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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by

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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-12/23

Norwegian Air Shuttle ASA

v

Staten v/Klima- og miljødepartementet

in which the Oslo District Court (*Oslo tingrett*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement concerning the interpretation and application of Directive 2003/87 establishing a system for greenhouse gas emission allowances trading within the Community.

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1 INTRODUCTION

1. The present request for an Advisory Opinion submitted by the Oslo District Court ("**the Referring Court**") to the EFTA Court on 6 October 2023 ("**the Request**") concerns the interpretation of the European Economic Area ("**EEA**") rules on the obligation to surrender emission allowances in a compulsory debt settlement in connection with restructuring of an insolvent operator.[1]

2. This first climate case before the EFTA Court concerns the Emission Trading System ("**ETS**"), the details of which are explained in section 5.2 below. In essence, the ETS is designed to cap the emission of greenhouse gasses ("**GHG**") in the EEA by issuing a limited number of "emission allowances" and obliging operators in sectors covered by the system to surrender a number of such allowances which correspond to their actual GHG emissions.

3. This case concerns the handling of emission allowances when an insolvent aircraft operator undergoes a court-driven restructuring. The question is whether the aircraft operator's obligation to surrender emission allowances can be treated like any other financial obligation of a debtor, and settled by a dividend representing a percentage of the market value of the emission allowances which the operator should have surrendered, or whether emission allowances must be surrendered to national authorities in full regardless of the restructuring process.

4. The plaintiff in the main proceedings, Norwegian Air Shuttle ASA ("**NAS**" or "**the Plaintiff**"), is a Norwegian aircraft operator subject to an obligation to surrender emission allowances according to Law No 99 of 17 December 2004 on emission allowances obligations and greenhouse gas emissions allowance trading ("**the Greenhouse Gas Emission Allowance Act**"). That Act implements Directive 2003/87[2] establishing a system[3] for greenhouse gas emission allowance trading within the Community as amended ("**the ETS Directive**" or "**the Directive**").

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[1] The case in the main proceedings concerns an aircraft operator according to Article 3(o) of the ETS Directive, hence the Authority will use the term "operator" in its written observations.

[2] Directive 2003/87 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, incorporated into the EEA Agreement by Joint Committee Decision No 146/2007 of 26 October 2007 in points 1f and 21al of Annex XX, which entered into force on 29 December 2007 (OJ L 100, 10.4.2008, p. 92.). Despite several adaptations being addressed in the Joint Committee Decision, none of them apply directly to the case in the main proceedings. Amendments to the ETS Directive were adopted by Directive 2004/101/EC, Directive 2008/101/EC, Directive 2009/29/EC, Directive 2018/410/EU, Directive 2023/958/EU, and Directive 2023/959/EU.

[3] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC *to enhance cost-effective emission reductions and low-carbon*

5. For the year 2019, NAS was allocated 824,183 free greenhouse gas emission allowances.[4] For the year 2020, NAS was allocated 827,543 free greenhouse gas emission allowances.[5] These allowances were placed in the operator's allowance account in the greenhouse gas emissions allowance registry (*klimakvoteregister*).

6. By 30 April each year,[6] aircraft operators subject to the obligation to surrender allowances must transfer a number of allowances corresponding to the operator's reportable greenhouse gas emissions from the preceding year to the Norwegian registry for greenhouse gas emission allowances.[7]

7. The Ministry of Climate and Environment sent a letter to the Federation of Norwegian Aviation Industries (*NHO Luftfart*) on 17 April 2020 which stated that the ETS Directive does not allow for extensions of the time limit or other exemptions from the obligation to surrender emission allowances, and that there was no margin to refrain from imposing an administrative penalty.

8. The travel restrictions introduced from mid-March 2020, due to the Covid 19 pandemic, put NAS in financial straits which led to court-driven restructuring negotiations. Restructuring proceedings were opened in Ireland, in respect of NAS's Irish subsidiaries, and in Norway, where a "Reconstructor" was appointed.[8]

9. Restructuring plans for NAS and its Irish subsidiaries were drawn up. In short, the final proposals of these plans were identical and consisted in unsecured and non-preferential creditors being allocated dividends corresponding to 5% of their

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investments, and Decision (EU) 2015/1814, incorporated into the EEA Agreement by Joint Committee Decision No 112/2020 of 14 July 2020 in point 21al of Annex XX, which entered into force on 1 February 2021 (OJ L 172, 6.7.2023, p. 33), changed the name of the ETS Directive 2003/87 from "a scheme" to "a system".

[4] Delegated Decision of the EFTA Surveillance Authority of 17 March 2017 instructing the Central Administrator of the European Union Transaction Log to enter the national aviation allocation tables of Norway and Iceland into the European Union Transaction Log in accordance with Article 54 of Commission Regulation (EU) No 389/2013, Doc No 846753. See also publicly available information in the European Union Transaction Log for "Norwegian Air Shuttle AOC AS", accessible at https://ec.europa.eu/clima/ets/ohaDetails.do?accountID=90245&action=all&languageCode=en&returnURL=installationName%3D%26accountHolder%3D%26search%3DSearch%26permitIdentifier%3D%26form%3Doha%26searchType%3Doha%26currentSortSettings%3D%26mainActivityType%3D10%26installationIdentifier%3D%26account.registryCodes%3DNO%26languageCode%3Den&registryCode=NO.

[5] Decision of the EFTA Surveillance Authority of 20 September 2021 instructing the Central Administrator of the European Union Transaction Log to enter the national aviation allocation tables of Iceland and Norway into the European Union Transaction Log, Doc No 1187698.

[6] Article 12(2a) of the ETS Directive as in force at the time when the Request was made. With the entry into force of Directives 2023/958 and 959 in the EEA, this deadline is henceforth 30 September. See further paragraph 13 and footnote 15 below.

[7] See section 4 and the first paragraph of section 12 of the ETS Act.

[8] A number of NAS's Irish subsidiaries, including Norwegian Air International Limited, which was subject to the obligation to surrender allowances on an independent basis under the Irish rules governing greenhouse gas emission allowances.

underlaying claims. Pursuant to both Norwegian and Irish insolvency legislation, the obligation to surrender allowances for emissions in 2020 up to the opening of the restructuring negotiations was converted into pecuniary claims.

10. On 22 April 2021, the Irish High Court delivered a decision in respect of the restructuring of NAS's subsidiary, Norwegian Air Limited. According to NAS, that decision entailed that the subsidiary's obligation to surrender allowances was covered by the Irish Scheme of Arrangement and could be settled by dividend. According to NAS, the Environmental Protection Agency of Ireland received its dividend, waived the claim for surrender of greenhouse gas emission allowances, and did not impose an administrative penalty. It appears from that decision that the Environmental Protection Agency opposed the restructuring proposal, but that its submissions to the High Court were limited to noting that "[the Environmental Protection Agency] *is governed by the provisions of the EU ETS Directive and the relevant EU and Irish regulations"* and that its position was *"reserved* […] *in that regard*".[9] In the absence of substantive arguments by the Environmental Protection Agency, the High Court confirmed the restructuring proposals in this regard.

11. The present Request, in essence, raises the question whether it is contrary to Norway's EEA law obligations under the ETS Directive, in particular Article 12(2a), to allow the obligation to surrender greenhouse gas emission allowances to be settled by dividend in a compulsory debt settlement in connection with a restructuring. In the national proceedings leading to the present Request, the Plaintiff has argued that Article 12(2a) would not preclude that the obligation to surrender emission allowances can be settled by dividend in a compulsory debt settlement in connection with a court-driven restructuring of an insolvent operator ("**the Plaintiff's interpretation**").[10] The Defendant has reasoned that Article 12(2a) does preclude such a settlement.[11]

2 EEA LAW

2.1 The ETS Directive

12. The ETS Directive, as amended and as adapted to the EEA Agreement, establishes a system for GHG emission allowance trading within the EEA in order to promote

[9] Accessible on the website of the Irish judiciary, www.courts.ie, as judgment of Mr. Justice Quinn of 22 April 2021 in Case 2020/366 COS, record [2021] IEHC 272, see paras. 215-218.
[10] See section 5.1, page 10 of the Request.
[11] See section 5.2, page 11 of the Request.

reductions of GHG emissions in a cost-effective and economically efficient way.[12] According to Article 1, as amended, the Directive provides for the reductions of GHG emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.[13]

13. It was by virtue of Directive 2008/101/EC, which entered into force in the EEA on 2 April 2011, that aviation activities were included in the ETS Directive.[14] That Directive also introduced Article 12(2a), which is the subject of the Request. The Authority's written observations reflect the wording and article numbering of the ETS Directive as in force under the EEA Agreement, following successive amendments, on 6 October 2023, when the Request was made, while highlighting changes which are subsequent to the facts of the present case, where relevant.[15]

14. Directive 2018/410/EU amending the ETS Directive to enhance cost-effective reductions and low-carbon investments entered into force in the EEA on 1 February 2021.[16] Pursuant to that Directive, the previously named “scheme” changed to “system”, and the validity of allowances issued from 1 January 2013 became indefinite.[17] That Directive furthermore sets out the framework for the fourth trading period from 2021 to 2030.

15. Article 12 of the ETS Directive, entitled “Transfer, surrender and cancellations of allowances”, provides, insofar as relevant:[18]

“1. Member States shall ensure that allowances can be transferred between:

(a) persons within the Union;

(b) persons within the Union and persons in third countries, where such allowances are recognised in accordance with the procedure referred to in

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[12] See Article 1 of the ETS Directive.
[13] *Idem.*
[14] See Joint Committee Decision No 6/2011 of 1 April 2011 (OJ L 93, 7.4.2011, p. 35).
[15] The Authority notes that its overview of the ETS Directive as in force under the EEA Agreement on 6 October 2023 does not include the changes introduced by Directives 2023/958 and 2023/959, which were incorporated into the EEA Agreement by Joint Committee Decision No 334/2023 of 8 December 2023 (not yet published), and which entered into force on 30 December 2023. For the sake of clarity, the Authority has opted to cite the provisions of the ETS Directive as in force at the time when the Request was made. The Authority notes that Article 12(2a) of the ETS Directive, which is the subject of the question posed by the Referring Court, is as of 30 December 2023 Article 12(3)(b) of the same Directive.
[16] See footnote 3 above.
[17] See Article 13 of Directive 2018/410, cited above at footnote 3.
[18] The Authority notes that this Article has since been amended and that the paragraph numbering no longer corresponds with ETS Directive as in force in the EEA at the time of the Request. The Authority does not find the latest amendments to have direct relevance to the present case, and notes that the current equivalent of Article 12(2a) of the ETS Directive, as referred to in the Request, is Article 12(3)(b) of the ETS Directive, as in force in the EEA at the time of submission of the present observations.

Article 25 without restrictions other than those contained in, or adopted pursuant to, this Directive.

[…]

2. Member States shall ensure that allowances issued by a competent authority of another Member State are recognised for the purpose of meeting an aircraft operator's obligations under paragraph 2a or of meeting an operator's obligations under paragraph 3.

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.

[…]*"*

16. Article 13, entitled "Validity of allowances", provides that:

"Allowances issued from 1 January 2013 onwards shall be valid indefinitely. Allowances issued from 1 January 2021 onwards shall include an indication showing in which ten-year period beginning from 1 January 2021 they were issued, and be valid for emissions from the first year of that period onwards."

17. Article 15, entitled "Verification and accreditation", provides:

"Member States shall ensure that the reports submitted by operators and aircraft operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article, and that the competent authority is informed thereof.

Member States shall ensure that an operator or aircraft operator whose report has not been verified as satisfactory in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator or aircraft operator has been verified as satisfactory."

18. Article 16, entitled "Penalties", provides, insofar as relevant:

1. *"Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.*
2. *Member States shall ensure publication of the names of operators and aircraft operators who are in breach of requirements to surrender sufficient allowances under this Directive.*
3. *Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. [The EFTA States shall provide for excess emissions penalties that are equivalent to those in the EU Member States.][19] Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.*
4. *The excess emissions penalty relating to allowances issued from 1 January 2013 onwards shall increase in accordance with the European index of consumer prices.*
5. *In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned.*

[…]

13. *The EFTA States shall submit any requests pursuant to Article 16(5) and (10) to the EFTA Surveillance Authority, which shall promptly pass them on to the Commission."*[20]

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[19] This text was adapted by Joint Committee Decision No 112/2020 of 14 July 2020. In the ETS Directive as applicable in the EU, this sentence provides: "*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*."

[20] Article 16(13) was inserted pursuant to Article 1(2)(o) of Joint Committee Decision No 112/2020 of 14 July 2020 (OJ L 172, 6.7.2023, p. 33).

19. Article 19, entitled “Registries”, provides, insofar as relevant:

> 1. *“Allowances issued from 1 January 2012 onwards shall be held in the Union registry for the execution of processes pertaining to the maintenance of the holding accounts opened in the Member State and the allocation, surrender and cancellation of allowances under the Commission Acts referred to in paragraph 3.*
>
> *Each Member State shall be able to fulfil the execution of authorised operations under the UNFCCC or the Kyoto Protocol.*
>
> 2. *Any person may hold allowances. The registry shall be accessible to the public and shall contain separate accounts to record the allowances held by each person to whom and from whom allowances are issued or transferred.*
>
> […]”

2.2 The Union Registry Regulation

20. 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 (“**Union Registry Regulation**”) entered into force in the EEA on 20 March 2021.[21] The Union Registry, which was initially established in 2012,[22] ensures the accurate accounting of transactions under the ETS. It is a standardised and secured electronic database containing common data elements to track the issue, holding, transfer and cancellation, as applicable, of emission allowances, and to provide for public access and confidentiality, as appropriate. The Registry is meant to ensure that there are no transfers, which are incompatible with the obligations resulting from the ETS Directive.[23]

21. Article 15 of the Union Registry Regulation concerns the opening of an aircraft operator holding account in the Union Registry and provides, insofar as relevant:

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[21] 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* was incorporated into the EEA Agreement by Joint Committee Decision No 126/2021 of 19 March 2021 (not yet published) in point 21anb of Annex XX, which entered into force on 20 March 2021.

[22] Commission Regulation (EU) 920/2010 of 7 October 2010 *for a standardized and secured system of registries* pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council was incorporated into the EEA Agreement by Joint Committee Decision No 156/2011 of 2 December 2011 in point 21an (OJ L 76, 15.3.2012, p. 41), which entered into force on 1 January 2012.

[23] See recital 3 to the Union Registry Regulation, cited above at footnote 21.

"[…]

5. An aircraft operator shall have only one aircraft operator holding account."

22. Article 26 on the closure of aircraft operator holding accounts provides:

"1. The competent authority shall notify the national administrator within 10 working days of notification by the account holder or of discovering after examining other evidence, that the aircraft operator merged into another aircraft operator or the aircraft operator has ceased all its operations covered by Annex I to Directive 2003/87/EC.

2. The national administrator may close an aircraft operator holding account if the following conditions are fulfilled:

(a) notification pursuant to paragraph 1 has been made;

(b) the year of last emission is registered in the Union Registry;

(c) verified emissions were registered for all years when the aircraft operator was included in the EU ETS;

(d) the aircraft operator has surrendered an amount of allowances equal to or greater than its verified emissions;

(e) no return of excess allowances is pending pursuant to Article 50(6)."

23. Article 28 concerning the closure of accounts and removal of authorised representatives on the administrator's initiative provides, insofar as relevant:

"[…]

"3. The national administrator shall close an operator holding account or an aircraft operator holding account upon instruction from the competent authority on the basis that there is no reasonable prospect of further allowances being surrendered or excess allowances being returned.

[…]"

24. Article 30 concerning suspension of access to accounts provides, insofar as relevant:

"[…]

5. The national administrator may suspend all access of authorised representatives to all accounts of an account holder if it receives information that the account holder has become subject of insolvency procedures. This suspension may be maintained until the national administrator receives

official information about who has the rights to represent the account holder and the authorised representatives are confirmed or new authorised representatives are nominated in accordance with Article 21.

6. *The administrator of the account shall reverse the suspension immediately once the situation giving rise to the suspension is resolved.*

[…]

10. *Where the holder of an operator holding account or aircraft operator holding account is prevented from surrendering in the 10 working days preceding the surrender time-limit laid down in Article 12(2a) and (3) of Directive 2003/87/EC due to suspension in accordance with this Article, the national administrator shall, if so requested by the account holder, surrender the number of allowances specified by the account holder.*

[…]"

25. Article 36, entitled "Nature of allowances and finality of transactions", provides:

"1. An allowance shall be a fungible, dematerialised instrument that is tradable on the market.

2. *The dematerialized nature of allowances shall imply that the record of the Union Registry shall constitute prima facie and sufficient evidence of title over an allowance, and of any other matter which is by this Regulation directed or authorised to be recorded in the Union Registry.*

3. *The fungibility of allowances shall imply that any recovery or restitution obligations that may arise under national law in respect of an allowance shall only apply to the allowance in kind.*

Subject to Article 58 and the reconciliation process provided for in Article 73, a transaction shall become final and irrevocable upon its finalisation pursuant to Article 74. Without prejudice to any provision of or remedy under national law that may result in a requirement or order to execute a new transaction in the Union Registry, no law, regulation, rule or practice on the setting aside of contracts or transactions shall lead to the unwinding in the registry of a transaction that has become final and irrevocable under this Regulation.

An account holder or a third party shall not be prevented from exercising any right or claim resulting from the underlying transaction that they may have in law, including to recovery, restitution or damages, in respect of a transaction

that has become final in the Union Registry, for instance in case of fraud or technical error, as long as this does not lead to the reversal, revocation or unwinding of the transaction in the Union Registry.

4. *A purchaser and holder of an allowance acting in good faith shall acquire title to an allowance free of any defects in the title of the transferor."*

3 NATIONAL LAW

26. The Greenhouse Gas Emission Allowance Act[24] implements the ETS Directive and accompanying legal instruments which are incorporated into the EEA Agreement. The obligation to surrender emission allowances is provided for in section 4, which provides, insofar as relevant:

"Anyone who has emissions subject to the obligation to surrender allowances from operations or activities as referred to in a regulation issued pursuant to section 3 must surrender allowances corresponding to their emissions subject to the obligation to surrender allowances in accordance with the provisions of section 12. […]"

27. The first and third paragraphs of section 12 of the Greenhouse Gas Emission Allowance Act provide:

"The party subject to the obligation to surrender allowances shall, by 30 April of each year, transfer a number of allowances corresponding to the business's or the operator's reportable emissions from the preceding year, to a specified settlement account in the registry.

[…]

If the party subject to the obligation to surrender allowances has not transferred a sufficient number of allowances by the time limit provided for in the first paragraph to the settlement account, the party subject to the obligation to surrender allowances shall, by 1 May of the year after the year in which the settlement under the first paragraph should have been effected, transfer allowances to the specified settlement account corresponding to the shortfall

[24] As per the Request, pages 5-7. For the Greenhouse Gas Emission Allowance Act in Norwegian, see *Lov om kvoteplikt og handel med kvoter for utslipp av klimagasser* at https://lovdata.no/dokument/NL/lov/2004-12-17-99.

from the preceding year. In addition, an administrative penalty shall be imposed pursuant to section 19."

28. The first paragraph of section 19 of the Greenhouse Gas Emission Allowance Act provides:

"If the party subject to the obligation to surrender allowances has failed to comply with its obligations under the first paragraph of section 12, the pollution control authorities shall impose an administrative penalty, to be paid to the State treasury. The administrative penalty shall correspond to EUR 100 on the due date for payment for each tonne of reportable greenhouse gas emissions for which allowances have not been transferred to the specified settlement account pursuant to the first paragraph of section 12. The amount of the administrative penalty shall be indexed in accordance with the European consumer price index. The penalty shall fall due for payment 14 days after issuance of the demand for payment. In the event of late payment, interest shall accrue under Act No 100 of 17 December 1976 on overdue payments, etc. (lov 17. desember 1976 nr. 100 om renter ved forsinket betaling m.m.). Decisions on administrative penalties shall constitute a basis for enforcement by attachment. The King may, by regulation, modify the amount of the administrative penalty."

4 THE QUESTION REFERRED

29. The Oslo District Court asks the following question:

"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?"

5 LEGAL ANALYSIS

5.1 Introductory remarks on climate change

30. Climate change is among the most pressing issues facing humanity today. Rising temperatures caused by greenhouse gasses disrupt the Earth's ecosystems, bringing ecological crises and threatening the foundations of human life and welfare. According to general scientific consensus and the best available data, the climate crisis is caused by excess GHG emissions resulting from human activity.

Unless swiftly and effectively addressed, climate change will bring inconceivable suffering and loss in the immediate future.

31. Climate change issues are the subject of rapid and important developments, both in legislation and jurisprudence. The EEA EFTA States have undertaken significant climate obligations, both in the European and international arena, of which the ETS Directive forms an integral part.[25] Among relevant developments is the evolving consensus that human rights encompass a right to a healthy environment, the respect of which is imperative in order to secure the enjoyment of other fundamental rights.[26]

32. At the outset, the Authority considers it important to note the clear trajectory of legislative and jurisprudential developments in this field, which is towards more environmental protection. In this light, the Authority underlines the importance of affording considerable weight to the ETS Directive's aim and objective of reducing GHG emissions in order to combat climate change.

5.2 The Emissions Trading System (ETS)

33. The ETS, as a cornerstone of the EU climate and energy policy, forms part of the EU's policy to combat climate change by reducing GHG emissions in a cost-effective manner. The ETS is a so-called "cap-and-trade system" which puts a price on GHG emissions and uses market forces to contribute to the necessary emission

[25] In the international context, see for example the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement. The ETS Directive is *inter alia* intended to fulfil the EU Member States' obligations under the Kyoto Protocol and the Paris Agreement. See recitals 2-5 to the ETS Directive, recitals 2-4 to Directive 2008/191/EC, recitals 2-4 to Directive 2018/410, and recitals 1-3 to Directive 2023/958.

[26] Among relevant legislative developments, ESA notes that the Charter of Fundamental Rights of the European Union (Article 37), the Aarhus Convention (preamble), the African Charter on Human and Peoples' Rights (Article 24), the Arab Charter of Human Rights (Article 38), and the Protocol of San Salvador (Article 11) all underline the importance of a healthy environment as an indispensable element to the enjoyment of human rights. The United Nations' Human Rights Council, the United Nations' General Assembly, and the European Parliament have all recognised a right to a healthy environment (see UNHRC resolution 48/13, UNGA resolution A/76/L.75, and the European Parliament resolution 2020/2273(INI) of 9 June 2021 on EU Biodiversity Strategy for 2030). Within the Council of Europe, the Committee of Ministers has adopted a resolution on the recognition of the right to a healthy environment (CM/Rec(2022)20), and the Steering Committee for Human Rights' environmental working group is drafting a report on the need for and feasibility of a further instrument on human rights and the environment, including as a Protocol to the European Convention on Human Rights (CDDG-ENV, see https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/environment-and-human-rights#{%22113149991%22:[10]}) .

reductions.[27] The ETS Directive was incorporated into the EEA Agreement in 2007.[28]

34. The ETS guarantees an environmental outcome by setting a limit on the total amount of carbon emissions ("**cap**"). The cap is reduced annually in line with the EU's climate target, ensuring that emissions decrease overtime. The system foresees the issuance of emission allowances in quantities corresponding to the emission caps. These allowances are then either freely allocated to operators covered by the system or auctioned off to operators wishing to purchase additional allowances. The allowances exist in electronic form in the Union Registry.

35. Trading of emission allowances ("**trade**" on the "**carbon market**") is permitted, while maintaining the obligation that operators concerned by the ETS regularly surrender sufficient allowances to match their actual emissions ("**surrender obligation**").[29] In order to reinforce the integrity and safeguard the efficient functioning of the carbon market, including supervision of trading in emission allowances, emission allowances were defined as financial instruments and brought within the scope of Directive 2014/65/EU ("**MiFID II**").[30] The market price of one emission allowance, which corresponds to a licence to emit one tonne of carbon dioxide, fluctuates. For example, the price was at €57.78 on 20 October 2021 and at €81.41 on 20 October 2023.[31]

36. As stated above, aviation activities were incorporated into the ETS by Directive 2008/101, which entered into force in the EEA on 2 April 2011. The objective of that amendment to the ETS Directive was to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the ETS.[32]

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[27] See the European Commission's final proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC at link: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2001%3A0581%3AFIN.

[28] The ETS Directive was incorporated into the EEA Agreement with JCD No 146/2007 of 26 October 2007 (OJ L 100, 10.4.2008, p. 92), cited above, which entered into force 29 December 2007.

[29] See *inter alia* Article 3(a), Article 12(1), Article 12(2a), Article 14, Article 15, and Article 19(2) of the ETS Directive.

[30] See 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 ("MiFID II"), incorporated into the EEA Agreement by Joint Committee Decision No 78/2019 of 29 March 2019, in points 13b and 31ba of Annex IX (OJ L 279, 31.10.2019, p. 143), which entered into force 3 December 2019. See, in particular, recital 11 and Articles 4(23), 58(1), 58(1)(a), 58(2).

[31] See, for example, the Carbon Price Tracker, accessible at https://ember-climate.org/data/data-tools/carbon-price-viewer/.

[32] See recital 14 of Directive 2008/101 of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC *so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community*, which was incorporated into

This required all airlines departing or arriving at an EEA airport to surrender allowances covering the emission of all EEA flights they had operated in a given year.

37. With the ETS, the cap on GHG emissions is progressively lowered and the number of freely allocated allowances decreased, meaning that operators will increasingly have to pay for their emissions. Free allowances to airlines will be phased out by 2026, from which time aircraft operators will have to purchase all their emission allowances.[33] In the meantime, allowances which are freely allocated to aircraft operators can be freely traded by them, just as allowances which they purchase at auction or on the carbon market.

38. However, the logic of the ETS is not to enable operators to monetize their freely allocated emission allowances irrespective of their actual emissions.[34] The logic is to incentivize operators to reduce their emissions, in order to monetize excess emission allowances.[35] When coupled with the plan to gradually phase out the free allocation of emission allowances, it is clear that the purpose of the ETS is to reduce emissions within the pre-determined cap that steadily decreases over time to ensure the environmental objectives.

39. A registry to keep track of the ownership of allowances held in the electronic accounts is therefore one of the essential requirements for a carbon market to function. The Union Registry works in a similar way as a bank, has a record of all its customers and keeps track of all allowances held in the ETS. The Union Registry operates both for the EU and the EFTA pillars, with the European Commission and the EFTA Surveillance Authority serving mirroring roles in the two pillars.[36]

40. The transfer of allowances between sellers and buyers takes place in the Union Registry.[37] The Union Registry operates in such a way that the transfer of emission allowances, once finalised in the Registry, is final and irrevocable.[38]

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the EEA Agreement with Joint Committee Decision No 6/2011 of 1 April 2011 in point 21al of Annex XX (OJ L 93, 7.4.2011, p. 35), which entered into force 2 April 2011.

[33] See Joint Committee Decision No 334/2023 of 8 December 2023, which entered into force 30 December 2023.

[34] See judgment of the CJEU of 20 January 2022 in *ET, acting as insolvency administrator of Air Berlin PLC & Co. Luftverkehrs KG v Bundesrepublik Deutschland ("**Air Berlin**"),* Case C-165/20, EU:C:2022:42, para. 56.

[35] See judgments of the CJEU of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others*, Case C-127/07, EU:C:2008:728, para. 32, and Case C-165/20, *Air Berlin*, cited above, para. 57.

[36] See Joint Committee Decision No 126/2021 of 19 March 2021 (not yet published).

[37] See Chapter 2 of the Union Registry Regulation.

[38] See Union Registry Regulation, Article 36, cited above, subject to Article 58 and Article 73.

5.3 The ETS Directive

41. The ultimate objective of the ETS Directive is the protection of the environment by means of reduction of GHG emissions.[39] The Directive does not of itself reduce those emissions but, as stated by the Court of Justice of the European Union ("**CJEU**") in Case C-127/07, "[…] *it encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions.*"[40]

42. Pursuant to the design of the system as reflected in the relevant acts and as stated in case-law from the European Courts, the benefit of the ETS for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the Directive.[41] The overall system of the Directive is "*based on the strict accounting of the issue, holding, transfer and cancellation of allowances*" which is "*inherent in the very purpose of the Directive*".[42]

43. The ETS Directive lays out deadlines for surrendering GHG emission allowances. Pursuant to Article 12(2a), emission allowances are to be surrendered by 30 April of each year, corresponding to and compensating for emissions in the previous calendar year. According to Article 3e(5), the number of allowances allocated to an aircraft operator are to be issued by the competent authorities by 28 February of each year.

44. Thus, for example, an aircraft operator subject to the ETS should normally in February of year X receive their free emission allowances for year X, and will by 30 April of year X+1 have to surrender emission allowances corresponding to its emissions in year X. Between those dates, the operator can freely trade allowances, including by selling excess allowances and/or purchasing additional allowances as needed.

45. If an operator fails to surrender allowances by 30 April in a given year, a fine should normally be imposed, pursuant to the obligation upon the EEA States under Article 16 of the Directive. However, the obligation to surrender allowances is *not*

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[39] See Article 1 of the ETS Directive and Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others*, cited above, para. 31.
[40] *Idem*.
[41] See recitals 4, 5, and 25, Articles 1, 12(2a), and 19(1) of the ETS Directive and, for example, Case C-127/07, *Societe Arcelor Atlantique et Lorraine and Others*, cited above, para. 31.
[42] See judgment of the CJEU of 17 October 2013 in *Billerud Karlsborg AB, Billerud Skärblacka AB v Naturvårdsverket ("**Billerud**"),* Case C-203/12, EU:C:2013:664, para. 27.

transformed into an obligation to pay a fine. Instead, the obligation to surrender allowances remains and is maintained parallel to the obligation to pay a fine.[43] This reflects the cap introduced by the ETS: all emissions covered by the system should be covered by an emission allowance, because the system is meant to limit the overall quantity of those emissions.

5.3 Bankruptcy and EEA law

46. Bankruptcy and insolvency legislation is not harmonized in either pillar of the EEA Agreement. Some limited legislation has been adopted in the EU pillar which has not been identified as EEA relevant.[44] Insofar as the Authority can ascertain, there does not appear to be any legislation adopted in the EU pillar which directly concerns or addresses the subject matter of the present case. Therefore, the solution to the issue at hand in the present case should, in principle, be the same in the two pillars.

47. The mere fact that bankruptcy and insolvency legislation is not harmonized does not mean that EEA law is irrelevant to these fields of law. As the Court has already held, EEA law, including sectoral legislation, can apply to and impact bankruptcy and insolvency proceedings.[45] Thus, the Authority submits that the standards set by EEA law should be respected also in the context of bankruptcy and insolvency proceedings.

5.4 The Authority's assessment

48. The case in the main proceeding concerns in essence how the obligation to surrender emission allowances should be treated in connection with insolvency proceedings, in this case restructuring. In particular, the question concerns Article 12(2a) of the ETS Directive, which establishes the system of surrendering, by 30 April each year, emission allowances corresponding to and compensating for the actual emissions of each operator in the preceding year.

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[43] Article 16(3), last sentence, of the ETS Directive and C-203/12 *Billerud*, cited above, para. 25.
[44] See, for example, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 *on insolvency proceedings*.
[45] See judgment of the EFTA Court of 25 March 2013 in Case E-10/12, *Yngvi Harðarsson v Askar Capital hf.* [2013] EFTA Ct. Rep. 204, para. 57. An example of sectoral EEA law relevant to insolvency proceedings is Directive 2008/94/EC *on the protection of employees in the event of the insolvency of their employer*, incorporated into the EEA Agreement by Joint Committee Decision No 51/2009 of 24 April 2009 (OJ L 162, 25.6.2009, p. 32).

49. The Authority submits that Article 12(2a) of the Directive does not allow for settling the obligation to surrender emission allowances by way of a dividend in restructuring proceedings.

5.4.1 The wording of Article 12(2a) and the aim, objective and context of the ETS Directive

50. As a starting point, the Authority notes that the wording of Article 12(2a) does not appear to address directly whether the surrender obligation remains despite or is affected in any way by insolvency. Instead, Article 12(2a) more generally obliges administering[46] EEA States "*to ensure that by 30 April each year*" every aircraft operator surrenders "*a number of allowances equal to the total emissions*" of their aviation activities during the preceding calendar year. EEA States shall moreover "*ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled"*.[47] While this obligation appears to be addressed solely to the administering EEA States, Article 12(2) of the ETS Directive describes the obligations under paragraph 2a as being an aircraft operator's obligations.

51. In accordance with the settled case-law of the European Courts, when interpreting a provision of EU/EEA law, it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part.[48]

52. With respect to the context, it appears that Article 12(2a), read in light of Article 12(2), entails that Article 12(2a) imposes an obligation upon the State to impose obligations upon aircraft operators. Aircraft operators are thus to be obliged to surrender emission allowances corresponding to their actual emissions, and the State is obligated to ensure that surrender, and to subsequently cancel the surrendered allowances.

53. Additional context for the obligation under Article 12(2a) is provided by Article 12(3a), which states that no obligation to surrender emission allowances arises in respect of emissions which are compensated for by way of carbon capture and storage. This is the only exception to the obligation to surrender emission

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[46] Administering Member State is defined in Article 3(q) of the ETS Directive as "[…] *the Member State responsible for administering the EU ETS in respect of an aircraft operator in accordance with Article 18a*:"

[47] Article 12(2a) (last sentence) of the ETS Directive.

[48] See e.g. judgment of the CJEU of 9 March 2022 in *Pro Rauchfrei eV v JS eK*, Case C-356/22, EU:C:2023:174, para. 28.

allowances which is provided for by Article 12. Neither the wording of Article 12(2a), nor other provisions of the Directive, foresee other exceptions to this obligation.

54. With respect to the aim and objective, the Authority submits that it follows from the initial proposal for the ETS Directive[49] and from the case-law of the CJEU that the aim of the ETS Directive is to establish a system for emission allowance trading and that its objective is to contribute to the reduction of GHG emissions and to fulfil the commitments of the EU and the EEA EFTA States under the Kyoto Protocol and, today, under the Paris Agreement.[50] As the CJEU held in Case C-203/12 *Billerud*, the purpose of the Directive is: "*the establishment of a Community scheme for greenhouse gas emission allowance trading, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthroprogenic interference with the climate system, with the ultimate objective of protection of the* environment".[51] The Authority submits that this is the aim and objective which is relevant for the interpretation of the ETS Directive.

55. As has been explained above, emission allowances constitute tradable assets, one of the primary functions of which is to be bought and sold in the carbon market at a profit or a loss. This particular function is a means by which the ETS is created and can function effectively. However, the Authority submits that this means employed in the ETS is of limited relevance for the purposes of interpretation of EEA law. The ETS's environmental objective is achieved, or facilitated, through the means of the tradability of emission allowances, but this means is not an objective in and of itself. Thus, for the purposes of the interpretation of the ETS Directive, the legally relevant factor is its aim and objective, but not the means by which they are achieved.

5.4.2 The nature of emission allowances and of the cap-and-trade system

56. In order to understand the nature of emission allowances and of the cap-and-trade system, it is useful to reiterate what was mentioned above:[52] that in the event of the failure of an operator to surrender emission allowances corresponding to their verified emissions by the relevant deadline, the operator not only has to pay a fine,

[49] See the European Commission's final proposal for the ETS Directive, cited above at footnote 27.
[50] Case C-203/12 *Billerud*, cited above, para. 27. See also Case C-127/07, *Arcelor Atlantique and Lorraine and Others*, cited above, paras. 28- 29.
[51] Case C-203/12 *Billerud*, para. 27. See also Case C-127/07*Arcelor Atlantique and Lorraine and Others*, cited above, paras. 28- 29.
[52] See paragraph 45 above.

but also has to actually surrender the allowances for these excess emissions.[53] In other words, the obligation to surrender allowances is *not* transformed into a monetary obligation; the obligation to surrender *actual* emission allowances *remains*, parallel to the imposition of a fine.[54] Those emission allowances can be settled by the operator using their next free allocation allowances,[55] or by purchasing additional emission allowances at auction or in the carbon market.

57. This reflects the cap of the ETS: GHG emissions are meant to be capped, and consequently no emissions can be made without actual emission allowances being surrendered.[56] As the CJEU held in Case C-321/15 *ArcelorMittal Rodange*: "*the correlation between actual emissions and those authorised by emissions allowances is, therefore, an essential priority of the system as a whole*".[57]

58. In this respect, emission allowances are not typical financial instruments: even though they can be traded, and a value can be attributed to them for the purposes of such trading (see paragraph 35 above), they cannot be transformed into a monetary obligation. Thus, emission allowances more closely resemble tradable licences than other financial instruments.[58]

59. This understanding of the nature of emission allowances is reflected in the Opinion of Advocate General Hogan in Case C-165/20 *Air Berlin*, where he describes free emission allowances as *not* constituting property rights within the meaning of the Charter of Fundamental Rights of the European Union considering that they are freely allocated pursuant to an EU legislative scheme and do not derive from the assets or occupational activity of an aviation operator.[59] The Advocate General also noted that "it *was never envisaged that these allowances would themselves be monetised independently of* [the operator's] *economic activity or that they would be regarded as tantamount to a form of quasi-currency which could then be treated as a liquid asset in insolvency*".[60]

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[53] ETS Directive, Article 16(3), final sentence, and Case C-203/12 *Billerud*, cited above, para. 25.
[54] *Ibid.*
[55] On the validity of emission allowances, see Article 13 of the ETS Directive, cited above.
[56] See Article 12(2a) and Article 15 of the ETS Directive, and Case C-203/12 *Billerud*, cited above, paras 25 and 27.
[57] Judgment of the CJEU of 8 March 2017 in *ArcelorMittal Rodange et Schifflange SA v État du Grand-duché de Luxembourg*, Case C-321/15, EU:C:2017:179, para. 25.
[58] See also Opinion of Advocate General Campos Sánchez-Bordona of 5 July 2016 in *ArcelorMittal Rodange et Schifflange SA v État du Grand-duché de Luxembourg*, Case C-321/15 para. 95.
[59] See Opinion of Advocate General Hogan of 23 September 2021 in *Air Berlin*, Case C-165/20, EU:C:2021:764, para. 78.
[60] *Idem*.

60. It is also important to note that with the cap-and-trade system and its function of allocating free emission allowances to operators, which they are allowed to trade for their own financial gain, operators are given a considerable financial advantage, as well as an incentive to decrease their emissions.[61] As the number of free emission allowances decreases, they are liable to become an ever more valuable commodity. Consequently, finding that Article 12(2a) does not preclude the settling of the obligation to surrender emissions allowances by dividend in restructuring proceedings could create an incentive for an operator in financial straits to sell off their free emission allowances in an effort to salvage their operations, while nevertheless operating and emitting GHG. If an operator's salvaging efforts are unsuccessful and the operator goes bankrupt without surrendering emission allowances to compensate for their actual emissions, the objective of capping GHG emissions would not be achieved. Moreover, the operator's other creditors would stand to gain from the monetization of the operator's freely allocated emission allowances at the cost of achieving the objectives of the ETS.[62]

61. Moreover, the treatment of emission allowances in the course of insolvency proceedings in the form of a reconstruction process risks giving the operator undergoing restructuring an advantage, to the detriment of other market participants.[63] This point is addressed further in section 5.4.7 below.

5.4.3 The situation in different types of insolvency proceedings

62. In light of the wording of Article 12(2a), the Authority does not in principle see a reason for distinguishing between bankruptcy proceedings – where the operator in question will not continue operations – and restructuring proceedings – where the operator is set to continue operations.

63. However, and as the matter at stake in the national proceedings concerns restructuring, the Authority will note that there is perhaps even more reason to ensure that emissions from continuing operators in sectors covered by the ETS are

[61] See judgment of the CJEU of 25 November 2021 in *Aurubis AG v Bundesrepublik Deutschland* C-271/20, EU:C:2021:959 para. 70.
[62] An unfair advantage to an aircraft operator's creditors was taken into account in *Air Berlin*, cited above, para. 59, on the question of the continuing allocation of free emission allowances after aviation activities cease.
[63] See also recital 18 to the ETS Directive, which, as the CJEU held in *Billerud*, para. 27, was what the EU legislature expressed when it introduced a predefined penalty in the Directive ("[…] *in introducing itself a predefined penalty, the Community legislature wished to shield the allowance trading scheme from distortions of competition resulting from market manipulations*".)

duly accounted for and compliant with the emission cap. As noted by the CJEU in *Air Berlin*, there is an express link between the allocation of aviation emission allowances and the performance of aviation activities subject to the ETS.[64]

64. In practice, the Authority recognises that enforcing Article 12(2a) *vis-à-vis* operators undergoing insolvency proceedings may entail different practical complications for operators undergoing bankruptcy on the one hand, and operators undergoing restructuring on the other hand.

65. In the case of bankrupt operators with no assets and with no emission allowances left in their ETS accounts, it may be practically impossible to enforce the surrender obligation.[65] However, the surrender obligation in principle remains. Here, the Authority takes note of Case C-580/14 *Sandra Bitter*, where the CJEU did not agree with an insolvency administrator that the obligation on the insolvent aircraft operator to pay a penalty pursuant to Article 16(3) of the ETS Directive infringed the principle of proportionality.[66] The finding was based on the assumption by the parties and the CJEU that the insolvent estate remained under an obligation to comply with its duties under the ETS Directive.[67] Indeed, the insolvency estate in that case eventually complied with the surrender obligation and surrendered emission allowances corresponding to the insolvent aircraft operator's 2011 emissions in 2015, four years after the opening of the insolvency proceedings.[68]

66. In the case of restructured operators, the ETS and the Union Registry Regulation do not foresee the annulment of an emission allowance deficit in an operator's ETS account based on a restructuring agreement. They do not either foresee the closure by an operator of an ETS account with an outstanding allowance deficit[69] and the re-opening of a new ETS account for the same operator. Pursuant to Article 15(5) of the Union Registry Regulation, an aircraft operator "*shall have only one aircraft operator holding account*" in the Union Registry.

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[64] Case C-165/20, *Air Berlin*, cited above, para. 49.
[65] See, for example, Article 28(3) of the Union Registry Regulation.
[66] See Order of the CJEU of 17 December 2015 in *Sandra Bitter v Bundesrepublik Deutschland,* Case C-580/14, EU:C:2015:835, paras. 20 and 35.
[67] See judgment of the CJEU of 16 December 1981 in *Pasquale Foglia v Mariella Novello*, Case C-244/80, EU:C:1981:302, para. 18.
[68] See publicly available information in the European Union Transaction Log concerning "HRB 9336 Amtgericht Paderborn" at https://ec.europa.eu/clima/ets/ohaDetails.do?accountID=104158&action=all&languageCode=en .
[69] For the conditions for the closure of an aircraft operator holding account, see Article 26 of the Union Registry Regulation, cited above.

67. Therefore, in order for the State to accept an emission allowance surrender settlement by way of a dividend paid as a percentage of the market value of the emission allowances due, from an aircraft operator which intends to continue to operate in the aviation sector, the Authority considers it possible that the State itself would have to acquire emission allowances corresponding to the aircraft operator's actual emissions and settle the operator's ETS account deficit with those emission allowances.[70] If the State were to settle the operator's deficit in this manner, it could have implications, such as for State aid rules, which are discussed in section 5.4.7 below. However, if the State would not do so, the Authority does not see how the Union Registry could be instructed to reflect a zero balance in the aircraft operator's ETS account.

68. The Authority notes that the Union Registry Regulation entered into force in the EEA on 20 March 2021. It was therefore not in force in the EEA when the insolvency proceedings at national level were initiated. However, it had been incorporated into the EEA Agreement by a Joint Committee Decision No 126/2021 and was in force at the surrender deadline of 30 April 2021, by which date emission allowances corresponding to the Plaintiff's 2020 emissions should have been surrendered.

69. The Authority notes that the surrender obligation is not established in the Union Registry Regulation, but in the ETS Directive, which was in force in the EEA before the relevant facts of the present Request. The Union Registry Regulation therefore only elaborates on the practical application of the principles established in the ETS Directive. Considering this, and that the Regulation was in force in the EEA Agreement at the surrender deadline, the Authority considers that the Union Registry Regulation should apply to the surrender obligation of 30 April 2021. As the Court stated in Case E-3/15, "[…] *When interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not.* […] *These obligations arise on the day the respective act is made part of the EEA Agreement*."[71]

70. In the alternative, the Authority submits that the predecessor to the Union Registry Regulation, Commission Regulation (EU) 920/2010,[72] which was in force in the

[70] See further section 5.4.7 below.
[71] See judgment of the EFTA Court of 2 October 2015 in Case E-3/15, *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* [2015] EFTA Ct. Rep. 512, paras. 70 and 74.
[72] See Commission Regulation (EU) 920/2010 of 7 October 2010 *for a standardized and secured system of registries pursuant to Directive 2003/87/EC*, cited above at footnote 22. That Regulation

EEA prior to 20 March 2021, should be interpreted with the provisions of the Union Registry Regulation in mind, in order to safeguard the homogeneity of the EEA Agreement during the interim period between the entry into force of the Union Registry Regulation in the two EEA pillars. In this regard, the Authority notes that the previous Regulation also provided, at Article 16(1) final sentence, that each aircraft operator should have only one aircraft operator holding account. Furthermore, it also provided, at Article 24, that aircraft operator holding accounts could only be closed pursuant to a merger or permanent cessation of activity.[73] Therefore, neither the previous Regulation nor the Union Registry Regulation seem to permit for the closure and reopening of an aircraft operator holding account in order to zero out a deficit pursuant to a court-driven restructuring.

5.4.4 The nature of the obligation to surrender emission allowances

71. The Authority considers it important to underline that, although emission allowances have been classified as financial instruments which can be traded, the obligation to surrender emission allowances corresponding to the actual emissions of an operator is not a financial obligation, but a compliance obligation. In this respect, the obligation to surrender emission allowances differs from financial transactions in three important respects.

72. *First*, emission allowances, once surrendered, have no monetary value. Pursuant to Article 12(3) of the ETS Directive, allowances which have been surrendered are subsequently cancelled by EEA States, not redistributed or resold. With the exception of emission allowances which are auctioned by EEA States, emission allowances have no monetary value to the State. In allocating free emission allowances, the State is therefore not in the position of a creditor that has extended credit to a debtor, incurring a risk of capital loss. Consequently, during insolvency proceedings, the State claiming the surrender of due emission allowances is not in the same position as a regular creditor, trying to reclaim their debt. Instead, the State is in the position of an administrator enforcing a compliance obligation which the State is not, in principle, entitled to forgive, as a creditor might forgive debt.

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was incorporated into the EEA Agreement by Joint Committee Decision No 156/2011 of 2 December 2011 in point 21an of Annex XX to the Agreement, and entered into force on 1 January 2012 (OJ L 76, 15.3.2012, p. 41.).

[73] Moreover, at Article 21, Commission Regulation 920/2010 provided for the obligation to notify any changes *inter alia* to an account holder's authorised representation and, at Article 27, for the conditions of suspension of access to accounts *inter alia* on the grounds of access without authorisation, similarly to Articles 22 and 30 of the Union Registry Regulation.

73. In this context, the Authority submits that the State's position is different when, on the one hand, it claims the surrender of emission allowances, and, on the other hand, it claims the payment of fines imposed pursuant to Article 16(3) of the ETS Directive. The former is an obligation of the State to ensure that all GHG emissions by emitters concerned by the ETS are accounted for. The latter is a monetary obligation, one effect of which may be that the State "benefits" financially if the obligation is complied with – even though the purpose of fines imposed is not the financial benefit of the State, but to encourage compliance.

74. In this sense, the Authority submits that an emission allowance most closely resembles a *license* to emit GHG, which has no value once it has been used – that is to say, when it has been surrendered. In light of the absence of any monetary value of an emission allowance once surrendered, it is difficult to classify the surrender obligation as "debt" in the traditional sense.

75. *Second*, the Authority considers it doubtful whether it can be considered compliant with EEA law for emission allowances, held in an ETS account by an operator which is subject to insolvency proceedings, to be considered "assets" in the traditional sense.

76. In most national insolvency systems, assets which are held by an insolvent operator are obligatorily monetized in order to meet the insolvent operator's debts. The Authority submits that it is evident from Articles 30(5) and 30(10) of the Union Registry Regulation that emission allowances in an insolvent operator's ETS account are not meant to be treated as any other asset. Article 30(5) indicates that access to the ETS account of an insolvent operator can be suspended until authorized representation of the estate has been established. Article 30(10), read together with Article 30(5), demonstrates that the surrender of emission allowances is foreseen, regardless of ongoing insolvency proceedings. Thus, Article 30(10) indicates that emission allowances are not intended to be treated as any other assets, monetized and evenly divided between creditors.

77. *Third*, the Authority notes that according to the Union Registry Regulation, Article 36(3), there does not seem to be a possibility of cancelling or annulling trades of emission allowances. According to that provision, all emission allowance transactions recorded in the Union Registry are final and irrevocable, and "no law, regulation, rule or practice on the setting aside of contracts or transactions shall lead to the unwinding in the registry of a transaction that has become final and irrevocable" under the Union Registry Regulation. This is contrary to the situation

of trades of other assets that have taken place in the months prior to insolvency, which under many legal systems can, based on certain conditions, be annulled in order to ensure a fair distribution of a company's assets.

78. This third point in the Authority's view raises concerns, in the sense that it does not seem possible to treat emission allowance transactions like other transactions of an insolvent company during insolvency proceedings, for example by annulling the trade of emission allowances immediately preceding the insolvency. The Authority considers this to be further evidence that emission allowances have a different nature than other financial instruments held by an insolvent operator and that the surrender obligation, as a compliance obligation, must be treated differently to monetary obligations of an insolvent operator.

5.4.5 The case of WOW Air

79. The Authority notes that Norway is not the first EFTA State to deal with issues such as those underlying the present case. The day before it declared bankruptcy in 2019, the Icelandic airline WOW Air sold off the vast majority of its emission allowances – which it had received through free allocation during the preceding month. The bankruptcy estate sold off the remaining allowances one month after bankruptcy was declared, six days before the surrender deadline of 30 April 2019, and did not surrender allowances by the due date.[74] The Icelandic Environment Agency attempted to recuperate the few allowances which had still been in the possession of WOW Air when it declared bankruptcy by having them declared as specific assets subject to separatist right, but was unsuccessful.[75] No request for an advisory opinion of the EFTA Court was made during the course of those proceedings.

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[74] See Ruling of the Reykjavik District Court of 9 October 2020 in the case of *Umhverfisstofnun v WOW Air Bankruptcy Estate* (excerpts translated in Annex 1 to the present observations) and publicly available information in the European Union Transaction Log concerning "WOW Air" at https://ec.europa.eu/clima/ets/ohaDetails.do?accountID=112514&action=all&languageCode=en&returnURL=installationName%3D%26accountHolder%3Dwow%2Bair%26search%3DSearch%26permitIdentifier%3D%26form%3Doha%26searchType%3Doha%26currentSortSettings%3D%26mainActivityType%3D-1%26installationIdentifier%3D%26account.registryCodes%3DIS%26languageCode%3Den&registryCode=IS .

[75] See Ruling of the Reykjavik District Court of 9 October 2020 in the case of *Umhverfisstofnun v WOW Air Bankruptcy Estate*, Ruling of the Court of Appeal of 17 December 2020 in case no. 598/2020), and the Supreme Court's Decision to refuse leave to appeal of 2 February 2021 in Case no. 2020-304. Excerpts of the first two are translated in Annex 1 to the present observations.

80. It should be specified that the Icelandic WOW Air case did not concern the allocation in bankruptcy proceedings of emission allowances which WOW Air should have *surrendered*, but rather emission allocations which it *still held* in its ETS account when bankruptcy was declared, which the Icelandic Environment Agency believed should be subject to a separatist right. Therefore, the subject matter of the present case is not quite the same as that of the WOW Air case.

81. Nevertheless, the WOW Air case demonstrates three things. *First*, that there is considerable incentive for a financially unstable operator to monetize their free emission allowances without reducing their emissions. *Second*, that the issue at stake in the present case is a relevant one, and not limited to this instance or this jurisdiction. *Third*, that if emission allowances are treated as any other asset, the capping of GHG emissions, which is the objective of the ETS Directive, stands to be significantly undermined.[76]

82. The last point is of particular importance. The purpose of the ETS is not to make a financial commodity of carbon emissions, it is to reduce carbon emissions and protect the environment.[77] Trading is merely the tool which is used for achieving that goal through the capital market in an efficient way, and to incentivize the reduction of GHG emissions.[78] Therefore, the ETS Directive should not be interpreted in a manner which undermines the achievement of its objective.

5.4.6 Potential ramifications

83. For the reasons explained above, the Authority submits that Article 12(2a) of the ETS Directive does not allow for treating emission allowances as like other asset in the context of insolvency proceedings. If they were treated as any other asset and settled by dividend calculated as a percentage of their market value, the potential outcome would be twofold.

84. *First*, the cap principle of the ETS would be undermined, meaning that actual emissions of GHG would exceed the cap set. As the CJEU has held, the ETS's

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[76] In this regard, it appears that no emission allowances were surrendered by WOW Air or its bankruptcy estate in respect of its 2018 or 2019 emissions, even though the airline emitted CO2 in both those years (with operations running until the end of March 2019) and even though it was apparently allocated free emission allowances in respect of both those years. (See the above-cited rulings and publicly available information in the European Union Transaction Log concerning "WOW Air", as referred to in footnote 74.)

[77] See judgment of the CJEU of 20 June 2019 in *ExxonMobil Production Deutschland GmbH v Bundesrepublik Deutschland*, Case C-682/17, EU:C:2019:518, para. 62.

[78] See e.g. recitals 5, 20 and 25 to the ETS Directive.

benefit for the environment "*depends on the stringency of the total quantity of allowances allocated*".[79] This means that the environmental protection which the ETS is intended to bring about can only be achieved if the cap, and the "*strict accounting of the issue, holding, transfer and cancellations of allowances*"[80] designed to ensure the cap, are properly enforced. Failing to secure the cap would risk the ETS Directive not ensuring in full the GHG reductions it was designed to achieve, undermining the EEA States' fulfilment of the relevant reduction targets under the Kyoto Protocol and the Paris Agreement.

85. *Second*, other creditors of the operator in question could disproportionately benefit from the free emission allowances allocated to the operator, if those allowances were sold for any reason other than their exceeding the operator's actual emissions. Such considerations have been taken into account by the CJEU, which held in *Air Berlin* that allocating emission allowances, which normally should have been allocated to an aircraft operator, to its insolvency administrator instead, in the event of its insolvency, would "*merely create an unforeseen advantage to the creditors of that former aircraft operator*".[81]

86. In the Authority's opinion, the contrary interpretation, argued for by the Plaintiff,[82] would entail a result which falls short of the "*stringent and consistent manner*" in which infringements of the obligation to surrender a sufficient number of allowances "*need*" to be treated, according to the CJEU.[83]

87. The Authority recognises that it could be considered that finding Article 12(2a) of the ETS Directive to preclude settling the obligation to surrender emission allowances like any other debt in restructuring proceedings would potentially affect the carbon market, as well as the credit market for operators covered by the ETS.

88. On the other hand, maintaining the strict accounting of emission allowances and the absolute obligation to surrender allowances matching actual emissions could potentially strengthen the carbon market, by securing trust in the ETS and ensuring consistent demand for emission allowances.[84] As the CJEU held in C-127/07, "*for*

[79] Case C-203/12 *Billerud*, cited above, para. 26.
[80] *Ibid*, para. 27.
[81] Case C-165/20 *Air Berlin*, cited above, para. 59.
[82] See paragraph 11 above.
[83] Case C-203/12 *Billerud*, cited above, para. 39.
[84] See Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others*, cited above, para. 33.

the allowance trading scheme to function properly, there must be a supply and demand for allowances on the part of the participants in the scheme".[85]

89. It can also not be excluded that one consequence of the finding proposed by the Authority could be, as the Plaintiff points out, that "t*he obligation to surrender allowances entails a separatist right or priority ahead of all other claims against insolvent companies*".[86] The Authority considers that, depending on the national insolvency system in question, such an approach could be one of several options of ensuring the effective application of the ETS Directive in the context of insolvency proceedings. However, the choice of how to effectively implement the ETS Directive and draw the necessary consequences of EEA law obligations are a matter for the national legislator.

5.4.7 Potential State aid implications

90. Furthermore, it appears to the Authority that if the Plaintiff's interpretation were to be followed,[87] this would appear to lead to the following result. *First*, emission allowances which the insolvent operator had received by free allocation administered by the State could be settled by a dividend which only amounts to a percentage of the market value of the emission allowances. *Second*, the insolvent operator's liability for any fines imposed by the State for not surrendering allowances owed in full could be avoided. Meanwhile, the competitors of the insolvent operator would have to surrender their emission allowances in full and would be subjected to a fine if they did not comply with that obligation.[88]

91. The Authority considers it plausible that such a scenario might fall under Article 61(1) EEA, which prohibits State aid which is not declared or considered compatible with the functioning of the EEA Agreement. It is settled case-law that classification as State aid within the meaning of Article 61(1) EEA requires four conditions to be satisfied: (1) that there be intervention by the State or 'through State resources'; (2) that the intervention be liable to affect trade between EEA States; (3) that that intervention confer a selective advantage on the beneficiary, and; (4) that the same intervention distort or threaten to distort competition.[89]

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[85] *Idem*.
[86] See page 10 of the Request.
[87] *Ibid* and paragraph 11 above.
[88] See, for example, Case C-203/12 *Billerud*, cited above, para. 27.
[89] See e.g. judgment of the CJEU of 2 March 2021 in *Commission v Italy and Others*, Case C-425/19 P, EU:C:2021:154, para. 57 and the case-law cited.

92. The Authority observes that it seems clear that the second and fourth conditions would be fulfilled. With respect to the third condition, it would at least appear plausible that there would be an advantage to the undertaking in question, although the Authority considers that the exact calculation of that advantage is not necessary for the purpose of the Advisory Opinion proceedings. With respect to the first condition, it would moreover appear clear that exempting an operator from a fine as a result of permitting that operator not to surrender allowances would entail a selective advantage conferred through State resources.[90]

93. Moreover, the Authority understands that even if the State accepted such a settlement of the surrender obligation, the obligation upon the State to ensure the surrender of actual emission allowances corresponding to the operator's actual emissions, pursuant to Article 12(2a) second sentence of the ETS Directive, would remain in place.[91] Thus, in principle, and as a result of the State permitting such a settlement of the surrender obligation, the State could have to acquire at market price the allowances which should have been surrendered by the operator, leading to a reduction of the State budget.[92]

94. To the Authority it therefore at least appears plausible that the conditions for classification as "State aid" within the meaning of Article 61 EEA would be fulfilled, in the event of Article 12(2a) being interpreted in line with the result suggested by the Plaintiff. Such State aid would have to be declared compatible with the functioning of the EEA Agreement in order to be lawful. Moreover, if emission allowances which were freely allocated and subsequently monetized to the benefit of the operator's other creditors, the dividend that all creditors receive might also constitute State aid under the provision of the EEA Agreement to the extent that the creditors are undertakings.

95. The EEA EFTA States are under an obligation, first, to notify the Authority of any measure intended to grant new aid or alter existing aid and, second, not to put into effect such a measure until the Authority has assessed its compatibility with the functioning of the EEA Agreement ("**standstill obligation**").[93] State aid granted in violation of the standstill obligations constitutes unlawful aid.[94] All administrative

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[90] See e.g. judgment of the CJEU of 14 January 2015 in *Eventech Ltd v The Parking Adjudicator*, Case C-518/13, EU:C:2015:9, paras. 33, 34 and 39.
[91] See paragraph 67 above.
[92] See Case C-518/13, *Eventech*, cited above, para. 34.
[93] See Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("**Protocol 3**").
[94] See Article 1(f) of Part II of Protocol 3.

authorities and national courts are bound by the standstill obligation and prohibited from granting unlawful aid. The national administrative authorities would have to address any such unlawful aid, including by ordering the recovery of such aid on their own initiative.[95]

96. In the same vein, the Authority notes that recital 7 of the ETS Directive provides that EEA "*provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition*." The Authority considers that these aims are also achieved by its suggested interpretation.

97. The Authority consequently considers that an interpretation of Article 12(2a) of the ETS Directive in line with that suggested by the Plaintiff would appear to lead to results which are not compatible with Article 61(1) of the EEA Agreement and Article 1(3) of Part I of Protocol 3. Thus, a systemic interpretation of Article 12(2a) of the ETS Directive[96] also suggests that Article 12(2a) of the ETS Directive must be understood as precluding national legislation that provides that the obligation to surrender emission allowances can be settled by dividend in a compulsory debt settlement in connection with a court-driven restructuring of an insolvent operator.

5.4.8 Legal certainty

98. Finally, the Authority recalls that the national proceedings which prompted the present Request concern the imposition of a fine in circumstances where the Plaintiff's court appointed Reconstructor refused to surrender emission allowances as he considered such a measure to be contrary to Norwegian bankruptcy law.[97]

99. In order to assist the Court in giving as complete and as useful a reply to the Referring Court as possible, the Authority recalls the necessity of a sufficiently clear legal basis for the imposition of a sanction pursuant to EEA law.[98] The principle of legal certainty requires, in particular, that "*those concerned* [must] […] *know precisely the extent of the obligations which are imposed on them, and those*

[95] See e.g. judgment of the CJEU of 5 March 2019 in *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, Case C-349/17, EU:C:2019:172, paras. 88- 92.

[96] Systemic interpretation is often employed by the European Courts, see e.g. the Opinion of Advocate General Szpunar of 24 March 2022 in *TC Medical Air Ambulance Agency GmbH* Case C-633/20, EU:C:2022:220, paras. 83- 88.

[97] See page 4 of the Request.

[98] See e.g. judgment of the EFTA Court of 2 October 2015 in Case E-3/15 *Liechtensteinische Gesellchaft für Umweltschutz v Municipality of Vaduz* ("Liechtensteinische Gesellchaft"), para. 33, and the case-law cited.

persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly".[99]

100. As the Court has held, national courts are bound to interpret national laws, insofar as possible, in conformity with EEA law.[100] This obligation applies equally to the whole body of national law, not merely to the rules intended to implement EEA law.[101] In the context of interpreting and applying directives to the detriment of individuals, the CJEU has held that this interpretation obligation is limited by general principles of law and cannot lead to an interpretation of national law *contra legem*.[102] In the same vein, the Authority further recalls the settled case-law that, under Article 3 EEA, national measures must, in general, facilitate the application of EEA rules, and must not hinder their implementation or effectiveness.[103]

101. The Authority submits that it is for the Referring Court to verify the exact facts of the national proceedings, all relevant national rules governing them, and how those national rules should be interpreted in order to reach an interpretation conform with the Court's findings concerning Article 12(2a) of the ETS Directive. In that interpretation, the Authority submits that the Referring Court need also have regard to general principles of EEA law, including the principle of legal certainty.

5.4.9 Conclusion on the interpretation of Article 12(2a) of the ETS Directive

102. The Authority has set out its view on how Article 12(2a) of the ETS Directive should be interpreted. In essence, the Authority concludes that it is incompatible with Article 12(2a) of the ETS Directive to maintain national legislation that provides that the obligation to surrender emission allowances may be settled by dividend in a compulsory debt settlement in connection with restructuring of an insolvent operator.

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[99] See judgment of the CJEU of 29 April 2021 in *Banco de Portugal and Others v VR*, Case C-504/19, EU:C:2021:335, para. 51, and judgment of the EFTA Court of 8 October 2021 in Cases E-10/11 and E-11/11 *Hurtigruten ASA, Norway* v *ESA*, para. 281.

[100] Judgment of the EFTA Court of 3 February 2015 in Case E-28/13 *LBI hf* v *Merrill Lynch Int Ltd* [2014] ETFA Ct. Rep. 970, para. 42.

[101] *Ibid*, para. 43.

[102] See e.g. judgment of the CJEU of 27 February 2014 in *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s. ("OSA")*, Case C-351/12, EU:C:2014:110, para. 45.

[103] See e.g. judgment of the CJEU of 14 October 1999 in *Adidas AG*, Case C-223/98, EU:C:1999:500, para. 25; and Case E-3/15 *Liechtensteinische Gesellchaft*, cited above, para. 33, and the case-law cited.

103. This conclusion is reached chiefly on the basis of an interpretation of Article 12(2a) in light of the aim, objective and context of the ETS Directive. In particular, the Authority emphasises that the aim of the ETS Directive could be seriously undermined by a contrary interpretation. Moreover, the Authority emphasises the special nature of emission allowances as not having a monetary value to the State once surrendered, and the nature of the surrender obligation as a compliance obligation. Finally, the Authority notes that a contrary interpretation might lead to a result incompatible with EEA State aid rules. Therefore, also from the perspective of systemic interpretation, such a contrary interpretation could not be supported.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to respond to the Request for an Advisory Opinion as follows:

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

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7 SCHEDULE OF ANNEXES

No	Description	Referred to in these Observations at paragraphs	Number of pages
A.1	Excerpts of Court of Appeal and District Court Rulings	Paragraphs 79-82	6