



REPORT FOR THE HEARING

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 (“SCA”) 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 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.

I Introduction

1. By letter of 20 January 2015, registered at the Court on 22 January 2015, the State Court of the Principality of Liechtenstein (“the State Court”) requested an Advisory Opinion in a case pending before it between the environmental organisation Liechtensteinische Gesellschaft für Umweltschutz (“the appellant” or “LGU”) and the Municipality of Vaduz (“the respondent”).

2. The case before the State Court concerns an action for annulment of an environmental impact assessment (“EIA”) decision of 19 and 20 November 2013 by the Liechtenstein Government. The decision found the respondent’s project for expanding a landfill site compatible with environmental requirements. However, it is disputed if, and to what extent, an EIA decision may reserve certain matters relating to the assessment of the project’s compliance with environmental protection rules to subsequent authorisation procedures, under which environmental organisations have no access to review before a judicial body.

II Legal background

EEA law

3. Article 3(1) 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.

4. Article 7 EEA reads in excerpt:

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.

5. Protocol 35 to the EEA Agreement 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.

6. 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”) 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), which entered into force on 8 December 2012. The time limit for the EEA/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) (“Directive 85/337”), 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.

...

(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.*

(8) *Projects belonging to certain types have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment.*

(9) *Projects of other types may not have significant effects on the environment in every case and those projects should be assessed where the Member States consider that they are likely to have significant effects on the environment.*

...

(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(1) 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.

13. Articles 5 to 7 of the Directive require the EEA States to ensure that the developer supplies sufficient information for an EIA to be carried out and that relevant authorities and the public are informed and consulted. Article 8 provides that the results of those consultations and the information gathered must be taken into consideration in the development consent procedure.

14. 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.

15. 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.

16. 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 was 1 May 2012.

17. 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 in the preamble to the Directive. However, the Aarhus Convention is not part of the EEA Agreement, nor has it been ratified by Liechtenstein.

National law

18. In Liechtenstein, an EIA is undertaken as a separate procedure established by law. 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 old EIA Act”) was in force.

19. Article 16 of the old EIA Act provides that consent must be granted to a project included within the scope of the Act where compliance with environmental protection rules can be ensured, if necessary by imposing conditions. Article 20 concerns the right to challenge such decisions. Complaints must be brought before the Administrative Court within two weeks of the decision. The parties entitled to bring such complaints are the project developer, the municipality concerned, neighbours and 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.

20. On 10 July 2013, the EFTA Surveillance Authority (“ESA”) issued a letter of formal notice to Liechtenstein. ESA concluded that the national legislation in force (the old 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 new EIA Act”). ESA then closed its investigation.

III Facts and pre-litigation procedure

21. In February 2013, the respondent 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 m³ of rock and creating an equivalent landfill volume. In May 2013, the Government defined the scope of the study pursuant to Article 11 of the old EIA Act.

22. In June 2013, the respondent submitted 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.

23. By a decision of 19 and 20 November 2013, the Government determined that the project satisfied 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 respondent was required to submit to the Office for the Environment preliminary projects for the inert substances compartment and the leachate from that compartment. The preliminary projects were to contain, inter alia, a description of the options studied, the preferred option, and choice of materials. The preliminary projects would then be reviewed by the Office for the Environment and subject to authorisation under special legislation.

24. On 6 December 2013, LGU challenged the Government decision before the Administrative Court (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*). By judgment of 21 March 2014, the action was dismissed. The Administrative Court found that the project was sufficiently detailed to be the subject of an EIA. As regards the uncertainties concerning leachate, imposition of the conditions, on the basis of Article 16(4) of the old EIA Act, was considered adequate.

25. On 23 April 2014, LGU appealed the judgment to the State Court, alleging, inter alia, that its right of challenge pursuant to the Directive had been infringed. LGU requested the State Court to make a reference for an Advisory Opinion regarding the interpretation of the Directive. In particular, it 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 are to be developed through preliminary projects, in which 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 contested the appeal. As the Directive was only transposed by the new EIA Act, the Municipality disputed its relevance for the present case and opposed the request to refer the case to the Court.

26. 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 old 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 old 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 old 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?**

IV Written procedure before the Court

27. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the respondent, represented by Dr Peter Wolff, Rechtsanwalt, acting as Counsel;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, and Nadja Rossettini-Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- ESA, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Audur Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents.

V Summary of the arguments submitted to the Court

The respondent

28. The respondent 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 EIA of 19 and 20 November 2013, which is at issue in the present case. There are no special circumstances which could result in a provision of the Directive having direct effect even before its transposition into national law.

29. The respondent observes that in relation to Article 10a of Directive 85/337,

which corresponds to Article 11 of the Directive, the second and third sentences of the third paragraph of that article, concerning the standing of non-governmental organisations to challenge decisions, acts or omissions subject to the Directive, have been held to have direct effect.¹ Moreover, the respondent considers it common ground in the present case that the appellant has standing to challenge the EIA at issue. However, according to the respondent, there is no basis on which to assert that the remainder of the provision may be relied on directly.

30. Even if Article 11 of the Directive were deemed directly effective in full, the respondent submits that the old EIA Act, which provides for a consent procedure to be carried out in several stages, is in any event compatible with the Directive. It asserts that, according to case law, 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.² In the respondent's view, this was precisely the situation in the Liechtenstein procedure at issue.

31. The question of the design of the inert substances compartment and the resulting discharge of leachate from that compartment was the key aspect of the project and was addressed in all phases of the project planning. Following a request from the Government in its decision of 7 May 2013 on the scope of the study, the respondent supplemented its project report for the purposes of the EIA. The Office for the Environment then proposed conditions and clarifications to prevent and reduce negative effects on the environment, which formed the basis for the Government's decision on the project, taking account of its likely environmental impact.

32. The respondent observes that the Government's decision of 19 and 20 November 2013 included, in accordance with Article 16(3) of the old 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 is to be reviewed in subsequent authorisation procedures under special legislation. Consequently, in the respondent's view, the possibility exists also at this later stage of the consent procedure to ensure compliance with environmental law.

33. The respondent submits that, under the old EIA Act, the appellant was entitled to challenge both the decision on the scope of the study and the decision taken in the light of the environmental impact report. Only in the authorisation procedure under the special legislation did the appellant no longer have a right of challenge.

34. According to the respondent, the Court of Justice of the European Union has

¹ Reference is made to Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] ECR I-3673, paragraphs 51 to 59.

² Reference is made to Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 26 and case law cited.

stressed that the right of associations to institute proceedings is limited to challenges based on rules of national law implementing EU environmental law and rules of EU environmental law having direct effect.³ Moreover, its judgment did not endorse the possibility of a representative action of general application in the context of environmental law. Consequently, in the respondent's view, Article 11 of the Directive does not provide for an action of that kind. As the appellant's challenge in the case at hand concerns the infringement of national environmental legislation, this is not covered by Article 11 of the Directive.

35. The respondent concludes by asserting that the Directive does not apply to the EIA procedure at issue. However, even if the Directive were to apply, reserving the resolution of important environmental issues to subsequent authorisation procedures under special legislation does not constitute an unlawful restriction on environmental organisations' right of challenge.

The Liechtenstein Government

36. In relation to the first question, the Liechtenstein Government notes that the Directive entered into force in the EEA on 8 December 2012. The Directive codified and replaced Directive 85/337 as amended, without making any substantive changes to its content. The Directive itself did not specify any transposition obligations or dates. Instead, it follows from Article 14 of the Directive that the transposition dates and obligations laid down in the directives replaced remained valid.

37. At the time when the EIA procedure was initiated on 20 February 2013 the Directive had already entered into force under the EEA Agreement, and the transposition dates had expired. Consequently, the Liechtenstein Government contends that the Directive applies to the EIA procedure in question.

38. In relation to the second question, the Liechtenstein Government notes 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 undertaken before any subsequent specific authorisation procedures which a project might need. In the 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, most important of which is that the EIA is undertaken at an early stage, before any specific authorisation is granted. Furthermore, it follows from case law that the EIA must be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.⁴

³ Reference is made to *Bund für Umwelt und Naturschutz*, cited above.

⁴ Reference is made to Case C-201/02 *Wells* [2004] ECR I-723, paragraph 52.

39. The Liechtenstein Government does not deny the fact that issues which prevent an identification and assessment of all the environmental effects of a project are crucial and may not be reserved for subsequent procedures. To do so could undermine and restrict the right of challenge granted to environmental organisations under Article 11 of the Directive, unless they also have a right of challenge in the subsequent procedures.

40. However, having regard to the division of jurisdiction established by Article 34 SCA, the Liechtenstein Government stresses that 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.

41. Should the Court seek to provide guidance to the referring court in the assessment whether crucial issues were reserved for subsequent authorisation procedures, 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.

42. 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. Accordingly, the Administrative Court found that the information presented and analysed during the EIA procedure was sufficiently detailed and that no crucial issues were left to the later specific authorisation procedures. Consequently, according to the Liechtenstein Government, 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 legislation.

43. As the Liechtenstein Government takes the view that the right of challenge laid down in Article 11 of the Directive has not been infringed, it is only for the sake of completeness that it addresses the third question concerning the potential direct effect of Article 11. In this respect, the Liechtenstein Government submits that only the last two sentences of Article 11(3) of the Directive are directly effective.⁵ The remaining

⁵ Reference is made to *Bund für Umwelt und Naturschutz*, cited above, paragraph 55.

parts of Article 11 are not unconditional or sufficiently precise to have direct effect.

44. Furthermore, the Liechtenstein Government continues, it follows from Article 7 EEA and Protocol 35 to the EEA Agreement that no transfer of legislative powers has taken place under that Agreement. Accordingly, the Court has clearly confirmed in earlier cases that 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 or not correctly transposed into national law to have direct effect.⁶ Consequently, EEA law does not require that non-implemented or incorrectly transposed EEA rules take precedence over conflicting national rules. It notes that in those cases the Court has made it clear nonetheless that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law.

45. The Liechtenstein Government stresses further that it is not for the Court to assess under the Advisory Opinion procedure whether national law is compatible with EEA law.⁷ This is solely a matter for the referring court. However, in any event, the Liechtenstein Government submits that Article 11 of the Directive has been correctly transposed into national law.

46. As the Liechtenstein Government rejects the view that Article 11 of the Directive has been infringed, its observations on the fourth question concerning the legal consequences of an infringement are merely supplementary. It notes that the Directive does not include any provisions on the legal consequences in the event that the right of challenge specified in Article 11 is infringed. Further, in the absence of EEA rules on this subject, it is for the domestic legal system of each EEA State to lay down detailed procedural rules to ensure the protection of the rights which 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).⁸ Consequently, it is for the referring court to establish whether a legal remedy exists and complies with these principles.

47. The Liechtenstein Government proposes that the Court should answer the questions referred as follows:

1. *The answer to the first question referred by the State Court should be that the provisions of Directive 2011/92/EU are applicable to EIA procedures which are still based, under transitional arrangements, on [the old EIA Act], if*

⁶ Reference is made to Cases E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 28, and E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 40.

⁷ Reference is made to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, paragraph 48.

⁸ Reference is made to Cases C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 25 and case law cited, and E-11/12 *Koch and Others* [2013] EFTA Ct. Rep. 272, paragraph 121 and case law cited.

these procedures were initiated after the entry into force of Directive 2011/92/EU under the EEA Agreement and as far as the transposition periods concerning the relevant provisions of Directive 2011/92/EU had, in accordance with Directive 85/337/EEC or its relevant amending Directives, expired at that moment.

2. *The answer to the second question referred by the State Court should be that where crucial issues relating to the project's environmental compatibility are reserved to subsequent authorisation procedures under special legislation this could unlawfully restrict the right of complaint of non-governmental organisations foreseen in Article 11 of Directive 2011/92/EU in conjunction with Article 20 of [the old EIA Act], if they do not have a right of complaint in the subsequent procedures. It is, however, for the national courts to assess all the facts of the case and to decide whether or not issues are of crucial nature and were reserved to the subsequent authorisation procedures.*
3. *In event, the answer to the third question referred by the State Court should be that EEA law does not require that Article 11 of Directive 2011/92/EU is directly applicable. The referring Court is, however, bound to interpret the national law, and in particular legislative provisions specifically adopted to transpose Article 11 into national law, as far as possible in conformity with EEA law. It is thereby for the referring Court to assess if Article 11 of Directive 2011/92/EU has (correctly) been transposed into national law.*
4. *In event, the answer to the fourth question referred by the State Court should be that, in the absence of EEA rules on this question, it is for the referring Court to establish whether, in the case of infringement of the right to complaint, a legal remedy exists at national level and complies with the principles of equivalence and effectiveness.*

ESA

48. As a preliminary remark, ESA notes that the Aarhus Convention has been found to play an important role in EU law with regard to the Directive, and that Article 11 of the Directive should be interpreted in light of, and having regard to the objectives of, the Aarhus Convention.⁹ The Aarhus Convention is also addressed in recitals 18 to 21 in the preamble to the Directive.

49. To the best of ESA's knowledge, Liechtenstein is the only EEA State not having ratified the Aarhus Convention, and therefore not being directly bound by its provisions as a matter of public international law. As an EEA State, and pursuant to Article 7 EEA, Liechtenstein must nonetheless correctly implement and apply the Directive. Therefore, in ESA's view, it does not matter whether or not Liechtenstein is bound by the Aarhus Convention. What is of importance is that provisions or concepts

⁹ Reference is made to *Bund für Umwelt und Naturschutz*, cited above, paragraph 41.

taken from EEA law are applied in a uniform manner in both EEA pillars, irrespective of the circumstances in which they apply.¹⁰

50. As regards the first question from the referring court, ESA submits that it is clear that the relevant administrative procedure regarding the project at issue was initiated after the Directive entered into force as regards the EEA/EFTA States. Furthermore, Article 11 of the Directive is identical to Article 10a of Directive 85/337, which Liechtenstein was under an EEA law obligation to transpose by 1 May 2012, when Directive 2003/35/EC entered into force in the EEA. Moreover, the EEA/EFTA States are under an obligation of result as regards the timely implementation of legal acts which have been made part of the EEA Agreement.¹¹

51. On the second question, 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.

52. ESA stresses, however, that the procedures adopted by a State must not render practically impossible or excessively difficult the exercise of rights conferred by the Directive.¹² 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.

53. 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, such a result would fail to ensure the achievement of the objectives pursued by Article 11 of the Directive. That is to give the public concerned wide access to justice, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.¹³

¹⁰ Reference is made to Cases E-25/13 *Engilbertsson* [2014] EFTA Ct. Rep. 524, paragraph 54, and E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraph 45.

¹¹ Reference is made to Case E-21/14 *ESA v Iceland*, judgment of 31 March 2015, not yet reported, paragraph 18 and case law cited.

¹² Reference is made to Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, paragraph 69, and *Koch and Others*, cited above, paragraph 121.

¹³ Reference is made to *Bund für Umwelt und Naturschutz*, cited above, paragraph 44, and Case C-72/12 *Altrip and Others*, judgment of 7 November 2013, published electronically, paragraph 46.

54. As for the third question, ESA observes that direct effect is a notion of EU law which enables individuals immediately to invoke a provision of EU law before a national or EU court, subject to several conditions. Directives can have direct effect when their provisions are unconditional and sufficiently clear and precise.¹⁴ However, the EEA/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 to the EEA Agreement specifies that the EEA/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.

55. Furthermore, Article 3 EEA obliges the EEA/EFTA States to take all measures necessary to guarantee the application and effectiveness of EEA law. Consequently, according to ESA, national courts are bound, as far as possible, to interpret national law in conformity with EEA law, and to apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law.¹⁵

56. As to the fourth question, ESA points out that, in the absence of EEA rules on remedies in a certain field, it is for the domestic legal system of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law, provided that the principles of equivalence and effectiveness are complied with.¹⁶

57. 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 environmental organisations and other relevant members of the public concerned 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 EEA/EFTA States must nullify the unlawful consequences of a breach of EEA law.

58. ESA submits that the EIA procedure at issue cannot be considered complete as long as members of the public concerned, including environmental organisations such as LGU, have not been given the opportunity to challenge decisions taken in authorisation procedures subsequent to the general EIA decision, regarding issues which are considered to be crucial.

59. ESA notes that a possible remedy for a breach of Article 11 of the Directive could be to revoke or suspend a decision on a project's compliance with environmental

¹⁴ Reference is made to Case 41/74 *Van Duyn* [1974] ECR 1337.

¹⁵ Reference is made to *Engilbertsson*, cited above, paragraph 159, and Cases E-6/13 *Metacom* [2013] EFTA Ct. Rep. 856, paragraph 69, and E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, paragraph 54 and case law cited.

¹⁶ Reference is made to *Casino Admiral*, cited above, paragraphs 69 and 72, and *Koch and Others*, cited above, paragraph 121.

protection rules, such as the Government decision of 19 and 20 November 2013.¹⁷ Another possible solution could be to grant the public concerned (here: LGU) 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 relevant members of the public that have been affected to claim compensation for the harm suffered.¹⁸

60. ESA proposes that the Court should give the following reply to the questions referred:

1. *Directive 2011/92/EU is applicable in the Principality of Liechtenstein to EIA procedures initiated after that Directive entered into force as regards the EEA EFTA States on 8 December 2012, regardless of whether the EIA procedures at issue are based on a national act implementing Directive 85/337/EEC which has been repealed.*
2. *It is a restriction on the right of access to a review procedure under Article 11 of Directive 2011/92/EU if members of the public concerned, including environmental organisations, are only allowed to challenge the substantive or procedural legality of EIA decisions at the stage at which the Government adopts a general decision on the environmental compatibility of a project, but where it is not possible to challenge the decisions subsequently taken by the relevant authorities (at a separate stage of the procedure) regarding the resolution of issues relating to the environmental compatibility of the project which are considered to be crucial.*
3. *National courts are bound, as far as possible, to interpret national law in conformity with EEA law, such as Article 11 of Directive 2011/92/EU, and must, as far as possible, apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law.*
4. *It must be ensured, at all stages which are considered to be material to the EIA procedure, that members of the public concerned 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 Article 11 of Directive 2011/92/EU. In the absence of EEA rules on remedies in a certain field, it is for the domestic legal system of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing*

¹⁷ Reference is made to *Wells*, cited above, paragraph 65.

¹⁸ Reference is made to *Wells*, cited above, paragraph 69. As regards State liability for incorrect implementation under the EEA Agreement, reference is made to Case E-9/97 *Sveinbjörndóttir* [1998] EFTA Ct. Rep. 95, paragraphs 60 to 66.

actions for safeguarding rights which individuals and economic operators derive from EEA law. It is for the national court to determine whether it is possible under domestic law to grant the members of the public concerned legal standing as regards the subsequent authorisation procedures by the Office for the Environment or whether the contested decision of 19/20 November 2013 must be revoked or suspended in order to remedy the failure to respect the right to a review procedure. Alternatively, the national court can also determine whether it is possible for the relevant members of the public that have been affected to claim compensation for any possible harm suffered.

Per Christiansen
Judge-Rapporteur