



MINISTRY FOR  
FOREIGN AFFAIRS

Rauðarárstígur 25, 105 Reykjavík, Iceland  
Tel: 354-545 9900, fax: 354-562 2373  
mfa@mfa.is · www.mfa.is

Reykjavík, 9 January 2024

**TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT**

**WRITTEN OBSERVATIONS**

submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 90 of the Rules of Procedure of the EFTA Court by

**THE GOVERNMENT OF ICELAND**

Represented by

Ms. Inga Þórey Óskarsdóttir, Legal Adviser, Ministry for Foreign Affairs, and  
Mr. Daníel Arnar Magnússon, Legal Adviser, Ministry of Environment, Energy and Climate,  
acting as Agents in

**Case E-12/23**

***Norwegian Air Shuttle ASA***

**v**

***the Norwegian State***

in which the Oslo District Court (Oslo tingrett) has requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of Article 12(2a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC.

The Government of Iceland has the honour of lodging the following written observations.

## **I. INTRODUCTION**

1. With a request dated 6 October 2023, the Oslo District Court requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation of the EEA Agreement relevant to an appeals proceeding before it.
2. In the EFTA Court's letter of 9 November 2023, the Government of Iceland was invited, pursuant to Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the Court, to lodge written observations within two months from the date of the notification, i.e. by Tuesday, 9 January 2024.
3. The case raises questions about whether the obligation to surrender emission allowances under Directive 2003/87/EC (hereinafter referred to as "the ETS Directive" or "the Directive") can be settled by dividend payment in the event of insolvency. Oslo District Court must rule on which requirements the ETS Directive imposes for the surrender of emission allowances, and the imposition of fines when less than full surrender is made of emission allowances, in connection with restructuring under national insolvency law.
4. For further details on the factual background of the case, the Government of Iceland refers to the request for an Advisory Opinion.
5. The referring court has submitted 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?*

## **II. OBSERVATIONS BY THE GOVERNMENT OF ICELAND**

6. The position of the Government of Iceland is that the obligation to surrender emission allowances as it was prescribed by Article 12(2a) of the ETS Directive, since replaced by Article 12(3)(b), is absolute and unconditional. This obligation is not extinguished or mitigated by insolvency proceedings. In this regard, the Government of Iceland shares the position presented by the Norwegian State in the national case, as described in chapter 5.2

of the request for an Advisory Opinion. This position is based on the fact that the provisions of the ETS Directive impose obligations on EEA Contracting Parties, their competent authorities and undertakings, which could not be complied with in the event of an alternative interpretation, as well as the purpose of the system established under the Directive.

### *2.1. The Emissions Trading System and the nature of emission allowances*

7. The ETS Directive establishes a system for greenhouse gas emission allowance trading within the European Economic Area (hereinafter referred to as “the Emission Trading System” or “the ETS”). The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 146/2007 of 26 October 2007 and subsequent amending acts have regularly been incorporated into the Agreement thereby resulting in an EEA-wide application of the system.
8. The ETS is engineered as a tool to combat climate change, for reducing greenhouse gas emissions cost-effectively and enable the EEA Contracting Parties to fulfil their international commitments pursuant to the Kyoto Protocol, and now the Paris Agreement, to the United Nations Framework Convention on Climate Change. The objective of the ETS, as outlined in the ETS Directive, is thus the safeguarding of the environment through the establishment of economic incentives for reducing greenhouse gas emissions within the EEA.
9. The system works in such a way that a cap is set on the total emissions of greenhouse gases from a given sector. In the aviation sector within the ETS, flight operators are allocated free emission allowances covering a portion of their emissions. Additional emission allowances can be acquired through auctions and, over time, the proportion of emission allowances from auctions increases thus displacing the free allocations. This dynamic necessitates that flight operators implement emission reduction measures or acquire additional emission allowances through market transactions.
10. In this regard, according to point (a) of Article 3 of the ETS Directive, an ‘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 the Directive and shall be transferable in accordance with the provisions of this Directive”.

11. Furthermore, according to Article 12(2a) of the ETS Directive, every aircraft operator is obligated to surrender emission allowances equivalent to its total emissions from the preceding calendar year by a certain date each year. The surrender of emission allowances is based on a verified emission report in accordance with Article 15 of the Directive.
12. With the exception of Article 12(3a), which refers to the capture and permanent storage of carbon dioxide, no exemptions exist for the obligation to surrender emission allowances for existing ETS operators. Therefore, the interpretation of Article 12(2a) must be regarded as unconditional. This nature of the obligation is underlined by the fact that the imposition of a penalty, provided for in Article 16 of the ETS Directive, does not absolve the obligated party from fulfilling the requirement to surrender a sufficient number of emission allowances to the registry for emissions to be considered lawful.
13. As an extensive legal regime affecting the activities of large industries whose activities are further regulated under both EEA and national law, the ETS must necessarily interact with other legal instruments. In this regard, the Government of Iceland submits that any interpretation of the ETS in the context of ancillary legal instruments must maintain coherence with, and not contradict, the existential purpose of that system which is to lower greenhouse gas emissions. This is especially the case for ETS allowances which, although tradeable on the market and holding market value, have no existence independent of the ETS Directive and associated legislation under which they are established to serve as a licensing system authorising their holders to emit tonnes of greenhouse gases equivalent to their number.
14. The Government of Iceland submits that the logical coherence of the ETS and the actual terms of Article 12(2a) of the Directive require that the obligation to surrender emission allowances be fulfilled exclusively through such allowances. No alternative methods of surrendering are authorised by the Directive.

## *2.2. The role of the national administrator*

15. It is relevant to the present case to highlight the role of the national administrator in the Union Registry. According to Articles 7 and 10 of Commission Delegated Regulation (EU) 2019/1122 (hereinafter referred to as “the Union Registry Regulation”), which supplements

the ETS Directive as regards the functioning of the Union Registry, each Contracting Party shall designate a national administrator for accessing and administering relevant accounts in the Registry. The responsibilities of the national administrator encompass tasks such as opening, suspending access to, or closing an account, altering its status, endorsing authorised representatives, and allowing changes to account details that necessitate the approval of the national administrator.

16. The ETS regime does not authorize the national administrator to receive pecuniary payments for the acquisition of emission allowances to surrender them on behalf of the operator. Neither does it allow the national administrator to negotiate with an operator about his obligation to surrender the respective allowances nor to cancel this obligation in full or in part.
17. The role and functions of the national administrator are set out in the Union Registry Regulation in the context of the ETS Directive. As a general principle, the terms of the Union Registry Regulation or other provisions of the EEA Agreement cannot be substantially altered by way of interpretation of extraneous and incompatible legal instruments.

### *2.3. Emission allowances in insolvency or restructuring procedures*

18. In the event of insolvency or restructuring procedures, it is necessary to ascertain whether the ETS allowances held by an aircraft operator to fulfil their obligations under the ETS Directive constitute an asset of a company and what kind of property rights they imply.
19. The question of the proprietary nature of ETS allowances has been raised in several cases before the Court of Justice of the European Union (“CJEU”), although never definitively settled.
20. In Case C-165/20 *Air Berlin*, specifically paragraph 78, Advocate General Hogan argued that ETS allowances do not stem from the assets or occupational activity of an aviation operator, and they do not constitute property rights protected by the Union legal order, inter alia, Article 17 of the Charter of Fundamental Rights of the European Union. In this regard, Advocate General Hogan contended that the ETS was simply a mechanism designed to incentivise certain economic behaviour, namely the reduction of greenhouse gases, and was

not originally conceived for the monetisation of emission allowances independently or for their treatment as quasi-currency in an insolvency scenario.

21. While the CJEU did not explicitly rule on the nature of ETS allowances in the *Air Berlin* case, the Government of Iceland submits that the conceptualisation advanced by Advocate General Hogan and the argumentation of the Norwegian State in the national case from which the present Request for an Advisory Opinion derives are consistent with the jurisprudence of the CJEU regarding the ETS and emission allowances as a whole. Referring to the CJEU judgment of 17 October 2012, *Billerud*, Case C-203/12 paragraph 26, it is clarified that the ETS itself does not directly reduce emissions but incentivizes cost-effective pursuit of emissions reduction. The environmental benefit hinges on the stringency of allocated emission allowances, defining the overall emission limit and accurate accounting of the issue, holding, transfer and cancellation of allowances.
22. The Government of Iceland submits that the ETS would be fundamentally undermined if the nature of emission allowances would be transformed in such a way as to be considered as conventional property rights. Emission allowances function as financial instruments, essentially as a license that entitle the holder to emit a certain amount of greenhouse gases, only to the extent necessary to meet the objective of the Directive. Moreover, the cap element of the ETS plays a crucial role to reduce greenhouse gas emissions by decreasing the number of emission allowances within the system. To ensure the effectiveness of this mechanism, ETS operators are restricted to acquiring and surrendering emission allowances and cannot employ any other pecuniary assets to fulfil their obligations.

*2.4 Court of Appeal case no. 598/2020: The Environment Agency of Iceland versus the insolvency estate of WOW air hf.*

23. The Government of Iceland submits that the question put forward by the Oslo District Court calls for an examination of related questions arising from situations where operators subject to a surrender obligation undergo insolvency procedures. This was paralleled in the Icelandic national proceedings in the case of the Environment Agency of Iceland versus the insolvency estate of WOW air hf., an Icelandic aircraft operator that was declared insolvent

in 2019. The dispute in the case regarding the insolvency estate's obligation to surrender emission allowances was referred to the Icelandic courts.

24. WOW air, a flight operator, had participated in the ETS since 2014. On 27 March 2019, WOW air submitted a certified emissions report for 2018, disclosing emissions of 278,125 tons of CO<sup>2</sup> falling under the ETS. The next day on 28 March, 152,000 EUAA had been transferred out of WOW air's account in the Union Registry, the same day as the Reykjavík District Court ruled that WOW air would undergo insolvency procedures.
25. On 24 April 2019, the administrators of the insolvency estate liquidated the remaining 516 emission allowances in WOW air's account. Nonetheless, the estate failed to surrender emission allowances equal to the total emissions for 2018 in the Union Registry by 30 April 2019 as required by paragraphs 1 and 2 of Article 17 of the Icelandic Act on Climate Change No. 70/2012, cf. Article 12(2a) of the ETS Directive. Subsequently, the Environment Agency demanded in the insolvency procedures that 278,125 emissions allowances be surrendered, including the 516 emission allowances liquidated on 24 April 2019. The claim, for the emissions sold by the administrators of the insolvency estate, was submitted as a separatist right (is. sértökukrafa) according to Article 109 of Act on Bankruptcy etc. No. 21/1991. That provision is as follows:

*1. Assets and interests in the possession of the bankruptcy estate shall be delivered to a third party if the third party proves his entitlement. Any assets and interests which the bankruptcy estate can not lawfully claim shall likewise be handed over to those entitled to them.*

*2. If the bankruptcy estate has sold any assets or interests which a third party later establishes as his, that party shall be entitled to the consideration received by the bankruptcy estate, less the cost of safekeeping and sale borne by the estate, as the case may be. Such a claim shall be paid before all other claims against the estate.*

26. The administrators of the insolvency estate rejected all the claims of the Environment Agency for the surrender of emission allowances. Therefore, the parties agreed to submit the dispute on the separatist right under Article 109 of Act on Bankruptcy etc. regarding

the 516 emission allowances, sold by the administrators of the estate, to the District Court of Reykjavik.

27. The District Court of Reykjavik did not agree that it was the role of the Environment Agency, as the national administrator of the Union Registry, as described in the Act on Climate Change, implementing Articles 7 and 10 of the Union Registry Regulation, to make such a claim. The District Court also held that the Act on Climate Change did not include any provisions providing for preferential treatment for emission allowances under insolvency procedures. Furthermore, the Court held that the administrators of the insolvency estate were entitled to sell the 516 emissions allowances without any restrictions or an approval from the Environment Agency on how they were disposed of, as the national administrator of the Union Registry did not have a lawful claim to the emission allowances.
28. The ruling of the District Court of Reykjavik was appealed to the Court of Appeal by the Environment Agency. In the ruling of the Court of Appeal in Case No. 598/2020, the Court upheld the District Court's ruling. In its conclusions, the Court indicated that to apply paragraph 2 of Article 109 of Act on Bankruptcy etc., the Environment Agency should have claimed the pecuniary value of the rights but not the surrender of the emission allowances. The claim could therefore only be considered under paragraph 1 of Article 109 of Act on Bankruptcy etc. which was not possible to fulfil as the emission allowances had already been sold by the administrators of the estate. Therefore, the Court did not rule on the question of whether the administrators of the insolvency estate should repurchase emission allowances to be able to fulfil the obligation to surrender.
29. Throughout the case, the Environment Agency consistently argued that it was not viable for the Agency, under the language of paragraphs 1 and 2 of Article 17 of Act on Climate Change and Article 12 of the ETS Directive, together with the principles of the ETS, to make pecuniary claims for the missing emission allowances. According to the Agency, it could only demand that the administrators of the insolvency estate of WOW air hf. settle the company's emissions by surrendering sufficient emission allowances in the company's registry account.



30. The ruling of the Icelandic national courts in the WOW air case is reflective of the challenges which national insolvency proceedings pose to the fulfilment of the provisions of the ETS Directive. In answering the question referred, the Government of Iceland invites the EFTA Court to reflect on how the interplay between the ETS Directive and ancillary national law not harmonised under the EEA Agreement can be effected in ways which safeguard a homogeneous application of the ETS throughout the EEA.

### **III. CONCLUSION**

31. The Government of Iceland submits that the question referred to the EFTA Court in the present case is of broad and actual significance to the operation of the ETS, as highlighted by the similar questions which arose in the WOW air case. A determination that the surrender obligation under the ETS Directive could be fulfilled by dividend in connection with the restructuring of an insolvent company would result in significant wider uncertainties for the ETS Directive which would need to be addressed in order to safeguard the logical coherence of the ETS at large. In addressing the question referred to the EFTA Court, the Court will need to consider and assess the following questions in the context of the ETS Directive:

- I. Whether ETS emission allowances can be defined as assets of a company or if they should be held outside the insolvency estate as a separatist right,
- II. whether the national administrator has the mandate to negotiate a settlement or receive pecuniary payments, and
- III. whether ETS emission allowances can be treated as pecuniary claims in restructuring or insolvency procedures.

32. If the interpretation of each State's bankruptcy law is to be decisive in answering the questions above, a potential risk exists that the execution of the ETS would deviate from the provisions of the Directive. The explicit intention of the ETS Directive is to create a harmonized approach to emissions trading within the European Economic Area.

33. It is the view of the Government of Iceland that allowing the settlement of emission allowances through dividends or any pecuniary payment in the context of a compulsory debt settlement contradicts the principles of the ETS and the specific provision of Article

12(2a), now Article 12(3)(b), of the ETS Directive. Without clearer guidance on the above questions such settlement would undermine the integrity of the ETS and compromise the common environmental objectives set by the Directive.

#### **IV. ANSWER TO THE QUESTION REFERRED**

34. The Government of Iceland respectfully submits that the question referred to the EFTA court is answered as follows:

*Article 12(2a), now Article 12(3)(b), of Directive 2003/87/EC, must be interpreted in such a way, considering the objective of the ETS and other provisions of the ETS regime, that it precludes 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 company.*

For the Government of Iceland,

Inga Þórey Óskarsdóttir  
Agent

Daníel Arnar Magnússon  
Agent