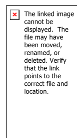

OSLO TINGRETT

Doc 83

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Deres referanse	Vår referanse	Dato
	23-003969TVI-TOSL/02	6 October 2023

Norwegian Air Shuttle ASA – the Norwegian State, represented by the Ministry of Climate and Environment

Request for an Advisory Opinion in proceedings between Norwegian Air Shuttle ASA and the Norwegian State, represented by the Ministry of Climate and Environment (Staten v/Klima og miljødepartementet)

Oslo District Court (Oslo tingrett) hereby requests an Advisory Opinion from the EFTA Court in Case No 23-003969TVI-TOSL/02 between Norwegian Air Shuttle ASA and the Norwegian State, represented by Ministry of Climate and Environment. The request is made pursuant to section 51a of the Norwegian Courts of Justice Act (Lov om domstolene) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

The parties to the case before Oslo District Court are:

Plaintiff:	Norwegian Air Shuttle ASA Oksenøyveien 3 1366 LYSAKER
Counsel:	Advokat Atle Skaldebø-Rød Advokatfirmaet BAHR AS P.O. Box 1524 Vika 0117 OSLO
Assisting Counsel:	Advokat Christopher Thue Jerving and Advokat Henrik Bjørnebye Advokatfirmaet BAHR AS

Defendant:	The Norwegian State, represented by Ministry of Climate and Environment (*Staten v/Klima- og miljødepartementet*) P.O. Box 8013 Dep 0030 OSLO
Counsel:	Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*) Advokat Knut-Fredrik Haug-Hustad P. O. Box 8012 Dep 0030 OSLO
Assisting Counsel:	Advokat Simen Hammersvik Office of the Attorney General (Civil Affairs)

The case before Oslo District Court concerns the validity of the decision of 16 December 2022 of the Ministry of Climate and Environment. The decision entailed an administrative penalty of around NOK 400 million being imposed on Norwegian Air Shuttle ASA for failure to surrender greenhouse gas emissions allowances.

1. Reasons for the request for an advisory opinion

The case raises questions about whether the obligation to surrender emissions allowances under Directive 2003/87/EC ("**the ETS Directive**") can be settled by dividend payment in the event of insolvency. Oslo District Court must rule on which requirements the ETS Directive imposes for the surrender of emissions allowances and the imposition of fines when less than full surrender is made of emissions allowances in connection with restructuring under national insolvency legislation.

The European Court of Justice has on a number of occasions interpreted the ETS Directive in situations where businesses under an obligation to surrender greenhouse gas emissions allowances have, for various reasons, not done so by the time limit. One key judgment is that given in C-203/12 *Billerud,* and equivalent principles are reiterated in later judgments.

As far as this court is aware, however, the European Court of Justice has not ruled on the question of the scope of the obligation to surrender emissions allowances in the event of restructuring or other insolvency processes under national law. In one of the decisions from the European Court of Justice referred to by the parties, Case C-580/14 *Sandra Bitter*, the company subject to the obligation to surrender allowances was bankrupt, but the German court did not refer any questions relating to the scope of the obligation to surrender allowances in the event of bankruptcy. The question referred to the European Court of Justice concerned the validity of the Directive's provision on the level of the penalty, more specifically whether it was contrary to the principle of proportionality. The European Court of Justice did not rule on the implications of the bankruptcy. In view of the description of the facts and German law, it is difficult to see how the decision gives any particular guidance on the scope of the obligation to surrender allowances in the event of bankruptcy and other insolvency processes.

The parties disagree as to whether it is contrary to the State's EEA law obligations under the ETS Directive to allow the obligation to surrender greenhouse gas emissions allowances to be settled by dividend in a compulsory debt settlement in connection with a restructuring. Oslo District Court finds that the question is doubtful and has accordingly decided to request an advisory opinion from the EFTA Court.

2. Facts

Norwegian Air Shuttle ASA ("**NAS**") is a Norwegian airline company subject to an obligation to surrender emissions allowances under Law No 99 of 17 December 2004 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))*. 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*).

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: see section 4 and the first paragraph of section 12 of the Greenhouse Gas Emissions Allowance Act ("**the obligation to surrender allowances**").

The Greenhouse Gas Emissions Allowance Act and its accompanying regulations implement Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emissions allowance trading within the Union and amending Council Directive 96/61/EC, with subsequent amendments and accompanying legal instruments, in 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.

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.

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 ETS Directive does not allow for extensions to the time limit or other exemptions from the obligation to surrender emissions allowances, and nor is there any margin to refrain from imposing an administrative penalty. NAS and the Norwegian Environment Agency were copied on that correspondence.

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.

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 in 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.

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.

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 to say, the period after the opening of the restructuring negotiations – NAS surrendered 15 039 allowances by the time limit of 30 April 2021.

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.

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: see section 402 of the Criminal Code (*straffeloven*). It is assumed that the State does not wish to aid and abet such transactions.

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

In June 2021, the Norwegian Environment Agency NAS gave 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 ETS Directive. NAS appealed against the decision, but on 16 December 2022 the Ministry of Climate and Environment decided to uphold the Norwegian Environment Agency's decision.

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

3. Norwegian law

3.1. Insolvency law

Insolvency processes are characterised by the fact that the debtor, at the very least for the foreseeable future, will have serious financial difficulties, with the result that available assets must be distributed amongst the creditors. The two insolvency processes in Norwegian law are bankruptcy and restructuring negotiations.

The procedural rules for bankruptcies and restructuring negotiations are laid down in Law No 58 of 8 June 1984 on debt negotiations and bankruptcy ("the Bankruptcy Act") (*lov 8. juni 1984 nr. 58 om gjeldsforhandling og konkurs (konkursloven)*) and Law No 38 of 7 May 2020 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)*).

Bankruptcy facilitates a controlled liquidation of the company's operations. At the time of opening of bankruptcy proceedings, a separate legal entity – a bankruptcy estate bankruptcy – is established that takes over control of the debtor's assets. Instead of liquidating the entire business, the estate in bankruptcy can decide to sell all or parts of the debtor's operations as a "going concern".

The purpose of restructuring is to make viable businesses able to continue in operation. Unlike in the event of bankruptcy, the debtor itself retains control of its own operations, although the court appoints a Reconstructor and a creditor committee (*kreditorutvalg*) that supervises the debtor's operations and financial matters, and that can give instructions which the debtor must obey. This follows from section 15(1) of the Restructuring Act:

> 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.

Failure to obey the instructions of the Reconstructor or the creditor committee can lead to consequences as set out in section 58(2) of the Restructuring Act:

> 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.

Failure to obey instructions after the restructuring negotiations have ended can also, depending on the circumstances, lead to a court-confirmed restructuring plan being set aside: see section 32(1)(2) of the Restructuring Act, read in conjunction with section 54(2).

Norwegian substantive insolvency law is regulated by Act No 59 of 8 June 1984 on creditors' recovery of claims (Creditors Recovery Act) (*lov 8. juni 1984 nr. 59 om fordringshavernes dekningsrett (dekningsloven)*), which applies both in the event of bankruptcy and restructuring. The Creditors Recovery Act and the Restructuring Act are drafted in general

terms and cover all of the debtor's debt obligations. This is expressed inter alia in the first sentence of section 54 of the Restructuring Act, which is worded as follows:

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

NAS's disputed obligation to surrender emissions allowances dates from before the opening of the restructuring negotiations. The parties disagree, however, as to whether the obligation to surrender allowances is a "claim" under Norwegian substantive insolvency law, or whether the obligation to surrender allowances is not covered by the insolvency rules. That question turns on an interpretation of Norwegian law on which the Oslo District Court has not yet ruled. In its advisory opinion, the EFTA Court must assume that a claim for settlement of the obligation to surrender allowances is a claim covered by the Creditors Recovery Act and the Restructuring Act, on an equal footing with other claims.

The Creditors Recovery Act provides that each of the creditors is to receive an equal share of the debtor's available assets, based on the priority of the claims. This also holds true for creditors having claims other than pecuniary claims, which, under section 6-4 of the Creditors Recovery Act, are to be converted into pecuniary claims. That provision is worded as follows:

> 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.

Certain creditors have a particular form of recovery available to them. This includes creditors who are entitled to recovery through a specific assets (separatist right) (*separatistrett*). Which creditors have a particular form of recovery available to them is regulated exhaustively in Chapter 8 of the Creditors Recovery Act.

For creditors who do not have a particular form of recovery available to them, the distribution of assets takes place according to set rules on priority. The rules on priority are regulated exhaustively in Chapter 9 of the Creditors Recovery Act. Some claims, such as wage claims, are to be prioritised ahead of others. The fact that a claim is a preferential claim means that other, lower-ranked creditors are able to recover only once higher-ranking claims have been fully settled. Since Chapter 9 of the Creditors Recovery Act applies to both bankruptcy and restructuring, the order of priority of the claims is not contingent on which insolvency process the debtor is undergoing.

The obligation to surrender emissions allowances is not given a particular form of recovery or priority ranking in the Creditors Recovery Act. Thus, as long as the obligation to surrender allowances is a claim under national insolvency law, it follows from the Restructuring Act and the Creditors Recovery Act that the disputed portion of NAS's obligation to surrender emissions allowances is to be settled by dividend payment under the court-confirmed restructuring plan.

3.2. The Greenhouse Gas Emissions Allowance Act

The Greenhouse Gas Emissions Allowance Act implements the ETS Directive and accompanying legal instruments which are incorporated into the EEA Agreement. The obligation to surrender emissions allowances is provided for in section 4:

> 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. […]

The first and third paragraphs of section 12 of the Greenhouse Gas Emissions Allowance Act are worded as follows:

> 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."

The first paragraph of section 19 of the Greenhouse Gas Emissions Allowance Act is worded as follows:

> 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.

4. EEA law

4.1. The ETS Directive

Directive 2003/87/EC (the ETS Directive) is incorporated into Annex XX (Environment) to the EEA Agreement by Decision of the EEA Joint Committee No 146/2007 of 26 October 2007. The Directive has been amended a number of times and the amendments are incorporated into the EEA Agreement by decisions of the EEA Joint Committee. This is true *inter alia* of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community, which is incorporated into Annex XX (Environment) to the EEA Agreement by Decision of the EEA Joint Committee No 6/2011 of 1 April 2011.

The ETS Directive has been amended recently in the EU by Directive (EU) 2023/958, which is not yet incorporated into the EEA Agreement. The amendments in Directive (EU) 2023/958 do not seem to have any bearing on the questions of interpretation in the present case, but the

wording and placement of certain relevant Directive provisions has been changed. In the present request, the District Court has used the wording and article numbering from the consolidated version of the ETS Directive as currently incorporated into the EEA Agreement.

Article 12, entitled "Transfer, surrender and cancellation of allowances", provides as follows in paragraph (2a):

> "2a. Administering Member States shall ensure that, by 30 April of 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."

Article 16, entitled "Penalties", provides as follows in paragraphs (1) and (3):

> "(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."

4.2. Case-law of the European Court of Justice on the ETS Directive

The European Court of Justice has, in a number of cases, ruled on the interpretation of the ETS Directive's provisions on the obligation to surrender emissions allowances and penalties.

In Case C-203/12 *Billerud*, the European Court of Justice ruled on two questions of interpretation concerning Article 16 referred by the Supreme Court of Sweden (*Högsta domstolen*). The case concerned two companies on whom penalties had been imposed under Swedish legislation. They had failed to surrender a sufficient number of emissions allowances by the time limit due to internal administrative breakdown. The first question of interpretation concerned (paragraph 21):

> "[…] in essence, whether Article 16(3) and (4) of Directive 2003/87 must be interpreted as allowing a certain degree of tolerance in the imposition of a penalty for excess emissions in respect of operators who, although not having surrendered their carbon dioxide equivalent allowances for the preceding year by 30 April of the current year, nevertheless on that date have the sufficient number of allowances."

In its reasons, the European Court of Justice referred inter alia to the "key role" of the obligation to surrender allowances (paragraph 25), purposive considerations and the need for "strict accounting of the issue, holding, transfer and cancellation of allowances" (paragraphs 26 and 27), and also the *force majeure* exception developed through the case-law (paragraph 31). The European Court of Justice concluded as follows (paragraph 43):

> "1. Article 16(3) and (4) of Directive 2003/87/EC […] must be interpreted as precluding operators who have not surrendered, by 30 April of the current year, the carbon dioxide equivalent allowances equal to their emissions for the preceding year, from avoiding the imposition of a penalty for the excess emissions for which it provides, even where they hold a sufficient number of allowances on that date."

The second question of interpretation in Case C-203/12 *Billerud* concerned the interpretation of the same Directive provisions in the light of the principle of proportionality under EU law. The European Court of Justice concluded as follows (paragraph 43):

> "2. Article 16(3) and (4) of Directive 2003/87 must be interpreted as meaning that the amount of the lump sum penalty provided for therein may not be varied by a national court on the basis of the principle of proportionality."

In subsequent decisions, the European Court of Justice has reiterated statements from *Billerud*, inter alia in Case C-580/14 *Sandra Bitter* and in Case C-113/19 *Luxaviation.* Both were delivered following a simplified procedure. In those cases as well, the European Court of Justice considered the rules in Article 16 on penalties for failure to surrender greenhouse gas emissions allowances in relation to the principle of proportionality.

In Case C-580/14 *Sandra Bitter*, German authorities had imposed a fine pursuant to provisions implementing Article 16(3) of the Directive. The German court referred questions concerning the validity of the second sentence of Article 16(3) of the Directive, which sets the fine at EUR 100 per tonne (paragraph 23):

> "By its question, the referring court questions the validity of the second sentence of Article 16(3) of Directive 2003/87, particularly in the light of the principle of proportionality."

The EU Court of Justice held as follows (paragraph 35):

> "... consideration of the question referred has revealed nothing capable of affecting, in the light of the principle of proportionality, the validity of the second sentence of Article 16(3) of Directive 2003/87, in that it provides for a penalty of EUR 100 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances."

In Case C-113/19 *Luxaviation*, the company had received a fine for failure to surrender emissions allowances. The company had attempted to surrender the emissions allowances by the time limit and believed that the procedure had been completed. The Luxembourg court referred questions relating to, *inter alia*, *force majeure* and the implications of the principle of proportionality for the calculation of the fine under Article 16(3) of the Directive. The European Court of Justice stated that circumstances such as those present in that case were not sufficient to amount to *force majeure* (paragraph 57) and that the fine was to be calculated as a flat-rate penalty of EUR 100 per tonne (paragraph 42).

4.3. EU legal instruments in the area of insolvency

The EU's legal instruments in the area of insolvency recognise that there are significant differences in the Member States' substantive insolvency law, see inter alia recital 22 in the preamble to Regulation (EU) 2015/848 on insolvency proceedings. Neither Regulation (EU) 2015/848 nor Directive (EU) 2019/1023 on restructuring and insolvency regulates the position of the obligation to surrender emissions allowances under insolvency. Those legal instruments are not incorporated into the EEA Agreement.

5. Parties' principal EEA law submissions

5.1. Plaintiff's submissions

In the plaintiff's submission, the answer to the question must be that Article 12(2a) of Directive 2003/87/EC does not preclude national legislation that provides that the obligation to surrender emissions allowances can be settled by dividend in a compulsory debt settlement in connection with a court-driven restructuring of an insolvent company.

It is an assumption for the purposes of the question of interpretation that the claim for settlement of the obligation to surrender emissions allowances is to be deemed a claim under Norwegian insolvency legislation which, like other claims, can be settled by dividend in an insolvency process. The question on which the EFTA Court is to rule is thus whether Article 12(2a) of Directive 2003/87/EC obliges the Contracting States to ensure that the obligation to surrender allowances is fully discharged by businesses that go bankrupt or undergo restructuring. If so, that will mean that the Directive imposes requirements for the Contracting States' regulation of national insolvency law, with the consequence that the obligation to surrender allowances entails a separatist right or priority ahead of all other claims against insolvent companies (including inter alia any wage- or pension-related obligations the debtor may have).

Neither the wording of Article 12(2a) of nor the preamble to the Directive supports the position that there is a requirement in the Directive for the obligation to surrender allowances to be given a separatist right or first priority in the event of insolvency. Nor is there any support for such an interpretation in the comprehensive Commission regulations complementing the ETS Directive. It is obvious that the ETS Directive's objective of reducing greenhouse gas emissions does not in and of itself provide a basis for a positive law rule on a separatist right or first priority in the event of insolvency. The fact that the obligation to surrender allowances is a claim covered by the insolvency legislation, on an equal footing with, e.g., a claim for payment of the CO_2 charge, does not jeopardise the integrity of the greenhouse gas emissions allowance system.

There are no decisions from the European Court of Justice or the EFTA Court suggesting that the obligation to surrender allowances is to give rise to a separatist right or first priority in the event of insolvency. The State has relied on Case C- 580/14 *Sandra Bitter* in support of its position, despite the fact that the question of the position of the obligation to surrender allowances in the event of insolvency was neither referred to nor addressed by the European Court of Justice in that case. The question before the European Court of Justice was whether the ETS Directive's imposition of a certain rate of penalty was contrary to the principle of proportionality under EU law. The European Court of Justice answered that question in the negative and dealt with the case using the simplified procedure, given that the answer could be clearly inferred from previous case-law. It is irrelevant that the facts of the case before German courts involved a case of insolvency. The question of the position of the obligation to surrender allowances in the event of insolvency was dealt with by German courts in accordance with German law, which differs from Norwegian rules. This illustrates the point that the ETS Directive does not harmonise the Contracting States' regulation of the position of the obligation to surrender allowances in the event of insolvency.

Furthermore, in a decision of 22 April 2021, the Irish High Court held that the Irish Environmental Protection Agency's submissions about obligations under the ETS Directive could not succeed, and that Norwegian Air International Limited could settle the obligation to surrender emissions allowances by dividend in the same overall set of proceedings.

That the ETS Directive does not harmonise the Contracting States' insolvency legislation is also supported by the fact that the EU has adopted its own legal instruments in the area of insolvency law, which do not harmonise the Member States' substantive insolvency law.

5.2. Defendant's submissions

The defendant submits that the question must be answered in the negative.

It follows from the wording of Article 12(2a) that the obligation to surrender allowances is to be absolute, and the imposition of a penalty does not release the party subject to the obligation to surrender allowances from the obligation to surrender a sufficient number of allowances to the registry in order for the emissions to be lawful. Apart from Article 12(3a), which applies to capture and permanent storage of CO_2, there is no exception to the obligation to surrender allowances, including in the event of insolvency.

The defendant's interpretation is supported by the purpose of the Directive, which is to achieve reductions of greenhouse gas emissions in accordance with the obligations under the Paris Agreement. In order to achieve that objective, the greenhouse gas emissions allowance system must ensure that the total number of allowances issued are an absolute limitation on the total lawful emissions in the system over a given period. If it is accepted that the obligation to surrender can be reduced or modified to become a dividend payment, then it will be possible for the total emissions to exceed the emissions cap. Such an approach would be contrary to the purpose of the Directive: see also Case C-203/12 *Billerud*, paragraph 26, and undermine the crucial environmental considerations the obligation to surrender allowances is intended to safeguard.

The case-law supports the defendant's interpretation. The European Court of Justice has stated that the obligation to surrender allowances is intended to ensure accurate accounting of the issue, holding, transfer and cancellation of greenhouse gas emissions allowances, and that "that accurate accounting is inherent in the very purpose of the directive": see *Billerud*, paragraph 27. The European Court of Justice has also emphasised that the legislature, in order to ensure attainment of the environmental objectives, has found it necessary to direct that the obligation to surrender allowances provided for in Article 12 and the lump sum penalty enforcing that obligation provided for in Article 16(3) are to be treated in a stringent and consistent manner throughout the European Union, "without any flexibility other than a transitional lowering of the amount": see *Billerud*, paragraph 39. It is inherent therein that the Member States have no flexibility to render the obligation to surrender allowances less stringent, including in the event of insolvency.

The position that the obligation to surrender emissions allowances may not be settled by dividend in connection with insolvency is also supported by the European Court of Justice's judgment in Case C-580/14 *Sandra Bitter*. That case involved the imposition of a penalty on an estate in bankruptcy that had failed to comply with its obligation to surrender its allowances. In its judgment, the European Court of Justice reiterated statements from *Billerud* to the effect that the obligation to surrender allowances is to be treated in a stringent and consistent manner throughout the European Union, and that Article 16(3) leaves the Member States no discretion as to whether a penalty is to be imposed. If the obligation to surrender allowances did not apply in the event of insolvency, the question referred to the European Court of Justice would have been hypothetical and hence would not have been answered.

The position that the obligation to surrender emissions allowances may not be reduced to a dividend in the event of insolvency must, in the defendant's submission, hold all the more

true in a case such as that in the main proceedings, in which the company, through the restructuring, is continued and thereby remains an aircraft operator: see C-165/20 *Air Berlin*. In the defendant's submission, the obligation to surrender will then follow the business. The fact that EU secondary insolvency legislation falls outside the EEA Agreement does not mean that the obligation to surrender allowances may be settled by dividend payment. A penalty under Article 16(3) must, at the same time, be dealt with under national insolvency rules. The defendant submits that the plaintiff's argument to the effect that the purpose of the ETS Directive is not intended to provide a basis for a separatist right charge or first priority is fallacious. The obligation to surrender emissions allowances is an environmental obligation; there cannot be a margin allowing for emissions subject to an obligation to surrender allowances to become lawful through the payment of a penalty.

6. Questions referred to the EFTA Court

Oslo District Court requests an advisory opinion from the EFTA Court concerning the following question of interpretation:

> 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?

Oslo District Court

Katinka Mahieu
District Court Judge