BORGARTING LAGMANNSRETT

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EFTA Court
1 Rue du Fort Thüngen
1499 Luxembourg

Your reference	Our reference	Date
	23-123554ASD-BORG/03	17.02.2025

Request for an Advisory Opinion in Case No 23-123554ASD-BORG/03 in the proceedings *Sarpsborg Avfallsenergi AS and Others* v *Staten ved Klima- og miljødepartementet*

1. Background to the request for 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 (SCA), read in conjunction with section 51a of the Norwegian Courts of Justice Act (*Lov om domstolene*), Borgarting Court of Appeal (*Borgarting Lagmannsrett*) hereby requests an Advisory Opinion from the EFTA Court for use in Borgarting Court of Appeal Case 23-123554ASD-BORG/03.

The appellants in the case are the municipality of Fredrikstad (*Fredrikstad kommune*), represented by the water drainage and renovation undertaking Fredrikstad Vann Avløp og Renovasjonsforetak FREVAR KF ('FREVAR') and Saren Energy Sarpsborg AS (formerly Sarpsborg Avfallsenergi AS) ('SAREN'). The respondent is the Norwegian State, represented by the Ministry of Climate and Environment (*Staten v/Klima- og miljødepartementet*).

The case before the Court of Appeal concerns the validity of a decision to issue a permit for emissions subject to the obligation to surrender allowances for the appellants' combustion installations.

The greenhouse gas emissions allowance system is regulated in Norwegian law by [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")], with accompanying [Regulation of 23 December 2004 No 1851 on emissions allowances obligations and greenhouse gas emissions allowance trading (*forskrift 23. desember 2004 nr. 1852 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteforskriften)*) ("the Greenhouse Gas Emissions Allowance Regulation"), which implement the EU's ETS Directive (Directive 2003/87/EC), as amended, with accompanying

Postadresse	Sentralbord	Saksbehandler	Bankgiro	Organisasjonsnummer
Postboks 2107 Vika, 0125 Oslo	21 55 80 00	Ingerid Helene Sandberg		926721356

Kontoradresse	Telefaks	Telefon	Ekspedisjonstid	Internett/E-post
Keysers gate 13, 0165 Oslo		21 55 81 17	0800-1545 (1500)	http://domstol.no/borgarting borgpost@domstol.no

legal instruments. The EU's greenhouse gas emissions allowance system is part of the European effort to reduce greenhouse gas emissions from the energy sector, industry, aviation and maritime transport. The main principle is that a cap is placed on the total lawful emissions from activities in the EEA which are subject to the obligation to surrender allowances by making a certain number of allowances available in an allowance market. The objective is to foster incentives to reduce emissions from those activities which are subject to the obligation to surrender allowances in a manner consistent with the overall environmental objectives.

The greenhouse gas emissions allowance system applies to those activities which are covered by Annex I to the ETS Directive: see Article 2(1) of the Directive. At the time of the decisions, it followed from the first activity listed in Annex I that the combustion of fuel in installations with a rated thermal input exceeding 20 MW, other than units for the incineration of hazardous or municipal waste, was covered by the greenhouse gas emissions allowance system. Point 5 of Annex I provided that all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, were to be included in the permit for emissions subject to the obligation to surrender allowances when the abovementioned input was exceeded in an installation.

It is not disputed that the appellants' installations have an input exceeding 20 MW. The question is whether they are installations subject to the obligation to surrender allowances for the combustion of fuels, or installations for the incineration of hazardous or municipal waste which are not subject to the obligation to surrender allowances.

The State's decisions on permits for emissions subject to the obligation to surrender allowances are based on the fact that the installations in question are not installations for municipal [or] hazardous waste because, in the State's submission, they are co-incineration installations and not waste incineration installations. This implies that, in the State's submission, the installations have as their *main purpose* the supply of energy for industrial purposes, as opposed to the disposal of waste.

By judgment of 10 May 2023, Søndre Østfold District Court (*Søndre Østfold tingrett*) held that the State's interpretation of the Directive was correct and that the decisions were valid. FREVAR and SAREN have appealed against that judgment. The appellants take the view that the decisive factor for whether the installations are installations for municipal [or] hazardous waste under the Directive is what the installations are built for and actually incinerate. Whether the installations' main purpose is deemed to be waste incineration or the supply of recovered heat from waste incineration for industrial purposes is, in the appellants' submission, not relevant in the assessment. The parties also disagree on the legal and factual subject-matter of assessment relating to a potential assessment of main purpose, in the event that the State is successful on its point that the main purpose is decisive for the obligation to surrender allowances.

On 6 June 2024, the Court of Justice of the European Union (ECJ) delivered judgment in Case C-166/23 on the interpretation of point 5 of Annex I to the ETS Directive and the exception provided for therein for "combustion units". Under that provision, all combustion units in installations coming within the greenhouse gas emissions allowance system are to be included in the permit, although with the exception of combustion units for the incineration of municipal [or] hazardous waste. The ECJ held that, in the determination of whether a combustion unit is a "unit for the incineration of hazardous or municipal waste", the decisive factor is what is actually incinerated. According to the ECJ, the purpose of the combustion

unit is not relevant for the assessment under point 5 of Annex I. The judgment raises questions about whether the same applies to the assessment under the similar wording "installations for the incineration of hazardous or municipal waste" in the first activity listed in Annex I.

In the light of the foregoing, the Court of Appeal requests the EFTA Court to determine whether the ECJ's interpretative statement in Case C-166/23 on point 5 of Annex I to the ETS Directive applies mutatis mutandis to the interpretation of the first activity listed in Annex I to the ETS Directive.

2. Parties to the case and subject-matter of the dispute

The parties to the proceedings before the Court of Appeal are as follows:

Appellant 1:
Fredrikstad municipality (*Fredrikstad kommune*), represented by Fredrikstad Vann Avløp og Renovasjonsforetak FREVAR KF

Appellant 2:
Saren Energy Sarpsborg AS

Counsel: Advokat Henrik Bjørnebye,
Advokatfirmaet BAHR AS, P. O. Box 1524 Vika, 0117 Oslo
Assisting Counsel: Advokat Thomas K. Svensen,
Advokatfirmaet BAHR AS

Respondent:
Norwegian State, represented by the Ministry of Climate and Environment
(*Staten v/Klima- og miljødepartementet*)
Counsel: Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*), Advokat Omar Saleem Rathore,
P. O. Box 8012 Dep, 0030 Oslo

The case concerns the validity of the decision of the Norwegian Environment Agency (*Miljødirektoratet*) to permit greenhouse gas emissions subject to the obligation to surrender allowances concerning SAREN dated 22 January 2014 and the decision of the Ministry of Climate and Environment concerning FREVAR dated 13 February 2017.

3. Facts

The matter in dispute in the case is whether FREVAR's and SAREN's installations are installations for the incineration of waste under Annex I to the ETS Directive. If the installations are held to be waste incineration installations, the parties agree that the installations are to be deemed to be installations for the incineration of hazardous [or] municipal waste in Norwegian law.

Waste is incinerated at a very high temperature. During the cooling-down process heat is formed. It is a requirement under EEA law and Norwegian law that all heat from the incineration process is to be recovered in so far as practicable (see part 4.1 below). The main

areas of use for such heat are hot water for district heating, and steam for industry and electricity production.

Fredrikstad municipality has for many years been engaged in waste management at Øra in the municipality. In February 1981, the Fredrikstad municipal council adopted a decision to build combustion installations for waste inter alia because there was not enough space for a landfill. The installation has been in operation since 1984 and is situated at the business and industrial area of Øra in Fredrikstad. FREVAR's installation incinerates and disposes of waste. There was no district heating in Fredrikstad at the time when the installation was built, but nearby industry was able to make use of the heat from the installation. FREVAR currently sells approximately 80% of recovered heat as steam to industry.

SAREN's installation incinerates and disposes of waste. The installation is situated in Sarpsborg municipality (*Sarpsborg kommune*) and has been in operation since 2010. SAREN sells all recovered heat as steam to industry.

In 2011 the Norwegian Climate and Pollution Agency (*Klima- og forurensningsdirektoratet*, now the Norwegian Environment Agency) carried out an assessment of the obligation to surrender allowances for emissions from waste incineration in the period 2013–2020. In that assessment, the Agency based itself on the European Commission's Guidance on Interpretation of Annex I of the EU ETS Directive of 18 March 2010. In that context, the Agency's assessment states inter alia that:

> "We have focused on whether the incineration installations mainly produce steam for industry or mainly produce power and/or district heating in the determination of in which category an installation belongs."

In consequence thereof, the Agency classified FREVAR's and SAREN's installations as co-incineration installations subject to the obligation to surrender allowances.

On 16 November 2012, FREVAR and SAREN applied for a permit for emissions subject to the obligation to surrender allowances. The Norwegian Environment Agency adopted a decision on permits for greenhouse gas emissions subject to the obligation to surrender allowances concerning SAREN on 22 January 2014 and concerning FREVAR on 30 January 2014. FREVAR's and SAREN's installations were deemed to be subject to the obligation to surrender allowances in accordance with the Agency's 2011 assessment.

FREVAR appealed against the decision of the Norwegian Environment Agency. On 13 February 2017, the Ministry of Climate and Environment upheld the decision. The Ministry also based itself on the European Commission's Guidance on Annex I to the ETS Directive, and stated inter alia:

> "The European Commission's Guidance states that it is up to the competent authority to determine whether an installation is deemed to be a co-incineration installation or waste incineration installation. The European Commission's Guidance highlights various factors that can provide guidance. […]
>
> A key assessment factor under the Guidance is whether an installation's main purpose is energy production: see the reference to the definition of co-incineration installation in the EU's former Waste Incineration Directive, now continued in the Industrial

> Emissions Directive (IED). The Guidance further points to the installation's geographical location, including whether the installation is situated at the same location as industrial production. In the Guidance, the reason given for the relevance of the installation's location is that it provides an indication as to whether the installation's main purpose is to supply energy for industrial production. The Ministry interprets this to mean that the connection to industry is a key factor in the assessment of the installation's main purpose. The Guidance's focus on energy production and connection to industry suggests that installations which supply a large share of energy for industrial production must be presumed to have as their main purpose the production of energy. The Ministry also emphasises that the rule for waste incineration installations in the EU's ETS Directive is formulated as an exception provision. The predominant general rule is that the combustion of fuels with a thermal input exceeding 20 MW is to be subject to the obligation to surrender allowances."

One consequence of the assessment of the Norwegian Environment Agency and the Ministry is that installations for the incineration of waste that supply heat for district heating are not subject to the obligation to surrender allowances, whilst installations that supply heat for industrial steam are deemed to be subject to the obligation to surrender allowances.

On 25 March 2022, FREVAR and SAREN requested that the Norwegian Environment Agency reverse the decisions on permits. That request was not granted. An appeal was lodged against the Agency's response, but the Ministry of Climate and Environment dismissed that appeal on 8 August 2022.

On 29 September 2022, FREVAR and SAREN lodged proceedings before Søndre Østfold District Court, seeking to have the decisions of the Norwegian Environment Agency and the Ministry of Climate and Environment declared invalid. The District Court found in favour of the State by judgment of 10 May 2023. An appeal against that judgment was lodged with Borgarting Court of Appeal on 12 June 2023.

On 6 June 2024, the ECJ delivered judgment in Case C-166/23, in which the European Commission's 2010 Guidance was discussed. That judgment is an essential reason underpinning the decision to make a reference to the EFTA Court.

4. Legal framework

4.1. Relevant Norwegian legislation

The Greenhouse Gas Emissions Allowance Act and the Greenhouse Gas Emissions Allowance Regulation implement the ETS Directive and accompanying legal instruments which are incorporated into the EEA Agreement.

The scope of the Greenhouse Gas Emissions Allowance Act is set out in section 3. The first and second paragraphs (as those provisions were worded at the time of the decisions) are worded as follows:

> "This Act shall apply to emissions of greenhouse gases from stationary industrial operations and aviation activities.

> The King may lay down more specific provisions by regulation providing for which greenhouse gases, activities and operations shall be subject to the obligation to surrender allowances."

The wording was amended with effect from 1 January 2024, entailing inter alia that the two paragraphs have been brought together in a new first paragraph. There have been no substantive amendments to the provision having implications for the present case.

The obligation to surrender allowances is provided for in section 4 (as that provision was worded at the time of the decisions):

> "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 wording was amended slightly with effect from 1 January 2024, although without substantive implications for the present case.

Under section 3 of the Greenhouse Gas Emissions Allowance Act, the Greenhouse Gas Emissions Allowance Regulation defines more specifically which activities are covered by that act. Section 1-1 of the Greenhouse Gas Emissions Allowance Regulation (as that provision was worded at the time of the decisions) provides that the obligation to surrender allowances pertains to emissions from those activities which are listed in the table in the same provision. The wording on the relevant activity in the present case, the first activity in the table, is as follows:

> "Combustion of fuel in installations with a rated thermal input exceeding 20 MW (the obligation to surrender allowances nevertheless does not apply to the combustion of fuel in installations for the incineration of hazardous and municipal waste)."

The provision was amended slightly with effect from 1 January 2024, although without substantive implications for the present case. The main rule is now incorporated into section 1-3, whilst the exception is provided for in section 1-3a(b) and the second paragraph of section 1-3a.

The key Norwegian provision corresponds to Article 2(1) of the ETS Directive, read in conjunction with the first activity listed in Annex I: see part 4.2 below.

Section 10-10 of the Regulation on recycling and treatment of waste (Waste Regulation) (*Forskrift om gjenvinning og behandling av avfall (avfallsforskriften)*), entitled "Energy recovery" (*Energiutnyttelse*), which implements Article 44(b) of Directive 2010/75/EU in Norwegian law, is worded as follows:

> "Incineration installations shall be designed, constructed and operated so that all heat generated by the incineration process is recovered in so far as practicable."

4.2. EEA law

4.2.1. Directive 2003/87/EC (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, most recently by [Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system], which is incorporated into the EEA Agreement. The 2023 amending directive entailed amendments to both the Greenhouse Gas Emissions Allowance Act and the Greenhouse Gas Emissions Allowance Regulation, as referred to in part 4.1. The amendments to the ETS Directive do not appear to have implications for the questions of interpretation at issue in the present case. In the present request for an advisory opinion, the wording and article numbering as it stood at the time of adoption of the decisions shall be used.

Article 2, entitled "Scope", regulates the scope of the Directive. Article 2(1) is worded as follows:

> "This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II."

Article 12, entitled "Transfer, surrender and cancellation of allowances", provides as follows in paragraph 3 on the obligation for installations to surrender allowances:

> "Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, other than allowances issued under Chapter II, equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled."

In accordance with Article 2, the scope of the Directive is more specifically regulated in annexes to the ETS Directive. Activities covered thereby are listed in Annex I.

The first activity listed in Annex I to the ETS Directive is referred to as follows:

> "Combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)."

Point 5 of Annex I to the ETS Directive is worded as follows:

> "When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit."

"Combustion" is defined as follows in Article 3(t) of the Directive:

> "'combustion' means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing"

4.2.2. Case-law of the ECJ. Case C-166/23

On 6 June 2024, the ECJ delivered judgment in Case C-166/23 *Naturvårdsverket* v *Nouryon Functional Chemicals AB* following a reference from Svea Court of Appeal, Land and Environment Court of Appeal [Stockholm, Sweden] (*Svea hovrätt, Mark- och miljööddomstolen*). That judgment concerned the interpretation of point 5 of Annex I to the ETS Directive, which is worded as follows:

> "When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit."

Nouryon produced bulk organic chemicals in such volumes that they were subject to the obligation to surrender allowances under the twenty-third activity listed in Annex I. The question in the case was whether a unit in the installation that incinerated hazardous waste was to be included in the installation's permit and thus come within the scope of the greenhouse gas emissions allowance system. The incineration unit incinerated solely hazardous waste from the production (additional fuel added only in order to obtain the desired incineration process in the incinerator).

The ECJ ruled on whether the exception covers all incineration units which incinerate hazardous or municipal waste, or whether further requirements must be imposed and, if so, whether the purpose of the combustion unit is to be decisive for whether the exception applies (paragraph 30).

The ECJ commented on and considered the European Commission's 2010 Guidance and interpretation of point 5 in paragraphs 42–44. The Commission's interpretation follows from part 3.3.3 of the Guidance on units (point 5 of Annex I to the Directive), read in conjunction with part 3.3.2 on installations (first activity listed in Annex I to the Directive). The ECJ held that the Guidance, which refers to the main purpose and lets the distinction between co-incineration and waste incineration be decisive, is not consistent with the wording, purpose or contextual interpretation of the Directive.

The ECJ took the view that the wording suggests that no requirements may be imposed to the effect that the purpose of the unit is relevant in the assessment of the exception, and went on to hold in paragraph 48 that:

> "[…] the wording of point 5 of Annex I to Directive 2003/87 does not indicate that the exclusion of units for the incineration of hazardous or municipal waste from a greenhouse gas emissions permit depends on the purpose for which that waste is incinerated."

The Court further held that a systematic and teleological interpretation weighs against attaching relevance to the main purpose of the incineration (paragraphs 50–56), including the following statement in paragraph 54:

> "It follows from the preceding elements that the EU legislature intended to promote the incineration of hazardous and municipal waste by removing them from the obligation to

be authorised under the EU ETS. To limit the scope of that exception using the concept of a 'main purpose' is inconsistent with that objective."

On that basis, the ECJ concluded that point 5 of Annex I to the ETS Directive:

> "… must be interpreted as meaning that all units for the incineration of hazardous or municipal waste are excluded from the scope of application of that directive, as amended, including those which are integrated within an installation falling within that scope and which do not have the incineration of that waste as their sole purpose, provided that they are used for the incineration of other waste only marginally."

The decisive factor under point 5 of Annex I is what is actually incinerated. The distinction between co-incineration and waste incineration, which turns on an assessment of main purpose, is, according to the ECJ, not relevant at the unit level.

4.2.3. The European Commission's "Guidance on Interpretation of Annex I of the EU ETS Directive"

The European Commission's "Guidance on Interpretation of Annex I of the EU ETS Directive" of 18 March 2010 refers to the interpretation of the first activity listed in Annex I in part 3.3.2, entitled "Waste incineration and Co-incineration" in the following terms:

> "*Installations* for the *incineration* of municipal waste or hazardous waste are thus excluded in Annex I to the EU ETS Directive. It is for the competent authority to determine whether a particular installation falls into one of these categories taking account the relevant definitions in the WID (Waste Incineration Directive). Installations falling under the WID have a permit under that Directive which should clearly state the status of the incineration or co-incineration units. This Directive defines an 'incineration plant' as a technical unit
>
> > '*dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated.*'
>
> If a dedicated installation is found by the CA to fall under this definition, and if the waste incinerated falls predominantly under the category 'municipal' or 'hazardous' (according to the European waste catalogue), then it is not subject to the EU ETS Directive in respect of any incineration that takes place at the installation.
>
> A co-incineration plant is defined in the WID as a plant
>
> > '*whose main purpose is the generation of energy or production of material products and:*
> > *— which uses wastes as a regular or additional fuel; or*
> > *— in which waste is thermally treated for the purpose of disposal.*
> > *If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the*

thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4.'

If the status of individual units cannot be derived unambiguously from the WID permit, the following considerations may serve as guidance: units burning waste which are situated at sites with industrial production (within the same installation or outsourced to a separate operator) are usually to be classified as *co-incineration*, because the main purpose of such combustion units is the supply of energy to the production of industry goods. This fact is often supported by the substitutability of the waste unit by units fired with conventional fossil fuels. As evidence for such substitutability may serve *inter alia*:

- The waste unit is operated in technical connection with other boilers or CHP units, e.g. by feeding into a steam grid;
- The waste unit has replaced a previous boiler or CHP plant, which was fired by conventional fuels;
- The existence of reserve units which use conventional fuels;
- A significant amount of the thermal input in the waste unit is provided by conventional fuels, or other waste than hazardous or municipal waste.

Wherever the CA classifies the waste unit as co-incineration or as using other wastes than municipal and hazardous wastes, it is to be included in the EU ETS."

Part 3.3.3 of the Guidance, entitled "Waste (co-)incineration units", refers to point 5 of Annex I to the Directive on combustion units and lays down the decisive corresponding distinction between waste incineration and co-incineration as found in part 3.3.2 of the Guidance.

The Guidance has since been revised twice, most recently on 4 December 2024 as a result of the abovementioned judgment. Although amendments were made relating to the interpretation of the exception in point 5 of Annex I in part 3.4.4 (formerly part 3.3.3) of the Guidance, the European Commission has not made any substantive amendments in the part relating directly to the first activity listed in Annex I (although the part has been moved from part 3.3.2 to 3.4.3). The reason for this is not evident from the Guidance.

5. Parties' EEA law submissions

5.1. Appellants: SAREN and FREVAR

The appellants submit that it follows clearly from the wording of the first activity listed in Annex I to the ETS Directive that installations which incinerate hazardous or municipal waste are not subject to the obligation to surrender allowances.

The parties are in agreement that the installations satisfy the requirement for hazardous [or] municipal waste incineration. The matter in dispute is whether they are installations for the incineration of waste. In that assessment, the decisive question is whether the installations are constructed for and actually incinerate waste. Whether the installations' "main purpose" is waste incineration or energy production is not relevant in the assessment. This follows clearly from the Directive's wording, purpose and systematic, as held by the ECJ in Case C-166/23.

The ECJ's judgment rules directly on the question in the present case. In that judgment, the ECJ concluded that the European Commission's interpretation in the 2010 Guidance, which concerns both the installation rule in the first activity listed in Annex I and the unit rule in point 5 of Annex I to the Directive, was incorrect. Case C-166/23 is, therefore, also decisive for the interpretation of the first activity listed in Annex I.

In paragraph 48 of its judgment, the ECJ emphasises that the wording of point 5 of Annex I does not indicate that the determination depends on the purpose for which the waste is incinerated. The wording of the first activity listed in Annex I is the same and must be interpreted in the same manner. There is nothing in the wording to indicate that installations which incinerate municipal [or] hazardous waste and, at the same time, recover the heat from the incineration process, are to be classified as subject to the obligation to surrender allowances. On the contrary, waste incineration installations are under an obligation to recover, in so far as possible, the heat derived from the cooling-down of waste gas from waste incineration: see Article 44(b) and Article 50(5) of Directive 2010/75/EU. Nor is a "main purpose doctrine" compatible with the wording of the first activity listed in Annex I, read in conjunction with the Directive's definition of "combustion". The incorrectness of the State's interpretation is further substantiated by the fact that the State, within the framework of the main purpose doctrine, puts forward as decisive a random distinction between installations which supply the energy produced for district heating and installations which supply energy for industry.

The ECJ refers to the European Commission's interpretation in the 2010 Guidance in paragraphs 42–44 of its judgment. That guidance is used as a basis for the State's decision and the District Court's judgment in the case that led to the present appeal. The ECJ concludes that the European Commission's interpretation – which concerns both units and installations – is not supported by the ECJ's literal, systematic and teleological methods of interpretation, and is incorrect. The European Commission's interpretation follows from the 2010 Guidance's part 3.3.3, dealing with units, compared with the assessment in part 3.3.2, dealing with installations. It follows therefrom, firstly, that the European Commission uses the same interpretation of the wording "for the incineration of hazardous or municipal waste" for units and for installations. Secondly, the ECJ's interpretation of that wording is, of course, decisive for the assessment of both installations and units.

As is further apparent from the ECJ's judgment, the EU legislature also had the objective of promoting the incineration of hazardous [or] municipal waste by exempting that activity from the obligation to surrender allowances under the greenhouse gas emissions allowance system: see paragraph 51 of the judgment. As observed by the ECJ in paragraph 54, an assessment focused on the installation's "main purpose" would be inconsistent with that objective underlying the legislation. That reasoning applies equally for units and installations.

The ECJ further states in paragraphs 55–56 that a rule under which waste incineration installations are subject to the obligation to surrender allowances because they supply heat from the incineration process to another process subject to the obligation to surrender allowances is inconsistent with the main purpose of the ETS Directive. Such a rule would result in a waste of heat and increased greenhouse gas emissions. That assessment is equally relevant for installations as for units.

In the light of the foregoing, it is clear that the ECJ's interpretation of point 5 of Annex I to the ETS Directive applies mutatis mutandis to the interpretation of the same wording in the first activity listed in Annex I, when it is stated that the first-mentioned provision:

> "… must be interpreted as meaning that all units for the incineration of hazardous or municipal waste are excluded from the scope of application of that directive, as amended, including those which are integrated within an installation falling within that scope and which do not have the incineration of that waste as their sole purpose, provided that they are used for the incineration of other waste only marginally."

That the European Commission has not revised the Guidance as a whole following the ECJ's judgment, but has merely adjusted the part relating to the unit rule, is not affected by the fact that that judgment is decisive for both installations and units. The provisions are included in the same annex, which regulates activities which are subject to the obligation to surrender allowances, have identical wording and must, given the context in which the rules are placed, be interpreted identically. This is also clear from the ECJ's judgment. The European Commission's Guidance has, in any event, no status as a source of law in EU/EEA law: see the fifth paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU). The ECJ's judgment in Case C-166/23 is an example of this, and the position is set out explicitly in part 1.1 of the Guidance.

When the ECJ's conclusion is read in the light of the reasons for judgment and the European Commission's 2010 Guidance, it is not possible to construe the ECJ otherwise than as meaning that the European Commission's "main purpose assessment" for installations and units is based on a misinterpretation of the Directive. Nor, therefore, is the State's interpretation correct.

In the appellants' submission, the question of interpretation must be answered to the effect that 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.

5.2. The respondent: The Norwegian State, represented by the Ministry of Climate and Environment

The State submits that the first activity listed in Annex I to the ETS Directive must be interpreted as meaning that the decisive factor for whether the exception applies is an assessment of the installations' main purpose, which determines whether they are co-incineration installations or waste incineration installations, respectively.

As is apparent from the different language versions of the text of the Directive, the exception is limited in its application to combustion installations for the combustion of hazardous [or] municipal waste. The word "for" indicates that the purpose of the installation is key to the assessment: see the English-language use of "for", the Danish-language use of "til" and the Swedish-language use of "för". This means, in the State's submission, that a teleological criterion must be read into the text. This becomes particularly clear when one considers the fact that the direction laid down in the European Commission's Guidance on the interpretation of the text of the Directive has remained unchanged since 2010.

If the waste composition was sufficient to come within the scope of the exception, the wording ought to have and could have reflected this in a simple manner, for example, with the wording "which incinerate".

The State's interpretation is also the most obvious one when the exception is read in the light of the objective of the ETS Directive, which is to foster incentives to reduce greenhouse gas emissions in a manner consistent with overall environmental objectives: see also Article 1 of the ETS Directive. The objective suggests that exceptions to the scope of the ETS Directive must be interpreted restrictively: see also paragraph 47 of the judgment in Case C-166/23.

There is no relevant case-law that further elucidates the exception for the first activity listed in Annex I. However, the recent judgment in Case C-166/23 raises questions as to whether the first activity listed in Annex I must be interpreted as meaning that the objective relating to incineration installations is not relevant, but that the decisive factor instead is the composition of the waste being incinerated. The question whether the reasoning in that judgment may be transposed to the present case arises because the wording for the exception is the same for units and for installations. The State nevertheless submits that there are a number of reasons why that judgment is not decisive for the present purposes.

Firstly, the judgment concerns the interpretation of an exception for a different situation. Under the first activity, the combustion of fuels with a thermal input exceeding 20 MW is an autonomous activity in the greenhouse gas emissions allowance system, whilst point 5 concerns individual incineration units which are not part of, but are connected to, an activity listed in Annex I. In other words, the unit rule is an autonomous rule which does not form part of the assessment of activities subject to the obligation to surrender allowances under Annex I. Even though the exception in both provisions deals with incineration of hazardous [or] municipal waste, the rules are different. The exception under point 5 excludes other incineration units in the installation, whilst the exception under the first activity entails that the entire installation falls outside the greenhouse gas emissions allowance system.

Secondly, the judgment concerns a situation where incineration constitutes disposal of waste. Both of the installations in the present case have been held to be for energy "recovery" where the waste is used to produce energy. What categorises the disposal and recovery of waste, respectively, is apparent from Annexes I and II to Directive 2008/98/EC (Waste Framework Directive). The ECJ addressed only the issue of disposal and concurred in the assessment of the scope of the exception to the effect that the obligation to surrender allowances must not impede the disposal of hazardous waste in paragraph 51:

> "[…] the establishment of a system for the allocation of emission allowances must not impede the disposal of hazardous and municipal waste by incineration."

Thus it is unclear whether the distinction between the recovery of waste (here through energy production) and the disposal of waste has implications for the interpretation of the scope of exceptions in point 5.

By extension, it is unclear whether the statement about systematic and teleological interpretation is to be construed similarly if the waste that is incinerated constitutes "recovery", as opposed to "disposal". In the State's submission, there are grounds to assess the waste market and the energy market differently for the purposes of the greenhouse gas

emission allowances, given that the energy market is subject to the scope of the ETS Directive. The uncertainty surrounding the interpretation of point 5 also arises in relation to the interpretation of the first activity, given that weight is to be attached to the judgment in the interpretation of that activity.

On 4 December 2024, the European Commission's Guidance was updated as a result of that judgment. Norwegian authorities were in dialogue with the European Commission during the revision-related work in order to discuss potential implications the ECJ's judgment might have for Norway. The changes made relate only to the exception in point 5 of Annex I. No relevant changes were made in the Guidance relating to the first activity listed in Annex I.

This indicates that, per the European Commission's approach, the judgment has no determinative value for the present case, and that the objective still serves as guidance for the assessment relating to the first activity listed in Annex I.

The ECJ's stipulation in Case C-166/23, to the effect that the composition of the waste is to be decisive for the determination of the scope of the exception, will be very difficult to apply in practice in cases where installations are engaged in the business of waste incineration. There is nothing in EU law requiring recipients of waste to keep records of the composition of "municipal and hazardous waste" as compared to other waste. It is therefore an open question as to how such a criterion can be assessed and applied. In the part of the Guidance relating to point 5 of Annex I, updated following the ECJ's judgment, the European Commission states that the criterion is to be interpreted as a requirement for 95% hazardous and municipal waste for units, without more detailed explanation as to how the threshold is to be applied in practice.

Thus, the State's interpretation of the ETS Directive still has support in the European Commission's Guidance – including after the ECJ's judgment of 6 June 2024. The ETS Directive is a fully harmonised directive which is to be interpreted and practised identically in all Member States, and the European Commission, as the EU's executive authority and surveillance body, is responsible for ensuring compliance with the rules laid down in the ETS Directive.

6. Questions referred to the EFTA Court

In accordance with the legal bases set out above, Borgarting Court of Appeal refers 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?

Borgarting Court of Appeal

Mette D. Trovik
Court of Appeal Justice