



ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 09 January 2024

Written Observations by the Kingdom of Norway

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Case E-12/23 Norwegian Air Shuttle ASA v. the Norwegian Government

in which Oslo tingrett (Oslo District Court) 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.

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1 INTRODUCTION

- (1) Oslo District Court (hereinafter “the Referring Court”) has, by reference dated 6 October 2023, requested the EFTA Court (hereinafter “the Court”) to give an advisory opinion regarding Directive 2003/87/EC on establishing a system for greenhouse gas emission allowance trading within the Community (hereinafter “the ETS Directive”). The question reads:

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?

- (2) The view of the Government is that the question by the Referring Court must be answered in the affirmative. It follows from a literal reading of Article 12(2a)¹ that the obligation to surrender allowances can be complied with only by the surrendering of allowances which fully cover total verified emissions during the preceding year. The ETS Directive contains no exceptions in case of insolvency. This means that the surrender obligation is to be applied in accordance with the wording of Article 12(2a) in case of insolvency.
- (3) The Government’s literal interpretation is supported by contextual and teleological arguments. The ultimate objective of the EU Emissions Trading System (hereinafter “the ETS”) is to protect the environment by the establishment of absolute limits on the emissions of greenhouse gases. It is an essential priority of the scheme that actual emissions do not exceed the ETS’ emissions cap. The surrender obligation plays a key role to ensure this by enabling accurate accounting of the allowances which are used to cover verified emissions in the preceding year. If it is accepted that the surrender obligation may be settled by dividend, verified emissions may exceed the scheme’s emissions cap. Such an interpretation would be contrary to the logic inherent in the very purpose of the ETS Directive.
- (4) Case law supports the Government’s view. The ECJ has concluded that the surrender obligation applies with particular force, which is to be treated in a stringent and consistent manner throughout the EEA. Therefore, the ECJ has presupposed that the surrender obligation is to be applied in accordance with the wording of Article 12(2a) in case of insolvency.

2 FACTS

- (5) The basic facts of the case, as set out in the referral, are as follows:
- (6) Norwegian Air Shuttle ASA (hereinafter “NAS”) is subject to the surrender obligation set out in national law implementing Article 12(2a) of the ETS Directive. Based on the verified emissions reported for the aviation activities in 2020, NAS was obliged to surrender 387 857 allowances by 30 April 2021. However, 372 818 of the required allowances were not

¹ As stated in the referral, the ETS Directive has been amended several times. In line with the referral, the Government will refer to the consolidated version of 1 January 2021.

surrendered within the surrender time-limit, and NAS has still not surrendered those allowances. Because of this failure to comply with the surrender obligation, NAS was imposed a penalty in accordance with national law implementing Article 16(3) of the ETS Directive.

- (7) In addition, it is necessary to provide some further elaboration of the facts:
- (8) In February 2020, NAS was awarded 826 821 *free* allowances specifically dedicated to the fulfilment of the obligation to surrender allowances covering emissions in 2020.² The number of free allowances turned out to be more than twice as many allowances as NAS would have needed to comply with its surrender obligation 30 April 2021. However, at the time NAS entered into the court-driven reconstruction process, NAS was in possession of only 3777 allowances, which was far from sufficient to cover NAS' emissions in 2020.
- (9) Shortly after NAS was awarded the free allowances for 2020, the COVID-19 pandemic resulted in travel restrictions. This had great impact on travel activity in general and caused cancellations for aircraft operators and other travel operators all over Europe – including NAS. On this background, by letter 3 April 2020 the Federation of Norwegian Aviation Industries (NHO Luftfart) requested the Ministry of Climate and Environment to examine whether it was possible for the national authorities to make exceptions from the surrender obligation set out in national law implementing Article 12(2a) of the ETS Directive. NAS made a similar request on 14 April 2020.
- (10) The Ministry of Climate and Environment replied to the request on 17 April 2020 – with a copy to NAS – and highlighted that national authorities were not entitled to make exceptions from the obligations under the ETS Directive because those obligations are fully harmonised. The Ministry also emphasized that the authorities had participated in meetings with the European Commission who had underscored that the surrender time-limit still applied after the breakout of the COVID-19 pandemic.
- (11) Accordingly, at the time NAS entered into the court-driven reconstruction process, it had been awarded a great number of free allowances and was also acquainted with the Government's view that there was no possibility to make exceptions from the ETS surrender obligation. Nevertheless, in NAS' draft reconstruction plan, the surrender obligation was transformed into an ordinary monetary claim corresponding to 5 % of NOK 148 686 026, which was the monetary value of the outstanding allowances. The Norwegian Environment Agency (hereinafter "NEA")³ was designated as the creditor of the claim, consisting of a payment obligation and the issuance of financial instruments.
- (12) The main terms of the reconstruction plan were presented to the creditors in a meeting on 27 January 2021. However, NEA was not invited to or informed about that meeting. In the reconstruction plan, it was stated that the claim resulting from the ETS surrender obligation

² Cf. Article 10a of the ETS Directive.

³ NEA is the competent authority and the national administrator under the ETS Directive and Regulation (EU) 2019/1122 ("the Registry Regulation").

had been submitted by NEA and was undisputed. This is incorrect and has later been confirmed by the Reconstructor as erroneous.

- (13) On 11 March 2021, NEA became aware of the reconstruction plan. The authorities maintained its position that the ETS' surrender obligation can be fulfilled only by the surrendering of sufficient allowances to the Union Registry, implying that the surrender obligation cannot be settled by dividend. However, the Reconstructor did not communicate NEA's position on this matter to Oslo District Court before the confirmation of the reconstruction plan.
- (14) Due to the successful reconstruction, NAS avoided a potential liquidation through bankruptcy proceedings. However, in contrast to a case of bankruptcy, in which the company ceases to exist, NAS continued to be an ongoing business throughout the reconstruction procedure. This means that NAS retained control of its own assets (including its aircraft operator holding account), business and operations, subject to the supervision of the reconstructor and the creditor committee. Accordingly, NAS is the same legal subject today as it was at the time it incurred the obligation to surrender the allowances covering total emissions in 2020.

3 LEGAL ANALYSIS

3.1 Preliminary Remarks

- (15) By its question, the Referring Court asks, in essence, whether Article 12(2a) of the ETS Directive precludes national legislation which provides that the obligation to surrender emissions allowances may be settled by a dividend in connection with the restructuring of an insolvent aircraft operator.
- (16) At the outset, it is recalled that the ETS Directive aims to contribute to fulfilling the commitments of the EU and the EEA States to substantially reduce anthropogenic emissions of greenhouse gases,⁴ with the ultimate objective of protecting the environment.⁵ To this end, the ETS Directive establishes a system for greenhouse gas emission allowance trading which, inter alia, sets out an absolute limit on the emissions of greenhouse gases from the sectors covered. As a result of the amendments introduced by Directive 2008/101/EU, the purpose and logic of the ETS were extended to the aviation sector.⁶
- (17) In short, the ETS works by issuing a number of allowances corresponding to the absolute limit on the emissions of carbon dioxide equivalents from the sectors covered. One allowance gives the right to emit one tonne of carbon dioxide equivalents. The allowances are partly allocated to operators free of charge and partly sold in auctions. The scheme

⁴ That is, the Kyoto Protocol which is now replaced by the Paris Agreement. Indeed, the Kyoto Protocol does not include international aviation, but by the amendments introduced by Directive 2008/101/EU, the purpose and logic of the ETS were extended to the aviation sector, cf. COM/2006/0304 point 1.

⁵ Cf. Article 1 and para. 5 in the preamble to the ETS Directive.

⁶ Cf. Case C-165/20 *Air Berlin*, para. 57, Case C-320/19 *Ingredion Germany*, paras. 38 and 39.

permits that allocated allowances are sold and traded in the market. In this way, the scheme is intended to, inter alia, encourage covered operators to emit quantities of greenhouse gases that are less than the free allowances originally allocated to it in order to sell the surplus to another operator who has emitted more than its free allowances.⁷

- (18) To ensure compliance with the overall limit on emissions allowed by the scheme, the ETS Directive is based on the strict accounting of the issuing, holding, transfer and cancellation of allowances.⁸ To this end, Article 12(2a) requires that:

«Administering Member States shall ensure that, by 30 April of 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.»

- (19) Article 12(2a) provides unequivocally that national law must impose upon each aircraft operator carrying out aviation activities listed in Annex I to surrender sufficient allowances by 30 April in the following year to have them cancelled in the Union Registry.⁹ The Union Registry is a standardised database intended to ensure accurate accounting of allowances under the ETS.¹⁰ It is operated and maintained by the Commission (the central administrator), whereas the main responsibility of the national authorities (the national administrator) is to be a contact point for national account holders.¹¹

- (20) In the main proceedings, it is not disputed that NAS is subject to the surrender obligation set out in national law implementing Article 12(2a), i.e., that NAS constitutes an aircraft operator which carry out aviation activities listed in Annex I. Based on the verified emissions reported for its aviation activities in 2020, NAS was obliged to surrender 387 857 allowances by 30 April 2021. However, NAS surrendered only 15 039 allowances. The remaining number of 372 818 allowances were converted to a dividend corresponding to 5 % of the monetary value of the outstanding allowances, consisting of a payment obligation and the issuance of financial instruments.

- (21) In the case before the Referring Court, NAS argues that the surrender obligation is complied with by the offering of dividend to national authorities. By its question, the Referring Court seeks the Court's guidance on whether the ETS Directive precludes that the surrender obligation may be settled by dividend pursuant to national insolvency law.¹²

⁷ Cf. Case C-127/07 *Société Arcelor Atlantique et Lorraine*, para. 32, Case C-165/20 *Air Berlin*, para 57.

⁸ Cf. Case C-203/12 *Billerud*, paras. 26 and 27.

⁹ Cf. Case C-203/12 *Billerud*, para. 30.

¹⁰ Cf. para. 3 in the preamble to the Registry Regulation.

¹¹ Cf. Para. 13 in the preamble to the Registry Regulation and Articles 4 and 7 of that regulation.

¹² Please note that, as set out on page 6 of the referral, the parties disagree as to whether the surrender obligation is a "claim" under national substantive insolvency law. The Government's view is that the surrender obligation is not a claim under national insolvency law, whereas NAS is of the opposite view. Thus,

- (22) The view of the Government is that the ETS Directive precludes that the surrender obligation may be settled by dividend in connection with national insolvency proceedings. This interpretation follows from the wording, context and purpose of the ETS Directive, in addition to case law.
- (23) The Government's main submission is that the surrender obligation must be applied in accordance with the wording of Article 12(2a) in any case of insolvency, i.e., that the surrender obligation can be complied with only by the surrendering of sufficient allowances to the Union Registry for cancellation. This view will be elaborated in section 3.2 below.
- (24) In the alternative, it is the Government's view that the surrender obligation in any event must be applied in accordance with the wording of Article 12(2a) in case of a compulsory debt settlement in connection with the reconstruction of an insolvent aircraft operator. This view will be elaborated in section 3.3 below.

3.2 The surrender obligation must be applied in accordance with the wording of Article 12(2a) in case of insolvency

I. National insolvency law must be in conformity with the ETS Directive.

- (25) At the outset, it is recalled that although the insolvency legislation of an EFTA State party to the EEA Agreement is not covered by the EEA Agreement, the EFTA States must nevertheless exercise their competence in conformity with EEA law. As regards the EU Member States, the ECJ in Case C-168/20 *MH and ILA* stated that:

«Although, in the absence of harmonisation at EU level, the substantive rules of insolvency law fall, at this point in time, largely within the competences of the Member States, Member States must nevertheless exercise such competencies in conformity with EU law, including with the fundamental freedoms under the FEU Treaty.»¹³

- (26) This must also apply to the EFTA States,¹⁴ implying that national insolvency law must be in conformity with the ETS Directive. This view is supported by Case C-165/20 *Air Berlin*, in which the ECJ applied the ETS Directive in the event of cessation of aviation activities due to insolvency.¹⁵ Case C-580/14 *Bitter* also supports the Government's view, as the ECJ in that ruling clearly presupposes that the surrender obligation applies in case of insolvency.¹⁶
- (27) The parties to the main proceedings agree that, in principle, the surrender obligation applies in case of insolvency. Thus, the disagreement consists of whether the surrender obligation may be settled by dividend, which is NAS' view, or whether the surrender obligation can be

the Referring Court asks the Court to assume that the surrender obligation is a claim under national insolvency law.

¹³ Cf. Case C-168/20 *MH and ILA*, para. 76 (our underlining in the main text).

¹⁴ See to that effect, Case C-1/04 *Fokus Bank*, para. 20.

¹⁵ Note also that the Advocate General in *Air Berlin* did not adhere to the Commission's argument that the withdrawal of free allocation of aviation allowances of an aircraft operator in the event of insolvency is purely a matter of national procedural autonomy, cf. para. 77 of the opinion by the Advocate General.

¹⁶ See section 3.2 V below.

complied with only by the surrendering of sufficient allowances to the Union Registry, which is the view of the Government.

II. The wording of Article 12(2a) supports the Government's view.

- (28) Starting with the wording of the provision, it is the Government's view that pursuant to the very letter of Article 12(2a), the surrender obligation is harmonised and can be complied with only by the surrendering of sufficient allowances to the Union Registry for cancellation.
- (29) First, Article 12(2a) states that the EEA States "shall ensure" that national law makes "each aircraft operator" subject to the surrender obligation. The term "aircraft operator" is defined as the person who operates an aircraft at the time it performs an aviation activity listed in Annex I, or if that person is unknown, the owner of the aircraft.¹⁷ Hence, the wording clearly states that the EEA States must ensure that the person who operated/owned the aircraft at the time it performed aviation activities causing emissions covered by the ETS, or as the case might be, the legal successor of an aircraft operator,¹⁸ shall be subject to the obligation to surrender allowances covering those emissions. The wording does not leave any discretion to the EEA States. This clearly indicates that the surrender obligation is harmonised in EEA law, including in case of insolvency.¹⁹
- (30) Second, the provision provides unequivocally that national law must ensure the surrendering of "allowances" equal to the emissions for the preceding year by 30 April of the following year to have them "cancelled" in the Union Registry. This wording corroborates the view that the surrender obligation can be complied with only by the surrendering of sufficient allowances to the Union Registry.
- (31) The concept of greenhouse gas *allowance* is of fundamental importance in the ETS because the total number of issued allowances corresponds to the emissions cap under that scheme. It is therefore denominated in metric tonnes of carbon dioxide equivalents, entitling the holder to emit a corresponding quantity of greenhouse gases.²⁰ To ensure compliance with the ETS' emissions cap, an accurate accounting record is kept of the allowances issued under that scheme. The surrender obligation plays a key role to ensure accurate accounting by enabling the *cancellation* of the allowances issued and then actually used.²¹
- (32) Accordingly, the wording of Article 12(2a) demonstrates that it is an essential priority of the scheme to ensure that (i) total emissions in the preceding year is covered by sufficient allowances issued under the ETS Directive which (ii) are to be surrendered to the Union

¹⁷ Cf. Article 3(o) of the ETS Directive and Case C-165/20 *Air Berlin*, para. 48.

¹⁸ In the case of bankruptcy, national legislation in the EEA States typically provides that the bankruptcy estate, represented by the insolvency administrator, is the legal successor of the insolvent undertaking, see for instance Case C-165/20 *Air Berlin* and Case C-580/14 *Bitter*. In the case of reconstruction of an insolvent undertaking, however, if the debtor's operations are not sold as a going concern or similar to another undertaking, there will be no legal successor because the undertaking continues its business.

¹⁹ Cf. Case C-203/12 *Billerud*, para. 39, Case C-113/19 *Luxaviation*, paras. 32 and 33, Case C-580/14 *Bitter*, paras. 30 and 31.

²⁰ Cf. Article 3(a) of the ETS Directive.

²¹ Cf. Article 12(2a) in fine, Case C-203/12 *Billerud*, paras. 25, 27 and 30.

Registry for cancellation. Therefore, the wording does not accept any alternative means of being entitled to emit greenhouse gases than the surrendering of sufficient allowances to the Union Registry, nor in case of insolvency.

- (33) In the case at hand, NAS argues that it was released from the surrender obligation by the offering of dividend to national authorities.²² This approach entails, however, that verified emissions may exceed the ETS' emissions cap. It goes without saying that such an interpretation violates the very letter of Article 12(2a), which clearly precludes that an aircraft operator may be released from its surrender obligation without surrendering sufficient allowances to the Union Registry for cancellation.

III. The Government's interpretation is supported by contextual arguments.

- (34) The Government's literal interpretation is corroborated by several contextual arguments.
- (35) First, whereas Article 12(3a) sets out an exception from the obligation to surrender allowances,²³ there are no exceptions in the ETS Directive regarding insolvency. It is a general interpretation principle of EEA law that where a situation is regulated by secondary law, the only permitted exceptions from the obligations applicable to that situation are those expressly mentioned in the secondary law itself. Hence, where the exception expressly provided for in the ETS Directive does not come into play, as in this case, the obligation to surrender allowances is to be applied in accordance with the wording of Article 12(2a).
- (36) Second, Article 12(2a) must be read in conjunction with the ETS Directive's fundamental rules on the issue of allowances, which establish absolute limits on the emissions of greenhouse gases from the sectors covered.
- (37) Articles 3(c) and 9 set out rules on the total quantity of allowances within the ETS. It is well established law that the total quantity of allowances issued under the ETS Directive, represents the overall limit on emissions allowed by that scheme.²⁴ In fact, it is an essential priority of the scheme as a whole that actual emissions do not exceed the total quantity of allowances issued under the ETS Directive.²⁵
- (38) The surrender obligation plays a key role to ensure compliance with the ETS' emissions cap.²⁶ This is because, ultimately, compliance by the operators with their surrender obligation also determines compliance by the EU and the EEA States with the commitments they have made to substantially reduce anthropogenic emissions of greenhouse gases.²⁷ Therefore, the surrender obligation must be applied strictly and consistently throughout the

²² As mentioned in para. 11 above, the dividend offered by NAS consisted of a payment obligation and the issuance of financial instruments, whose value is limited to 5 % of the monetary value of the outstanding allowances.

²³ Which regards emissions verified as captured and transported for permanent storage.

²⁴ Cf. Case C-127/07 *Arcelor Atlantique and Lorraine and Others*, para. 31, Case C-203/12 *Billerud*, para. 27.

²⁵ See to that effect, Case C-321/15 *ArcelorMittal*, para. 25.

²⁶ Cf. Case C-203/12 *Billerud*, para. 25.

²⁷ Cf. para. 4 in the preamble to the ETS Directive.

EEA.²⁸ If an aircraft operator fails to comply with that obligation, the emissions will be regarded as unlawful as they are above the permitted amount. This is precisely why the ETS Directive sets out a harmonised penalty in Article 16(3) in case of non-compliance with the surrender obligation.

- (39) To ensure the key role of the surrender obligation for the compliance with the ETS' emissions cap, the surrender obligation must be applied in accordance with the wording of Article 12(2a) in case of insolvency. This interpretation prevents that verified emissions may exceed the ETS' emissions cap, which is an essential priority of the scheme as such.
- (40) NAS contends, on the other hand, that it was released from the surrender obligation by the offering of dividend to national authorities, i.e., that the emissions made in 2020 are lawful even if NAS has not surrendered sufficient allowances to the Union Registry for cancellation.²⁹ This interpretation is unfounded and contrary to the fundamental logic inherent in the ETS. This is because it entails that verified emissions may exceed the overall limit on emissions allowed by the ETS. Hence, NAS' interpretation completely neglects that it is an essential priority of the scheme to ensure that actual emissions do not exceed the ETS' emissions cap.
- (41) Third, Article 12(2a) must be read in conjunction with the rules of the ETS Directive requiring that an accurate accounting record is kept of the allowances. The framework for this is provided for by Article 19, which requires the establishment of standardised registries through a separate Commission regulation, i.e., the Registry Regulation.³⁰
- (42) To ensure that the total quantity of allowances represents the overall limit on emissions allowed by the ETS Directive, the scheme is based on the strict accounting of the issuing, holding, transfer and cancellation of allowances.³¹ The surrender obligation ensures this by enabling the cancellation of allowances issued and then actually used.³² To guarantee that accurate accounting of allowances, which is inherent in the ETS, national law must require that sufficient allowances are surrendered to the Union Registry for cancellation in case of insolvency.
- (43) On the other hand, to accept that the surrender obligation may be settled by dividend, will violate the very salient accounting logic inherent in the ETS. As illustrated by the case at hand, this is because no allowances are surrendered to the Union Registry for cancellation in the case of payment of dividend. It goes without saying that such an approach is unsuitable to meet the requirements of an accurate accounting of the scheme's allowances.

²⁸ Cf. Case C-203/12 *Billerud*, paras. 25 and 39.

²⁹ It is recalled that NAS neither after the surrender time-limit has surrendered the allowances required to cover total verified emissions in 2020, see section 2 above.

³⁰ Regulation (EU) no. 2019/1122.

³¹ Cf. Case C-127/7 *Arcelor Atlantique and Lorraine and Others*, para. 31, Case C-457/15 *Vattenfall Europe Generation*, para. 27, Case C-321/15 *ArcelorMittal* para. 24, Case C-203/12 *Billerud*, para. 27, Case C-165/20 *Air Berlin*, para. 58.

³² Cf. Case C-203/12 *Billerud* para. 30.

- (44) The Government's interpretation is furthermore supported by the fact that the Registry Regulation presupposes that the surrender obligation is to be applied in accordance with the wording of Article 12(2a) in case of insolvency.
- (45) Pursuant to Article 15(2) of the Registry Regulation, each aircraft operator shall have one aircraft operator holding account. In case of insolvency, Article 30(5) provides that the national administrator may suspend all access of authorised representatives of an account holder until it receives official information about who has the rights to represent the account holder and the authorised representatives are confirmed. If the account holder in case of suspension is prevented from surrendering allowances in the 10 working days preceding the surrender time-limit laid down in Article 12(2a), Article 30(10) provides that the administrator upon request shall surrender the number of allowances specified by the account holder.
- (46) Accordingly, when Article 30(10) is read in light of Article 30(5), the Registry Regulation presupposes that the surrender obligation applies in accordance with the wording of Article 12(2a) in case of insolvency. This is perfectly in line with the principles laid down in the ETS Directive and the Registry Regulation entailing that a change of identity of the owner of the aircraft operator is irrelevant for the obligation to surrender allowances. This is because either the aircraft operator or its legal successor in any event will remain responsible for compliance with the surrender obligation.³³
- (47) Fourth, Article 12(2a) must be read in conjunction with the harmonised penalty set out in Article 16(3), which once again demonstrates the key role of the allowance surrender process in the ETS.³⁴
- (48) Article 16 lays down sanctions which shall guarantee the proper functioning of the scheme set out in the ETS Directive. The first paragraph provides, in a conventional way, that the EEA States are to lay down the rules on penalties applicable in the case of infringement of the national provisions adopted pursuant to the ETS Directive. However, the EEA States have no freedom to choose the penalties applicable to infringements of the obligation to surrender sufficient allowances. This is because Article 16(3) itself provides for a specific sanction, without leaving any discretion to the EEA States.³⁵
- (49) Article 16(3) shall enforce the surrender obligation provided for in Article 12(2a). The fact that the sanction in Article 16(3) is harmonised, without leaving any discretion to the EEA States, entails, *a fortiori*, that also the surrender obligation is harmonised. This means that the surrender obligation must be applied in accordance with the wording of Article 12(2a) in case of insolvency.
- (50) The Government's interpretation is supported by Article 16(3) *in fine*, according to which not even payment of excess emissions penalty shall release the aircraft operator from the

³³ See to that effect, Article 22(7) of the Registry Regulation. As to installations, see Articles 22(5) to 22(6) of the Registry Regulation and Article 7 of the ETS Directive.

³⁴ Cf. Case C-203/12 *Billerud*, paras. 25 and 27.

³⁵ Cf. Case C-203/12 *Billerud*, para. 39.

obligation to surrender sufficient allowances.³⁶ Hence, the obligation to actually surrender sufficient allowances to the Union Registry is to be absolute in each and every case, including in the case of insolvency.

- (51) Fifth, Article 12(2a) must be read in conjunction with the rules on allocation of allowances and the need to shield the allowance trading scheme from market manipulations.
- (52) Articles 3d to 3f of the ETS Directive govern allocation of allowances for aviation. For the trading period in the case at hand, 82 % of the allowances for aviation were allocated free of charge.³⁷ This is why NAS in 2020 was awarded a great number of allowances free of charge, amounting to twice as many allowances as NAS would have needed to comply with the surrender obligation by 30 April 2021.
- (53) The rules on allocation of free allowances which were applicable to the facts of the main proceedings facilitated compliance with the surrender obligation. This supports the view that the surrender obligation must be applied strictly and consistently throughout the EEA, i.e., that the surrender obligation in each and every case must be applied in accordance with the wording of Article 12(2a).³⁸ This is also necessary in order to shield the ETS from distortions of competition resulting from market manipulations.³⁹
- (54) If the surrender obligation may be settled by dividend, however, certain operators may be tempted to use the free allowances to manipulate the allowance trading scheme by speculating abusively in prices, quantities, time limits or complex financial products which tend to come about in any market.⁴⁰ For example, an aircraft operator in difficulty may become tempted to await to file a bankruptcy petition until the free allowances have been awarded and subsequently sell the free allowances allocated to it before a bankruptcy petition is filed. Such an approach would be to the detriment of the integrity and the effective functioning of the ETS.

IV. The Government's interpretation is fully in line with the objectives of the ETS scheme.

- (55) The Government's literal and contextual interpretation is also supported by a teleological interpretation.
- (56) First, the objectives of the ETS Directive support the view that the surrender obligation must be applied in accordance with the wording of Article 12(2a) in case of insolvency.
- (57) The ultimate objective of the ETS is to protect the environment by the establishment of a pre-determined environmental outcome which the scheme shall achieve. The total quantity of allowances is intended to provide relatively certainty of the environmental outcome of the

³⁶ See to that effect, Case C-203/12 *Billerud*, para. 25.

³⁷ Whereas 15 % of the total quantity of allowances for aviation were actioned and 3 % were set aside in a special reserve for aircraft operators.

³⁸ See to that effect, Case C-203/12 *Billerud*, para. 29.

³⁹ Case C-203/12 *Billerud*, paras. 27 and 39. See also section 3.2 IV and section 3.3 below.

⁴⁰ See to that effect, Case C-203/12 *Billerud*, para. 39.

scheme.⁴¹ However, since the scheme does not in itself reduce greenhouse gas emissions, the benefit for the environment depends on the stringency of the total quantity of allowances allocated.⁴² Furthermore, it depends on the stringency and consistency of the surrender obligation because that obligation is provided for to ensure compliance with the ETS' emissions cap.

- (58) Accordingly, to meet the environmental objectives of the ETS Directive, the surrender obligation must be applied in a consistent and stringent manner throughout the EEA. This view is corroborated by the preparatory works for Directive 2003/87, which speaks of the surrender obligation as a "basic obligation"⁴³ where "*cases involving breaches of the obligation to surrender sufficient allowances to cover verified emissions are to be dealt with in a stringent and consistent manner throughout the European Community.*"⁴⁴
- (59) The only way to ensure that the surrender obligation is applied in a stringent and consistent manner throughout the EEA, is to apply that obligation in accordance with the wording of Article 12(2a) in each and every case, including in case of insolvency. The fact that there are significant differences in the EEA States' substantive insolvency law, demonstrates that there is a need to harmonise the surrender obligation in case of insolvency.⁴⁵ If the EEA States were free to decide that the surrender obligation may be settled by dividend in case of insolvency, verified emissions may exceed the ETS' emissions cap. Such an approach undermines the effective functioning of the scheme and is contrary to the environmental objective which lies at the very heart of the ETS Directive.
- (60) Second, the need to ensure an efficient allowance trading scheme which is shielded from market manipulations supports the Government's interpretation.
- (61) The key economic rationale behind emissions trading is to ensure that emissions reductions required to achieve the pre-determined environmental outcome take place where the cost reduction is the lowest.⁴⁶ For this to be possible, however, the allowance trading scheme must be efficient and shielded from market manipulations.
- (62) Based on the above, the EU legislator viewed the surrender obligation and the penalty enforcing that obligation as necessary in the pursuit of the objective of establishing an efficient allowance trading scheme. Those rules are intended to prevent certain operators from being tempted to circumvent or manipulate the scheme by speculating abusively in prices, quantities, time limits or complex financial products which tend to come about in any market.⁴⁷
- (63) To ensure fulfilment of the objective of establishing an effective trading scheme, the surrender obligation must be applied in accordance with the wording of Article 12(2a) in

⁴¹ COM/2001/0581 final, point 2, first paragraph, and point 4, second paragraph.

⁴² Cf. Case C-203/12 *Billerud* para. 27.

⁴³ COM/2001/0851 final, point 4.

⁴⁴ COM/2001/0851 final, point 17 (our underlining in the main text).

⁴⁵ Recital 22 in the preamble to Regulation (EU) 2015/848.

⁴⁶ COM/2001/0851 final, point 2.

⁴⁷ Cf. Case C-203/12 *Billerud*, paras. 26 and 39.

case of insolvency. On the other hand, if it is accepted that the surrender obligation may be settled by dividend, certain operators may be tempted to manipulate the allowance trading system. That would clearly undermine the effective functioning of the trading scheme and be contrary to the objectives pursued by the EU legislator.⁴⁸

- (64) Third, the Government's view is in line with the principles which are inherent in the aim of protecting the environment.
- (65) It is well established law that the polluter-pays principle is inherent in the aim of protecting the environment.⁴⁹ That principle is also inherent in the obligation to surrender allowances equal to the emissions during the preceding year.⁵⁰ The polluter-pays principle justifies a strict interpretation of the surrender obligation.⁵¹
- (66) The only interpretation which is in line with the polluter-pays principle in a case such as that at hand, is that the surrender obligation is to be applied in accordance with the wording of Article 12(2a). To accept that the surrender obligation may be settled by dividend would, on the other hand, imply that the polluting aircraft operator, or its legal successor, does not have to fully bear the costs of its emissions. That would clearly be contrary to the polluter-pays principle which is inherent in the ETS.

V. Case law supports the Government's interpretation.

- (67) Finally, the Government's interpretation is supported by case law.
- (68) First, the ECJ has repeatedly held that in order to meet the ultimate objective of protecting the environment, the total quantity of allowances allocated under the ETS Directive represents the overall limit on emissions allowed by that scheme.⁵² To this end, it is an essential priority of the system as a whole that actual emissions do not exceed the total quantity of allowances allocated under the ETS Directive.⁵³ This supports the view that the surrender obligation may not be settled by dividend because, in that case, verified emissions may exceed the total quantity of allowances allocated under the ETS Directive.
- (69) Second, the ECJ has confirmed that the obligation to surrender sufficient allowances plays a key role to ensure compliance with the ETS' emissions cap. It must therefore be treated in a stringent and consistent manner throughout the EEA.⁵⁴
- (70) In Case C-203/12 *Billerud*, the ECJ concluded that the surrender obligation is not a mere obligation to hold the allowances covering the emissions for the preceding year on 30 April of the following year. It is an obligation to surrender those allowances by 30 April in the

⁴⁸ See para. 54 above.

⁴⁹ Cf. Case C-127/07 *Arcelor Atlantique and Lorraine and Others*, para. 30.

⁵⁰ COM/2001/0581 final, point 6, fourth paragraph.

⁵¹ See to that effect, Joined Cases C-14/06 and C-295/06 *Parliament and Denmark v. Commission*, para. 75.

⁵² Cf. Case C-127/07 *Arcelor Atlantique and Lorraine and Others*, para. 31, Case C-203/12 *Billerud*, para. 26.

⁵³ See to that effect, Case C-321/15 *ArcelorMittal*, para. 25.

⁵⁴ Cf. Case C-203/12 *Billerud*, paras. 25, 27 and 39, Case C-580/14 *Bitter*, para. 30, Case C-113/19 *Luxaviation*, paras. 32 and 33.

following year to have them cancelled in the Union Registry, which is intended to ensure that an accurate accounting record is kept of the allowances.⁵⁵ This conclusion supports the view that the surrender obligation can be complied with only by the surrendering of sufficient allowances to the Union Registry for cancellation.

- (71) NAS argues, on the other hand, that the surrender obligation has been complied with by the offering of dividend to national authorities. In reality, NAS is thereby arguing that an exemption applies in the case of insolvency, meaning that it is not mandatory for the EEA States to make the insolvent aircraft operator, or its legal successor, subject to the obligation to surrender sufficient allowances to the Union Registry for cancellation. This view is unsupported by case law.
- (72) In the *Billerud* ruling and Case C-113/19 *Luxaviation*, the ECJ concluded that if an operator who holds sufficient allowances on 30 April is unable to surrender those allowances within the surrender time-limit due to force majeure, the operator shall not be imposed the harmonised penalty.⁵⁶ However, under EEA law, force majeure may only be pleaded for the period necessary to resolve the difficulties constituting force majeure.⁵⁷ As soon as the cause making it objectively impossible to surrender the allowances on 30 April of the following year is resolved, the operator must thus surrender sufficient allowances to the Union Registry for cancellation.⁵⁸ The exception for force majeure is therefore not an exception from the surrender obligation as such. It is merely a postponement of the surrender time-limit.⁵⁹
- (73) It is important to note that in *Billerud* and *Luxaviation*, the operators held sufficient allowances to cover total emissions in the preceding year. Thus, the operators merely failed to comply with the surrender time-limit due to internal errors. Nevertheless, the ECJ ruled that national authorities were obliged to impose the sanction set out in Article 16(3) unless the late surrendering was caused by force majeure. By comparison, the situation of NAS is far more problematic than the situations ruled upon in *Billerud* and *Luxaviation*. This is because NAS, in contrast to the operators in *Billerud* and *Luxaviation*, did not even hold sufficient allowances by 30 April 2021.⁶⁰ Even though NAS was awarded 826 821 free allowances in 2020, NAS had only 3777 allowances when it entered into the court driven reconstruction. This was far from sufficient to cover NAS' verified emissions in 2020. Hence, NAS has clearly violated its ETS obligations.

⁵⁵ Cf. Case C-203/12 *Billerud*, para. 30.

⁵⁶ Cf. Case C-203/12 *Billerud*, para. 31 and Case C-113/19 *Luxaviation*, paras. 55 to 57. Please note that the referral does not seek guidance on the exception for force majeure, as the question submitted by the Court is merely whether the surrender obligation can be complied with by payment of dividend.

⁵⁷ Cf. Case C-1/00 *Commission against France*, para. 131.

⁵⁸ This view is also supported by Article 16(3) in fine, according to which the imposition of a penalty shall not release the aircraft operator from the obligation to surrender sufficient allowances.

⁵⁹ If the required number of allowances is not surrendered when the difficulties constituting force majeure are resolved, however, the national authorities must impose the penalty provided for by Article 16(3).

⁶⁰ See to that effect, the opinion of the Advocate General in Case C-203/12 *Billerud*, para. 30.

- (74) Third, case law specifically regarding the application of the ETS Directive in case of insolvency demonstrates that the surrender obligation is to be applied in accordance with the wording of Article 12(2a) in case of insolvency.
- (75) In Case C-580/14 *Bitter*, insolvency proceedings had been opened in respect of a company subject to the ETS surrender obligation. A lawyer was appointed as insolvency administrator, and national authorities considered her to be the operator of the installation in question and thus responsible for the surrender obligation. The insolvency administrator considered that the company was no longer obliged to either report or surrender its emissions allowances because it had ceased its business activity before the opening of the insolvency procedure, entailing that its contingent liabilities were solely to be registered as claims in insolvency.⁶¹
- (76) However, due to non-compliance with the surrender obligation, national authorities in the *Bitter* case imposed a fine pursuant to national law implementing Article 16(3) of the ETS Directive. The insolvency administrator challenged that decision before a national court. The national court asked the ECJ whether the imposition of a fine in accordance with Article 16(3) would infringe the principle of proportionality. With reference to the *Billerud* ruling, the ECJ answered that question in the negative.⁶²
- (77) In the Government's view, the *Bitter* ruling clearly presupposes that the surrender obligation is to be applied in accordance with the wording of Article 12(2a) in case of insolvency. If that was not the case, the question from the referring court would have been hypothetical and thus inadmissible. To this end, paragraph 14 of the ruling shows that the ECJ was well aware of the objections from the insolvency administrator.⁶³ However, the ECJ answered the question based on the *harmonised* rules of the ETS Directive, i.e., Articles 12 and 16(3). This once again demonstrates that it is not left to national law to decide whether or how the surrender obligation is to be complied with in case of insolvency.
- (78) Also, Case C-165/20 *Air Berlin* corroborates the view that the surrender obligation is to be applied in accordance with the wording of Article 12(2a) in case of insolvency. In that ruling, the ECJ confirmed that the ETS Directive requires that the number of allowances allocated to an aircraft operator must, in the event of cessation of that operator's activities during the trading period in question due to insolvency, be reduced in proportion to the part of that period during which those activities are no longer carried out.⁶⁴ The reason for this is that for the years during which the insolvent aircraft operator no longer carries out aviation activities, it is no longer subject to the ETS surrender obligation.⁶⁵
- (79) The conclusion of the ECJ in *Air Berlin* is based on the premise that the insolvent aircraft operator, or its legal successor, is subject to the obligation to surrender allowances for the

⁶¹ Cf. Case C-580/14 *Bitter*, para. 14.

⁶² Cf. Case C-580/14 *Bitter*, para. 35.

⁶³ That is, that the surrender obligation did not apply as the operator had ceased its activities and that contingent liabilities were solely to be registered as claims in insolvency. These arguments are similar to those set out by NAS in the case at hand, and which were implicitly rejected by the ECJ in the *Bitter* ruling.

⁶⁴ Cf. Case C-165/20 *Air Berlin*, para. 65.

⁶⁵ Cf. Case C-165/20 *Air Berlin*, paras. 57 to 59.

period in which the aircraft operator actually carried out aviation activities covered by that scheme. Therefore, allowances allocated shall be reduced only in proportion to the part of the period during which the aircraft operator no longer carried out aviation activities, but not for the period where it conducted activities covered by the ETS.

VI. *Summary – the surrender obligation must be applied in accordance with the wording of Article 12(2)a in case of insolvency.*

- (80) To summarise, the Government is of the view that the wording, context and objective of the ETS Directive, as well as case law, demonstrate that the ETS Directive precludes national legislation which provides that the surrender obligation may be settled by dividend. The surrender obligation can be complied with only by the surrendering of sufficient allowances to the Union Registry for cancellation.
- (81) NAS has argued that the consequence of the Government's interpretation is that the obligation to surrender allowances entails a separatist right or priority ahead of all other claims. That objection is unfounded and misses the point.
- (82) The Government is not a creditor for the surrender obligation because the allowances must be surrendered to the Union Registry for cancellation. Hence, in national insolvency proceedings, the Government cannot claim or enforce a separatist right or priority ahead of all other claims. The point is that if the insolvent aircraft operator, or its legal successor, fails to surrender sufficient allowances to the Union Registry within the surrender time-limit, the Government is obliged by EEA law to impose the harmonised penalty provided for by Article 16(3) of the ETS Directive.
- (83) The Government will, on the other hand, be the creditor for a penalty imposed in accordance with national law implementing Article 16(3). Such a claim must be dealt with in accordance with national insolvency rules, provided that those rules are in line with the EEA principles of equivalence and effectiveness.

3.3 In any event, the surrender obligation must be applied in accordance with the wording of Article 12(2a) in case of reconstruction

- (84) As stated above, it is the Government's view that the surrender obligation must be applied in accordance with the wording of Article 12(2a) in any case of insolvency. In the alternative, the Government is of the view that the arguments set out above apply even more in the case of reconstruction according to a procedure such as that in the main proceedings.
- (85) As stated in the order for reference, the purpose of reconstruction under national law is to make viable businesses able to continue in operation. This means that the debtor retains control of its own assets (including its aircraft operator holding account), business and operations, subject to the supervision of the reconstructor and the creditor committee. Hence, NAS continued with its aviation activities throughout the reconstruction procedure and has subsequently continued to do so. Based on this, the Government will add the following arguments:

- (86) First, it follows from the very letter of Article 12(2a) that the provision expressly governs a situation such as that at hand, where the debtor continues with its aviation activities throughout the reconstruction procedure and afterwards. In such a case, the debtor keeps its status as an “aircraft operator” and therefore constitutes an aircraft operator also at the surrender time-limit.⁶⁶
- (87) Second, the need to shield the allowance trading scheme from market manipulations corroborates the Government’s view.
- (88) If the surrender obligation may be settled by dividend in the case of reconstruction, certain aircraft operators may be tempted to manipulate the allowance trading scheme by speculating abusively in prices, quantities, time limits or complex financial products. Such market manipulations, which tend to come about in any market, may cause distortions of competition to the detriment of a level playing field in the EEA aviation market.
- (89) For example, an aircraft operator in difficulty may be tempted to sell allowances allocated free of charge, and subsequently file a request for reconstruction proceedings with the knowledge that it does not have to comply with the surrender obligation. In such a case, the aircraft operator continuing with its operations would gain a competitive advantage to the detriment of a level playing field in the EEA aviation market. It goes without saying that such an approach would completely undermine the effective functioning and the purpose of the ETS Directive,⁶⁷ and it would also constitute a flagrant violation of the polluter-pays principle.
- (90) Third, the rules on allocation of allowances support the Government’s view.
- (91) In line with the ultimate environmental objective of the ETS Directive, the purpose of the scheme on allocation of allowances is, inter alia, to encourage aircraft operators to emit quantities of greenhouse gases that are less than the free allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its free allowance.⁶⁸ That objective would not be met if an aircraft operator was entitled to sell the free allowances allocated to it, and subsequently become released from the surrender obligation by payment of dividend in the case of reconstruction.
- (92) Based on the above, the Government submits that the question from the Referring Court must be answered in the affirmative.

4 ANSWER TO THE REFERRING COURT’S QUESTION

- (93) Based on the foregoing, the Government submits that the question posed by the Referring Court should be answered as follows:

⁶⁶ Cf. Case C-165/20 *Air Berlin*.

⁶⁷ Cf. Case C-203/12 *Billerud* paras. 27 and 39 regarding the need to shield the trading system from distortion of competition due to market manipulations.

⁶⁸ Cf. Case C-165/20 *Air Berlin*, para. 57 and the case law cited.

ATTORNEY GENERAL FOR CIVIL AFFAIRS

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

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Oslo, 09/01/2024

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