



REPORT FOR THE HEARING

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 scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

I Introduction

1. By letter of 6 October 2023, registered at the Court on the same date, Oslo District Court requested an Advisory Opinion in the case pending before it between Norwegian Air Shuttle ASA and the Norwegian State, represented by the Ministry of Climate and Environment (*Staten v/Klima- og miljødepartementet*).

2. The case before Oslo District Court concerns the validity of a decision of 16 December 2022 of the Ministry of Climate and Environment. That decision imposed an administrative penalty of around NOK 400 million on Norwegian Air Shuttle ASA for failure to surrender greenhouse gas emissions allowances. The principal question at issue in the main proceedings is whether the obligation to surrender emissions allowances under Directive 2003/87/EC can be settled by dividend payment in the event of insolvency.

II Legal background

EEA law

3. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32, and Norwegian EEA Supplement 2011 No 71, p. 1792) (“the Directive” or

“Directive 2003/87”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 146/2007 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 21al of Annex XX (Environment) to the EEA Agreement. Constitutional requirements indicated by Iceland, Liechtenstein and Norway were fulfilled on 28 December 2007, and the decision entered into force on 29 December 2007.

4. In the version applicable at the relevant time, Article 12(2a) of the Directive read:

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.

5. In the version applicable at the relevant time, Article 16(1) and (3) of the Directive 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 excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. 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*¹

6. The Norwegian Act of 7 May 2020 No 38 on restructuring to remedy economic problems arising from the outbreak of Covid-19 (“the Restructuring Act”) (*lov 7. mai 2020 nr. 38 om rekonstruksjon for å avhjelpe økonomiske problemer som følge av utbrudd av covid-19 (rekonstruksjonsloven)*).

7. Section 15(1) of the Restructuring Act reads:

¹ All translations of national law are unofficial.

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.

8. The first sentence of Section 54 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.

9. 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.

10. The Norwegian Act of 8 June 1984 No 59 on creditors' recovery of claims ("the Creditors Recovery Act") (*lov 8. juni 1984 nr. 59 om fordringshavernes dekningsrett (dekningsloven)*).

11. Section 6-4 of 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.

12. The Norwegian Act of 17 December 2004 No 99 on emissions allowances obligations and greenhouse gas emissions allowance trading ("the Greenhouse Gas Emissions Allowance Act") (*lov 17. desember 2004 nr. 99 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteloven)*).

13. Section 4 of the Greenhouse Gas Emissions Allowance Act reads, 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. ...

14. The first and third paragraphs of Section 12 of the Greenhouse Gas Emissions Allowance Act reads:

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.

15. The first paragraph of Section 19 of the Greenhouse Gas Emissions Allowance Act reads:

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.

III Facts and procedure

16. 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 (*klimakvoteregister*).

17. Aircraft operators subject to the obligation to surrender allowances must, by 30 April of each year, transfer 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”).

18. The Greenhouse Gas Emissions Allowance Act and its accompanying regulations implement the Directive, 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.

19. 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.

20. In a letter of 17 April 2020 to the Federation of Norwegian Aviation Industries (*NHO Luftfart*), the Ministry of Climate and Environment stated that the Directive 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.

21. 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.

22. 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.

23. 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 District Court (*Oslo byfogdembete*) of 12 April 2021, following a similar vote in favour by the creditors. The order made no mention of the obligation to surrender allowances.

24. 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 18 November 2020 to 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.

25. The Norwegian Environment Agency did not accept to receive a dividend settlement, on the ground 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.

26. The reconstructor did not agree with the Norwegian Environment Agency. 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 e-mail 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.²

27. NAS followed up with a letter of 30 April 2021, in which it provided further reasons why the company did not consider itself empowered or obliged to honour fully the obligation to surrender emissions allowances.

28. 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, the agency 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 the Directive. NAS appealed the decision. On 16 December 2022, the Ministry of Climate and Environment decided to uphold the Norwegian Environment Agency's decision.

29. NAS has stated that an Irish subsidiary, Norwegian Air International Limited, was also in examinership in Ireland. On 22 April 2021, the High Court 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. The Environmental Protection Agency in Ireland

² Unofficial translation.

received its dividend, waived the claim for surrender of greenhouse gas emissions allowances and did not impose an administrative penalty.

30. Against this background, Oslo District Court decided to refer the following question to the Court:

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?

IV Written observations

31. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- 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 Þórey Óskarsdóttir and Daníel Arnar Magnússon, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Hildur Hjörvar, Ingibjörg Ólöf Vilhjálmsdóttir, 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.

V Proposed answers submitted

Norwegian Air Shuttle ASA

32. Norwegian Air Shuttle ASA submits that the question referred should be answered as follows:

Article 12(2a) of Directive 2003/87/EC does not 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.

The Norwegian Government

33. The Norwegian Government submits that the question referred should be answered as follows:

Article 12(2a) of Directive 2003/87/EC precludes national legislation that provides 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.

The Icelandic Government

34. The Icelandic Government submits that the question referred should be answered as follows:

Article 12(2a), now Article 12(3)(b), of Directive 2003/87/EC, must be interpreted in such a way, considering the objective of the ETS and other provisions of the ETS regime, that it precludes national legislation that provides that the obligation to surrender emission allowances may be settled by dividend in a compulsory debt settlement in connection with restructuring of an insolvent company.

ESA

35. ESA submits that the question referred should be answered as follows:

It is incompatible with Article 12(2a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, when read in light of its context, aim and objective, to maintain national legislation that provides that the obligation to surrender emission allowances may be settled by dividend in a compulsory debt settlement in connection with restructuring of an insolvent operator.

The Commission

36. The Commission submits that the question referred should be answered as follows:

Directive 2003/87/EC precludes national legislation from providing for the obligation to surrender allowances pursuant to Article 12(2a) of that Directive to be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company.

Páll Hreinsson
Judge-Rapporteur