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To the President and Members of the EFTA Court

WRITTEN OBSERVATIONS

Submitted pursuant to Article 20 of the Statue of the EFTA Court by

NORWEGIAN AIR SHUTTLE ASA

Represented by

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In

CASE E-12/23

Norwegian Air Shuttle ASA

v.

The Norwegian State

Concerning a request by Oslo District Court (Oslo tingrett) for an Advisory Opinion from the EFTA Court, lodged on 17 October 2023 in the case of Norwegian Air Shuttle ASA v. the Norwegian State under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Ref.:#11756160/2

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CONTENTS

Page

1. Introduction....3
2. Factual and legal background....4
   - 2.1 Facts....4
   - 2.2 Norwegian law....8
     - 2.2.1 Insolvency law....8
     - 2.2.2 The Greenhouse Gas Emissions Allowance Act....10
3. Overview of the ETS Directive and related legislation....10
4. The interpretation of Article 12(2a) of the ETS Directive....13
   - 4.1 Introduction....13
   - 4.2 The legal nature of allowances....15
   - 4.3 The obligation to surrender allowances....18
   - 4.4 Case law....22
     - 4.4.1 Introduction....22
     - 4.4.2 Case C-203/12, *Billerud*....22
     - 4.4.3 Case C-580/14, *Sandra Bitter*....25
     - 4.4.4 Case C-113/19, *Luxaviation*....27
     - 4.4.5 Case C-165/20, *Air Berlin*....28
   - 4.5 The High Court of Ireland's decision on the issue....28
   - 4.6 Observations on the State's arguments relating to the purpose of the ETS Directive....37
5. The lack of harmonisation of substantive insolvency law at EU level....39
6. The lack of national implementing measures and consequences of the State's view.44
7. Proposed answer to the Referring Court's question....47

1. Introduction

(1) On 6 October 2023, Oslo District Court (the "**Referring Court**") submitted a Request for an Advisory Opinion to the EFTA Court (the "**Request**") in Case No 23-003969TVI-TOSL/02 between Norwegian Air Shuttle ASA ("**NAS**") and the Norwegian State (the "**State**").

(2) By its question, the Referring Court seeks, in essence, to determine whether EEA law precludes national insolvency law providing that claims in general, including an obligation to surrender emission allowances under the EU Emissions Trading System ("**EU ETS**"), shall be settled by dividend in a compulsory debt settlement in insolvency proceedings.

(3) An assessment of the Referring Court's question requires an overview of the factual background and national insolvency law. This is presented in Section 2 below. A brief overview of Directive 2003/87/EC[1] as subsequently amended (the "**ETS Directive**") and relevant related legislation is included in Section 3. Observations on the interpretation of the ETS Directive Article 12(2a) are presented in Section 4. Those observations must also be seen in relation to the role of EU insolvency legislation and the lack of national implementation measures addressing the State's interpretation, discussed below in Sections 5 and 6, respectively. Finally, in Section 7, NAS presents a proposed answer that the EFTA Court may provide to the Referring Court.

[1] 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, L 275/32, 25.10.2003.

2. Factual and legal background

2.1 Facts

(4) The Request provides an accurate summary of the facts relevant for the EFTA Court's assessment. NAS considers there is a need to elaborate on some points and will follow the same structure as in the Request for coherence. Some of the facts summarised in the Request will also be repeated to provide context to NAS's observations.

(5) As explained in the Request, restrictions introduced during the COVID-19 pandemic led NAS into a severe financial crisis.[2] In the spring and summer of 2020, NAS unsuccessfully attempted to execute an out-of-court restructuring of its debt. To avoid bankruptcy, NAS therefore entered into concurrent insolvency proceedings in Ireland (examinership) and Norway (reconstruction negotiations) on 18 November and 8 December 2020, respectively. Examinership was also opened for several of NAS's Irish subsidiaries, including Norwegian Air International Limited ("**NAI**").

(6) The parallel court-driven insolvency proceedings resulted in a reconstruction plan in Norway and a scheme of arrangement in Ireland which were, for all purposes, identical.[3] The reconstruction plan and scheme of arrangement stipulated that unsecured and non-preferential creditors would receive a dividend of 5 per cent,[4] including their pro-rata share of a cash pool amounting to NOK 500 million. In compliance with Norwegian and Irish insolvency law, both NAS's and NAI's obligation to surrender allowances for emissions in 2020 before the opening of the insolvency proceedings were converted into monetary claims.[5]

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[2] The Request Section 2, paragraphs 4 and 6.

[3] See the Request Section 2, paragraph 7.

[4] The dividend consisting of (i) a cash payment of approximately 1% of each claim, and (ii) 5% (less the cash payment) of each claim converted into shares for immediate sale with the proceeds distributed to the creditor, but with an option to retain the converted debt as a debt obligation with interest for seven years.

[5] See the Request Section 2, paragraph 7.

(7) The proposals for a reconstruction plan and scheme of arrangement were put to the creditors for a vote on 11 March 2021.[6] Both the Norwegian Environment Agency (the **"NEA"**) and the Irish Environmental Protection Agency (the **"IEPA"**) rejected the reconstruction plan and scheme of arrangement, respectively, contending that NAS's and NAI's obligations to surrender emission allowances were "absolute" and could not be settled by dividend. Despite this contention, the reconstruction plan and scheme of arrangement were approved by Oslo District Court and the Irish High Court, respectively.[7]

(8) In its judgment 2020/366 COS dated 22 April 2021, the High Court in Ireland determined that the obligation to surrender allowances in Ireland should be settled by dividend.[8] This judgment, which specifically discusses the relationship between EU ETS and national insolvency law, is described in more detail below in Section 4.5.

(9) In line with the court approved reconstruction plan, NAS settled its obligation to surrender allowances for emissions in the period from 1 January to 17 November 2020 – the day prior to the deadline date[9] in the reconstruction process – by offering dividend to the State, represented by the NEA.[10] For emissions after the initiation of the reconstruction negotiations, i.e., from 18 November to 31 December 2020, NAS surrendered 15,039 allowances within the deadline of 30 April 2021.[11]

(10) The State rejected NAS's dividend offer and insisted that its claim be fully settled by surrendering allowances that fully covered the total emissions for 2020. NAS's court-

[6] *Ibid.*

[7] See the Request Section 2, paragraph 8.

[8] See the Request Section 2, paragraph 15.

[9] As a rule, the deadline date is the day the petition for reconstruction was filed with the court. Since the Norwegian reconstruction negotiations were conducted in parallel with the Irish examinership, NAS and the Norwegian reconstructor decided, and Oslo District Court confirmed, that the deadline date in the Norwegian proceeding should be the same as in the Irish proceeding, i.e., November 18, 2020. Accordingly, NAS was obliged to pay debts incurred on or after 18 November 2020 (the deadline date) in full, while debts incurred prior to this was included in the insolvency process.

[10] See the Request Section 2, paragraph 9.

[11] *Ibid.*

appointed reconstructor disagreed with the State.[12] As a result, the reconstructor instructed NAS not to comply with the State's demand for full settlement. He wrote *inter alia*, as quoted in the Request, that:

> *"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."*[13]

(11) NAS was legally bound to follow the reconstructor's instruction under the Norwegian Reconstruction Act.[14] Non-compliance could have led to liability for damages and/or criminal charges for NAS and the individuals involved, cf. the Norwegian Penal Code[15] Sections 402 and 410. The reconstructor would also have authority to request termination of the reconstruction negotiations, which would likely lead to NAS's bankruptcy, cf. the Norwegian Reconstruction Act Sections 15(1) and 58(2). NAS concurred with the reconstructor's view.[16]

(12) Notwithstanding the above, the NEA was of the view that NAS did not settle the State's claim for allowances. As a result, the State imposed a penalty of NOK 399,685,275.[17]

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[12] See the Request Section 2, paragraphs 10 and 11, respectively.
[13] The Request Section 2, paragraph 11.
[14] Law 7 May 2020 No. 38 (midlertidig lov om rekonstruksjon for å avhjelpe økonomiske problemer som følge av utbrudd av covid-19 (rekonstruksjonsloven)).
[15] Law 20 May 2005 No. 28 (lov om straff (straffeloven)).
[16] See the Request Section 2, paragraph 12.
[17] See the Request Section 2, paragraph 13.

(13) On 9 January 2023, NAS filed a lawsuit with Oslo District Court, asserting that NAS was permitted and obliged to settle the obligation to surrender allowances by dividend, and that the State's decision to impose a penalty was void.

(14) The Request mentions that NAS was awarded free allowances in February 2020 which were placed in the company's allowance account.[18] In the proceeding before Oslo District Court, the State has incorrectly held that NAS sold its allocated free allowances to enhance liquidity prior to 30 April 2021, and that it would be unreasonable to permit NAS to settle its obligation to surrender allowances by dividend. While this argument is in any case irrelevant to the question of interpretation raised by the Request, the argument is also based on an incorrect factual premise which warrants clarification.

(15) In certain ETS sectors, such as aviation, entities are annually allocated a specific number of free allowances. The overall aim of the free allowances scheme is to reduce the risk of carbon leakage, i.e., that the activities in question relocate to third countries with lower costs of greenhouse gas emissions. Free allowances are calculated and awarded pursuant to detailed and standardised EU/EEA rules.

(16) The relevant free allowances were allocated to NAS on 29 February 2020. As NAS also purchased allowances in the market before and after the allocation of free allowances, it held a total of 2,069,193 allowances on 23 April 2020. This significantly exceeded the amount required to fulfil NAS's obligation to surrender allowances for emissions in 2019. Instead of selling its surplus allowances, NAS transferred 1,256,638 allowances to its wholly owned subsidiary NAI, which was ineligible for free allowances. NAI used the allowances transferred from NAS to settle its obligation to surrender allowances for emissions in 2019. Intra-group transfers of allowances are both permitted, common, and a natural consequence of aviation activity usually being

[18] The Request Section 2, paragraph 1.

divided into subsidiaries which are obligated to surrender allowances on an independent basis.

(17) Consequently, all free allowances allocated to NAS have been utilised to settle the group's obligations to surrender allowances. The State's assertions regarding NAS's use of free allowances are hence both irrelevant and factually incorrect.

2.2 Norwegian law

2.2.1 Insolvency law

(18) The Request Section 3.1 provides an overview of relevant Norwegian insolvency law. NAS deems this description correct. Therefore, NAS believes it is sufficient to highlight only certain key aspects of Norwegian insolvency law.

(19) As outlined in the Request, there are two insolvency processes under Norwegian law: bankruptcy proceedings and reconstruction negotiations.[19] The opening of bankruptcy proceedings presupposes the debtor's insolvency, meaning that: (a) the debtor is unable to pay his obligations as they fall due (and the inability is not temporary) and, (b) the debtor's liabilities exceed the value of the assets. Reconstruction proceedings may be initiated if the debtor is currently facing or is likely to face severe financial difficulties in the near future.

(20) While the procedural rules vary, the substantive rules on which claims the proceedings comprise and the ranking of claims, among other things, are joint and, hence, identical in bankruptcy proceedings and reconstruction negotiations.[20] The fundamental principle in both insolvency processes under Norwegian law is that all the debtor's liabilities are included, including non-monetary liabilities which are valued in money, all available assets are monetised, and the proceeds are proportionally distributed among the creditors based on the value of their claims and in accordance with a set priority order. The priority order in Norwegian insolvency law is set out in Chapter 9

[19] See the Request Section 3.1, paragraphs 1 and 2.
[20] See the Request Section 3.1, paragraphs 3 and 7.

of the Creditors Recovery Act.[21] These substantive rules are joint and apply to both bankruptcy proceedings and reconstruction negotiations, as per Section 1-6 of the Creditors Recovery Act and Sections 62 and 63 of the Reconstruction Act.

(21) The disputed outstanding part of NAS's obligation to transfer allowances for 2020 emissions originates from before the deadline day in the reconstruction negotiations, i.e., from emissions before 18 November 2020. NAS and the State disagree as to whether the obligation to surrender the remaining allowances constitutes a "claim" under Norwegian insolvency law, which is a prerequisite for NAS being obliged and entitled to meet this obligation by dividend. As emhasised in the Request, this is a matter to be determined under Norwegian law where the EFTA Court for the purposes of its Advisory Opinion must assume that NAS's obligation to surrender allowances is a "claim" in accordance with Norwegian insolvency law.[22]

(22) As explained in the Request, the State's claim for settlement of the obligation to surrender emission allowances is not given a particular form of recovery or priority ranking under Norwegian insolvency law.[23] Therefore, it follows from NAS's court approved reconstruction plan that the State's claim shall be settled by dividend. Consequently, NAS is neither obliged nor entitled to cover the State's claim in full. Preferential treatment of specific creditors, unless it is based on the set priority ranking pursuant to the Creditors Recovery Act, is punishable for both the debtor and accomplices, as per Sections 402 and 410 of the Norwegian Penal Code.

(23) Therefore, under Norwegian insolvency law, the State's claim shall be settled by dividend under NAS's court-confirmed reconstruction plan.

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[21] Law 8 June 1984 No. 59 (lov om fordringhavernes dekningsrett (dekningsloven)).

[22] The Request Section 3.1, paragraph 8.

[23] The Request Section 3.1, paragraphs 9-12.

2.2.2 The Greenhouse Gas Emissions Allowance Act

(24) The relevant provisions in the Greenhouse Gas Emissions Allowance Act are quoted in the Request Section 3.2.[24]

(25) Regulation No 1851 of 23 December 2004 on emissions allowances obligations and greenhouse gas emissions allowance trading ("**the Greenhouse Gas Emissions Allowance Regulation**") is adopted as a subordinate Regulation pursuant to the Greenhouse Gas Emissions Allowance Act. The Greenhouse Gas Emissions Allowance Regulation incorporates into Norwegian law the EU ETS Regulations which are incorporated in the EEA Agreement, see Article 7 a) of the EEA Agreement.

3. Overview of the ETS Directive and related legislation

(26) In this section NAS will provide a general overview of relevant parts of the ETS Directive and related legislation as a context to the observations on the interpretation of Article 12(2a) below in Section 4.

(27) The ETS Directive was adopted on the basis of the environmental Title of the Treaty on the Functioning of the European Union ("**TFEU**"), see (now) Article 192(1) TFEU. It established EU ETS *"in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner"*.[25] The instrument to achieve this goal is a "cap and trade" system where emission allowances are issued, traded and surrendered against monitored and reported greenhouse gas emissions.

(28) The EU ETS is now in its fourth emission trading phase (2021-2030), following a pilot phase 1 (2005-2007), phase 2 (2008-2012) and phase 3 (2013-2020). Each new phase has seen reforms and amendments, with significant changes implemented for phases 3 and 4. Norway has been a part of the ETS since phase 2 as an EEA Contracting Party, after the ETS Directive was incorporated in the EEA Agreement by the EEA Joint

[24] Law 17 December 2004 No. 99 (lov om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteloven)).

[25] The ETS Directive Article 1 first paragraph.

Committee's decision No. 146/2007. The ETS Directive has later been amended many times with subsequent incorporations in the EEA Agreement. The latest EU amendments to the Directive were incorporated in the EEA Agreement by the EEA Joint Committee's decision 8 December 2023.[26]

(29) The ETS Directive is a cornerstone measure for reducing greenhouse gas emissions in EU and EEA Member States. The most recent Directive amendments follow up the European Union's ambitious climate goals enshrined in the European Climate Act.[27] The Act sets out binding objectives of climate neutrality in the Union by 2050 and domestic reduction of net greenhouse gas emissions by at least 55 % compared to 1990 levels by 2030.[28] Those objectives have resulted in an increased annual linear reduction factor for the cap on allowances to be issued for EU ETS activities. For activities not comprised by the EU ETS, Regulation (EU) 2018/842 (the "**Effort Sharing Regulation**") as recently amended at EU level sets forth a Union target of reducing emissions by 2030 which has been translated into individual Member State targets.[29] The Effort Sharing Regulation leaves the choice of instruments for attaining the goals to each Member State, where the main instrument applied by Norway is the CO2 levy.

(30) The ETS Directive applies to greenhouse gas emissions from activities specifically defined in Annexes to the Directive.[30] These include CO2 emissions from electricity

[26] Decisions of the EEA Joint Committee No. 334/2023 and 335/2023 of 8 December 2023 amending Annex XX (Environment) to the EEA Agreement, incorporating inter alia Directive (EU) 2023/958 and Directive (EU) 2023/959 amending the ETS Directive.

[27] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999. See also the ETS Directive Article 1 second paragraph as adopted by Directive (EU) 2023/959.

[28] The European Climate Act, Articles 1 and 4(1), respectively.

[29] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156/26, 19.6.2018. The Effort Sharing Regulation was amended by Regulation (EU) 2023/857, inter alia increasing the emissions reduction target from 30 to 40 per cent. While the Effort Sharing Regulation (EU) 2018/842 was implemented under Protocol 31 of the EEA Agreement by EEA Joint Committee decision No. 269/2019, the more recent Regulation (EU) 2023/857 increasing the emissions reduction target to 40 per cent has not yet been implemented.

[30] The ETS Directive Article 2(1) as amended by Directive (EU) 2023/959, see Annexes I and III.

and heat generation, energy-intensive industry sectors, aviation and, more recently, maritime transport. Aviation activities were included in the EU ETS by Directive 2008/101/EC, incorporated in the EEA Agreement in 2011.[31]

(31) Operators of activities comprised by the EU ETS[32] are required to monitor and report their greenhouse gas emissions[33] on a yearly basis. The overall requirements for monitoring and reporting emissions are set out in the Directive. It requires Member States, *inter alia*, to ensure that aircraft operators submit a monitoring plan for approval, setting out measures to monitor and report emissions.[34] Detailed rules on monitoring and verification are set out in Commission Implementing Regulation (EU) 2018/2066 (the "**Monitoring and Reporting Regulation**").[35]

(32) As set out in Article 12(2a) of the ETS Directive, Member States shall ensure that each aircraft operator surrenders, by 30 April each year, a number of allowances equal to the monitored, reported and verified emissions during the last calendar year. A parallel provision, previously included in Article 12(3), applied for the obligation of operators of stationary installations to surrender allowances. Following more recent amendments by Directive (EU) 2023/959, the previous wording of Articles 12(2a) and 12(3) have now been replaced by a new Article 12(3) which sets out the surrender obligation in relation to stationary installations, aviation and maritime transport. Except for a change of time limit for surrendering allowances from 30 April to 30 September each year, the changes in wording do not seem to indicate substantive amendments to the surrender obligation for aircraft operators. In the following, NAS will apply the former wording in Article 12(2a) of the ETS Directive which was incorporated in the EEA Agreement at the time of the disputed decision in the case.

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[31] Decision of the EEA Joint Committee No. 6/2011 of 1 April 2011.
[32] See Annexes I and III to the ETS Directive.
[33] The greenhouse gas emissions comprised by the Directive, including CO2, are listed in Annex II to the Directive.
[34] The ETS Directive Article 3g as amended by Directive (EU) 2023/959.
[35] Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 as subsequently amended.

(33) The allowances required to meet the surrender obligation may be acquired through auctioning and trade, and through the award of free allowances. The determination of the total quantity of allowances and the free allowances for aviation, and the method of allocation through auctioning are further regulated in the ETS Directive and stipulated in European Commission decisions.[36]

(34) Article 16 of the ETS Directive requires Member States to lay down rules on penalties applicable to infringements of national provisions adopted pursuant to the Directive. According to Article 16(3), Member States shall ensure that operators who do not surrender sufficient allowances by the deadline set out above shall be held liable for an excess emissions penalty amounting to EUR 100 for each tonne that the operator has not surrendered allowances for.

(35) Detailed rules concerning the establishment of a Union Registry for emission allowances are adopted in Commission Regulation (EU) 2019/1122 as further amended (the "**Registry Regulation**").[37]

4. The interpretation of Article 12(2a) of the ETS Directive

4.1 Introduction

(36) The Referring Court has referred the following question to the EFTA 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?"*

(37) In the case before the Referring Court, the State has argued that emission allowances may be considered as emission permits and that the surrender obligation is a public law

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[36] See in particular Articles 3c and 3d of the ETS Directive.

[37] Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry.

obligation which cannot be considered as a "claim" under Norwegian substantive insolvency law. As held by the Referring Court in the Request, that question turns on an interpretation of Norwegian law where the EFTA Court must assume that a claim for settlement of the surrender obligation is a "claim" according to Norwegian insolvency law.[38]

(38) NAS qualifies as an aircraft operator[39] within the meaning of the ETS Directive and is under an obligation pursuant to the Greenhouse Gas Emissions Allowance Act to monitor and report CO2 emissions and surrender allowances.

(39) The Member State obligation to ensure that aircraft operators surrender allowances is set out as follows in the ETS Directive Article 12(2a):

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

(40) The question raised by the Referring Court is, in essence, whether Article 12(2a) obliges Member States to ensure that aircraft operators subject to insolvency proceedings under national law are required to surrender allowances in full. The consequence of an answer in the affirmative is that Member States would be required to adopt provisions attributing "super priority" to the claim for settlement of the surrender obligation in insolvency proceedings.

(41) As an environmental measure, the ETS Directive is adopted within an area of shared competence between the EU and the Member States, where the Member States shall

[38] The Request Section 3.1, paragraph 8.
[39] See the definition of "aircraft operator" in the ETS Directive Article 3(o).

exercise their competence to the extent not exercised by the Union, see Articles 4(2)(e) and 2(2) TFEU, respectively. The point of departure for the assessment is therefore whether the Union, based on the environmental competence conferred on it, has adopted a requirement for Member States to give specific priority to the obligation to surrender allowances in national insolvency law.

(42) An important starting point for interpreting Article 12(2a) of the ETS Directive is the determination of the legal nature of "allowances" under EU law. This is considered further below in Section 4.2. On this basis, a question arises as to how to interpret the obligation to surrender allowances as set forth in Article 12(2a). Observations on this interpretation are provided below in Section 4.3. Section 4.4 discusses the case law of the European Court of Justice ("**ECJ**") described in the Request. The assessment of the relationship between EU ETS and national insolvency law by the Irish High Court in judgment 2020/366 COS is described further in Section 4.5. Finally, observations on the arguments submitted by the State relating to the purpose of the EU ETS are provided in Section 4.6.

4.2 The legal nature of allowances

(43) Article 12(2a) of the ETS Directive sets out two obligations for Member States. According to the first sentence, Member States shall ensure that relevant aircraft operators, by 30 April each year, *"surrenders a number of allowances equal to the total emissions"* reported and verified during the preceding calendar year. According to the second sentence, the Member States shall ensure that surrendered allowances are subsequently cancelled. The Referring Court's question concerns the interpretation of the Member State obligation in Article 12(2a) first sentence. To answer this question, it is first necessary to determine the legal nature of *allowances* under EU and EEA law before determining the meaning of the obligation to *surrender* such allowances.

(44) The term "*allowance*" is defined as follows in the ETS Directive Article 3(a):

> *"'allowance' means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive".*

(45) The definition's wording that allowances "*shall be transferable*" corresponds to the ETS Directive's objective to promote greenhouse gas emission reductions in a cost-effective and economically efficient manner.[40] That goal is to be reached through a "cap and trade" mechanism where allowances must be open to trade.

(46) The nature of allowances as tradable instruments is further emphasised by Directive 2014/65/EU as subsequently amended (MIFID II) which define emission allowances recognised for compliance with the requirements of the ETS Directive as financial instruments.[41]

(47) Apart from emphasising the tradable nature of allowances, the definition of *"allowance"* in the ETS Directive and its definition as financial instruments in MiFID II leaves considerable discretion for Member States to define the legal nature of allowances within their national legal systems.

(48) The legal nature of EU ETS allowances was analysed in an extensive report prepared for the European Commission in 2018.[42] The report aims to, *inter alia*, outline the characteristics of allowances based on EU and national legislation and case law, and to provide a detailed analysis of the treatment of allowances in five selected Member

[40] The ETS Directive Article 1 first paragraph.

[41] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173/349, 12.6.2014, as subsequently amended, Article 4 no.1(15), cf. the Directive Annex I Section C paragraph (11). The Directive was implemented in the EEA Agreement by EEA Joint Committee decision No. 78/2019.

[42] Milieu Ltd, Legal nature of EU ETS allowances (final report, December 2018, available at url https://op.europa.eu/en/publication-detail/-/publication/9d985256-a6a9-11e9-9d01-01aa75ed71a1 .

States at that time (Belgium, Germany, France, Poland and the UK).[43] The following are among the conclusions in the executive summary of the report (emphasis added):

> *"The system thus leaves the definition of the legal nature of the allowances to the discretion of the Member States through their national legislation. In practice, the definitions used by Member States vary considerably as a result of this discretion [...]. While some consider allowances to fall into the category of property rights that thus permit their use as securities or financial instruments, some see them as administrative authorisations to emit [...] or sui generis administrative rights (personal rights under common law), while others have established a mixed regime, combining different elements [...]. Each of the five selected Member States described in this report takes a different approach to classifying allowances, with none explicitly defining the legal nature of those allowances. Belgium, the UK and France recognise characteristics of a property right in the allowances, while the legislation in Poland and Germany includes elements of both property and administrative rights."*[44]

(49) The report also sets out that *"[a]ny legal issues that are not currently harmonised, such as treatment of allowances in the event of insolvency, would remain within the purview of the Member States"*.[45]

(50) Advocate General Campos Sánchez-Bordona took at similar view in the opinion in case C-321/15:

> *"However, it is true that EU law does not resolve unequivocally the question of the legal nature of emissions allowances and that it is for the Member States to define the nature of such allowances, in accordance with the principle of subsidiarity. The approaches adopted are very diverse and range from the*

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[43] *Ibid.*, p. 3.
[44] *Ibid.*, p. 5.
[45] *Ibid.*, p. 185.

classification of emissions allowances as administrative authorisations (quotas granted, licences, permits, concessions) to their classification as property which may be acquired (with absolute title or through rights of use or other atypical rights jura in re) or merely as financial instruments, and, in nearly all cases, there is no shortage of reservations and precautions."[46]

(51) Neither the wording of the ETS Directive, its preamble, or ECJ case law provide any basis for a conclusion deviating from the views above.

(52) In NAS's view, there can be no doubt that the Member States have discretion to define the legal nature of allowances in accordance with their legal traditions based on the broadly worded definition in the ETS Directive Article 3(a). This entails that it is within Member State discretion, for example, to define allowances as private law instruments that may be pledged, and that allowances or claims for allowances may be subject to insolvency proceedings under national insolvency law.

4.3 The obligation to surrender allowances

(53) The State nevertheless argues that the ETS Directive Article 12(2a) must be interpreted as precluding that the obligation to surrender allowances may be settled by dividend in a compulsory debt settlement in accordance with national insolvency law.

(54) In NAS's opinion, there is no legal basis for an argument that the Member States' discretion to determine the legal nature of the surrender obligation in insolvency proceedings is more limited than the discretion to determine the nature of allowances. Neither the wording of the ETS Directive nor its preamble provide any basis for interpreting the ETS Directive Article 12(2a) as requiring Member States to ensure that allowances are surrendered in full by aircraft operators subject to insolvency proceedings. On the contrary, the ETS Directive and related Acts clearly signal that the

[46] Opinion of Advocate General Campos Sánchez-Bordona in ECJ judgment ArcelorMittal Rodange et Schifflange SA v GrandDuchy of Luxembourg case C-321/15, EU:C:2017:179 (AG Opinion EU:C:2016:516), paragraph 90.

status of the surrender obligation in insolvency proceedings has not been harmonised at EU/EEA level.

(55) The term "*surrender*" is defined as follows in the Registry Regulation Article 3 (13):

> *"'surrender' means the accounting of an allowance by an operator or aircraft operator against the verified emissions of its installation or aircraft"*[47]

(56) The wording of the definition signifies clearly that the surrender obligation is simply an obligation to submit allowances within the defined time limit in the same number as last year's verified emissions. The Danish language version of the same definition makes this even clearer:

> *«»returnering«: en driftsleders eller luftfartøjsoperatørs registrering af en kvote som modregning for de verificerede emissioner fra den pågældendes anlæg eller luftfartøj».*

(57) The accounting, or offsetting ("modregning" in Danish), of allowances against verified emissions amounts to a settlement with financial instruments that may be subject to insolvency proceedings, as any other claim for allowances. There is no basis in the wording for a different and more restrictive interpretation of Member States' discretion.

(58) Furthermore, drawing a distinction between the legal nature of allowances and the legal nature of the surrender obligation for the purposes of national insolvency law would be self-contradictory. If EU law leaves to Member State discretion to determine whether allowances may be pledged – which is clearly the case – it would be meaningless interpreting the ETS Directive Article 12(2a) as requiring those Member States to ensure that the surrender obligation is fulfilled in full even in insolvency proceedings. Such fulfilment would either mean that a lender with security interests in allowances at best would acquire a second priority lien with highly uncertain value, or the indebted

[47] Commission Delegated Regulation (EU) 2019/1122, Article 3(13).

operator would be precluded from surrendering the allowances required to settle the secured claim.

(59) If the State should argue that EU and EEA law define allowances as permits and the surrender obligation as a public law obligation, the EFTA Court should note that the ETS Directive Article 3(d) defines "*greenhouse gas emissions permit*" by reference to permits issued in accordance with the Directive Articles 5, 6 and 30b. The Directive Articles 4 to 6 require Member States to ensure that operators of stationary installations with ETS activities hold a greenhouse gas emissions permit. It follows clearly from these provisions that the greenhouse gas emissions permit requirement is separate from the obligation to ensure that operators surrender allowances. This approach has also been applied in Norwegian law, where the requirement for operators of stationary ETS installations to acquire a greenhouse gas emissions permit follows from the Norwegian Pollution Control Act Section 11 second paragraph.[48] For aviation activities, the ETS Directive requires the Member States to ensure that aircraft operators submit a monitoring plan to be approved by the competent authorities rather than requiring a greenhouse gas emissions permit, see Article 3g of the Directive. This does not alter the fact that greenhouse gas emissions permits and the obligation to surrender allowances are two different legal concepts under the ETS Directive, and that allowances or the surrender obligation cannot be considered a "permit" under EU law.

(60) If it were the intention of the Union to harmonise the status of the surrender obligation in national insolvency proceedings, this would at the very least have been specifically regulated in the detailed and extensive Acts adopted at EU level pursuant to the ETS Directive. That is not the case, providing further support to the conclusion that the matter is not regulated at EU/EEA level.

[48] Law 13 March 1981 No. 6 (lov om vern mot forurensninger og om avfall (forurensningsloven)).

(61) The Registry Regulation applies to allowances created for the purposes of the EU ETS. The legal basis for the Regulation follows from the ETS Directive Article 19(3), which provides that:

> *"The Commission is empowered to adopt delegated acts in accordance with Article 23 to supplement this Directive by laying down all necessary requirements concerning the Union Registry for the trading period commencing on 1 January 2013 and subsequent periods, in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation, as applicable, of allowances, and to provide for public access and confidentiality, as appropriate. Those delegated acts shall also include provisions to put into effect rules on the mutual recognition of allowances in agreements to link emission trading systems."*

(62) Notwithstanding its legal basis and scope, the Registry Regulation does not regulate the status of emission allowances or the surrender obligation under national insolvency proceedings.[49] The same holds true for the Monitoring and Reporting Regulation, which does not govern the relationship between the surrender obligation and insolvency proceedings.

(63) In conclusion, there is no basis in the ETS Directive or related legislation for interpreting Article 12(2a) as precluding that the obligation to surrender allowances may be settled by dividend in a compulsory debt settlement in accordance with national insolvency law.

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[49] The only insolvency related matter governed by the Regulation concerns the national administrator's right to suspend access to accounts if the account holder has become subject of insolvency procedures, see Article 30(5). This provision is not relevant to the case at hand.

4.4 Case law

4.4.1 Introduction

(64) As held in the Request Section 1, the ECJ has not ruled on the scope of the obligation to surrender allowances in national insolvency proceedings. The same is true of the EFTA Court and the General Court.

(65) NAS takes the position that there is no ECJ, General Court or EFTA Court case law of direct relevance for the question raised in the Request. The State has, however, referred to several decisions as basis for its interpretation, including in particular ECJ's decisions in cases C-203/12, *Billerud*,[50] C-580/14, *Sandra Bitter*[51] and C-165/20, *Air Berlin*.[52] NAS finds none of the references made by the State to these cases relevant to the present case and sets out its detailed reasons below.

4.4.2 Case C-203/12, *Billerud*

(66) The background for the ECJ's preliminary ruling in case C-203/12, *Billerud* was that two Swedish companies, Billerud Karlsborg AB and Billerud Skärblacka AB, had failed to surrender a sufficient number of allowances for 2006 emissions within the deadline 30 April 2007. The Swedish Environmental Protection Agency had imposed a penalty on the companies pursuant to Swedish emissions trading legislation implementing the ETS Directive. At that time, the fixed penalty rate was EUR 40 per non-surrendered allowance pursuant to former Article 16(4) of the ETS Directive, increasing to EUR 100 from 2008 according to Article 16(3).

(67) The Billerud companies argued before Swedish courts that they had the necessary number of allowances on their accounts, had no intention of circumventing the obligation to surrender, and that the deadline was missed due to an internal ad-

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[50] The judgment in *Billerud Karlsborg AB and Billerud Skärblacka AB v Naturvårdsverket*, C-203/12, EU:C:2013:664.

[51] The order in *Sandra Bitter v Bundesrepublik Deutschland*, C-580/14, EU:C:2015:835.

[52] The judgment in *ET, acting as liquidator of Air Berlin PLC & Co. Luftverkehrs KG (AB KG) v Bundesrepublik Deutschland*, C-165/20, EU:C:2022:42.

ministrative breakdown. The Swedish Supreme Court decided to request an Advisory Opinion from the ECJ on two questions of interpretation.

(68) The referring court's first question was:

> *"Does Article 16(3) and (4) of Directive 2003/87 ... mean that an operator who has not surrendered a sufficient number of emission allowances by 30 April must pay a penalty regardless of the cause of the omission, for example, where, although the operator had a sufficient number of emission allowances on 30 April, as a result of an oversight, an administrative error or a technical problem it did not surrender them then?"*[53]

(69) The penalty provisions in Articles 16(3) and (4) of the ETS Directive both referred to "*excess emissions penalty*" at fixed levels. On this basis, the ECJ held that the referring court's question:

> *"amounts to asking whether the concept of punishable 'excess emissions' must be construed as concerning excessively polluting conduct per se, in which case the penalty would be payable only by operators who do not have the sufficient number of allowances on 30 April of each year, or whether it instead consists solely in the failure to surrender the allowances equal to the emissions for the preceding year by 30 April, irrespective of the reason for the non-surrender or the number of allowances actually held by the operators concerned."*[54]

(70) The ECJ ruled that Articles 16(3) and (4)

> *"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*

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[53] Case C-203/12, *Billerud*, paragraph 20.
[54] Case C-03/12, *Billerud*, paragraph 22.

the excess emissions for which it provides, even where they hold a sufficient number of allowances on that date."[55]

(71) The ECJ's statements in *Billerud* paragraphs 26 and 27, as referred to more generally by the State in the present case,[56] formed part of the reasoning in reaching the conclusion above. Consequently, the ECJ's reasoning that the functioning of the ETS Directive is *"based on the strict accounting of the issue, holding transfer and cancellation of allowances [...]"* and where *"accurate accounting is inherent in the very purpose of the directive [...]"* proved a specific point: the excess penalty is tied to the failure to surrender, and not the failure to acquire and hold, allowances.[57]

(72) On the other hand, the reasoning of the ECJ has no relevance for the interpretation of the question in the present case, namely whether Article 12(2a) requires Member States to ensure that the surrender obligation has super priority in national insolvency proceedings.

(73) In case the first question was answered in the affirmative, the referring court's second question was whether the same provisions *"mean that the penalty will or may be waived or reduced for example in the circumstances described in Question 1?"*[58] The ECJ interpreted this question as asking whether the penalty could be varied by a national court based on the principle of proportionality.[59] The ECJ ruled that Articles 16(3) and (4) of the ETS Directive must be interpreted as meaning that the lump sum penalty could not be varied based on the principle of proportionality in EU law.[60]

(74) The State has referred to the ECJ's reasoning in *Billerud* paragraph 39 as an argument in favour of its interpretation of Article 12(2a). That reasoning, however, is tied to the question of whether the lump sum penalty in (now) Article 16(3) of the ETS Directive

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55 Case C-03/12, *Billerud*, paragraph 32.
56 See the description of the State's submission in the Request Section 5.2.
57 Case C-03/12, *Billerud*, paragraph 27.
58 Case C-03/12, *Billerud*, paragraph 20.
59 Case C-03/12, *Billerud*, paragraph 33.
60 Case C-03/12, *Billerud*, paragraphs 34-42.

is in accordance with the proportionality principle in EU law. This question is entirely different from the question of Member States' obligations under Article 12(2a) with respect to national insolvency proceedings.

(75) In NAS's opinion, it follows clearly from the questions raised by the referring court as interpreted, analysed and answered by the ECJ in *Billerud* that the ECJ's reasoning cited by the State has no relevance for the interpretation of Article 12(2a) of the ETS Directive in the present case.

4.4.3 Case C-580/14, *Sandra Bitter*

(76) In case C-580/14, *Sandra Bitter*, the ECJ issued a ruling by order which solely addresses the question of whether the rate of the penalty for non-surrender of allowances violated the principle of proportionality in EU law. The reason why the issue was brought before the ECJ again, was that the penalty rate of EUR 40 per allowance that applied from 2005 to 2007, and which was dealt with in Billerud, had increased to EUR 100 from 2008. The status of the obligation to surrender emission allowances in insolvencies was not addressed by the ECJ.

(77) In the Request Section 1, the Referring Court observes that "*it is difficult to see how [Sandra Bitter] gives any particular guidance on the scope of the obligation to surrender allowances in the event of bankruptcy and other insolvency processes*". NAS supports this observation: the order clearly has no relevance to the question raised in the Request. However, since the State has persistently argued that the case supports its interpretation, it is necessary to describe it in more detail.

(78) The order of the ECJ in *Sandra Bitter* is based on a reference for a preliminary ruling in a case before German courts where the German company subject to insolvency proceedings had ceased its business shortly before the commencement of the insolvency proceedings. Ms. Bitter was appointed as liquidator and was considered by German authorities as operator of the relevant installation with responsibility to report emissions and transfer allowances. Ms. Bitter argued that the company was no longer

obliged to report and surrender allowances, as the business had ceased prior to the opening of the insolvency proceedings. This was not accepted by German authorities, which imposed a penalty for the lack of transfer of allowances pursuant to German legislation.

(79) The case was brought before the administrative court in Berlin, which questioned whether the ECJ's assessment in *Billerud* regarding the proportionality of the previous penalty rate applied equivalently to the new rate. The question referred to the ECJ was as follows:

> *"Does the second sentence of Article 16(3) of Directive 2003/87, according to which 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, infringe the principle of proportionality?"*[61]

(80) Consequently, the ECJ was requested to answer the question as to whether the new rate violated the principle of proportionality in EU law. The ECJ arrived at the same conclusion as in *Billerud*, largely referring to this ruling. Therefore, the ECJ made its decision based on a simplified procedure in the form of an order of the ECJ, as the answer to the question referred for interpretation could clearly be derived from previous case law, cf. Article 99 of the Rules of Procedure of the European Court of Justice.

(81) The above clarifies that the issue of the status of the obligation to surrender emission allowances in insolvency was not raised by the referring court or considered by the ECJ in *Sandra Bitter*. Nevertheless, the State maintains that the decision is relevant to the present case, arguing that the question referred to the ECJ would have been hypothetical and would not have been answered if the obligation to surrender allowances did not apply in insolvency. The State's view is incorrect and based on a misconception. Since the ETS Directive does not harmonise Member State law

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[61] Case C-580/14, *Sandra Bitter*, paragraph 20.

governing how the obligation to surrender allowances should be treated in insolvency proceedings, it is within the discretion of each Member State to govern the issue in national insolvency law. Consequently, in *Sandra Bitter* it was a matter for German courts to assess the obligation to surrender emission allowances under German law.

4.4.4 Case C-113/19, *Luxaviation*

(82) The ECJ's order in case C-113/19, *Luxaviation* concerned a request for a preliminary ruling on the interpretation of Article 16(3) of the ETS Directive in proceedings between Luxaviation SA and the Minister of the Environment in Luxembourg.[62] The order is not mentioned in the reiteration of the State's submissions, and NAS understands that the Referring Court considers the order not relevant to the question in the Request.[63] However, NAS will for the sake of completeness offer a brief observation on the order since it is mentioned by the Referring Court in its overview of ECJ case-law on the ETS Directive.[64]

(83) The case concerned a penalty for failure to surrender allowances within the time limit in 2016 for 2015 emissions. Luxaviation maintained before the national court that it was convinced in good faith that it had completed the surrender procedure. The national court referred questions concerning, *inter alia*, the application of the EU Charter of Fundamental Rights, the proportionality principle in EU law and force majeure.[65]

(84) The *Luxaviation* case did not concern insolvency proceedings and the question of the scope of the obligation to surrender emission allowances in insolvency was not raised by the referring court or considered by the ECJ. It follows clearly from the ECJ's consideration of the questions referred in that case that is has no relevance for the interpretation of the question in the Request.

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[62] The order in *Luxaviaion SA v. Ministre de l'Environnement*, C-113/19, EU:C:2020:228.
[63] See the Request Section 1 paragraph 3.
[64] The Request Section 4.2.
[65] Case C-113/19, *Luxaviation*, paragraph 28.

4.4.5 Case C-165/20, *Air Berlin*

(85) The preliminary ruling in case C-165/20, *Air Berlin* concerned questions from the administrative court of Berlin regarding whether the ETS Directive precluded national authorities from rescinding free allowances because the operations of Air Berlin had ceased due to insolvency. The ECJ did not assess the status of the obligation to surrender emission allowances in insolvency.

(86) The ECJ focused on Article 3e of the ETS Directive, concluding that the provision must be interpreted as meaning that the number of aviation allowances allocated to an aircraft operator must, in the event of cessation of that operator's aviation activities during the relevant trading period, be reduced proportionately.

(87) The ECJ did not address the question of the obligation to surrender allowances in the event of insolvency and the case offers no guidance on the question raised in the present Request.

4.5 The High Court of Ireland's decision on the issue

(88) The judgment of the High Court dated 22 April 2021 in case 2020/366 COS[66] is highly relevant in determining the question raised by the Request. It not only addresses the specific question at hand, but also concerns the same insolvency process that forms the factual background for the Request as further explained in Section 2.1 above.

(89) The IEPA had voted against the scheme of arrangement under the Irish examinership. A subsequent letter 24 March 2021 from Messrs. Fieldfisher on behalf of the IEPA, stated that the IEPA was "*governed by the provisions of the EU ETS Directive and the relevant EU and Irish regulations and we reserve our clients [sic] position in that regard*".

[66] The judgement in 2020/366 COS, confirming the proposals for a scheme of arrangement between each of Arctic Aviation Assets Designated Activity Company, Norwegian Air International Limited, Drammensfjorden Leasing Limited, Torskefjorden Leasing Limited, Lysakerfjorden Leasing Limited and Norwegian Air Shuttle ASA and their respective members and creditors.

(90) In its judgment 22 April 2021, the High Court concluded that the IEPA and its claim was comprised by the scheme of arrangement as neither EU legislation, nor considerations on the purpose of the Directive provided grounds of exemption from Irish national insolvency law. The consequence of this conclusion is that the IEPA's claim for allowances was settled by dividend on an equal basis with all other ordinary claims comprised by the scheme of arrangement. The High Court assessed the matter in detail at paragraphs 194-221 of its judgment (where IEPA is referred to as "EPA"). The High Court's key findings of relevance to the present case are found in paragraphs 217 and 218 of the judgment. To provide relevant background and context to these findings, the High Court's assessment in paragraphs 194-221 are cited in full below (our emphasis added below, except in Section 214 where the High Court has added emphasis):

*"**194**. The proposals for NAI contain a class of creditors referred to as Contingent Unagreed Creditor. The sole member of that class is the EPA.*

***195.** The proposals provide at paras. 10.5.10 that as at the date of the proposals the liability and the quantum if any to the EPA has not been determined, agreed or crystallised. They provide that unless agreed and crystallised prior to the effective date the claim of the EPA should be determined by the expert determination process.*

***196.** The proposals treat the EPA as an unsecured creditor and that any amount due or found to be due to the EPA is subject to the same treatment as unsecured creditors. The dividend for unsecured creditors of NAI is a cash dividend of 1% of its net agreed debt or of its determined debt.*

***197.** In a letter of 19 March, 2021, addressed to NAI the EPA informed the company that it did not accept the proposal contained in the examiner's proposals. By letter dated 20 March 2021 the examiner's solicitors William Fry informed the EPA that the examiner noted that the EPA "cannot accept the*

proposals", and that the effect of the proposals, if confirmed would be the payment of a cash dividend of 1% of any amount determined to be due, in full and final satisfaction of the total amount of any liability.

***198.** The EPA attended the statutory meeting and voted against the proposals. By letter dated 24 March 2021 the solicitors for the EPA Fieldfisher LLP confirmed to the examiner that they would not be attending the confirmation hearing. They concluded by stating "our client is governed by the provisions of the EU ETS Directive and the relevant EU and Irish regulations and we reserve our clients position in that regard."*

***199.** The attention of the court was drawn to the provisions of European Communities (Greenhouse Gas Emissions Trading) (Aviation) Regulations 2010, SI 261/2010.*

***200.** These Regulations implement in the State Directive 2003/87/EC of the European Parliament and of the Council of 13 October, 2003, which establishes a scheme for greenhouse gas emission allowance trading within the EU.*

***201.** The Regulations govern the monitoring of emissions by operators holding a valid operating licence granted by the Commission for Aviation Regulation and impose obligations on operators requiring them to report and verify emissions from aircraft, and to apply for or acquire an allocation of carbon allowances for emissions ("Allowances"). Regulation 23 establishes certain offences for failure to comply and provides for the imposition of penalties and other sanctions for non-compliance.*

***202.** The Regulations require that by 31 March in each year aircraft operators submit to the agency a report on its "verified emissions figures" in respect of the previous year. By 30 April each year, the operator is required to surrender a corresponding number of Allowances to the EPA.*

203. *If the operator does not provide sufficient Allowances to account for the previous year's emissions an excess emissions penalty of €100 per ton of carbon is applied, (referred to as the "Penalty"), and the operator remains under an obligation to surrender the correct number of outstanding Allowances.*

204. *NAI has complied with these obligations each year since 2015. It is said that it will also comply with the obligation by 31 March, 2021, to file its report as to its emissions figures for 2020. However, it does not expect that the company will be in a position to surrender Allowances by 30 April, 2021. Accordingly, it is expected to become liable for penalties.*

205. *Based on recorded traffic data and estimates of associated emissions for 2020 the EPA has estimated the financial liability for NAI in respect of 2020 Allowances in the amount of €7.4 million which will become due on 30 April, 2021.*

206. *The examiner states that NAI's own estimate of the liability in respect of the 2020 allowances is for the slightly lower amount of between €6,745,040 and €7,082,292. He says that if those figures are applied and if the Allowances are not surrendered to correspond with these, the estimated total liability including the Penalty will be €16,862,600.*

207. *The examiner states that the emissions in respect of 2020 were emitted in the period prior to the presentation of the petition in these proceedings on 18 November, 2020.*

208. *In circumstances where NAI will not have sufficient assets or cash with which to discharge the liability for Allowances, or for the Penalty, it is submitted that the proposals for the payment of a dividend of 1% will apply to those pecuniary liabilities.*

209. *Regulation 23 contains the following provisions: -*

"(11) An aircraft operator who fails to surrender allowances as required by Regulation 16(3), not later than 30 April of each year and commencing after 1 January 2013, to cover its emissions during the preceding year shall be liable for payment to the Agency of an excess emissions penalty in the amount of €100 for each tonne of carbon dioxide equivalent emitted for which the aircraft operator has not surrendered allowances.

(12) Payment of the excess emissions penalty specified in this Regulation shall not release the 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.

(13) An excess emissions penalty under this Regulation may be recovered by the Agency, as a simple contract debt in a court of competent jurisdiction.

(14) In the event that an aircraft operator fails to comply with the requirements of these Regulations and where other enforcement measures have failed to ensure compliance, the Agency may, with the approval of the Minister, request the Commission to decide on the imposition of an operating ban on an aircraft operator and shall submit a report to the Commission in accordance with paragraph 15".

***210.** A report pursuant to para. 15 contains details of any non-compliance and any enforcement action taken by the agency and recommendations concerning the scope of any operating ban.*

***211.** The examiner submits that any pecuniary obligations, being any liability which NIA would incur for the acquisition of Allowances which would be surrendered under the regulations and any Penalty for which NAI is liable constitute debt obligations to which the Proposals will apply and that once the*

Expert has determined the quantum of any such liabilities, the amount due will attract the dividend of 1% provided for under the proposals.

212. *The treatment of unsecured creditors is described in para. 10.5.3 of the proposals as follows: -*

> *"Each unsecured creditor shall be paid a cash dividend of 1% of the net agreed debt in full and final satisfaction of the total amount of such unsecured creditor's claims. Consequently, the unsecured creditors are impaired by these proposals".*

213. *The operative provision of Clause 10.5.10, which relates specifically to the EPA, contains the following provision regarding releases: -*

> *"The Contingent Unagreed Creditor shall be deemed to have absolutely, irrevocably and unconditionally discharged and released each relevant related company from any liability associated or related to the contingent and agreed creditor's claims. Each such related company shall be treated as so discharged and released by operation of these proposals without any further action on the part of the related companies under the related proposals or otherwise".*

214. *Attention was drawn also to the definition of the term "claim" in the proposals, as follows:-*

> *"Claim means any claim or right of action which a creditor may have against the company as at the petition date, including <u>but not limited</u> to any right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, prospective, matured, unmatured, disputed, undisputed, ascertained, unascertained, legal equitable secured, or unsecured (and including for the avoidance of doubt and without limitation (1) the right to payment of any repudiation post-*

petition liabilities, and (2) any claim from the counter indemnity creditor or a Contingent Unagreed Creditor that has not crystallised". (emphasis added)

215. *Although the EPA voted against the proposals it has not articulated any objection to the confirmation of the proposals and specifically informed the examiner that it did not intend to participate in the hearing to confirm the proposals.*

216. *In their letter of 24 March, 2021, Messrs. Fieldfisher on behalf of the EPA stated: -*

"Our client is governed by the provisions of the EU ETS Directive and the relevant EU and Irish regulations and we reserve our client's position in that regard".

217. *There can be no doubt that the EPA in its activity, which includes its response to these proposals, is governed by the ETS Directive and relevant EU and Irish regulations. The companies are of course subject also to those regulations but equally to the provisions of the Companies Act 2014. In that regard, any claims against the company would on a liquidation be governed by the provisions of Part 11 of the Act and in an examinership by the provisions of Part 10.*

218. *I have not been referred to any provision either in the regulations or in the Companies Act which confers priority status on pecuniary obligations under the regulations. In the absence of such express priority, there can be no objection to the treatment in the proposals of the EPA for a dividend comparable to that payable to unsecured creditors. This is consistent with the judgment of Carroll J. in Re Irish ISPAT Limited (in voluntary liquidation) [2005] 2 IR 338, where the court refused an application by the agency for orders requiring the liquidator to undertake and discharge the costs associated with remedial work pursuant to s.*

58 of the Waste Management Act 1996 in priority to other claims against the company. This being the case, I am satisfied that it is appropriate to confirm the proposals of the examiner.

219. *The court raised with the examiner during the hearing a question as to whether confirmation of these proposals would eliminate any prospect of the agency requesting the commission to decide on the imposition of an operating ban in accordance with the provisions of Regulation 23.14. In response, it was not submitted to the court that in circumstances where the company would discharge any pecuniary liability in respect of allowances or penalties by payment only of the dividend under the scheme once confirmed, this would render the company compliant for the purpose of para. 14. The court was therefore not asked to make a finding on such a question and I expressed some doubt as to whether doing so in the absence of any submissions by the agency would be appropriate. The remaining question for the court was whether the possibility of any remedy later being invoked by the agency pursuant to para. 14 should inform or alter the opinion expressed by the examiner as to the viability of the company itself having regard to the very radical remedy of an operating ban provided for in para. 14.*

220. *It was submitted on behalf of the examiner that neither the companies nor the examiner had any direct experience of such a remedy actually being invoked. The court was informed that the examiner was of the view that were this to arise it could in due course be met by the company and therefore, this question did not undermine his opinion as to the future viability of the company.*

221. *A good argument could be made to the effect that payments made pursuant to the scheme and therefore in accordance with company law, would render the company compliant for the purposes of para. 23.14 of the Regulations. It is unnecessary for me to make a finding on that subject and, in the absence of participation and submissions by the Agency, I did not do so. I accept the*

statement of the examiner that this question does not undermine the view expressed by him as to the viability of the company and accordingly would not justify refusal of confirmation of the proposals."

(91) The High Court's conclusions above apply correspondingly to the present case. Since the ETS Directive as incorporated in Irish law did not specifically govern the status of the surrender obligation in insolvency proceedings, and national insolvency law did not confer priority status on the claim for settlement of the surrender obligation, the claim was to be settled by dividend in accordance with the scheme of arrangement.

(92) To distinguish the present case from the High Court's decision, the State has emphasised that Oslo District Court did not consider whether the obligation to surrender allowances could be settled by dividend when confirming the reconstruction plan. It is therefore appropriate to clarify why Oslo District Court did not consider the issue. Under Irish insolvency law, the court supervising an insolvency proceeding can make a binding decision during that proceeding on whether a creditor's claim should be included or not based on the substance of the claim. Consequently, the High Court could decide that the surrender obligation was a claim covered by the scheme of arrangement to be settled by dividend based on an expert determination process.[67] Under Norwegian insolvency law, on the other hand, the court cannot consider the merits of a disputed claim unless the vote of the creditor in question could affect the outcome of the vote on the proposal for a reconstruction plan. Otherwise, the substance of that claim will be decided in a separate court proceeding before the relevant creditor receives payment. The State's vote could not influence the outcome of the vote on NAS's proposal for a reconstruction plan. Oslo District Court therefore lacked legal basis for ruling on the substance of the State's claim in its decision to confirm NAS's reconstruction plan.

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[67] See paragraphs 67-69 of the High Court's judgement.

(93) The High Court decision above also illustrates that an advisory opinion supporting the State's interpretation would necessarily entail that not only Norwegian law, but also Irish law, is in violation of EU and EEA law.

(94) Furthermore, NAS is not aware of any EU or EEA Member State, including Norway, requiring in national legislation that claims for settlement of surrender obligations shall have priority in compulsory debt settlements under insolvency law. The consequence of the arguments of the State is therefore that most, if not all, EU and EEA Member States are likely in breach of their Treaty obligations. This would be a highly surprising finding given that the surrender obligation mechanism enshrined in Article 12(2a) of the ETS Directive has applied to stationary installations under Article 12(3) of the Directive since the adoption of the Directive in 2003.

4.6 Observations on the State's arguments relating to the purpose of the ETS Directive

(95) As described in the Request Section 5.2, the State argues that the ETS Directive's purpose to achieve reductions of greenhouse gas emissions supports the State's interpretation of Article 12(2a). In NAS's opinion, this argument is unconvincing and without merit.

(96) First, the purpose of the ETS Directive cannot in any case be applied to establish a highly specific rule on surrender obligations in insolvency which has no basis in the wording of the Directive. That would be comparable to attributing independent legal force to a preamble of a Directive, without basis in the wording of the Directive itself. It is settled case-law that the preamble to an EU act has no binding legal force.[68] There is even less basis for applying an aim of a Directive as such as basis for a positivistic rule that has no basis in the wording of the Directive.

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[68] See case C-345/13, *Karen Millen Fashions*, paragraph 31, case C-303/19, *Istituto nazionale della previdenza sociale*, paragraph 26, and case C-165/20, Air Berlin, paragraph 55.

(97) Second, there is no contradiction between the purpose of the ETS Directive and NAS's interpretation of Article 12(2a). NAS's interpretation merely means that the regulation and status of the surrender obligation in national insolvency proceedings is left to Member State discretion.

(98) Consequently, it would be within the discretion of the State to set out in national law that super priority should be conferred on claims for settlement of the surrender obligation. However, no legislation to such effect has been enacted. This means that the general rules in Norwegian insolvency law applies to settlement of surrender obligations as to other claims.

(99) Moreover, if diverging substantive rules on insolvency proceedings across EU and EEA Member States were to be considered a challenge for realising the aims of the ETS Directive – which in NAS's opinion is not the case – the Union could adopt measures requiring Member States to adopt appropriate amendments to national insolvency legislation. Such EU legislation has, however, clearly not been adopted so far and, to NAS's knowledge, the need for such legislation has not been discussed at EU level.

(100) An example of EU legislation related to insolvency challenges within the environmental area is provided by Directive 2004/35/CE on environmental liability.[69] The purpose of this Directive is "*to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage*", see Article 1 of the Directive. Article 14(1) of the Directive provides that:

> "*Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of*

[69] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56, 30.4.2004, implemented in the EEA Agreement by EEA Joint Committee decision No. 17/2009.

enabling operators to use financial guarantees to cover their responsibilities under this Directive."

(101) It would be perfectly possible to consider equivalent measures within EU ETS – whether at Union or Member State level – if considered necessary. Such measures would, however, require careful consideration as part of legislative procedures. It is certainly not for the courts at EU/EEA or national level to decide the complexities involved in conferring priority in insolvency on certain claims based on a Directive wording that does not mention the issue and does not provide any indication that it has been considered by the legislator.

(102) Finally, the Norwegian CO2 levy as an instrument to achieve the climate goals in the Effort Sharing Regulation, illustrates that the climate aims of a measure has no bearing on its treatment in insolvency. Neither the Effort Sharing Regulation nor other EU/EEA legislation preclude that the CO2 levy is considered a "claim" comprised by Norwegian insolvency law that can be settled by dividend. The climate purpose of the EU ETS therefore provides no basis for treating the surrender obligation differently.

5. The lack of harmonisation of substantive insolvency law at EU level

(103) It follows clearly from Section 4 above that the ETS Directive does not preclude that the obligation to surrender allowances may be settled by dividend in a compulsory debt settlement in accordance with national insolvency law.

(104) A better suited legal basis at EU level for governing the status of allowances in insolvency would be the internal market provision in Article 114 TFEU and EU insolvency legislation adopted on this basis. National substantive insolvency law has, however, not been made subject to harmonisation at EU level, leaving considerable discretion to the Member States. In this section, we provide an overview of the lack of harmonisation in EU insolvency legislation, which also provides a background as to why the matter at hand is neither harmonised by the ETS Directive nor EU insolvency legislation.

(105) Current EU insolvency legislation consists primarily of Regulation 2015/848 (the "**Insolvency Regulation**")[70] and Directive 2019/1023 (the "**Restructuring and Insolvency Directive**").[71] None of these Acts have been considered EEA relevant and they are not incorporated in the EEA Agreement. While the Restructuring and Insolvency Directive merely encompass pre-insolvency and debt-discharge measures, the Insolvency Regulation governs applicable law in cross-border insolvency cases. The absence of harmonisation of substantive insolvency law within the EU is described and explained as follows in paragraph 22 of the preamble to the Insolvency Regulation:

> *"This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. [...]"*

(106) Accordingly, distribution of proceeds among creditors, including ranking of claims, is not harmonised at EU level. This is underscored by Article 7(2)(i) in the Insolvency Regulation which sets out:

> *"The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: [...]*

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[70] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141/19, 5.6.2015.

[71] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172/18, 26.6.2019.

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;"

(107) The Restructuring and Insolvency Directive also suggests that ranking of claims and distribution of proceeds are regulated by national insolvency law, cf. *inter alia* Articles 2 and 68 of the Directive.

(108) Furthermore, the Explanatory Memorandum to the European Commission's proposal for a directive harmonising certain aspects of insolvency law underline that insolvency law is not harmonised at EU level:[72]

> *"The lack of harmonised insolvency regimes has long been identified as one of the key obstacles to the freedom of capital movement in the EU and to greater integration of the EU's capital markets. [...]"*[73]
>
> *"[...]. Regulation (EU) 2015/848 has no impact on the content of national insolvency law. It determines the applicable law but does not prescribe any features or minimum standards for that law. Therefore, it does not address the divergences across the Member States' insolvency laws (and the resulting problems and costs). [...]"*[74]
>
> *"At the same time, given the close link between insolvency laws and other areas of national law (such as property law and labour law), and the differences in the main policy objectives of insolvency law, some Member States have expressed reservations to binding legislation harmonising insolvency law, including in a letter sent to the Commission on 1 April 2021. [...]"*[75]

[72] COM(2022) 702 final, 7.12.2022.
[73] *Ibid.*, p. 1.
[74] *Ibid.*, p. 3.
[75] *Ibid.*, p. 8.

(109) The Explanatory Memorandum also considers the Commission proposal's coherence with Article 14 of Directive 2004/35/EC:

> *"The proposal is also coherent with the Directive 2004/35/EC of the European Parliament and of the Council, which aims to limit the accumulation of environmental liabilities and to ensure compliance with the 'polluter pays' principle. Directive 2004/35/EC obliges Member States to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under Directive 2004/35/EC. These mechanisms aim to ensure that claims will be served even in cases where the debtor becomes insolvent. The proposal does not interfere with those measures under Directive 2004/35/EC. On the contrary, a more efficient insolvency framework would support a speedier and more effective recovery of asset value overall and hence would facilitate the compensation for environmental claims against an insolvent company even without having recourse to financial security instruments, in full consistence with the aims of Directive 2004/35/EC."*[76]

(110) The Explanatory Memorandum does not mention the ETS Directive, which suggests that the latter directive does not require Member States to ensure the debtor's obligations to surrender allowances in instances of insolvency.

(111) Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (the **"Insolvency Protection Directive"**) is, on the other hand, incorporated in the EEA Agreement.[77] The directive stipulates that to safeguard employees in the event of their employer's insolvency, Member States are required to establish a body that guarantees, to a certain extent, the payment of the outstanding

[76] *Ibid.*, p. 4-5.
[77] Decision of the EEA Joint Committee No. 51/2009 of 24 April 2009.

claims of the concerned employees. However, establishing a body that guarantees the payment of certain claims if they are not covered in the insolvency proceeding is not harmonisation of national insolvency law as such. This is emphasised in Advocate General Bobek's opinion in ECJ case C-454/15.[78] In his opinion, the Advocate General stated *inter alia* that:

> *"The national court's question is whether, when an employer goes insolvent, Article 8 of Directive 2008/94 mandates that monies deducted by the employer from an employee's salary in order to be deposited in a supplementary pension fund but which were not in fact paid by the employer into a separate account, be excluded from the insolvency proceedings in respect of the employer's assets. In other words, the question is whether Article 8 reaches so far as to require the modification or setting aside of the relevant provisions of national insolvency regulations which do not contain any specific rules dealing with that particular situation.*
>
> *My short answer to that precise question is 'no'. It comes, however, with a qualifying caveat. The chief reason for the negative answer is simple: I find it difficult to construe an instrument of minimum harmonisation, such as Directive 2008/94, and in particular a deliberately loose provision of that directive, such as Article 8 (which leaves considerable discretion to the Member State as regards the means by which it is to be implemented), in a way that effectively necessitates the introduction of a very specific provision into a Member State's legal order, such as a rule requiring the exclusion of unpaid pension contributions from the insolvency proceedings of an employer."*[79]

(112) The Advocate General also held that:

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[78] Opinion of AG Bobek (C:2016:653) in ECJ case *Jürgen Webb-Sämann v Christopher Seagon,* C-454/15, C:2016:891.

[79] *Ibid.*, paragraphs 52 and 53.

"This answer to the referring court also makes practical sense. Directive 2008/94 does not seek to fully regulate and harmonise national pension law or insolvency law. Furthermore, insolvency and pension law are highly complicated and technical at the national level. Member States thus retain control over how insolvency proceedings are to be organised and creditors are to be ranked. Reading Article 8 so as to require the exclusion of money in order to guarantee employees' pension contributions is likely to interfere significantly with how Member States prioritise creditors in insolvency proceedings. There is nothing to suggest that Article 8 or Directive 2008/94 was designed to have such far reaching effects."[80]

(113) In line with the Advocate General's conclusion, the ECJ ruled that Article 8 of Directive 2008/94/EC did not require that money withheld from employee salary which should have been paid into a pension fund, to be excluded from the scope of insolvency proceedings.

(114) NAS asserts that the lack of harmonisation of insolvency law at EU level underpins that the ETS Directive cannot, without any basis in the Directive's wording, be interpreted as requiring Member States to exclude the debtor's obligation to surrender allowances from insolvency proceedings.

6. The lack of national implementing measures and consequences of the State's view

(115) Although not decisive for the interpretation of Article 12(2a) of the ETS Directive as such, the fact that the State has made no attempts to incorporate the interpretation argued by the State in Norwegian law does provide relevant context in the present case. The incorporation made in Section 12 of the Norwegian Greenhouse Gas Emissions Allowance Act, cited in the Request Section 3.2, only mirrors the wording of the ETS

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[80] *Ibid.*, paragraph 69.

Directive. As the present case illustrates, this is by no means sufficient to incorporate such a rule as argued by the State.

(116) The lack of a legal basis for conferring priority on the State's claim for settlement of the surrender obligation was, in fact, discussed by the Norwegian Quota Commission in 1999.[81] The Commission was appointed to draw up a national trading system for greenhouse gases using allowances and based on the Kyoto Protocol. In the report, the Commission states that:

> *"If weak finances are the reason for the failure to fulfill the obligation to surrender allowances, a relevant question is what priority the state's refund claim or claims related to other sanctions will have in a potential bankruptcy. Reasonableness suggests that claims corresponding to businesses' lack of payment for their greenhouse gas emissions should be given high priority. However, as the Creditors Recovery Act of 8 June 1984 No. 59 (no. lov om fordringshavernes dekningsrett av 8. Juni 1984 nr. 59) is currently formulated, this will not be the case."*[82]

(117) The Commission's view above applies correspondingly to incorporation of the EU ETS in Norwegian law. Nevertheless, NAS has not been able to find any indication that such legislative amendment has subsequently been considered in Norwegian law.

(118) The consequence of the State's argument is that it relies on an interpretation of a Directive imposing obligations on the State as a basis for imposing obligations and a very significant penalty on a private party without basis in national law. While the lack of national incorporation is a separate issue to be decided under Norwegian law by the Referring Court, it also provides context to the question referred for an Advisory Opinion.

[81] NOU 2000:1 – Et kvotesystem for klimagasser, available (in Norwegian) at url https://www.regjeringen.no/no/dokumenter/nou-2000-1/id142331/.

[82] NOU 2000:1 – Et kvotesystem for klimagasser, section 14.3.4 (our translation).

(119) It follows from the duty of loyalty enshrined in Article 3 of the EEA Agreement that the State is under an obligation to incorporate EEA Directives into national law in a clear and unambiguous manner, ensuring legal certainty for private parties. If the State would prevail with its interpretation of the ETS Directive in the present case, the requirements for national incorporation of such rule on the basis of Article 3 EEA would not be met. Consequently, the view of the State would indirectly mean that the State is in breach of its Treaty obligations under EEA law. The same would, in turn, likely be the case in a large number of EU and EEA Member States. NAS finds it highly unlikely that this should be the case without any previous action having been taken by the European Commission or the EFTA Surveillance Authority.

(120) The State's position that the obligation to surrender allowances shall be fully settled despite the debtor being subject to an insolvency process under national insolvency law, is also likely to have significant and intrusive consequences for several stakeholders.

(121) Firstly, the State's position implies that the State would receive coverage to the detriment of all other creditors, including those with claims that are currently prioritised under national law, essentially establishing a super priority for the claim to surrender allowances. Unless the obligation is fully met, the debtor would also be subjected to substantial fines. In the current matter, super priority and full settlement of the obligation to surrender allowances would require NAS to spend approximately NOK 300 million of available cash to purchase and surrender allowances. As NAS had a total of NOK 500 million available for cash dividends to unsecured creditors, this is likely to have significantly reduced cash dividends to the other creditors. As the court's acceptance of the reconstruction plan presupposed support from creditors representing a majority of the unsecured debt, super priority for the State could have led to an unsuccessful reconstruction, resulting in NAS's bankruptcy. Thus, the State's position is likely to render reconstruction processes unattainable for companies obligated to

surrender allowances, undermining the object of such processes and leading to unnecessary bankruptcies for viable businesses.

(122) Secondly, the State's perspective, which implies that the obligation to surrender emission allowances takes precedence over the debtor's obligation to pay salaries and pension obligations, weakens employee rights. This contradicts the protection otherwise granted to employees in the event of their employer's insolvency and the aim to safeguard employee claims as outlined in EU directives concerning insolvency, see Section 5.

(123) Thirdly, the State's position is likely to affect the debtor's operations even before insolvency proceedings are initiated. Establishing a super priority for one creditor will reduce coverage for other creditors, and thus negatively affect the debtors access to unsecured credit from lenders, vendors, and customers whilst financially challenged, or significantly increase the price of such credit. Even creditors with security rights over the allowances, would rank behind the State's claim. This would likely entail that the value of such allowances as collateral and a means to raise credit, would be close to zero.

(124) Accordingly, changing the ranking of claims could significantly influence dynamics between debtors and creditors before and during insolvency processes. Although it is challenging to predict all potential consequences, NAS believes that the outcomes described above are likely to transpire. This implies that there should be a substantial threshold for interpreting the ETS Directive as interfering with the priority order established in national insolvency law.

7. Proposed answer to the Referring Court's question

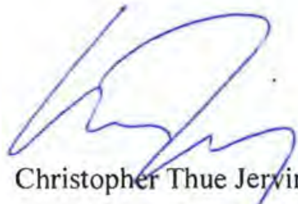
(125) In light of the observations above, NAS proposes that the EFTA Court answers the question raised by the Referring Court as follows:

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.

* * *

Oslo, 8 January 2024

Atle Skaldebø-Rød
Advokat



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