours or environmental organisations registered in Liechtenstein which have been committed to environmental protection objectives for at least five years and designated by the Government as eligible to bring complaints.
- 22 On 10 July 2013, ESA issued a letter of formal notice to Liechtenstein. ESA concluded that the former EIA Act did not correctly implement the Directive, in particular as regards the scope of projects subject to an EIA, the information to be provided by the developer and the cross-border impact. In order to accommodate the concerns addressed in that letter, Liechtenstein adopted a new EIA Act on 5 December 2013. The Act entered into force on 1 February 2014 (*Gesetz vom 5. Dezember 2013 über die Umweltverträglichkeitsprüfung, LGBl. 2014 Nr. 19*) (“the present EIA Act”). ESA has closed its investigation.
- 23 Since the EIA is undertaken as a separate procedure under Liechtenstein law, the remainder of the procedure for granting consent to public and private projects is governed by other legislative instruments in Liechtenstein (“special Liechtenstein legislation”), such as the Technical Regulation on Waste of 10 December 1990, which applies in this case.

### **III Facts**

- 24 In February 2013, the Municipality of Vaduz submitted to the Liechtenstein Government an environmental impact plan for an expansion of the *Im Rain* landfill site. The expansion entails removing more than 150 000 m<sup>3</sup> of rock thus creating

an equivalent landfill volume. The plan was followed up in June 2013 by an environmental impact report. This report was made public and discussed at a joint meeting in September 2013 between interested parties, including a representative of LGU. In particular, the issue of sealing a construction waste compartment was discussed.

- 25 The contested decision determined that the project satisfied the environmental protection rules, subject to compliance with certain conditions. One of those conditions was the construction of a compartment for disposal of inert substances. The compartment was to be fitted with a seal preventing leachate into the subsoil. The Municipality of Vaduz was required to submit to the Office for the Environment preliminary projects for compliance with this condition. The preliminary projects were to contain, inter alia, a description of the options studied, the preferred option, and choice of materials. The Office for the Environment would then review the preliminary projects under special Liechtenstein legislation and for the purpose of authorisation.
- 26 On 6 December 2013, LGU lodged proceedings to bring the contested decision before the Administrative Court (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*). That court dismissed the action by judgment of 21 March 2014. The Administrative Court found that the project was sufficiently detailed to be the subject of an EIA. As to uncertainties concerning leachate, the Administrative Court considered the imposition of conditions as adequate.
- 27 On 23 April 2014, LGU appealed to the State Court (*Staatsgerichtshof des Fürstentums Liechtenstein*) against the judgment of the Administrative Court. LGU alleged, inter alia, that its right of access to a review procedure pursuant to the Directive had been infringed. LGU requested the State Court to make a reference to the Court for an advisory opinion on the interpretation of the Directive. In particular, LGU raised the question whether the Directive allows an EIA to be carried out on the basis of information describing merely the initial essential features and basic framework of a project, whereas project details were to be developed through subsequent preliminary projects. In those proceedings there is no public participation, for example, as regards the choice of materials and design, evidence of the long-term impermeability of the waste disposal facility or its drainage. In its reply of 25 May 2014, the Municipality of Vaduz contested the appeal. Since the Directive was transposed by the present EIA Act, the Municipality of Vaduz disputed the Directive's relevance to the present case and opposed the request to refer the case to the Court.
- 28 On 16 December 2014, the State Court decided to stay the proceedings and to refer the following questions to the Court:

1. *Is [Directive 2011/92/EU] applicable in the Principality of Liechtenstein to EIA procedures which are still based, under transitional arrangements, on [the former EIA Act]?*

2. *If so, is there an unlawful restriction of the right of complaint of environmental organisations under Article 11 of Directive 2011/92/EU in conjunction with Article 20 of [the former EIA Act] in the present case if the Government takes a general decision on the environmental compatibility of the project pursuant to Article 16 of [the former EIA Act] in a separate procedure, but – in the form of conditions – reserves the resolution of crucial issues relating to the project’s environmental compatibility to subsequent authorisation procedures under special legislation?*
3. *If so, does Article 11 of Directive 2011/92/EU have direct effect in respect of the EIA procedure at issue, which forms the basis for the individual complaint to the State Court?*
4. *What would be the legal consequence, in the present case, of an infringement of the right of complaint under the Directive with reference to questions 2 and 3?*

29 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed later only insofar as is necessary for the reasoning of the Court.

#### **IV Assessment**

##### *Question 1*

30 By its first question, the referring court asks whether the Directive is applicable to EIA procedures which are based on transitional arrangements under the former EIA Act.

##### Observations submitted to the Court

31 The Municipality of Vaduz submits that, although the Directive was made part of the EEA Agreement on 8 December 2012, the provisions of national law transposing it into the Liechtenstein legal order did not enter into force until 1 February 2014. The Directive thus did not apply to the contested decision.

32 The appellant, the Liechtenstein Government and ESA, on the other hand, submit that the Directive had become part of the EEA Agreement, and the transposition date had expired, when the EIA procedure was initiated on 20 February 2013. Consequently, the appellant, the Liechtenstein Government and ESA contend that the Directive applies to the EIA procedure in question.

##### Findings of the Court

33 Directives must be implemented into the national legal order of the EEA States with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. EEA States must ensure

full application of directives not only in fact but also in law. It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts. Moreover, EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, paragraphs 51 to 54).

- 34 The Directive was made part of the EEA Agreement with effect from 8 December 2012 (see Article 3 of Decision No 230/2012). The deadline for implementation of the Directive expired on the same date. As this case concerns in particular Article 11 of the Directive, it may be mentioned in passing that this Article is identical to the provisions of Article 10a of the former Directive, which had been in force under the EEA Agreement since 1 May 2012. However, this point is not decisive.
- 35 At the time the EIA procedure in question was carried out, the Directive had properly been made part of EEA law. Liechtenstein was therefore under an obligation to implement it into its national legal system. The fact that the EIA procedure at issue is based on the old EIA Act does not change that finding. The consequences of a potential failure to correctly implement the Directive are discussed in the Court's assessment of Questions 3 and 4.
- 36 The answer to the first question must be that Liechtenstein was under an obligation to implement the Directive pursuant to Decision No 230/2012 and apply it to the EIA procedure at issue in the main proceedings.

#### *Question 2*

- 37 By its second question, the referring court asks, in essence, whether it represents an unlawful restriction on the right of access for environmental NGOs to a review procedure under Article 11 of the Directive if the Government adopts a conditional EIA decision deferring crucial environmental issues to subsequent authorisation procedures under special Liechtenstein legislation. According to the reference, there is no access for environmental NGOs to a review procedure before a judicial body.

#### Observations submitted to the Court

- 38 The appellant emphasises the principles of precaution and preventive action, mentioned in recital 2 in the preamble to the Directive. Accordingly, all significant effects a project is likely to have on the environment should be assessed before a development consent is granted. Crucial matters relating to the assessment of environmental effects may therefore not be left to subsequent procedures where environmental NGOs have no access to judicial review.
- 39 The appellant submits that the environmental report submitted by the Municipality of Vaduz, which forms the basis for the contested decision, is not complete. It contains no information on the design of the inert substances compartment

intended to prevent leachates into the subsoil. The appellant contends that it is unlawful to defer this aspect to subsequent preliminary projects, which are not susceptible to judicial review by environmental NGOs.

- 40 The appellant relies on point 1 of Annex IV to the Directive, which states that the information to be supplied by the developer includes in particular a description of the physical characteristics of the whole project. The appellant contends that this requirement has not been complied with in relation to the project at issue.
- 41 The Municipality of Vaduz submits that the former EIA Act, which provides for a consent procedure to be carried out in several stages, is compatible with Article 11 of the Directive. It concedes that the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. If, however, those effects are not identifiable until the time of the procedure relating to the implementing decision, the assessment should be carried out in the latter procedure. In the view of the Municipality of Vaduz, this was precisely the situation in the Liechtenstein procedure at issue.
- 42 The Municipality of Vaduz observes that the contested decision included, in accordance with Article 16(3) of the former EIA Act, conditions intended to ensure that the project satisfied environmental protection rules. The conditions provide that the detailed design of the inert substances compartment and the resulting leachate must be reviewed in subsequent authorisation procedures under special legislation. Consequently, in the view of the Municipality of Vaduz, the possibility exists also at this later stage of the consent procedure to ensure compliance with environmental law.
- 43 The Liechtenstein Government observes that the Directive leaves EEA States a considerable margin of discretion in transposing its provisions as long as it is ensured that consent to projects with significant environmental effects is not given before those effects have been assessed. As permitted by Article 2(2) of the Directive, Liechtenstein has opted for a system where the EIA takes place in a separate procedure. This procedure is undertaken before any subsequent specific authorisation procedures a project might need. In an EIA decision, the Government may include conditions to ensure that the project is executed in accordance with environmental protection rules. Subsequent specific authorisations are bound by any conditions imposed in the initial EIA decision. This system provides many advantages, the most important of which is that the EIA is undertaken at an early stage, before any specific authorisation is granted. Furthermore, it allows an EIA to be carried out as soon as it is possible to identify and assess all the effects the project may have on the environment.
- 44 The Liechtenstein Government does not deny that issues which prevent an identification and assessment of all the environmental effects of a project are crucial and may not be deferred to subsequent procedures. To do so could undermine and restrict the right of challenge granted to environmental NGOs under Article 11 of the Directive, unless they also have a right of challenge in the subsequent procedures. However, it is solely for the referring court to assess

whether crucial issues preventing the Government from identifying and assessing the environmental effects of the project were reserved to the subsequent specific authorisation procedures.

- 45 Should the Court seek to provide guidance to the referring court in this assessment, the Liechtenstein Government avers that it took its EIA decision when it could identify and assess all the environmental effects of the project. An impact on the groundwater could not be excluded, unless an inert substances compartment was built subject to a number of conditions. Imposing those conditions enabled the Government to rule out negative effects on the environment and consequently to determine the project's compatibility with environmental protection rules. The conditions imposed did not reserve the assessment of any crucial issues to subsequent authorisation procedures.
- 46 The Liechtenstein Government considers this approach fully in line with the Directive. In particular, Article 9(1)(a) of the Directive envisages that the consent decision may contain conditions and describe the main measures to avoid, reduce and, if possible, offset major adverse effects. The conditions laid down in the present case, in the form of two preliminary projects, are intended precisely to ensure and monitor closely that the project is executed such that environmental protection rules are upheld. Consequently, the aim of the procedure established by the Directive has been met, which appears also to have been accepted by the appellant. The Liechtenstein Government stresses further that Article 11 of the Directive on the right of challenge applies only to the EIA procedure and not to subsequent authorisation procedures under special Liechtenstein legislation.
- 47 ESA submits that Article 2 of the Directive allows the EEA States discretion as regards the choice of measures to ensure that the Directive is implemented into national law. As is permitted by Article 2(2), it is in principle compatible with the Directive to establish a two-stage procedure in national law, as Liechtenstein has chosen to do. Furthermore, there are no indications that Article 11 of the Directive was breached as regards the right of access to a review procedure for the public concerned at the stage of the EIA procedure where the Government determined that the project satisfied environmental protection rules.
- 48 ESA stresses, however, that the procedures adopted by an EEA State must not render practically impossible or excessively difficult the exercise of rights conferred by the Directive. In other words, the right for members of the public concerned to challenge the legality of decisions, acts or omissions must be conferred as regards all stages that are material to the EIA procedure.
- 49 ESA understands Liechtenstein law as explained in the request to the effect that the right to challenge the substantive or procedural legality of EIA decisions is only available against the Government decision determining whether the project satisfies environmental protection rules. Conversely, decisions subsequently taken by the Office for the Environment in separate procedures regarding the resolution of allegedly crucial issues relating to the environmental compatibility of the project

may not be challenged. In ESA's view, this would fail to ensure the achievement of the objectives pursued by Article 11 of the Directive.

- 50 The Commission, which mainly agrees with ESA, submits that if the long-term impermeability of the waste disposal facility or its drainage form part of the project's essential characteristics, it should be the subject of an EIA with an integral right for environmental NGOs to challenge the decision.
- 51 In assessing this, the Commission submits that account must be had of the wide scope of the Directive, and its objective to protect the environment against significant negative effects. The waste disposal facility will have such significant effects without the inert substances compartment. In order to determine whether the inert substances compartment will be effective in preventing significant negative effects, a certain degree of detail is necessary.
- 52 Furthermore, the Commission makes reference to the objective of ensuring wide access to justice for the public concerned, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health. If this objective depends on the design of the specific compartment in question in this case, it should be subject to judicial review. In this regard, the Commission emphasises the importance of involving environmental NGOs in both the administrative and judicial stages of decision-making.
- 53 Finally, the Commission submits that the Implementation Guide under the Aarhus Convention is relevant for determining the obligations under the Directive. The Guide speaks of adequate effective remedies, which will be limited if crucial aspects of the EIA cannot be subject to judicial review.

#### Findings of the Court

- 54 It is not disputed that LGU is an environmental NGO. Accordingly, it is part of the public concerned under the Directive, with a right to judicial review under Article 11. The key issue is whether it is compatible with Article 11 that the contested decision defers, subject to certain conditions, the resolution of crucial issues relating to the project's environmental effects to subsequent authorisation procedures under which environmental NGOs have no access to a review procedure before a judicial body.
- 55 One of the objectives of the Directive is – as recital 3 in its preamble states – to harmonise the principles of assessment of environmental effects, in particular with reference to the projects which should be subject to assessment, the main obligations of the developers and the content of the assessment.
- 56 Moreover, the Directive aims to introduce general principles for EIAs governing public and private projects likely to have a major effect on the environment, with a view to supplementing and coordinating development consent procedures (see recital 6 of the preamble to the Directive).

- 57 Article 4 of the Directive provides that certain projects listed in Annex I must be made subject to such assessment. On the other hand, projects listed in Annex II must only be subject to assessment if they are likely to have significant effects on the environment. However, in the present case, it is undisputed that the project at issue must be made subject to an EIA.
- 58 It follows from Article 2(1) of the Directive that the purpose of the EIA procedure is to ensure that development consent for projects likely to have significant effects on the environment is not granted before those effects have been assessed. This assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and members of the public concerned, as provided for in Articles 5 and 6.
- 59 It follows further from Article 5(3) of the Directive that the information to be supplied by the developer shall include at least the items mentioned in that paragraph.
- 60 It is thus clear from the objectives of the Directive that the competent national authorities, when they receive a request for development consent for a project, must carry out a specific evaluation on the basis of the criteria set out in Article 5(3) of the Directive, such as whether the information supplied by the developer includes a sufficient description of the project, the measures envisaged in order to avoid, reduce and remedy significant adverse effects, and the main alternatives studied.
- 61 In the present case, the Government has adopted its final EIA decision. According to that decision, the Municipality of Vaduz had to carry out preliminary projects containing a description of the options studied, the preferred option and choice of materials. This is more or less identical to the requirement in Article 5(3)(d) of the Directive, which must be fulfilled before the EIA decision is adopted. Adopting the final EIA decision at this stage raises the question of appropriate public participation in the decision-making.
- 62 Moreover, it is clear from the reference from the national court that there is no access to judicial review for environmental NGOs during the subsequent authorisation procedures under the special Liechtenstein legislation. Article 11 of the Directive aims at ensuring that the public concerned, including environmental NGOs, has wide access to justice with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health (see, for comparison, Case C-72/12 *Gemeinde Altrip and Others*, judgment of 7 November 2013, published electronically, paragraph 28).
- 63 Article 11(2) of the Directive leaves the EEA States a margin of discretion to choose at what stage an EIA decision may be challenged. However, the measures adopted by an EEA State must not render practically impossible or excessively difficult the exercise of rights conferred by the Directive (see Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, paragraph 69 and case law cited). Reserving the resolution of crucial environmental issues such as those set out in Article 5(3)

of the Directive to subsequent procedures, under which there is no access to judicial review for environmental NGOs cannot be reconciled with Article 11 of the Directive, as it would deprive them of their right of challenge.

- 64 A development consent may be subject to conditions, as is provided for in Article 9(1) of the Directive. However, such conditions cannot undermine or substitute for the public participation objective of the Directive. Crucial issues relating to a project's environmental effects cannot be deferred to subsequent procedures, as long as those procedures exclude environmental NGOs from the rights under the Directive. The imposition of strict conditions in this context is therefore inadequate. An exclusion of a legitimate interest may have resulted in the present case, as the assessment of the compatibility of the inert substances compartment with environmental law has been deferred to subsequent authorisation procedures. However, it is for the national court to determine whether issues of a crucial nature have been involved.
- 65 In light of these considerations, the answer to the second question must be that it is not compatible with Article 11 of the Directive to adopt a general EIA decision, while deferring the resolution of crucial issues relating to the project's environmental effects such as those set out in Article 5(3) of the Directive to subsequent authorisation procedures with no access for environmental NGOs to a review procedure before a judicial body. Whether crucial issues are at stake in this case is for the national court to decide.

### *Question 3*

- 66 The essence of the third question is whether the Directive is directly effective in relation to the EIA procedure at issue despite the fact that it was implemented into Liechtenstein law only after the completion of that procedure.

#### Observations submitted to the Court

- 67 The Municipality of Vaduz and the Liechtenstein Government observe that the last two sentences of Article 11(3) of the Directive, concerning the standing of non-governmental organisations, have been held to be directly effective by the Court of Justice of the European Union. It is also undisputed that the appellant has standing to challenge the EIA at issue. However, the remaining parts of Article 11 are not unconditional or sufficiently precise to have direct effect.
- 68 The Liechtenstein Government contends further that, according to Article 7 EEA and Protocol 35 EEA, no transfer of legislative powers has taken place under the EEA Agreement. Consequently, as the Court has confirmed in earlier cases, EEA law does not require a provision of a directive which has been made part of the EEA Agreement but which has not been transposed into national law to have direct effect. It follows from this that EEA law does not require that non-implemented or incorrectly transposed EEA rules take precedence over conflicting national rules. National courts are nevertheless bound to interpret national law as far as possible in conformity with EEA law.

- 69 ESA, whose observations are supported by the appellant, observes that direct effect is a notion of EU law. This notion enables individuals to invoke a provision of EU law directly before a national or EU court, under certain conditions. However, the EFTA States have refrained from accepting the principle of direct effect. Instead, they seek to achieve similar results through national procedures. To that end, Protocol 35 EEA specifies that the EFTA States shall introduce, if necessary, a statutory provision to the effect that implemented EEA rules prevail in cases of conflict with other statutory provisions.

#### Findings of the Court

- 70 The Directive was not implemented in the Liechtenstein legal order at the time when the EIA procedure at issue was undertaken. However, the Directive had been incorporated into the EEA Agreement at that time.
- 71 It follows from Article 7 EEA and Protocol 35 EEA that the EEA Agreement does not entail a transfer of legislative powers. Accordingly, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts (see for example Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 40). However, as ESA has rightly pointed out, the EFTA States seek to achieve similar results through national procedures.
- 72 Liechtenstein has chosen to attain those objectives by applying EEA law in its internal legal order without any additional national implementation if certain conditions are fulfilled. It depends solely on Liechtenstein law whether Article 11 of the Directive can be applied directly in case of a conflict with national law.
- 73 Moreover, Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented prevails over conflicting national law and to guarantee the application and effectiveness of the directive (see, to that effect, *Wahl*, cited above, paragraph 54).
- 74 In any case, it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. National courts are bound by EEA law to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law, and consequently comply with Articles 3 and 7 EEA and Protocol 35 EEA (see, for example, Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 123, and Case E-7/13 *Creditinfo Lánstraust* [2013] EFTA Ct. Rep. 970, paragraph 47). When interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 28). These obligations arise on the day the respective legal act is made part of the EEA Agreement. The national rules in the present case on the access to a judicial review procedure must be interpreted with those obligations in mind.

- 75 In light of these considerations, the answer to the third question must be that EEA law does not require that non-implemented EEA rules can be relied on directly before national courts in the EFTA States. However, it follows from EEA law that when interpreting national rules the national court is bound to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by the Directive. This obligation arises on the day the respective legal act is made part of the EEA Agreement.

*Question 4*

- 76 By its fourth question, the referring court seeks guidance on the possible consequences of an infringement of Article 11 of the Directive.

Observations submitted to the Court

- 77 The appellant supports the observations submitted by ESA concerning this question.
- 78 The Liechtenstein Government and ESA note that, in the absence of EEA rules on remedies, in case of an infringement of Article 11 of the Directive, it is for the domestic legal system of each EEA State to lay down detailed procedural rules to ensure the protection of the rights individuals derive from EEA law. However, those rules should not be less favourable than those pursuant to which the national legal order protects similar rights under purely domestic legislation (principle of equivalence) or render it in practice impossible or excessively difficult to exercise the rights conferred by EEA law (principle of effectiveness). It is for the referring court to establish whether a legal remedy exists and complies with these principles.
- 79 Applied to situations such as those in the main proceedings, ESA submits that it must be ensured, at all stages which are considered to be material to the EIA procedure, that members of the public concerned, including environmental NGOs such as LGU, have access to a review procedure before a judicial body to challenge the substantive or procedural legality of decisions, acts or omissions subject to the Directive. The obligations arising from Articles 3 and 7 EEA entail that the EFTA States must nullify the unlawful consequences of a breach of EEA law. The EIA procedure at issue cannot be considered complete as long as members of the public concerned have not been given the opportunity to challenge decisions taken in authorisation procedures subsequent to the general EIA decision regarding crucial issues.
- 80 ESA notes that a possible remedy for a breach of Article 11 of the Directive could be to revoke or suspend the contested decision. Another possible solution could be to grant members of the public concerned legal standing to challenge decisions during the subsequent authorisation procedures. In ESA's view, determination of these issues is a matter for the referring court. Alternatively, ESA continues, the national court may also determine whether it is possible for the members of the public that have been affected to claim compensation for the harm suffered.

- 81 The Commission refers to the judgment in Case C-201/02 *Wells* [2004] ECR I-723 concerning the remedies available for a failure to carry out a proper EIA procedure.

#### Findings of the Court

- 82 In the absence of EEA rules on remedies in a certain field, it is for the domestic legal order of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights of individuals and economic operators under EEA law. Such rules must satisfy the principles of equivalence and effectiveness (see *Casino Admiral*, cited above, paragraph 69 and case law cited).
- 83 If the referring court holds that the contested decision defers crucial issues relating to the environmental effects of the project to subsequent procedures under which there is no access to judicial review for environmental NGOs, that finding entails that the EIA procedure has not been properly carried out or has been incomplete. One appropriate remedy in such a situation could be to annul the contested decision and refer it back to the Government for renewed consideration.
- 84 Depending on the circumstances, Liechtenstein may be obliged also to provide compensation to affected members of the public in accordance with the principle of State liability under EEA law (see *Irish Bank*, cited above, paragraph 125 and case law cited).
- 85 The answer to the fourth question must therefore be that it is for the referring court, in the light of the principles of equivalence and effectiveness, to determine the remedies that are available for an infringement of Article 11 of the Directive.

#### **V Costs**

- 86 The costs incurred by the Liechtenstein Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the State Court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the State Court of the Principality of Liechtenstein gives the following Advisory Opinion:

- 1. Liechtenstein was under an obligation to implement Directive 2011/92/EU pursuant to Decision No 230/2012 of 7 December 2012 of the EEA Joint Committee and apply it to the environmental impact assessment procedure at issue in the main proceedings.**
- 2. It is not compatible with Article 11 of Directive 2011/92/EU to adopt a general environmental impact assessment decision, while deferring the resolution of crucial issues relating to the project's environmental effects such as those set out in Article 5(3) of Directive 2011/92/EU to subsequent authorisation procedures with no access for non-governmental organisations promoting environmental protection to a review procedure before a judicial body. Whether crucial issues are at stake in this case is for the national court to decide.**
- 3. EEA law does not require that non-implemented EEA rules can be relied on directly before national courts in the EFTA States. However, it follows from EEA law that when interpreting national rules the national court is bound to apply, as far as possible, the methods of interpretation recognised by national law in order to achieve the result sought by Directive 2011/92/EU. This obligation arises on the day the respective legal act is made part of the EEA Agreement.**
- 4. It is for the referring court, in the light of the principles of equivalence and effectiveness, to determine the remedies that are available for an infringement of Article 11 of Directive 2011/92/EU.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 2 October 2015.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President