



09.9.2024

## NOTICE TO MEMBERS

**Subject: Petition No 0190/2021 by Eskil Nielsen (Danish), on behalf of Klimabevægelsen i Danmark, on the environmental impact of the planned artificial island Lynetteholmen in Copenhagen**

**Petition No 0511/2021 by Ole Damsgaard (Danish), on behalf of The Danish Society for Nature Conservation, on the impact assessment for project Lynetteholm in relation to Directive 2011/92/EU**

### 1. Summary of petition 0190/2021

The petitioner says that the Lynetteholm Island project agreed on in 2018 by the Danish Government and the Municipality of Copenhagen breaches EU legislation in several ways. The aim of the project is to have an island in the port of Copenhagen that will, firstly, provide protection from climate change and a storage site but also, in the long term, an area for the city's urban development. According to the promoters, the creation of Lynetteholm would help reduce the pressure Copenhagen is under as a consequence of its rapid population growth and would have a positive effect on housing prices and furnish finance for public infrastructure, including an underground railway for the area and a new bypass that would connect Nordhavn to Refshaleøen via Lynetteholm. In the petitioner's view that breaches Directive 2011/92/EU and Directive 2014/52/EU. The environmental impact assessment (EIA) should examine and assess the overall environmental impact of a project. However, in this specific case, the project was divided into several separate parts such that an EIA is not needed for each individual part of the project. The petitioner says that the EIA only covers and includes part of the whole project (the demarcation and construction of the island's outer limits). It does not include or cover the infrastructure works (the new port tunnel, the 'Østlig Ringvej' bypass and the underground railway for Lynetteholm) or the housing.

He asks the EU institutions to take urgent action.

## Summary of petition 0511/2021

The petitioner is of the opinion that the project Lynetteholm, a large-scale construction project of a new residential island in Copenhagen, submitted to the Danish Parliament on 28 April 2021 and expected to be adopted before the summer of 2021, takes into account only the environmental impact of part of the overall project and is contrary to Directive 2011/92/UE (new Directive 2014/52/UE), which requires, *inter alia*, an assessment of a project and its cumulative effects in its entirety.

He underlines that the European Court of Justice has already held on several occasions that a full assessment of a project cannot be circumvented by dividing the project into smaller projects when the report is made aware of secondary or ancillary projects.

The petitioner has indicated that the Danish Government merely refers to the project as a single project but a number of additional works are omitted from the EIA report. The complainant insists on the fact that the EIA report covers only part of the overall project, namely only the construction of the boundaries of the island and not the works relating to the Eastern Ringvej and metro infrastructure projects for Lynetteholm, urban development and a possible future link between Lynetteholm and Nordhavn.

He concludes considering the Danish government has violated EU law, namely Directive 2011/92/UE at least, and in this context asks the Committee on Petitions of the European Parliament (PETI) to assess the case.

## 2. Admissibility

Petition 0190/2021 declared admissible on 4 June 2021.

Petition 0511/2021 declared admissible on 19 July 2021.

Information requested from Commission under Rule 227(6).

## 3. Commission reply, received on 21 September 2021

### The Commission's observations

Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the Environmental Impact Assessment (EIA) Directive)<sup>1</sup> provides that Member States must ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment of the environmental effects. These projects are defined in Article 4, which refers to Annex I and II of the Directive.

While artificial islands are not expressly listed in the above-mentioned annexes of the EIA Directive, depending on the circumstances it may be that they constitute an urban development project<sup>2</sup>. For such projects, there is no automatic obligation to conduct an EIA. Member States

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<sup>1</sup> Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, as amended by Directive 2014/52/EU, OJ L 124, 25.4.2014.

<sup>2</sup> Project category listed in Annex II 10(b) of the EIA Directive.

have to determine, either through a case-by-case examination or according to thresholds or criteria, whether the project is to be made subject to an assessment because of its likely significant effects on the environment taking into account the relevant selection criteria set out in Annex III of the EIA Directive. Amongst the selection criteria to be used by the respective competent authorities to determine if an Annex II project should be subject to an EIA are the size and design of the whole project and cumulation with other existing and/or approved projects as well as the cumulation of the impact with the impact of other existing and/or approved projects, the location of the project, pollution and nuisances, as well as risks to human health. If the Member State concludes that the project will have significant effects on the environment, an EIA has to be carried out. If an EIA is carried out, it has to include a description of the likely significant effects of the project on the environment resulting from the cumulation of effects with other existing and/or approved projects (Annex IV, point 5.e).

The EIA Directive also includes specific provisions on access to justice, allowing citizens and non-governmental organisations to challenge decisions breaching the Directive before the national courts.

Based on the information available to the Commission services, an EIA on the artificial island project of Lynetteholmen was carried out. For future construction projects, such as a bypass and a metro, that may supplement the already approved one – once defined and provided that these fall under the scope of the EIA Directive – the competent national authorities shall ensure application of the respective legal provisions. It should be noted that an overall environmental impact assessment of future non-defined projects is not a requirement under the EIA Directive, as the latter obliges Member States to consider cumulative effects with existing and/or approved projects.

### Conclusion

Based on the information provided by the petitioner, the Commission cannot identify a breach of the EIA Directive. In addition, the petition relates to an individual case of possible poor application of EU law of a specific project. As indicated in the Communication “EU law: Better results through better application”<sup>3</sup>, the Commission focuses its enforcement action on issues of wider principle, general practices, and systematic failures to comply with EU law, none of which emerge in the case at stake. In this context, it should be stressed that compliance with EU law falls primarily with the national authorities, including judicial ones, who are better placed to assess individual situations such as the one referred to by the petitioner, and intervene if necessary.

Under these circumstances, the Commission cannot provide further follow-up to this petition.

#### **4. Further reply from the Commission, received on 9 September 2024**

##### The petition

The petitioner is concerned about the environmental impact of building the artificial island of Lynetteholm in the port of Copenhagen. Work on the construction of Lynetteholm started in January 2022. The PETI committee asks the Commission to reconsider its position about the

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<sup>3</sup> C(2016) 8600 final.

Lynetteholm project<sup>4</sup> and update its last reply (of 2022) in view of the latest developments.

### The Commission's observations

The information shared in the Commission's previous reply about environmental impact assessments remains valid. Below, in view of the latest developments, the Commission shares additional information on (a) the applicable rules about possible transboundary impacts of the project and (b) the role of the Marine Strategy Framework Directive<sup>5</sup>.

The Espoo Convention<sup>6</sup> sets the rules for carrying out environmental impact assessments in a transboundary context. The EU has ratified the Espoo Convention, which makes it an integral part of the EU's legal order and gives it precedence over secondary legislation adopted under the Treaty on the Functioning of the European Union (TFEU).

The Espoo Convention's primary aim is to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities, and the party of origin is obliged to notify affected parties in line with Article 3 of the Espoo Convention even if there is only a low likelihood of such impact. This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty with due respect to the precautionary and prevention principles. The environmental impact assessments required under the Espoo Convention are carried out under the sole responsibility of the concerned parties.

In addition to the provision in the Espoo Convention, Article 7 of the Environmental Impact Assessment Directive<sup>7</sup> is applicable for cases in which a project implemented in one Member State is likely to have significant effects on the environment of another Member State. The Commission does not participate in environmental impact assessments and authorisation procedures. These responsibilities lie solely with the Member States' authorities. It is up to the competent authorities to ensure that the overall assessment of a project's effects on the environment is carried out. Based on the information available to the Commission as of today, the environmental impact assessment on the artificial island Lynetteholm was completed.

In this context, the Danish authorities consulted the Swedish authorities about the Lynetteholm project. In the original project, two locations in the southern part of the Sound outside the Køge Bay were foreseen for dumping the dredged material. In 2022, the Danish authorities decided to use the Lynetteholm perimeter for this purpose<sup>8</sup>. To date, the Commission is not informed of

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<sup>4</sup> Petition No 0190/2021 by Eskil Nielsen on the environmental impact of the planned artificial island Lynetteholmen in Copenhagen, <https://www.europarl.europa.eu/petitions/en/petition/content/0190%252F2021/html/Petition-No-0190%252F2021-by-Eskil-Nielsen-%2528Danish%2529-on-the-environmental-impact-of-the-planned-artificial-island-Lynetteholmen-in-Copenhagen>

<sup>5</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0056>

<sup>6</sup> Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) as last amended on 23 October 2017, <https://unece.org/environment-policy/environmental-assessment/text-convention>

<sup>7</sup> Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28.1.2012, p. 1–21) as amended by Directive 2014/52/EU (OJ L 124, 25.4.2014, p. 1–18).

<sup>8</sup> Swedish Environmental Protection Agency, <https://www.naturvardsverket.se/om->

any complaint launched with the Espoo Convention bodies.

As regards the Marine Strategy Framework Directive<sup>9</sup> perspective – the EU’s main tool to protect and conserve the health of EU coasts, seas and oceans – Member States have to define the good environmental status (GES) of their marine waters<sup>10</sup> and adopt appropriate measures in order to achieve or maintain it<sup>11</sup>. Following the update of the GES determination of their marine waters, which was due in October 2018, the Member States had to communicate their updated programme of measures (POM) to the Commission by 31 March 2022. Denmark failed to communicate its updated POM by the deadline. Accordingly, the Commission opened an infringement case due to late reporting (case INFR(2022)2174)<sup>12</sup>. Denmark submitted its updated POM to the Commission on 20 March 2024. Following the assessment of the updated POM, if the Commission assesses that Denmark fails to comply with the Marine Strategy Framework Directive, the situation will be addressed accordingly.

Where a Member State fails to comply with EU law, the Commission may initiate an infringement procedure and if necessary, refer the case to the Court of Justice of the European Union. According to the case-law of the Court of Justice of the European Union<sup>13</sup>, in infringement proceedings the Commission bears the burden of proof and must demonstrate the failure of the Member State. To date, the Commission has no evidence showing that the Danish national authorities have failed to correctly apply EU law as regards the Lynetteholm project. The Member States’ authorities, including the judiciary, are primarily responsible for ensuring compliance with EU law, including verifying individual cases of potential breach of the relevant rules. In this context, the Danish Climate Movement, a coalition of several non-governmental organisations, has launched an appeal at national level asking to suspend the Lynetteholm project. According to the judgment of 22 March 2024 of the Eastern High Court (*Østre Landsret*), the request for suspensive effect was rejected<sup>14</sup>.

## Conclusion

The Commission maintains its previous position, according to which the responsibility to carry out the environmental impact assessment in line with the applicable EU law lies solely with the Member States and the Member States’ authorities, including the judiciary, are primarily

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<sup>9</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (OJ L 164, 25.6.2008, p. 19–40) as amended by the Commission Directive 2017/845/EU of 17 May 2017 (OJ L 125, 18.5.2017, p. 27–33).

<sup>10</sup> Article 9 of Directive 2008/56/EC.

<sup>11</sup> Article 13 of Directive 2008/56/EC.

<sup>12</sup> Case information is available at [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/)

<sup>13</sup> See, for example, judgment of the Court of Justice of 4 May 2006, *Commission v United Kingdom*, C-508/03, ECLI:EU:C:2006:287 at <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-508/03>

<sup>14</sup> *Østre Landsret*, <https://domstol.dk/oestrelandsret/aktuelt/2024/3/landsretten-tillaegger-ikke-soegsmaalet-om-lynetteholm-opsaettende-virkning/#lynetteholm>

responsible to ensure compliance with EU law, including verifying individual cases of potential breach of the relevant rules. The Commission is in the process of assessing Denmark's updated POM submitted pursuant to the Marine Strategy Framework Directive. The decision on the subsequent actions will be taken after completing this assessment. If the Commission assesses that Denmark fails to comply with the Marine Strategy Framework Directive, it will liaise with the Danish authorities in this context and take the necessary steps until Denmark remedies the situation and fulfils its obligations under EU law. In the meantime, while this assessment is ongoing and while national court proceedings are also ongoing, the Commission is not planning to conclude that there is an infringement requiring initiating Article 258 infringement proceedings.