



JUDGMENT OF THE COURT

9 August 2024*

(Directive 2003/87/EC – Article 12(2a) – Obligation to surrender emission allowances – National insolvency law – Emissions trading system (ETS) – Greenhouse gases – Climate change)

In Case E-12/23,

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 Oslo District Court (*Oslo tingrett*), in the case between

Norwegian Air Shuttle ASA

and

The Norwegian State, represented by the Ministry of Climate and Environment,

concerning the interpretation of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- Norwegian Air Shuttle ASA, represented by Atle Skaldebø-Rød, Christopher Thue Jerving and Henrik Bjørnebye, advocates;
- the Norwegian Government, represented by Knut-Fredrik Haug-Hustad and Simen Hammersvik, acting as Agents;
- the Icelandic Government, represented by Inga Pórey Óskarsdóttir and Daníel Arnar Magnússon, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Hildur Hjörvar, Ingibjörg Ólöf Vilhjálmisdóttir, Erlend Møinichen Leonhardsen and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Geert Wils and Bart De Meester, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of Norwegian Air Shuttle ASA, represented by Henrik Bjørnebye; the Norwegian Government, represented by Simen Hammersvik; the Icelandic Government, represented by Birgir Hrafn Búason, acting as Agent; ESA, represented by Erlend Møinichen Leonhardsen and Hildur Hjörvar; and the Commission, represented by Geert Wils, at the hearing on 16 April 2024,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

- 1 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32, and Norwegian EEA Supplement 2011 No 71, p. 1792) (“Directive 2003/87”) was incorporated into the EEA Agreement by Decision No 146/2007 of the EEA Joint Committee of 26 October 2007 (OJ 2008 L 100, p. 92, and Norwegian EEA Supplement 2008 No 19, p. 90) and is referred to at point 21a) of Annex XX (Environment) to the EEA Agreement. Constitutional requirements indicated by Iceland, Liechtenstein and Norway were fulfilled by 28 December 2007, and the decision entered into force on 29 December 2007.
- 2 Decision No 112/2020 of the EEA Joint Committee of 14 July 2020 (OJ 2023 L 172, p. 33, and Norwegian EEA Supplement 2023 No 51, p. 32) (“JCD No 112/2020”) entered into force on 1 February 2021.

3 Article 1 of JCD No 112/2020 reads, in extract:

Annex XX to the EEA Agreement shall be amended as follows:

...

2. The adaptations in point 21a) (Directive 2003/87/EC of the European Parliament and of the Council) are replaced by the following:

‘The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:

...

(n) The second sentence in Article 16(3) shall be replaced by the following:

“The EFTA States shall provide for excess emissions penalties that are equivalent to those in the EU Member States.”

...

4 Recital 3 of Directive 2003/87 reads:

The ultimate objective of the United Nations Framework Convention on Climate Change, which was approved by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system.

5 Recital 4 of Directive 2003/87 reads:

Once it enters into force, the Kyoto Protocol, which was approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, will commit the Community and its Member States to reducing their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8 % compared to 1990 levels in the period 2008 to 2012.

6 Recital 5 of Directive 2003/87 reads:

The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly, in accordance with Decision 2002/358/EC. This Directive aims to contribute to fulfilling the commitments of the European Community and its

Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.

7 Recital 7 of Directive 2003/87 reads:

Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.

8 In the version applicable at the relevant time, Article 1 of Directive 2003/87, entitled “Subject matter”, read:

This Directive establishes a system for greenhouse gas emission allowance trading within the Union (hereinafter referred to as the ‘EU ETS’) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

This Directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.

This Directive also lays down provisions for assessing and implementing a stricter Union reduction commitment exceeding 20 %, to be applied upon the approval by the Union of an international agreement on climate change leading to greenhouse gas emission reductions exceeding those required in Article 9, as reflected in the 30 % commitment endorsed by the European Council of March 2007.

9 In the version applicable at the relevant time, Article 12 of Directive 2003/87, entitled “Transfer, surrender and cancellation of allowances”, read, in extract:

...

2a. Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.

...

10 In the version applicable at the relevant time, Article 16(1) and (3) of Directive 2003/87, entitled “Penalties”, as adapted by JCD No 112/2020, read:

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and

shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. [The EFTA States shall provide for excess emissions penalties that are equivalent to those in the EU Member States.] Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

National law

- 11 Section 15(1) of the temporary Act of 7 May 2020 No 38 on restructuring to remedy economic problems arising from the outbreak of Covid-19 (*midlertidig lov 7. mai 2020 nr. 38 om rekonstruksjon for å avhjelpe økonomiske problemer som følge av utbrudd av covid-19 (rekonstruksjonsloven)*) (“the Restructuring Act”) reads:

During the restructuring negotiations, the debtor retains control of its operations and other assets, but shall be under the supervision of the restructuring committee. The Reconstructor and the creditor committee shall be given full powers to supervise the debtor’s operations and financial matters, and the debtor shall obey any instructions given by the Reconstructor and the creditor committee in that connection.

- 12 The first sentence of Section 54(1) of the Restructuring Act reads:

The court-confirmed settlement shall be binding for all creditors having claims that date from before the opening of the restructuring negotiations.

- 13 Section 58(2) of the Restructuring Act reads:

The court may, at the request of the restructuring committee, suspend the restructuring negotiations and open bankruptcy proceedings in the debtor’s estate when the court finds that the debtor has grossly or repeatedly acted contrary to its obligations under sections 15 and 20.

- 14 Section 6-4 of the Act of 8 June 1984 No 59 on creditors’ recovery of claims (*lov 8. juni 1984 nr. 59 om fordringshavernes dekningsrett (dekningsloven)*) (“the Creditors Recovery Act”) reads:

All claims against the debtor consisting of something other than pecuniary items and which are to be covered as dividend claims shall be converted into pecuniary

claims according to the value ratios on the deadline date. If the claim arose after the deadline date, the value ratios at the time of opening of the estate in bankruptcy proceedings shall be used as a basis.

- 15 Section 4 of the Act of 17 December 2004 No 99 on emissions allowances obligations and greenhouse gas emissions allowance trading (*lov 17. desember 2004 nr. 99 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteloven)*) (“the Greenhouse Gas Emissions Allowance Act”) read, at the relevant time, in extract:

Anyone who has emissions subject to the obligation to surrender allowances from operations or activities as referred to in a regulation issued pursuant to section 3 must surrender allowances corresponding to their emissions subject to the obligation to surrender allowances in accordance with the provisions of section 12. ...

- 16 The first and third paragraphs of Section 12 of the Greenhouse Gas Emissions Allowance Act read, at the relevant time:

The party subject to the obligation to surrender allowances shall, by 30 April of each year, transfer a number of allowances corresponding to the business’s or the operator’s reportable emissions from the preceding year, to a specified settlement account in the registry.

If the party subject to the obligation to surrender allowances has not transferred a sufficient number of allowances by the time limit provided for in the first paragraph to the settlement account, the party subject to the obligation to surrender allowances shall, by 1 May of the year after the year in which the settlement under the first paragraph should have been effected, transfer allowances to the specified settlement account corresponding to the shortfall from the preceding year. In addition, an administrative penalty shall be imposed pursuant to section 19.

- 17 The first paragraph of Section 19 of the Greenhouse Gas Emissions Allowance Act read, at the relevant time:

*If the party subject to the obligation to surrender allowances has failed to comply with its obligations under the first paragraph of section 12, the pollution control authorities shall impose an administrative penalty, to be paid to the State treasury. The administrative penalty shall correspond to EUR 100 on the due date for payment for each tonne of reportable greenhouse gas emissions for which allowances have not been transferred to the specified settlement account pursuant to the first paragraph of section 12. The amount of the administrative penalty shall be indexed in accordance with the European consumer price index. The penalty shall fall due for payment 14 days after issuance of the demand for payment. In the event of late payment, interest shall accrue under Act No 100 of 17 December 1976 on overdue payments, etc. (*lov 17. desember 1976 nr. 100 om renter ved forsinket betaling m.m.*). Decisions on administrative penalties*

shall constitute a basis for enforcement by attachment. The King may, by regulation, modify the amount of the administrative penalty.

II **FACTS AND PROCEDURE**

- 18 Norwegian Air Shuttle ASA (“NAS”) is a Norwegian airline company subject to an obligation to surrender emissions allowances under the Greenhouse Gas Emissions Allowance Act. In February 2020, NAS was allocated free greenhouse gas emissions allowances, which were placed in the company’s allowance account in the greenhouse gas emissions allowance registry (*klimavoteregister*).
- 19 Aircraft operators subject to the obligation to surrender allowances were required, at the relevant time, to transfer, by 30 April of each year, a number of allowances corresponding to the operator’s reportable greenhouse gas emissions from the preceding year to the Norwegian registry for greenhouse gas emissions allowances in accordance with section 4 and the first paragraph of section 12 of the Greenhouse Gas Emissions Allowance Act (“the obligation to surrender allowances”).
- 20 The Greenhouse Gas Emissions Allowance Act and its accompanying regulations implement Directive 2003/87, with subsequent amendments and accompanying legal instruments, into Norwegian law. The Norwegian Environment Agency (*Miljødirektoratet*) and the Ministry of Climate and Environment are the authorities responsible for the system of greenhouse gas emissions allowance in Norway.
- 21 In mid-March 2020, Norway and a number of other countries introduced travel restrictions due to the COVID-19 pandemic. Following the introduction of travel restrictions, in the course of a few days NAS had to cancel 85% of its flights and furlough approximately 7 300 employees. This put NAS in a serious financial crisis.
- 22 In a letter of 17 April 2020 to the Federation of Norwegian Aviation Industries (*NHO Luftfart*), the Ministry of Climate and Environment stated that Directive 2003/87 does not allow for extensions to the time limit or other exemptions from the obligation to surrender emissions allowances, nor is there any margin to refrain from imposing an administrative penalty. NAS and the Norwegian Environment Agency were copied in that correspondence.
- 23 In the spring and summer of 2020, NAS attempted to implement an out-of-court restructuring, but was unable to put in place an arrangement that made the company viable. Following petitions from NAS on 18 November and 8 December 2020, court-driven restructuring negotiations were opened in Ireland (“examinership”) and Norway respectively. An examiner was appointed in Ireland and a reconstructor (*rekonstruktør*) was appointed in Norway. Examinership was also opened for a number of NAS’s Irish subsidiaries, including Norwegian Air International Limited, which is subject to the obligation to surrender allowances on an independent basis under the Irish rules governing greenhouse gas emissions allowances.

- 24 NAS drew up a draft restructuring plan in Norway and a Scheme of Arrangement in Ireland, in cooperation with the Norwegian reconstructor and the Irish examiner. The final proposals in the restructuring plan and the Scheme of Arrangement were to all intents and purposes identical and consisted of unsecured and non-preferential creditors being allocated dividends corresponding to 5% of their underlying claims. Under Norwegian and Irish insolvency legislation, the obligation to surrender allowances for emissions in 2020 up to the opening of the restructuring negotiations was converted into a pecuniary claim. The Norwegian Environment Agency's entitlement to dividend by way of settlement of the obligation to surrender allowances was calculated to be approximately NOK 7 500 000. In addition, there was the issuance of financial instruments, which were an integral part of the restructuring plan and the Scheme of Arrangement. The proposals were sent to the creditors for a vote on 11 March 2021.
- 25 In Ireland, NAS's Scheme of Arrangement was confirmed by the High Court on 26 March 2021, after creditors representing the biggest share of the voting debt voted in favour of the proposal. In Norway, the virtually identical restructuring plan was confirmed by order of the then Oslo City Court (*Oslo byfogdembete* (now part of *Oslo tingrett* (District Court)) of 12 April 2021, following a similar vote in favour by the creditors. The order made no mention of the obligation to surrender allowances.
- 26 By way of settlement for the obligation to surrender allowances for emissions in the period from 1 January to 17 November 2020 – the day before the deadline date in the restructuring process – NAS made a dividend offer. For emissions in the period between 18 November 2020 and 31 December 2020 – that is, the period after the opening of the restructuring negotiations – NAS surrendered 15 039 allowances by the time limit of 30 April 2021.
- 27 The Norwegian Environment Agency declined to receive a dividend settlement, on the grounds that the obligation to surrender allowances could be settled only by surrendering allowances that fully covered the total emissions for 2020. This totalled 372 818 allowances for 2020 emissions on the deadline date of 30 April 2021.
- 28 NAS has stated that an Irish subsidiary, Norwegian Air International Limited, was also in examinership in Ireland. On 22 April 2021, the High Court (Ireland) delivered a decision which, according to NAS, entailed that Norwegian Air International Limited's obligation to surrender allowances was covered by the Irish Scheme of Arrangement and could be settled by dividend. According to the facts set out in the request, the Environmental Protection Agency in Ireland received its dividend, waived the claim for surrender of greenhouse gas emissions allowances and did not impose an administrative penalty.
- 29 The reconstructor did not agree with the Norwegian Environment Agency's position on the obligation to surrender allowances. On 28 April 2021, he informed the agency that he considered full settlement of the obligation to surrender allowances to be an unlawful preferential treatment of creditors and wrote, inter alia:

For the sake of completeness, the company will not be in a position to settle obligations to surrender allowances arising before the opening of the restructuring by the time limit of 30 April. The company is still under restructuring. Reference is made in that connection to my email of 22 April. As stated therein, such a settlement will be contrary to the rules of the Creditors Recovery Act, constitute clear preferential treatment and may lead to criminal liability for the debtor, cf. section 402 of the Criminal Code (straffeloven). It is assumed that the State does not wish to aid and abet such transactions.

- 30 NAS followed up with a letter of 30 April 2021, in which it provided further reasons as to why the company did not consider itself empowered or obliged to honour fully the obligation to surrender emissions allowances.
- 31 In June 2021, the Norwegian Environment Agency gave NAS notice of an imminent administrative penalty for failure to surrender greenhouse gas emissions allowances and, by decision of 21 September 2021, imposed an administrative penalty of NOK 399 685 275. The penalty was calculated at a rate of EUR 100 per non-surrendered allowance pursuant to section 19 of the Greenhouse Gas Emissions Allowance Act and Article 16(3) of Directive 2003/87. NAS appealed the decision. On 16 December 2022, the Ministry of Climate and Environment decided to uphold the Norwegian Environment Agency's decision. NAS has challenged the decision of 16 December 2022 before Oslo District Court.
- 32 Against this background, Oslo District Court decided to request an advisory opinion from the Court by letter of 6 October 2023, registered at the Court on the same date. Oslo District Court has referred the following question:

Does Article 12(2a) of Directive 2003/87/EC preclude national legislation that provides that the obligation to surrender emissions allowances may be settled by dividend in a compulsory debt settlement in connection with restructuring of an insolvent company?

- 33 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWER OF THE COURT

- 34 By its question, the referring court asks whether Article 12(2a) of Directive 2003/87 precludes national legislation that provides that the obligation to surrender emissions allowances under that directive may be settled by dividend in a compulsory debt settlement in connection with restructuring of an insolvent company. It follows from the request that the main proceedings concern the obligation under Directive 2003/87 to surrender by 30 April 2021 emissions allowances equal to NAS's total emissions during the year 2020. Accordingly, the question referred must be examined in the light of the provisions in Directive 2003/87, including Article 12(2a), as they stood at that

point in time.

- 35 As a preliminary point, the Court observes that, as follows, inter alia, from recitals 3, 4 and 5 of Directive 2003/87, which refer to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, as well as the numerous references to the Paris Agreement in that directive, such as Article 30, Directive 2003/87 is aligned with a wider international framework for combating climate change. Furthermore, it must be recalled that combating climate change is an objective of fundamental importance given its adverse effects and the severity of its consequences, including the grave risk of their irreversibility and its impact on fundamental rights (compare the judgment of the European Court of Human Rights of 9 April 2024, *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, CE:ECHR:2024:0409JUD005360020).
- 36 The purpose of Directive 2003/87 is to establish an emission allowance trading system which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (compare the judgment of 16 December 2021 in *Apollo Tyres*, C-575/20, EU:C:2021:1024, paragraph 24 and case law cited).
- 37 Pursuant to Article 1 of Directive 2003/87, and in line with recital 7 thereof, that directive establishes a system for greenhouse gas emission allowance trading within the EEA in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner which contributes to preserving the integrity of the internal market and avoids distortions of competition.
- 38 To that end, Article 12(2a) of Directive 2003/87 provides that administering EEA States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I to that directive for which it is the aircraft operator, as verified in accordance with Article 15 of that directive. Furthermore, EEA States shall ensure that allowances surrendered in accordance with Article 12(2a) are subsequently cancelled.
- 39 The economic logic underlying the emissions trading system is that it encourages participants to emit quantities of greenhouse gases that are less than the greenhouse gas emission allowances originally allocated to them, in order to sell the surplus to another participant which has emitted more than its allowance (compare the judgment of 20 January 2022 in *Air Berlin*, C-165/20, EU:C:2022:42, paragraph 57 and case law cited).
- 40 The overall scheme of Directive 2003/87 is based on the strict accounting of the issue, holding, transfer and cancellation of greenhouse gas emission allowances (compare the judgment in *Air Berlin*, C-165/20, cited above, paragraph 58 and case law cited). That framework requires the establishment of a system of standardised registries through a separate Commission regulation. As such, accurate accounting is inherent in the very purpose of Directive 2003/87 (compare the judgment of 17 October 2013 in *Billerud Karlsborg and Billerud Skärblackska*, C-203/12, EU:C:2013:664, paragraph 27 and case

law cited).

- 41 The requirements as to the accuracy of the quantity and circumstances of emissions allowances reflect the legislature's ambition of improving the way the market operates by preventing distortions which are caused by any uncertainty as to whether allowances are valid. Moreover, in addition to the purely economic interest in maintaining the reliability of the market, that requirement as to accuracy enables the purpose served by the market to be achieved, namely combating pollution. The correlation between actual emissions and those authorised by emissions allowances is, therefore, an essential priority of the system as a whole (compare the judgment of 8 March 2017 in *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 25).
- 42 One of the pillars on which the system established by Directive 2003/87 is built is the obligation on operators to surrender by 30 April of the current year, in order to have them cancelled, a number of greenhouse gas emission allowances equal to their emissions during the preceding calendar year. That obligation must be applied particularly strictly. It is worded unambiguously in Article 12(2a) and is an obligation to which that directive attaches a specific penalty under Article 16(3), whereas the penalty for any other conduct contrary to its provisions is left to the discretion of EEA States under Article 16(1), which must nonetheless be effective, proportionate and dissuasive (compare the judgment of 29 April 2015 in *Nordzucker*, C-148/14, EU:C:2015:287, paragraphs 29 and 30 and case law cited).
- 43 Article 16(3) of Directive 2003/87 provides that EEA States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be liable for the payment of an excess emissions penalty. The EFTA States shall provide for excess emissions penalties that are equivalent to those in the EU Member States, which is EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances.
- 44 Accordingly, it follows that the obligation to surrender allowances equal to the emissions for the preceding year by 30 April of the current year in order to have them cancelled applies with particular force. The key role of the allowance surrender process in the system of Directive 2003/87 is also apparent from the fact that being ordered to pay the penalty under Article 16(3) does not release the operator from the obligation to surrender the corresponding allowances during the surrender process the following year (compare the judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, cited above, paragraph 25).
- 45 It follows from the structure and general scheme of Directive 2003/87 that the legislature viewed the surrender obligation provided for in Article 12(2a) and the lump sum penalty enforcing that obligation provided for in Article 16(3) as strict obligations without any flexibility in order to prevent certain operators or market intermediaries from being tempted to circumvent or manipulate the system by speculating abusively on prices, quantities, time limits or complex financial products which tend to come about in any market. As evidenced, inter alia, by point 17 of the explanatory

memorandum for the proposal for a directive (COM(2001) 581 final) of 23 October 2001, tabled by the Commission, the relatively high level of the penalty is justified by the need to have infringements of the obligation to surrender a sufficient number of allowances treated in a stringent and consistent manner throughout the EEA (compare the judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, cited above, paragraph 39).

- 46 In its written observations, NAS has argued, in essence, that EEA States have a discretion to determine the means by which the aircraft operator must comply with Article 12(2a) of Directive 2003/87 other than by surrendering a number of allowances equal to the total emissions during the preceding calendar year. Hence, NAS argues that the obligation under Article 12(2a) can be fulfilled by paying a dividend in accordance with national insolvency laws.
- 47 That argument must be rejected. The obligation to surrender allowances equal to the total emissions during the preceding calendar year is strict and Directive 2003/87 does not foresee any exceptions other than those explicitly laid down by that directive. Therefore, regardless of the status which that obligation is accorded under national law, Article 12(2a) of Directive 2003/87 necessitates that each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year in accordance with that provision.
- 48 In this respect, it must be observed that failure to surrender allowances would undermine the requirements as to strict accounting, accuracy and correlation between actual emissions and those authorised under Directive 2003/87 (compare the judgment in *ArcelorMittal Rodange et Schifflange*, C-321/15, cited above, paragraph 33).
- 49 As observed by the Commission in its written observations and at the hearing, compliance with the obligation laid down in Article 12(2a) of Directive 2003/87 is not an obligation of compliance towards any single administering EEA State, but an obligation of compliance towards the system as a whole established by that directive. As such, individual administering EEA States are not afforded any discretion under that system to discount or waive the obligation to surrender emission allowances pursuant to Article 12(2a).
- 50 Consequently, Article 12(2a) of Directive 2003/87 must be interpreted as precluding national legislation from providing that the obligation to surrender emissions allowances pursuant to that article may be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company. This interpretation is borne out not only by a literal interpretation of Article 12(2a), but also the objective pursued by Directive 2003/87 and by its system and general scheme.
- 51 That finding cannot be called into question by the argument put forward by NAS that EEA law does not harmonise substantive insolvency law in EEA States. It follows from settled case law that EEA States must exercise their competences in conformity with EEA law, including new *acquis* incorporated into the EEA Agreement such as Directive 2003/87 (see the judgment of 13 September 2017 in *Yara*, E-15/16, paragraph 32 and

case law cited, and compare the judgment of 11 November 2021 in *MH and ILA (Droits à pension en cas de faillite)*, C-168/20, EU:C:2021:907, paragraph 76). Thus, even though EEA law does not harmonise the substantive insolvency law of EEA States, national insolvency law cannot undermine the obligations arising from Article 12(2a) of Directive 2003/87.

- 52 In light of the foregoing, the answer to the question referred must be that Article 12(2a) of Directive 2003/87 must be interpreted as precluding national legislation from providing that the obligation to surrender emissions allowances may be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company.

IV COSTS

- 53 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the question referred to it by Oslo District Court hereby gives the following Advisory Opinion:

Article 12(2a) of Directive 2003/87/EC of the European Parliament and of the Council establishing a system for greenhouse gas emission allowance trading within the Union must be interpreted as precluding national legislation from providing that the obligation to surrender emissions allowances may be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company.

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 9 August 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President