



INFORMATION NOTE

A request from the Borgarting Court of Appeal (*Borgarting lagmannsrett*), dated 17 February 2025 was lodged on 17 February 2025, requesting the EFTA Court give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. This request was registered as Case E-2/25 - *Sarpsborg Avfallsenergi AS and Others v Norwegian State, represented by the Ministry of Climate and Environment (Staten v/Klima- og miljødepartementet)*, on 17 February 2025.

In the request for an advisory opinion the Borgarting Court of Appeal sent the following questions to the EFTA Court;

1. *Must the first activity listed in Annex I to Directive 2003/87/EC be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally?*
2. *If question 1 is answered in the negative, what is to be the subject-matter of assessment and which factors are relevant in the assessment of the exception in the first activity listed in Annex I to the ETS Directive?*

On 7 March 2025, in accordance with Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court, the Governments of the EFTA States, the EFTA Surveillance Authority, the Union (which includes the Governments of the EU States), the European Commission and the parties to the dispute were invited to submit written observations to the Court on the referred questions within a two month deadline.

The Court received and registered written observations from:

Sarpsborg Avfallsenergi AS and Others

The Government of Norway

The Government of Iceland

The EFTA Surveillance Authority

The European Commission

The submitted suggested answers to the questions posed by the referring Court are as follows:

Sarpsborg Avfallsenergi AS and Others

1. The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally.
2. If the first question above is answered in the negative, FREVAR and SAREN respectfully propose that the EFTA Court answers the second question as follows:

The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations that exclusively or for all practical purposes incinerate waste and predominantly incinerate hazardous or municipal waste, including those which do not have waste incineration as their sole purpose, are excluded from the scope of the Directive. For installations that also incinerate other fuels for the purpose of energy production in addition to incinerating waste, it must be assessed whether the installation has the incineration of waste or the production of energy as its main purpose. In this assessment, account must be taken, in particular, of the volume of energy generated by the installation in relation to the quantity of waste incinerated in that installation and the stability and continuity of that production. It is a relevant indicative factor whether the

installation from time-to-time substitutes waste with other fuels to generate heat, or whether the installation shuts down when there is lack of waste for incineration, which could indicate that it is an installation for the combustion of fuels or for the incineration of waste, respectively. Whether the installation generates and recovers heat as part of its incineration process, and how and for what purpose such heat energy is used or sold, is not relevant for the assessment above.

The Government of Norway

1. The first activity listed in Annex I to the ETS Directive cannot be interpreted as meaning that all installations for incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally.
2. The first activity listed in Annex I to the ETS Directive includes combustion in installations whose main purpose is the generation of energy, and which use waste, including hazardous or municipal waste, as fuel. Such installations are not excluded from the ETS Directive. Relevant factors in the assessment of the main purpose of the installation include, inter alia, the volume of energy generated in relation to the quantity of waste incinerated and the stability or continuity of that production, whether the units incinerating waste are situated at sites with industrial production (within the same installation or outsourced to a separate operator), and whether the incineration of waste replaces production of energy by conventional fuels.

The Government of Iceland

1. The first activity listed in Annex I to Directive 2003/87/EC should be interpreted as excluding from the scope of the Directive installations with a total rated thermal input exceeding 20MW, the primary purpose of which is the incineration of hazardous or municipal waste.

2. The assessment of whether an installation comes within the scope of Directive 2003/87/EC should consider whether the incineration of hazardous or municipal waste constitutes a primary or a marginal purpose for the operation of the installation in question.

The EFTA Surveillance Authority

1. The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally.
2. If the first question is answered in the negative, the assessment of whether an installation falls within the exemption should focus on whether the *main purpose* of the incineration is energy production or waste disposal. Installations whose main purpose is to dispose of hazardous or municipal waste fall within the exemption. Conversely, installations whose main purpose is energy production may fall under the ETS. To ensure legal certainty and equal treatment of operators, the assessment of the main purpose should rely on clear and objective criteria. Relevant factors may include the installation's operating permits and how its primary function is classified, the substitutability of waste with fossil fuels, and the extent to which the incineration has or will replace landfill disposal or other disposal of waste.

The European Commission

1. The first activity listed in Annex I to Directive 2003/87/EC must not be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally.

2. When assessing whether the exception in the first activity listed in Annex I to Directive 2003/87/EC applies, the main purpose of the waste incineration installation must be considered, as set out in the Commission Guidance Document No. 0. If the main purpose is energy generation, the installation is within the scope of the ETS. If the main purpose is not the generation of energy and if the waste incinerated falls predominantly under the category “municipal” or “hazardous”, the installation is not within the scope of the ETS.
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The public hearing of the Court in Case E-2/25 - *Sarpsborg Avfallsenergi AS and Others v Norwegian State, represented by the Ministry of Climate and Environment (Staten v/Klima- og miljødepartementet)*, has been set for: **Thursday 5 June at 9:30am** at the EFTA Court (1 rue du Fort Thüngen, L-1499, Luxembourg). The hearing will also be livestreamed on the Court’s website, [here](#).

Luxembourg, 12 May 2025

Ólafur Jóhannes Einarsson

Registrar