



EUROPEAN COMMISSION

Brussels, 9 January 2024
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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the **European Commission**, represented by Geert Wils, Legal Advisor, and Bart De Meester, Member of its Legal Service, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/93, 1049 Brussels and consenting to service by e-EFTA Court, in

Case E-12/23

Norwegian Air Shuttle ASA (Plaintiff),

v

Norwegian State (Defendant)

in which the Oslo District Court requested 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.

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I. INTRODUCTION

1. The European Commission (hereinafter: **“the Commission”**) divides its observations into several parts. After outlining the factual and legal framework of the present case (Section II), the Commission discusses in Section III the responses to questions referred to the EFTA Court by the Oslo District Court (hereafter: **“the referring court”**). The proposed responses are provided in the Conclusion (Section V).

II. THE FACTUAL AND LEGAL FRAMEWORK

II.1. The factual framework

2. The Commission refers to the description of facts as set out in the ruling of the referring court seeking the advisory opinion of the EFTA Court (hereinafter: the **“reference order”**)¹. Nonetheless, the Commission considers it useful to highlight a few facts mentioned by the referring court in the reference order.
3. Norwegian Air Shuttle ASA (NAS) is a Norwegian airline. NAS has several subsidiaries covered by the EU ETS as an aircraft operator performing the activity “aviation” listed in Annex I to Directive 2003/87/EC (the **‘ETS Directive’**)².
4. NAS’ subsidiary Norwegian Air Shuttle AOC AS, whose surrender obligation is the subject of the case at issue, is administered by Norway in accordance with Article 18a of the ETS Directive and Regulation (EC) No 748/2009 on the attribution of aircraft operators to administering Member States³. Its registry identification number is 200307 and its unique identification code (CRCO number) is 22212⁴. NAS’ Irish subsidiaries, including Norwegian Air

¹ The Commission’s submission is based on the English translation of the reference order provided by the EFTA Court. References to certain pages or parts of the reference order in the text of this submission are references to the English translation of the order.

² Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32); for the temporally relevant version, see below point 20 and footnotes 7 and 8.

³ Commission Regulation (EC) No 748/2009 of 5 August 2009 on the list of aircraft operators which performed an aviation activity listed in Annex I to Directive 2003/87/EC on or after 1 January 2006 specifying the administering Member State for each aircraft operator (OJ L 219, 22.8.2009, p.1).

⁴ See [EUROPA - Environment - Kyoto Protocol - European Union Transaction Log](#)

International Limited, were administered by Ireland. Norwegian Air International Limited's registry identification number is 207688⁵.

5. NAS faced financial difficulties, in particular because of the travel restrictions due to the COVID-19 pandemic. Following petitions from NAS on 18 November 2020 and 8 December 2020, insolvency procedures were opened in Ireland and Norway respectively. In Ireland, the Scheme of Arrangement was confirmed by the High Court on 26 March 2021. In Norway, the restructuring plan was confirmed by order of the [then] Oslo District Court of 12 April 2021.
6. According to the data submitted by the Oslo District Court, NAS should have surrendered 372 818 allowances for its emissions during the reporting year 2020 in respect of the subsidiary administered by Norway.
7. NAS has not surrendered allowances in respect of the emissions released during the period 1 January 2020-17 November 2020 ('**Period 1**'). According to the data submitted by the Oslo District Court, NAS should have surrendered 357 779 allowances to fulfil its surrender obligation for Period 1.
8. NAS surrendered 15 039 allowances by the deadline of 30 April 2021, to fulfil its surrender obligation for the period 18 November 2020-31 December 2020 ('**Period 2**').
9. The [public registry account](#) of the aircraft operator Norwegian Air Shuttle AOC AS shows the following situation:⁶

EU Compliance Information							
EU ETS Phase	Year	Allowances in Allocation	Verified Emissions	Units Surrendered	Cumulative Surrendered Units	Cumulative Verified Emissions	Compliance Code
2013-2020	2020	827543	387043	15039	11143279	11516097	B

10. Compared to the data submitted by the Oslo District Court, the emissions of Norwegian Air Shuttle AOC AS in 2020 amounted to 387 043 tonnes CO₂ according to the Union Registry (while the Oslo District Court mentioned the number of 372 818 emissions for year the 2020). The difference in the total amount of verified emissions for 2020 has no impact on the legal issue in this case.

⁵ See [EUROPA - Environment - Kyoto Protocol - European Union Transaction Log](#).

⁶ See [EUROPA - Environment - Kyoto Protocol - European Union Transaction Log](#).

II.2. The legal issue in this case

11. NAS made a dividend offer in relation to its surrender obligation for Period 1, in accordance with NAS' interpretation of its restructuring plan, which provides that 'claims' that date from before the opening of the restructuring procedure can be settled through dividends corresponding to 5% of the underlying claims.
12. According to the submission of the Oslo District Court, NAS' restructuring plan was confirmed by order of the Oslo District Court of 12 April 2021; the order made no mention of the obligation to surrender allowances.
13. The Norwegian Environment Agency refused to receive a dividend settlement, on the ground that the surrender obligation could not be settled by a dividend settlement, but only by a surrender of allowances, because the obligation to surrender allowances under the ETS Directive is an 'absolute' environmental obligation.
14. In line with Article 16(3) of the ETS Directive, the Norwegian Environment Agency on 21 September 2021 imposed an administrative penalty of around NOK 400 million, calculated at a rate of EUR 100 per non-surrender allowances (the '**Penalty Decision**').
15. NAS appealed the Penalty Decision before the Norwegian Ministry of Climate and Environment, which upheld the Penalty Decision on 16 December 2022.
16. NAS is contesting the validity of the 16 December 2022 decision of the Ministry of Climate and Environment before the Oslo District Court. NAS claims that its surrender obligation for Period 1 can be settled by dividend in a compulsory debt settlement in connection with a court-driven restructuring.
17. Oslo District Court requested an advisory opinion from the EFTA Court concerning the interpretation of Article 12(2a) of the ETS Directive, as regards the obligation to surrender allowances.

III. THE QUESTION REFERRED TO THE EFTA COURT

18. The referring court seeks an advisory opinion from the EFTA Court on 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?

IV. THE ANALYSIS BY THE COMMISSION

19. The Commission considers that the question should be answered in the affirmative. In the Commission's view, Directive 2003/87/EC precludes national legislation from providing for the obligation to surrender allowances pursuant Article 12(2a) of that Directive to be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company, for the following reasons.
20. According to the ETS Directive as it was in force in 2021 (i.e. before the amendments brought by Directive (EU) 2023/958⁷ and Directive (EU) 2023/959⁸), the obligation to surrender allowances of an aircraft operator is laid down in Article 12(2a) of the ETS Directive. The amendments to the ETS Directive brought by Directive (EU) 2023/958 and Directive (EU) 2023/959 do not alter the substance of the surrender obligation of aircraft operators.
21. Article 12(2a) of the ETS Directive, as applicable at the time where NAS was subject to surrender obligation in respect of emissions released during Period 1, reads as follows:

“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.”
22. Pursuant to Article 16(1) and (3) of the ETS Directive, in case of failure to comply with its surrender obligation in respect of the precedent reporting period by the deadline (30 April of each year), the administering Member States must

⁷ Directive (EU) 2023/958 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure (OJ L 130, 16.5.2023, p. 115).

⁸ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system (OJ L 130, 16.5.2023, p. 134).

impose penalties, including an “excess emissions penalty” of EUR 100 for each tonne of emissions emitted for which the aircraft operator has not surrendered allowances. Article 16(3) of the ETS Directive specifies that “*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*”.(emphasis added)

23. The ETS Directive does not provide for any derogations from the surrender obligation for any reasons, including economic reasons like in the case of insolvency of the aircraft operator. On the contrary, it provides for maintaining the surrender obligation even in the case of imposition of the excess emissions penalty. It can therefore be deducted that Member States should continue ensuring the full enforcement of the surrender obligation, even when the aircraft operator is subject to insolvency procedures.
24. In relation to insolvency procedures of an aircraft operator, Commission Delegated Regulation (EU) 2019/1122⁹ (the ‘**Registry Regulation**’) provides for provisions that seem to confirm that surrender obligations subsist despite insolvency procedures.
25. The combined reading of Article 30(5) and (10) of the Registry Regulation provides that the national administrator may suspend the access of the authorised representatives of the Aircraft Operator Holding Account, in the case where the aircraft operator is subject to insolvency procedures. Notwithstanding this suspension, the national administrator shall ensure the surrendering of allowances by the deadline, if so requested by the aircraft operator.
26. Article 30(5) of the Registry Regulation provides:

“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.”

⁹ 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 (OJ L 177, 2.7.2019, p.3).

27. Article 30(10) of the Registry Regulation provides:
- “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.”*
28. In addition, the Registry Regulation provides for rules on the calculation of the compliance status of installations and aircraft operators. In line with the principle of strict accounting of emissions on which the EU ETS relies, the Registry Regulation provides that the compliance status must reflect whether an installation or aircraft operator is in compliance with the surrender obligation over the years. In accordance with Article 33 of the Registry Regulation, the compliance status is calculated on a yearly basis, but the calculation takes into account the compliance with the surrender obligations that related to previous reporting periods.
29. NAS did not comply with its surrender obligation for 2020, taken separately. The compliance status for 2020 is B (i.e. “The number of allowances and ERUs/CERs surrendered by 30 April is lower than verified emissions”). While NAS did comply with its surrender obligation for 2021 and 2022 taken separately, NAS’ compliance status remains B, because the calculation of the compliance status for 2021 and 2022 respectively take into account the non-compliance for 2020.
30. Such an approach reflects the fact that the surrender obligation in respect of a given reporting period is ‘absolute’ and cannot be ‘erased’. The EU ETS is based on a strict accounting of emissions; past emissions cannot be ‘forgotten’ and remain subject to the surrender obligation in order to ensure the integrity of the EU ETS.

EU Compliance Information							
EU ETS Phase	Year	Allowances in Allocation	Verified Emissions	Units Surrendered	Cumulative Surrendered Units	Cumulative Verified Emissions	Compliance Code
2008-2012	2012	994506	1696576	1696576	1696576	1696576	A*
2013-2020	2013	824183	1845344		0	0	A
2013-2020	2014	824183	2058681	3904025	3904025	3904025	A
2013-2020	2015	824183	1996198	1996198	5900223	5900223	A
2013-2020	2016	824183	1373324	1373324	7273547	7273547	A
2013-2020	2017	824183	1242919	1242919	8516466	8516466	A
2013-2020	2018	824183	1287963	1287963	9804429	9804429	A
2013-2020	2019	824183	1324625	1324625	11129054	11129054	A
2013-2020	2020	827543	387043	15039	11143279	11516097	B
2021-2030	2021	773713	490388	490205	490152	490152	B*

2021-2030	2022	756308	912082	913957	1402470	1402470	B
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Source: European Union Transaction Log, accessible: <https://ec.europa.eu/clima/ets/ohaDetails.do?action=all&accountID=90245&languageCode=en>

31. The Commission considers that the ETS Directive does not allow Member States to accept derogations from the surrender obligation due to insolvency procedures. It agrees with the Norwegian Ministry of Climate and Environment that the obligation to surrender allowances is an ‘absolute’ environmental obligation.
32. The case law of European Court of Justice seems to support such an approach, recognising that the ETS is based on “*a strict accounting of the issue, holding, transfer and cancellation of allowances*”¹⁰.
33. In Case C-203/12 *Billerud*¹¹, regarding ETS installations, the Court reiterated the key role of the allowance surrender process, which encompasses the surrender and cancellation of the allowances in the Union Registry. Such surrender process ensures the integrity of the ETS.
34. In point 25 of the judgment of the Court in Case C-203/12 *Billerud*, the Court ruled (emphasis added):

*“It follows from the very letter of Directive 2003/87 that **the obligation to surrender allowances equal to the emissions for the preceding year by 30 April of the current year in order to have them cancelled applies with particular force.** Referred to obligatorily in the greenhouse gas emissions permit under Article 6(2)(e) **and formulated unequivocally in Article 12(3),** that obligation is the only one for which Directive 2003/87 itself provides for a specific sanction, whereas the sanction for any other conduct contrary to its provisions is, under Article 16, left to the discretion of the Member States. The **key role of the allowance surrender process** in the scheme of the directive is also apparent from the fact that being ordered to pay the penalty does not release the operator from the obligation to surrender the corresponding allowances during the surrender process the following year.”*
35. Point 30 of the same judgment reads (emphasis added) “[...] **the obligation imposed by Directive 2003/87 must be regarded** not as a mere obligation to hold the allowances covering the emissions for the preceding year on 30 April of the current year, but **as an obligation to surrender those allowances by 30 April in order to have them cancelled in the Community registry, which is intended to ensure that an accurate accounting record is kept of the allowances.**”

¹⁰ See e.g. Case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, 2013, EU:C:2013:664, point 27.

¹¹ *Ibid.*

36. In a more recent case related to the aviation sector (C-165/20 *Air Berlin*), the Court reiterated these considerations: “*The overall scheme of Directive 2003/87 is thus based on the strict accounting of the issue, holding, transfer and cancellation of greenhouse gas emission allowances [...]. In that connection, that directive requires, in Article 12(2a) thereof in particular, that each aircraft operator, each year, ‘[surrender] 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 ...’*”¹².
37. Further, with regard to penalties in case of failure to surrender allowances in time, the Court ruled in case C-580/14 – *Sandra Bitter v Bundesrepublik Deutschland*,¹³ that nothing was capable of affecting, in the light of the principle of proportionality, the validity of the second sentence of Article 16(3) of the ETS Directive, in that it provides for a penalty of EUR 100 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances. This case referred to a German installation which had ceased its operations after going bankrupt in 2011 and the German authority ordered the insolvency agent to report the emissions and surrender the allowances even during the insolvency proceeding. As the [EU Transaction Log public website](#)¹⁴ shows, the missing surrender happened in 2015, well after the insolvency procedure started.
38. The case law of the European Court of Justice thus supports an approach according to which Member States have no flexibility in the enforcement of the surrender obligation, including in the event of insolvency of the aircraft operator.
39. In this regard, the Commission also recalls that the ETS compliance obligation is not an obligation towards a single State, but towards the Union, as that obligation is part of a Union-wide system. This stands in contrast to, for instance, taxes. Accordingly, a State may agree that it accepts less money in taxes, this does not consider other parties, while for the ETS a State cannot decide in the name of the Union (or another Member State) to accept less. Not fulfilling the compliance obligation concerns the ETS as a whole, and thus the entire Union, not just the particular State. It would compromise the integrity of the ETS, as emissions

¹² Case C-165/20, *Air Berlin*, 2022, EU:C:2022:42, point 58.

¹³ Case C-580/14, *Sandra Bitter v Bundesrepublik Deutschland*, 2015, EU:C:2015:835, points 35 and 36.

¹⁴ See [EUROPA - Environment - Kyoto Protocol - European Union Transaction Log](#).

would no longer match the number of surrenders at the level of the Union. This would lead to a surplus of allowances. Keeping more allowances in the system affects the entire ETS, as the allowances not cancelled in Norway will be used elsewhere, affecting the demand/supply ratio. The Commission points out in this regard that compliance with ETS obligations is also very important to meet the Union and the Member States' commitments under the Paris Agreement.

40. The Commission understands from the submission of Oslo District Court that the relevant Norwegian insolvency law (the Restructuring Act and the Creditors Recovery Act) does not specify whether the obligation to surrender allowances under the ETS Directive constitutes a "claim" for the Administering Member State and, if the surrender obligation amounts to a "claim", whether such a claim is given a particular form of recovery or priority ranking.
41. EU insolvency law (not incorporated into the EEA Agreement) does not regulate the nature of the obligation to surrender allowances.
42. The absence of provisions regulating the obligations to surrender allowances in EU and Norwegian insolvency law does not preclude Member States from considering the obligation to surrender allowances as an environmental obligation that continues to exist on a self-standing basis, despite the initiation of insolvency procedures.
43. The dividend settlement offered by NAS to the Norwegian Environment Agency would render the obligations to surrender allowances less stringent. Indeed, the settlement offered by NAS consisted in converting the obligations to surrender allowances in respect of the emissions released during the period preceding the opening of the restructuring negotiations (i.e. Period 1) into a pecuniary claim. According to the restructuring plan, non-preferential creditors would be allocated dividends corresponding to 5% of their underlying claims. The entitlement to dividend of the Norwegian Environment Agency was estimated at approximately NOK 7,5 million.
44. NAS has failed to surrender 357 779 allowances in respect of its emissions during Period 1. Based on conservative estimates (assuming an allowance price of EUR 50), the purchase of 357 779 allowances would amount to about EUR 17,9 million or NOK 210 million. The pecuniary compensation offered by NAS to the Norwegian Environment Agency would thus be by far insufficient to cover the purchase of allowances necessary to fulfil NAS' surrender obligation for Period 1. Assuming that the dividend settlement would have been used to purchase and

surrender allowances, such an approach would render the surrender obligation less stringent. For a given quantity of emissions released during 2020, NAS would have been allowed to surrender a number of allowances that is lower than the emissions released during Period 1, and thus during 2020.

45. NAS cannot claim that its restructuring plans allows it to offer a dividend settlement to the Norwegian Environment Agency with a view to fulfilling its surrender obligation in respect of Period 1. Such a dividend settlement concerning the surrender obligation for Period 1 would not be in line with the ETS Directive and as clarified by EU case law. In accordance with Article 12(2a) of the ETS Directive as applicable in 2021, NAS is obliged to surrender a number of allowances equal to the total emissions during 2020, including emissions released during Period 1.
46. In light of the above, the Commission shares the view of the Norwegian Ministry of Climate and Environment that the obligation to surrender obligation cannot be settled by dividend payment in connection with the restructuring of an insolvent company, all the more so where such settlement renders the obligation to surrender allowances less stringent.

V. CONCLUSION: THE PROPOSED RESPONSE

47. In the light of the preceding discussion, the Commission proposes to respond to the question from the referring court in the affirmative, as follows:

Directive 2003/87/EC precludes national legislation from providing for the obligation to surrender allowances pursuant Article 12(2a) of that Directive to be settled by dividend in a compulsory debt settlement in connection with the restructuring of an insolvent company.

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