BAHR

Oslo, 5 May 2025

To the President and Members of the EFTA Court

WRITTEN OBSERVATIONS

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

FREDRIKSTAD KOMMUNE REPRESENTED BY FREDRIKSTAD VANN AVLØP OG RENOVASJONSFORETAK FREVAR KF AND SAREN ENERGY SARPSBORG AS

Represented by

Henrik Bjørnebye and Thomas K. Svensen, advokater,

In

CASE E-2/25

Fredrikstad kommune represented by Fredrikstad Vann Avløp og Renovasjonsforetak FREVAR KF and Saren Energy Sarpsborg AS

v.

The Norwegian State

Concerning a request by Borgarting Court of Appeal (Borgarting lagmannsrett) for an Advisory Opinion from the EFTA Court, lodged on 17 February 2025 in the case of Fredrikstad kommune represented by Fredrikstad Vann Avløp og Renovasjonsforetak FREVAR KF and Saren Energy Sarpsborg AS v. the Norwegian State represented by the Ministry of Climate and Environment under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Ref.: #34686546/1

Contents

1. Introduction

(1) On 17 February 2025, Borgarting Court of Appeal (the "**Referring Court**") submitted a Request for an Advisory Opinion to the EFTA Court (the "**Request**") in Case No 23-123554ASD-BORG/03 between Fredrikstad kommune represented by Fredrikstad Vann Avløp og Renovasjonsforetak FREVAR KF ("**FREVAR**") and Saren Energy Sarpsborg AS ("**SAREN**") on one side and the Norwegian State represented by the Ministry of Climate and Environment (the "**State**") on the other side.

(2) By its questions, the Referring Court seeks to clarify how the exclusion of installations for the incineration of hazardous or municipal waste from the scope of the first activity listed in Annex 1 of Directive 2003/87/EC (the "**ETS Directive**") must be understood.[1]

(3) An assessment of the Referring Court's questions requires an overview of the legal and factual background, presented below in sections 2 and 3, respectively. FREVAR's and SAREN's observations to the questions referred are presented in sections 4 and 5. Finally, FREVAR and SAREN present a proposed answer that the EFTA Court may provide to the Referring Court in section 6.

2. Legal background

2.1 Overview

(4) The Request sections 4.1 and 4.2 set out relevant provisions of national and EEA law. This overview is supplemented by other relevant provisions below. The wording and article numbering applicable at the time of the State's disputed decisions are applied unless otherwise stated.

[1] 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, L 275/32, 25.10.2003, as subsequently amended.

2.2 EEA law

2.2.1 The ETS Directive

(5) The ETS Directive establishes the EU emissions trading system (EU ETS) "in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner".[2] The instrument to achieve this goal is a "cap and trade" system for activities comprised by the EU ETS, where emission allowances are issued, traded and surrendered against monitored and reported greenhouse gas emissions.

(6) The ETS Directive was incorporated in the EEA Agreement by the EEA Joint Committee's decision No. 146/2007.[3] The ETS Directive has later been amended many times with subsequent incorporations in the EEA Agreement.[4]

(7) It followed from the ETS Directive Article 2(1) at the time of the disputed decisions that

"This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II."

(8) As follows from the title of the ETS Directive it amended Council Directive 96/61 concerning integrated pollution prevention and control.[5] Directive 96/61 was later superseded by Directive 2010/75/EU on industrial emissions.[6] It follows from the ETS Directive Article 2(2) that:

"This Directive shall apply without prejudice to any requirements pursuant to Directive 2010/75/EU of the European Parliament and of the Council."

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[2] Article 1(1) of the Directive.
[3] Decision of the EEA Joint Committee No. 146/2007 of 26 October 2007, incorporating the ETS Directive into Annex XX (Environment) of the EEA Agreement.
[4] The latest EU amendments to the ETS Directive were incorporated in the EEA Agreement by Decisions of the EEA Joint Committee No. 334/2023 and 335/2023 of 8 December 2023 amending Annex XX (Environment) to the EEA Agreement, incorporating inter alia Directive (EU) 2023/958 and Directive (EU) 2023/959 amending the ETS Directive.
[5] OJ L 257, 10.10.1996, p. 26-40.
[6] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17-119. Implemented in the EEA Agreement by the EEA Joint Committee Decision No. 229/2015.

(9) The relevant activity in this case is defined in the ETS Directive Annex I, first activity. This activity was worded as follows, after amendment by Directive 2009/29/EC,[7] at the time of the disputed decisions:

"Combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)"

(10) The corresponding Danish language version of the first activity reads as follows:

«Forbrænding af brændsel i anlæg med en samlet nominel indfyret termisk effekt på mere end 20 MW (undtagen i anlæg til forbrænding af farligt affald eller kommunalt affald)»

(11) The ETS Directive Annex I, item 5 has the following wording:

"When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit."

(12) The term "installation" is defined as follows in the ETS Directive Article 3(e):

"'installation' means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution"

(13) The term "combustion" is defined as follows in the ETS Directive Article 3(t):

""combustion" means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing"

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[7] OJ L 140, 5.6.2009, p. 63-87.

(14) The corresponding Danish language version of the definition is as follows:

««forbrænding«: enhver oxidering af brændsel, uanset hvorledes den varme og den elektriske eller mekaniske energi, der produceres ved denne proces, anvendes, og andre hermed direkte forbundne aktiviteter, herunder røggasrensning»

(15) For the sake of completeness, it should be mentioned that installations for the incineration of municipal waste were included in the EU ETS for reporting purposes only by Directive (EU) 2023/959 with a view to considering whether such installations are to be fully included in the EU ETS at a later stage.[8] This amendment, included as a new second paragraph to the first activity in Annex I, does not apply to the present case and, as held in the Request, do not appear to have implications for the question of interpretation.

2.2.2 Directive 2010/75/EU on industrial emissions

(16) Directive 2010/75/EU requires that any heat generated during the incineration of waste is recovered as far as practicable. It follows from Directive 2010/75/EU Article 44(b) that:

> *"An application for a permit for a waste incineration plant or waste co-incineration plant shall include a description of the measures which are envisaged to guarantee that the following requirements are met*
>
> *[...]*
>
> *b) the heat generated during the incineration and co-incineration process is recovered as far as practicable through the generation of heat, steam or power"*

(17) Furthermore, Directive 2010/75/EU Article 50(5) sets out that:

> *"Any heat generated by waste incineration plants or waste co-incineration plants shall be recovered as far as practicable"*

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[8] OJ L 130, 16.5.2023, p. 134-202. Implemented in the EEA Agreement by the EEA Joint Committee Decision No. 152/2012.

2.2.3 Directive 2008/98/EC on waste and repealing certain Directives

(18) Directive 2008/98/EC on waste and repealing certain Directives, as subsequently amended, also addresses energy recovery from waste.[9] The Directive Article 4(1) sets forth that:

"The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:

(a) prevention;

(b) preparing for re-use;

(c) recycling;

(d) other recovery, e.g. energy recovery; and

(e) disposal."

(19) Furthermore, it follows from Directive 2008/98/EC Article 23(4) that

"It shall be a condition of any permit covering incineration or co-incineration with energy recovery that the recovery of energy take place with a high level of energy efficiency."

(20) Directive 2008/98/EC defines the terms "hazardous waste" and "municipal waste" in Articles 2(2) and 2(2b), respectively. These terms are not reiterated here as their interpretation is not relevant for answering the questions submitted by the Referring Court in the Request.

2.3 National law

(21) Under Norwegian law, the EU ETS is governed by the Greenhouse Gas Emission Trading Act 17 December 2004 No. 99 (the "**Act**"). Regulation No 1851 of 23 December 2004 on emissions allowances obligations and

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[9] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312/08, 22.11.2008, p. 3-30. Implemented in the EEA Agreement by the EEA Joint Committee Decision No. 85/2011.

greenhouse gas emission allowance trading (the "**Regulation**") is adopted as a subordinate regulation pursuant to the Act.

(22) The Act Sections 3(1) and (2) set out at the time of the disputed decisions that:

> *"The Act applies to emissions of greenhouse gases from stationary industrial activities and aviation activities.*
>
> *The King may, by regulation, provide detailed provisions on which greenhouse gases, activities, and enterprises are covered by the first paragraph." (our translation)*

(23) The Regulation provides a more specific definition of which activities are covered by the Act. At the time of the disputed decisions, Section 1-1 of the Regulation provided that the obligation to surrender allowances pertained to emissions from the activities listed in the table in the same provision. The wording of the relevant activity in the present case, the first activity in the table, was as follows:

> *"Combustion of fuels in installations where the total rated thermal input exceeds 20 MW (the obligation to surrender allowances however does not apply to the combustion of fuels in installations for the incineration of hazardous and municipal waste)" (our translation)*

(24) The definition of the covered activities of relevance is now incorporated into Section 1-3, whilst the exception is provided for in Section 1-3a (b) and the second paragraph of Section 1-3a, as follows:

> *Section 1-3*
>
> > *"Combustion of fuels in installations where the total nominal installed thermal input exceeds 20 MW"*
>
> *Section 1-3a*
>
> > *"The Greenhouse Gas Emissions Trading Act does not apply to:*

[...]

b. Combustion of fuels in waste incineration plants that predominantly incinerate hazardous waste.

[...]

For waste incineration plants that fall under activity no. 1 in the table in Section 1-3, and predominantly incinerate municipal waste, the rules of the Emissions Trading Act and this regulation concerning monitoring, reporting, verification, and accreditation of CO2 emissions apply." (our translation)

(25) Pursuant to Section 10-7 of the Norwegian Waste Regulation, incineration plants are subject to specific combustion conditions set out in Annex IX (exceptions from these conditions may be granted in special cases under Section 10-8).[10] The provision reads as follows:

"Incineration plants shall be designed, constructed, and operated in such a manner that the requirements regarding temperature, residence time, auxiliary burner, and waste feeding set out in Annex IX to this chapter are fulfilled." (our translation)

(26) According to Annex IX, the incineration plants

"shall be designed, constructed and operated so that the temperature of combustion gases, after the final injection of combustion air, is increased in a controlled and uniform manner to at least 850°C for a minimum of 2 seconds. For incineration plants that incinerate hazardous waste and/or infectious waste containing more than 1% halogenated organic compounds, expressed as chlorine (Cl), the temperature shall be increased to at least 1100 °C for a minimum of 2 seconds." (our translation)

(27) Article 44(b) and Article 50(5) of Directive 2010/75/EU are implemented in Norwegian law by Section 10-10 of the Waste Regulation, which imposes the

[10] Forskrift 1. juni 2004 nr. 930 om gjenvinning og behandling av avfall (avfallsforskriften), (FOR-2004-06-01-930).

requirement to recover the heat generated in the waste incineration process. The provision reads as follows:

> *"Incineration installations shall be designed, constructed and operated so that all heat generated by the incineration process is recovered in so far as practicable." (our translation)*

3. Factual background

3.1 Introduction

(28) Waste that cannot be prevented, re-used or recycled must be subjected to other recovery, such as energy recovery, and disposal according to the waste hierarchy set out in Article 4(1) of Directive 2008/98/EC. Since waste disposal at landfills must be minimised due to negative environmental consequences such as methane emissions, the primary means of disposal is waste incineration with energy recovery.

(29) Waste is typically combusted in specifically designed waste incineration plants subject to a number of requirements under national legislation and environmental permits. This includes requirements that waste must be incinerated at high temperatures (at least 850 degrees Celsius for minimum 2 seconds) and strict requirements on the cleaning and pollution prevention of flue gases from the combustion process.

(30) Flue gases from the incineration process must be cooled before purification and cleaning, which is necessary to comply with environmental requirements. The cooling of flue gases in boilers generate heat that the operators are required to recover. This heat may be recovered and used as steam to industry, hot water for district heating, or input for electricity generation turbines.

(31) Consequently, a waste incineration installation receives income both from offering to incinerate waste for disposal and from selling heat energy

generated by the incineration process in the form of steam to industry or hot water for district heating, or electricity generated by heat turbines.

3.2 FREVAR's and SAREN's installations

(32) FREVAR and SAREN both operate installations that are designed for waste incineration and which incinerate waste only. Both installations recover heat generated from the cooling of flue gases as part of the incineration process. Such heat recovery is a requirement under Norwegian and EEA law. The heat is subsequently sold to nearby industry and, in FREVAR's case, also for district heating purposes.

(33) The parties to the dispute agree that both FREVAR's and SAREN's installations exceed the 20 MW limit in the ETS Directive Annex I, first activity. Furthermore, the parties agree that both installations incinerate "hazardous or municipal waste" as the requirement in the ETS Directive Annex I, first activity has been applied in Norwegian law.

(34) Consequently, the disputed question is whether FREVAR's and SAREN's installations are to be considered as installations for the incineration of waste, or alternatively as installations for the combustion of fuels, within the meaning of the ETS Directive Annex I, first activity.

(35) FREVAR's waste incineration plant was established in 1984 and is located at Øra in Fredrikstad municipality, Norway. An important background for the establishment was to avoid further expansion of landfills that would raise environmental and local siting challenges.

(36) The plant is of the grate furnace type consisting of two identical furnace lines, where the waste is dried, combusted and incinerated on the grates. Both the furnace type and the purification system for air emissions have a design intended for municipal waste. The plant has multiple combustion zones with different air supplies to ensure efficient combustion of the waste and flue gases. Additionally, the facility has multi-stage flue gas cleaning systems which are typical for meeting emission requirements for the incineration of municipal waste.

(37) The flue gases are completely combusted in a secondary combustion above the grates and upward in the furnace's combustion chamber. The temperature after the secondary combustion must be over 850°C. Consequently, there is a lot of energy in the flue gas that must be cooled before the flue gas reaches a purification plant, which requires a much lower temperature to clean the exhaust gas. The flue gas is cooled in a boiler consisting of water tubes, thereby heating the water. Cooling the flue gas is necessary regardless of whether the generated heat is recovered.

(38) The heated water from the flue gas cooling process is recovered as high-pressure steam. FREVAR sells approximately 80 % of the recovered heat as steam to nearby industries and the remaining heat to district heating. However, the exact shares distributed to industries and district heating varies from year to year.

(39) SAREN's waste incineration plant is situated in Sarpsborg municipality and commenced operations in 2010. The installation incinerates municipal and hazardous waste. The heat generated by the incineration process is recovered and distributed as steam to Borregaard industries in Sarpsborg.

(40) SAREN's waste incineration plant uses technology developed for the thermal treatment of waste through a two-step combustion process. The first step involves gasification, where the process and production of synthesis gas require correct and controlled conditions. This includes ensuring the right amount of time on the combustion grate, which is controlled by the amount of waste and feed rate. The second step is oxidation, which requires control of the amount of recycled cold flue gas and the amount of secondary air. The process strives for the highest possible and stable throughput of waste. Cooling of the flue gas to a temperature suitable for subsequent treatment and purification generates heat. Heat production is considered a secondary outcome and is determined by the properties of the waste being processed.

(41) To sum up, both FREVAR's and SAREN's installations are typical waste incineration plants dedicated to the incineration of municipal and hazardous waste. The cooling of flue gas from the incineration process generates heat

that the operators are required to recover. This heat is sold as steam to nearby industries and, for FREVAR, also as hot water to district heating. The waste combustion is determining for operation of the plants, and strict requirements for combustion (temperature and residence time), as well as emission limits to air, must be satisfied and have operational priority over energy utilization. Given that it is not possible to regulate the heat energy output to be able to deliver the energy demanded by customers at any given time, the technologies are not suitable for facilities whose main purpose is to produce energy.

(42) In Norway, there are a total of 18 waste incineration facilities. Most of these installations have comparable types of construction to FREVAR's and SAREN's installations. However, apart from FREVAR's and SAREN's installations, only one of the other installations have been considered by the State to fall within the scope of the EU ETS pursuant to the ETS Directive Annex I, first activity as incorporated in Norwegian law. This distinction is based on the State's assessment that these three installations predominantly distribute recovered heat to industry and are therefore considered to have energy production as their primary purpose. The other 15 installations predominantly distribute recovered heat to district heating networks and are therefore considered by the State as waste incineration installations outside the scope of EU ETS. However, there is no substantial factual difference between these 18 waste incineration installations. FREVAR's and SAREN's installations are subject to the same emission requirements for waste incineration plants as the other installations. The only notable difference between the 15 installations not subject to EU ETS and the three installations subject to EU ETS (including FREVAR's and SAREN's installations), is that the former 15 installations predominantly distribute recovered heat to district heating, while the latter three predominantly distribute such heat to industry.

3.3 Case background

(43) The European Commission issued a Guidance on Interpretation of Annex I of the EU ETS Directive (excl. aviation activities) dated 18 March 2010 ("**Commission Guidance 2010**").

(44) The Commission Guidance 2010 section 3.3 included "Various interpretation issues" where "Waste incineration and Co-incineration" was discussed in section 3.3.2 and "Waste (co-)incineration units" was discussed in section 3.3.3. Those two sections read as follows:

"3.3.2 Waste incineration and Co-incineration

The first activity in Annex I is defined as

> *"Combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)"*

Installations for the incineration of municipal waste or hazardous waste are thus excluded in Annex I to the EU ETS Directive. It is for the competent authority to determine whether a particular installation falls into one of these categories taking account the relevant definitions in the WID (Waste Incineration Directive [Directive 2000/76/EC, later replaced by Directive 2010/75/EU]). Installations falling under the WID have a permit under that Directive which should clearly state the status of the incineration or co-incineration units. This Directive defines an "incineration plant" as a technical unit

> *"dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated."*

If a dedicated installation is found by the CA to fall under this definition, and if the waste incinerated falls predominantly under the category "municipal" or "hazardous" (according to the European waste catalogue [...]), then it is not subject to the EU ETS Directive in respect of any incineration that takes place at the installation.

A co-incineration plant is defined in the WID as a plant

"whose main purpose is the generation of energy or production of material products and:

— which uses wastes as a regular or additional fuel; or

— in which waste is thermally treated for the purpose of disposal.

If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4."

If the status of individual units cannot be derived unambiguously from the WID permit, the following considerations may serve as guidance: units burning waste which are situated at sites with industrial production [...] (within the same installation or outsourced to a separate operator) are usually to be classified as co-incineration, because the main purpose of such combustion units is the supply of energy to the production of industry goods. This fact is often supported by the substitutability of the waste unit by units fired with conventional fossil fuels. As evidence for such substitutability may serve inter alia:

- *The waste unit is operated in technical connection with other boilers or CHP units, e.g. by feeding into a steam grid;*
- *The waste unit has replaced a previous boiler or CHP plant, which was fired by conventional fuels;*
- *The existence of reserve units which use conventional fuels;*
- *A significant amount of the thermal input in the waste unit is provided by conventional fuels, or other waste than hazardous or municipal waste.*

Wherever the CA classifies the waste unit as co-incineration or as using other wastes than municipal and hazardous wastes, it is to be included in the EU ETS.

3.3.3 Waste (co-)incineration units

The previous section has dealt with whole installations for the incineration or co-incineration of wastes (or installations where only the activity "combustion of fuels" is carried out). Beyond this case, clause 5 of Annex I mandates: "When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit." In contrast to what has been explained in the previous section, which has dealt with whole installations, here "units" for the incineration of waste are mentioned. As this clause deals primarily with the inclusion of associated activities, a suitable decision making for this case can be outlined like this:

1. *Is there a unit part of this installation, which according to the competent authority's opinion is dedicated to the incineration (not co-incineration) of hazardous or municipal waste? If no: no unit to be exempt.*

2. *Is this unit part of another activity listed in Annex I of the ETS Directive (e.g. integral part of a refinery or a bulk organic chemical production [...])? If yes, it is included in the EU ETS anyway as part of that activity.*

3. *If under 2 the answer is no, this unit can be exempt from the EU ETS."*

(45) As follows from the Commission Guidance 2010 sections 3.3.2 and 3.3.3 cited above, the European Commission interpreted both the rule for installations (first activity) and units (point 5) to the effect that a decisive factor was whether the installation or unit had as its main purpose the generation of energy or production of goods.

(46) As explained in the Request section 3, the Norwegian Climate and Pollution Agency (now the Norwegian Environment Agency) carried out an assessment

of the scope of EU ETS for waste incineration in 2011. This assessment was based on the Commission Guidance 2010, stating, *inter alia*, that

"We have focused on whether the incineration installations mainly produce steam for industry or mainly produce power and/or district heating in the determination of in which category an installation belongs."

(47) The Referral section 3 explains further how the Agency on this basis classified FREVAR's and SAREN's installations as being within the scope of the EU ETS. This eventually resulted in the Agency's decisions on permits for greenhouse gas emissions subject to surrender obligations for SAREN on 22 January 2014 and for FREVAR on 30 January 2014. Following an appeal by FREVAR, the Ministry of Climate and the Environment upheld that decision on 13 February 2017.

(48) The citation in the Referral section 3 from the Ministry's decision 13 February 2017 shows that the Ministry relied on the Commission Guidance 2010. Furthermore, the quote shows that the Ministry on this basis considered as a key assessment factor whether an installation's main purpose was energy production, and that the connection to industry was considered a key factor in this assessment.

(49) As observed by the Referring Court in section 3 of the Referral,

"One consequence of the assessment of the Norwegian Environment Agency and the Ministry is that installations for the incineration of waste that supply heat for district heating are not subject to the obligation to surrender allowances, whilst installations that supply heat for industrial steam are deemed to be subject to the obligation to surrender allowances."

(50) FREVAR and SAREN challenged the validity of the Agency's and Ministry's permit decisions before Søndre Østfold District Court. On 10 May 2023, the District Court found in favour of the State, ruling that the permit decisions were not invalid. An important background for the District Court's reasoning was that the State's interpretation was deemed to be supported by the Commission Guidance 2010.

(51) FREVAR and SAREN lodged an appeal against the District Court judgment with Borgarting Court of Appeal on 12 June 2023.

(52) On 6 June 2024, the ECJ delivered judgment in *Naturvårdsverket v Nouryon*, C-166/23, EU:C:2024:465. As further explained below, the ECJ ruled that the Commission Guidance 2010's interpretation that a decisive factor for Annex I, point 5 was whether the unit had as its main purpose the generation of energy or production of goods, was incorrect.

4. Observations to question 1

4.1 The question of interpretation

(53) With its first question, the Referring Court asks in essence whether the ECJ's interpretation in case C-166/23 of the ETS Directive Annex I, point 5 applies correspondingly for the interpretation of the first activity in Annex I.

(54) The ETS Directive applies identically under the Treaty on the Functioning of the European Union and under the EEA Agreement. The ETS Directive must consequently be interpreted in accordance with ECJ case-law, as follows from the principle reflected in the EEA Agreement Article 6 and the Agreement between the EFTA States on the establishment of a surveillance authority and a court of justice Article 3(2). See also to that effect the EFTA Court judgment in Case E-12/23 *Norwegian Air Shuttle ASA v. The Norwegian State represented by the Ministry of Climate and Environment,* judgment of 9 August 2024.

(55) It is recalled that the wording of the ETS Directive Annex I, first activity and point 5 exclude, correspondingly, installations and units *"for the incineration of hazardous or municipal waste"* from the scope of the allowance surrender obligation.

(56) In case C-166/23, the ECJ ruled that the ETS Directive Annex I, point 5

"must be interpreted as meaning that all units for the incineration of hazardous or municipal waste are excluded from the scope of application of that directive, as amended, including those which are integrated within an installation falling within that scope and which do not have the incineration of that waste as their sole purpose, provided that they are used for the incineration of other waste only marginally."

(57) The dispute in case C-166/23 concerned a Swedish industrial company engaged in the production of organic chemicals. The company's installation was comprised by the ETS Directive under the activity concerning production of bulk organic chemicals in Annex I. Hazardous wastewater was a by-product of its manufacturing process. An incinerator was used almost exclusively to incinerate the hazardous wastewater, and the energy released by the incineration was recovered as steam and used in the production process (see para 24 of the judgment). The question at issue was whether this incinerator qualified as a unit *"for the incineration of hazardous or municipal waste"* which could consequently be excluded from the company's greenhouse gas emissions permit pursuant to Annex I, point 5.

(58) The ECJ scrutinized the Commission Guidance 2010,[11] referring to it in paras 42-44 and holding in para 44 that the Commission's interpretation relevant for the case was

"not supported by the literal, systematic and teleological methods of interpretation upon which the Court normally relies".

(59) FREVAR and SAREN maintain that the ECJ's interpretation in case C-166/23 applies correspondingly to the interpretation of Annex I, first activity. Consequently, the question of interpretation raised in the present case has in FREVAR's and SAREN's opinion already been determined by the ECJ in case C-166/23.

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[11] The European Commission issued a revised version of the Commission Guidance 2010 in 2023. The 2023 revision did not amend the relevant interpretation included in the Commission Guidance 2010, and the ECJ only refers to the 2010 guidance which was also applied by the State in the current dispute. We therefore refer to the Commission Guidance 2010 in the following.

(60) The ECJ's literal, systematic and teleological methods of interpretation in case C-166/23, and the corresponding application to the interpretation of Annex I, first activity, is further outlined below.

4.2 The wording of Annex I, first activity

(61) The wording *"installations for the incineration of hazardous or municipal waste"* in Annex I, first activity clearly indicates that installations used for incineration of hazardous or municipal waste are excluded from the scope of the EU ETS, irrespective of what is considered to be their main purpose.

(62) It is recalled that the parties to the main dispute agree that the waste composition requirement under Norwegian law, i.e. that the waste incinerated is hazardous or municipal waste, is fulfilled for both FREVAR's and SAREN's installations. The question at issue is consequently whether these installations qualify as installations for the incineration of waste within the meaning of the ETS Directive.

(63) In the present dispute, as in case C-166/23, national authorities have relied on the interpretations advanced in Commission Guidance 2010. As explained above, the guidance document offered an interpretation of Annex I, first activity in section 3.3.2 and built on this interpretation in the brief interpretation of Annex I, point 5 in section 3.3.3. The Commission Guidance 2010 interpreted both the installation rule and the unit rule to the effect that a decisive factor was whether the installation or unit had as its main purpose the production of energy or goods.

(64) In case C-166/23, para 48, the ECJ explicitly refutes the literal interpretation in Commission Guidance 2010:

"By contrast, the wording of point 5 of Annex I to Directive 2003/87 does not indicate that the exclusion of units for the incineration of hazardous or municipal waste from a greenhouse gas emissions permit depends on the purpose for which that waste is incinerated."

(65) The ECJ's literal interpretation is based on wording in point 5 identical to the wording in the first activity *("for the incineration of hazardous or municipal waste")*.

(66) The definition of "installation" in the ETS Directive Article 3(e) as meaning "a stationary technical unit where one or more activities listed in Annex I are carried out [...]" (our emphasis added) also supports the view that the ETS Directive does not distinguish between installations and units when interpreting the scope of the EU ETS for such facilities incinerating hazardous or municipal waste.

(67) Moreover, by its interpretation, the ECJ refutes the interpretation applied by Commission Guidance 2010 for both installations and units and which the Commission has considered to be the same.

(68) On this basis, FREVAR and SAREN submits that the ECJ in case C-166/23 has already directly considered the question of interpretation in the present case and concluded that the scope of the first activity in Annex I does not depend on the purpose for which the waste is incinerated.

(69) In any case, FREVAR and SAREN submit that the same literal interpretation offered by the ECJ under point 5 of Annex I clearly also applies to the first activity in Annex I, which includes the same wording.

(70) Several other legal arguments which were not explicitly discussed by the ECJ also support the conclusion offered above.

(71) First, it should be recalled that the ETS Directive Article 3(t) defines "combustion" as "*any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing*" (our emphasis added).

(72) Consequently, the first activity in Annex I must be understood as referring to any oxidation of fuels, regardless of the way in which the heat or energy produced by the process is used, except in installations for the incineration of

hazardous or municipal waste. This means that, when determining whether an activity shall be considered combustion of fuels comprised by the EU ETS, it is not relevant whether the heat generated by that combustion is distributed as steam to industry or hot water to district heating. It would therefore be contrary to the wording of the provision, read in conjunction with the definition of "combustion", to consider as relevant the use of the generated heat when determining whether the activity is not comprised by the EU ETS.

(73) The relevance of the definition in the ETS Directive Article 3(t) is even clearer in the Danish language version, since that language version also applies the defined term "forbrænding" in the waste incineration exclusion in Annex I, first activity: *"[…] undtagen i anlæg til forbrænding af farligt affald eller kommunalt affald"*. Read in conjunction with the definition, this wording explicitly states that the exception applies for hazardous and municipal waste installations irrespective of how the heat or energy produced by this process is used.

(74) Second, the original wording of the ETS Directive supports that the prevailing wording "for" the incineration of waste does not signify that an assessment of the purpose of such incineration is relevant, as argued by the State. In the original version of the ETS Directive adopted on 13 October 2003,[12] the first of three activities identified in Annex I under the heading "Energy activities" was worded as follows:

"Combustion installations with a rated thermal input exceeding 20 MW (except hazardous or municipal waste installations)"

(75) The first activity in Annex I was amended by Directive 2009/29/EC to the present wording. [13] There is no indication in Directive 2009/29/EC that the amended wording was intended to signify any substantive changes to the scope of the ETS Directive for such activity. Consequently, the prevailing wording *"installations for the incineration of hazardous or municipal waste"* has the same meaning as the original wording *"hazardous or municipal waste installations"* and does not signify that the purpose of incineration is a relevant

[12] OJ L 275, 25.10.2003, p. 32-46.
[13] OJ L 140, 5.6.2009, p. 63-87.

criterion. This is also in accordance with the ECJ's interpretation in case C-166/23.

4.3 Systematic and teleological considerations

(76) In case C-166/23, the Court found it appropriate to examine systematic and teleological interpretations of Annex I, point 5 together, see para 49. Such examination is carried out by the Court in paras 50-56 of the judgment.

(77) The ECJ's reasoning in paras 50-54 reads as follows:

> *"50 As is clear, inter alia, from both recital 25 and Article 1 of Directive 2003/87, the general objective of that directive is to achieve, by establishing a system for the allocation of greenhouse gas emission allowances, a reduction of emissions of those gases.*
>
> *51 Nevertheless, the exemption provided for in point 5 Annex I to Directive 2003/87 for units of incineration of hazardous and municipal waste does not pursue that objective as its priority. Rather, it responds to a secondary objective of that directive, as the EU legislature considered that the establishment of a system for the allocation of emission allowances must not impede the disposal of hazardous and municipal waste by incineration.*
>
> *52 In that regard, it must be observed that Directive 2003/87, as stated in its title, amends Directive 96/61. Article 2(2) of Directive 2003/87 states that 'this Directive shall apply without prejudice to any requirements pursuant to Directive [96/61].' Directive 96/61, the objective of which is wider than that of Directive 2003/87 and concerns integrated pollution prevention and control, expressly provides, in Article 3(c), for the recovery and disposal of waste.*
>
> *53 Recital 8 of Decision 96/61 also states that 'whereas the objective of an integrated approach to pollution control is to prevent emissions into air, water or soil wherever this is practicable, taking into account waste*

management, and, where it is not, to minimize them in order to achieve a high level of protection for the environment as a whole'.

54 It follows from the preceding elements that the EU legislature intended to promote the incineration of hazardous and municipal waste by removing them from the obligation to be authorised under the EU ETS. To limit the scope of that exception using the concept of a 'main purpose' is inconsistent with that objective.

(78) The key point in paras 50-54, cited above, is that the EU legislator intended to promote the incineration of hazardous and municipal waste as a secondary objective by exempting the activity from the obligations under the ETS Directive.

(79) Directive 96/61 referred to in the original ETS Directive has subsequently been replaced by Directive 2010/75/EU on industrial emissions. This does not affect the reasoning presented by the ECJ. The ETS Directive Article 2(2) now sets out that the Directive *"shall apply without prejudice to any requirements pursuant to Directive 2010/75/EU"*. Moreover, the subject matter set out in Article 1 of Directive 2010/75/EU shows that it is wider than that of the ETS Directive.

(80) Furthermore, Directive 2010/75/EU Article 11(e) sets out that Member States shall take the necessary measures to provide that installations are operated in accordance with, *inter alia*, the principles that

"where waste is generated, it is, in order of priority and in accordance with Directive 2008/98/EC, prepared for re-use, recycled, recovered or, where that is technically and economically impossible, it is disposed of while avoiding or reducing any impact on the environment"

(81) Consequently, the EU legislature's intention to promote incineration of hazardous and municipal waste by removing them from the scope of EU ETS still prevails, and limiting the scope of the exception by using a concept of "main purpose" would be inconsistent with that objective, cf. case C-166/23, para 54.

(82) As mentioned above in section 2.2.1, installations for the incineration of municipal waste were included in the EU ETS for reporting purposes by Directive (EU) 2023/959 with a view to considering whether such installations shall be fully included in the EU ETS at a later stage. The Background for this potential inclusion is further described in recital 98 of the preamble to Directive (EU) 2023/959, which requires the European Commission to report by July 2026 *"on the feasibility of including municipal waste incineration installations in the EU ETS [...]"*. The recital sets out, *inter alia*, that

"To avoid diversion of waste from municipal waste incineration installations towards landfills in the Union, which create methane emissions, and to avoid exports of waste to third countries, with a potentially negative impact on the environment, in its report the Commission should take into account the potential diversion of waste towards disposal by landfilling in the Union and waste exports to third countries. The Commission should also take into account the effects on the internal market, potential distortions of competition, environmental integrity, alignment with the objectives of Directive 2008/98/EC of the European Parliament and of the Council [...] and robustness and accuracy with respect to the monitoring and calculation of emissions. Considering the methane emissions from landfilling and to avoid creating an uneven playing field, the Commission should also assess the possibility of including other waste management processes, such as landfilling, fermentation, composting and mechanical-biological treatment, in the EU ETS, when assessing the feasibility of including municipal waste incineration installations."

(83) The recital cited above appears to assume that municipal waste incineration installations are not included in the EU ETS today, irrespective of the main purpose of such installations. This is in accordance with the reasoning of the ECJ in case C-166/23.

(84) Furthermore, the ECJ states that a rule under which waste incineration plants are subject to EU ETS because they supply heat to a production process subject to EU ETS is inconsistent with the principal objective of the ETS

Directive, as such a rule would result in a waste of energy and increased greenhouse gas emissions. Case C-166/23 paras 55-56 read as follows:

> *"55 Furthermore, the scope of the exception must also be interpreted in the light of the principal objective of Directive 2003/87. The interpretation advanced by the Commission, according to which a unit for the incineration of hazardous or municipal waste which contributes, by supplying it with heat, to the functioning of an installation within the EU ETS, should itself fall within the scope of application of the EU ETS, is contrary to that objective.*
>
> *56 Such an interpretation would lead to the benefit of that derogation being reserved to units for the incineration of hazardous and municipal waste the heat produced by which is not recovered by an installation covered by Directive 2003/87, which would result in a waste of energy and an increase in emissions."*

(85) The systematic and teleological considerations examined by the ECJ in paras 50-56 of case C-166/23 apply correspondingly for the interpretation of Annex I, first activity. The relevant wording is identical in Annex I, first activity and point 5. Both provisions set out that emissions from combustion of hazardous and municipal waste are not to be included within the scope of EU ETS. This responds to the secondary objective of the ETS Directive that the establishment of the EU ETS should not impede the disposal of hazardous and municipal waste by incineration. The interpretation that the use of heat generated by waste incineration is not relevant for determining the scope of Annex I, first activity is also in line with the primary objective of the ETS Directive, as an alternative interpretation would result in waste of energy and increased emissions.

4.4 Comments to the State's arguments

(86) In the Referral, the State argues that case C-166/23 concerns the interpretation of an exception for a different situation than the situation in the present case. This argument must be rejected, as the exclusion of hazardous

and municipal waste incinerators from the unit rule in Annex I, point 5 is a consequence of the installation rule in the first activity and based on the same overriding rule: emissions from combustion of hazardous or municipal waste shall not be comprised by the obligation to surrender allowances under the EU ETS.

(87) That the exclusion of waste incineration from both the installation and unit rule must be based on the same criterion is also supported by the fact that a different interpretation would render the rules incompatible and susceptible for circumvention. As an example, it could be envisaged an installation for the incineration of municipal waste consisting of two units for the incineration of municipal waste. If the installation were to be assessed based on a criterion relating to its main purpose, as argued by the State, a possible consequence could be that the installation is comprised by Annex I, first activity and subject to the obligation to surrender allowances. Nevertheless, the installation's two units for the incineration of municipal waste would still need to be considered based on the ECJ's interpretation in case C-166/23, entailing that they are not to be included in the installation's greenhouse gas permit. Consequently, the installation would not be required to surrender allowances for its emissions from municipal waste incineration. The example shows that it cannot be drawn a distinction between installations and units where installations are considered under a "main purpose" criterion while units are considered based on what is incinerated.

(88) The State has also argued that a distinction should be drawn between disposal of waste and energy recovery. There are several reasons why this argument cannot be accepted.

(89) First, the wording and purpose of the ETS Directive do not provide any basis for distinguishing between installations that dispose waste and installations that recover energy from waste when determining the scope of Annex I, first activity. Such distinction would be contrary to the wording in Annex I read in conjunction with the Directive's definition of "combustion", and it would be contrary to both the primary and secondary objectives of the ETS Directive as further explained above.

(90) Second, it follows from Directive 2010/75/EU Articles 44(b) and 50(5) that operators of waste incinerator installations are required to recover any heat generated by the plant as far as practicable. On this basis, it is difficult to see how a distinction between disposal and recovery could be drawn for waste incineration installations which are required to recover heat generated by the incineration process.

(91) Finally, the State argues that the exception cannot be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the ETS Directive, provided that they are used for the incineration of other waste "only marginally". The State's reasoning is that the criterion "only marginally" will be difficult to apply in practice as the recipients of waste are not required to keep records of the composition of hazardous and municipal waste as compared to other types of waste. However, the ECJ did apply this criterion in case C-166/23, and any views on the practical difficulties involved in its application are not convincing arguments for not following ECJ case-law. Furthermore, any potential practical difficulties in applying the ECJ's interpretation may be overcome through national implementing measures and is not an argument against the legal interpretation as such. Moreover, the Referring Court has not raised any questions concerning the application of the "only marginally" criterion which is consequently not a matter of interpretation to be determined by the EFTA Court in the present case.

4.5 The European Commission's guidance document from 2024

(92) On 4 December 2024, the European Commission published a revised Guidance on Interpretation of Annex I of the ETS Directive, applicable from 2024 ("**Commission Guidance 2024**"). In this revised document, the text on the unit rule in Annex I, point 5 has been updated with reference to case C-166/23 (see section 3.4.4 of Commission Guidance 2024). However, similar substantive amendments have not been made to the text on the installation rule in Annex I, first activity (section 3.4.3), which seems to imply that the Commission still considers the "main purpose" criterion as applicable for installations.

(93) At the same time, the Commission Guidance 2024 section 6 concerning municipal waste incineration as applicable from 2024 leaves some unclarity as to which interpretations apply by way of the references to sections 3.4.3 and 3.4.4.

(94) In FREVAR's and SAREN's view, it is incorrect to interpret the first activity to the effect that a "main purpose" criterion applies, particularly when considering the ECJ's ruling in case C-166/23.

(95) If, indeed, the European Commission is still of the view that the exclusion of hazardous or municipal waste incineration installations according to Annex I, first activity rests on a "main purpose" criterion, even after the ECJ's judgment in case C-166/23, it should be noted that the Commission Guidance 2024 as such is not legally binding.

(96) It follows from Article 288(1) and (5) of the Treaty on the Functioning of the European Union that such recommendations and opinions shall have no binding force. Correspondingly, it is also explicitly stated in Commission Guidance 2024 section 1.1 that:

> *"The guidance represents the views of the Commission services at the time of publication. It is not legally binding. Only the European Court of Justice can give definitive judgements concerning interpretation of the EU ETS Directive."*[14]

(97) The judgment in case C-166/23, where the ECJ overruled the interpretation in Commission Guidance 2010, is an example of how such guidance documents are not attributed legal significance by the Courts as a source of interpretation under EU and EEA law.

(98) Consequently, the key question before the EFTA Court is whether the interpretation offered by the ECJ in case C-166/23, that there is no basis for a "main purpose" criterion, applies correspondingly in the present case. If the

[14] EU ETS Guidance document no. 0, Updated Version, 4 December 2024, page 5.

answer to this question is in the affirmative, the views in Commission Guidance 2024 have no legal significance as such.

(99) Furthermore, FREVAR and SAREN recall that the Commission Guidance 2010 applied the "main purpose" criterion to both the installation and the unit rule, and that the ECJ ruled that this interpretation was incorrect. When the ECJ's conclusion in case C-166/23 is read in conjunction with the Court's reasoning and Commission Guidance 2010, it must be understood as meaning that the Commission's "main purpose" criterion is based on an incorrect interpretation of the wording "for the incineration of hazardous or municipal waste" which applies both under point 5 and the first activity.

4.6 Proposed answer to question 1

(100) In light of the observations above, FREVAR and SAREN respectfully propose that the EFTA Court answers the first question raised by the Referring Court as follows:

> *The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally.*

5. Observations to question 2

(101) With its second question, the Referring Court asks what is to be the subject-matter of assessment and which factors are relevant in the assessment pursuant to Annex I, first activity if that provision is not to be interpreted in accordance with the judgment in case C-166/23.

(102) It is recalled that the parties to the main case agree that FREVAR's and SAREN's installations both fulfil the requirement for incineration of "hazardous or municipal waste" as applied in Norwegian law. Consequently, the question

at issue is how to assess whether an installation qualifies as an installation for the incineration of waste.

(103) As held in section 4 above, FREVAR and SAREN maintain that Annex I, first activity must be interpreted in accordance with the ECJ's interpretation in case C-166/23. This entails that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the ETS Directive, irrespective of what is considered to be the main purpose of the installations. If this interpretation is not applied, the interpretation of Annex I, first activity must nevertheless be based on the literal, systematic and teleological methods of interpretation applied in EU and EEA law.

(104) FREVAR and SAREN submit that a literal interpretation of the wording *"installations for the incineration of hazardous or municipal waste"* entails that installations that exclusively or in all material respects incinerate waste must always be considered as installations for the incineration of waste according to the wording of the Directive. The inclusion of installations that in all material respects incinerate waste is necessary to take into account that waste incineration installations are required to be operated with auxillary burners to ensure waste incineration at correct temperatures and compliance with other operating requirements.

(105) For installations that do not exclusively or in all material respects incinerate waste by also incinerating other fuels for the purpose of energy production, a distinction could be drawn as further explained below in paras 105 *et seq*.

(106) On the other hand, it cannot be relevant for the assessment under Annex I, first activity whether an installation which incinerates waste also generates and recovers heat in the incineration process and sells this heat energy.

(107) First, considering heat generation from waste incineration as a relevant factor in determining the scope of the EU ETS could result in waste of energy and increased emissions, as the installations would be incentivised not to recover heat generated by the incineration process. This would be contrary to the primary objective of the EU ETS Directive.

(108) Second, since installations for waste incineration are required by Directive 2010/75/EU to recover the heat generated as far as practicable, applying heat generation and recovery as a relevant factor in the assessment would in effect greatly reduce the scope of the exception in Annex I, first activity. This would be contrary to the secondary objective of the EU ETS to promote waste disposal through waste incineration, as emphasised by the ECJ in case C-166/23.

(109) In any case, the installation's use of heat generated by the incineration process cannot be relevant in the assessment under Annex I, first activity. Such assessment would contradict the wording of Annex I, first activity read in conjunction with the definition of "combustion" in the ETS Directive Article 3(t). It would also be contrary to the ECJ's ruling in case C-166/23, creating a situation where the installation's use of recovered heat would be relevant and could lead to its inclusion in the EU ETS. At the same time, the use of recovered heat from that installation's units would nevertheless be irrelevant for determining whether emissions from the units should be included in the installation's greenhouse gas emissions permit.

(110) The European Commission has argued in Commission Guidance 2010 and 2024, and the State has argued correspondingly, that the definitions of "waste incineration plant" and "waste co-incineration plant" in Directive 2010/75/EU are relevant for the assessment under the ETS Directive, Annex I, first activity. As mentioned above, the Commission considered in Commission Guidance 2010 that these definitions were equally relevant for the interpretation of Annex I, point 5, but this interpretation was refuted by the ECJ in case C-166/23.

(111) If the definitions of "waste incineration plant" and "waste co-incineration plant" in Directive 2010/75/EU, were to have any relevance for the interpretation of the ETS Directive – contrary to the ECJ's view in case C-166/23 and to FREVAR's and SAREN's opinion – they would at the very least need to be applied in accordance with the wording, system and objective of the ETS Directive.

(112) FREVAR and SAREN hold that such interpretation would need to consider that the definition of "waste incineration plant" in Directive 2010/75/EU Article 3(40) includes units and equipment *"[...] dedicated to the thermal treatment of waste, with or without recovery of the combustion heat generated [...]"*. Consequently, installations that exclusively or in all material respects incinerate waste must be considered installations for the incineration of waste within the meaning of the ETS Directive, irrespective of heat recovery and use.

(113) The European Commission and the State have emphasised that the definition of "waste co-incineration plant" in Directive 2010/75/EU Article 3(41) includes units *"[...] whose main purpose is the generation of energy or production of material goods [...]"*. However, this definition cannot be applied to the effect that installations which exclusively or in all material respects incinerate waste and sell recovered heat to industry nevertheless have as their main purpose to sell energy and are therefore included in the EU ETS.

(114) Rather, the correct application of the definition above within the meaning of the ETS Directive would have to be that for installations that incinerate both waste and other fuels to generate heat, a distinction will have to be drawn between installations that must be considered waste incineration installations on the one hand and energy producers on the other hand.

(115) In case C-251/07, *Gävle Kraftvärme AB v. Länsstyrelsen i Gävleborgs län*, ECLI:EU:C:2008:495, the ECJ considered the distinction between the definitions of "incineration plant" and "co-incineration plant" in Directive 2000/76, which has later been superseded by Directive 2010/75/EU on industrial emissions. The case did not concern the scope of the ETS Directive.

(116) In the context of the assessment whether a plant, on the basis of its main purpose, should be classified as an incineration plant or a co-incineration plant pursuant to the definitions in Directive 2000/76/EC, the ECJ held in case C-251/07, para 46 that *"account must be taken, in particular, of the volume of energy generated or material products produced by the plant in question in relation to the quantity of waste incinerated in that plant and the stability and continuity of that production"*.

(117) For installations which exclusively or in all material respects incinerate waste, the question of drawing the distinction above does not arise as the installation could always be considered an installation for waste incineration. For installations that also incinerate other fuels to generate heat for sale, on the other hand, the assessment outlined above by the ECJ for classification under Directive 2000/76/EC suggests that the installation's shares of fuel input (waste and other fuels) must be considered in relation to energy produced. In this respect, a relevant indicative factor could be whether the installation from time-to-time substitutes waste with other fuels to generate heat, or whether the installation shuts down when there is lack of waste for incineration. While the former situation could indicate that the installation is a co-incineration installation which has as its main purpose to generate energy, the latter situation indicates an installation for the incineration of waste.

(118) However, it should be emphasized that the question of drawing the distinction above for the purpose of classification under the ETS Directive has already been solved by the ECJ by its interpretation in case C-166/23. This interpretation provides that installations for the incineration of hazardous or municipal waste are excluded from the scope of the ETS Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally. An installation that regularly incinerates larger quantities of other fuels rather than waste for the purpose of heat generation will not fulfil this requirement and consequently fall within the scope of EU ETS.

(119) The ECJ's answer to the first question of interpretation in case C-251/07, when viewed in relation to case C-166/23, also supports that the incineration plant and co-incineration plant definitions in Directives 2000/76/EC and 2010/75/EU are not relevant for the interpretation of the ETS Directive. The referring Court's first question was whether, in a combined power and heating plant consisting of a number of units, each unit would have to be assessed as a separate plant or whether the assessment covered the combined power and heating plant as a whole. The ECJ answered this question in para 33 by concluding that *"[...] for the purposes of applying Directive 2000/76, where a*

co-generation plant comprises a number of boilers, each boiler and its associated equipment is to be regarded as constituting a separate plant". Although the ECJ in case C-251/07 concluded that each unit were to be considered separately for the purpose of the incineration plant and co-incineration plant definitions in Directive 2000/76/EC, the Court did not consider those definitions relevant in interpreting the unit rule in the ETS Directive in case C-166/23. Consequently, those definitions are neither relevant for the interpretation of the unit rule nor the installation rule in the ETS Directive Annex I.

(120) What could in any case not amount to a factor in the assessment under the ETS Directive Annex I, first activity is whether an installation incinerating waste sells the heat generated by that process as steam to industry or as hot water to district heating. There is no basis in the wording, system or purpose of the ETS Directive for such interpretation. Nor do the definitions of "waste incineration plant" and "co-incineration plant" in Directive 2010/75/EU indicate such interpretation. As illustrated by the Norwegian waste incineration market where 15 waste-to-energy plants are not comprised by the EU ETS because they predominantly sell generated heat to district heating, while three plants that predominantly sell steam to industry are included in the EU ETS, such distinction is arbitrary. All plants are subject to the same emission requirements for waste incineration plants under Norwegian law. Drawing such distinction may promote solutions that are not energy efficient or are detrimental to climate objectives, as market participants would be incentivised to prioritise supply to district heating irrespective of e.g. geographical and demographical conditions. It would also contradict the fundamental EU/EEA principle of equal treatment by discriminating between waste incineration operators without objective justification. Finally, such distinction could create situations where an installation's status under the EU ETS could change from year to year based on its deliveries of recovered heat to industry, district heating or for electricity production. Such situation has clearly not been intended by the EU legislature in the adoption of Annex I, first activity.

(121) In light of the observations above, and if the EFTA Court finds it necessary also to answer the second question raised by the Referring Court, FREVAR and SAREN respectfully propose that the EFTA Court answers the second question as follows:

> *The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations that exclusively or for all practical purposes incinerate waste and predominantly incinerate hazardous or municipal waste, including those which do not have waste incineration as their sole purpose, are excluded from the scope of the Directive. For installations that also incinerate other fuels for the purpose of energy production in addition to incinerating waste, it must be assessed whether the installation has the incineration of waste or the production of energy as its main purpose. In this assessment, account must be taken, in particular, of the volume of energy generated by the installation in relation to the quantity of waste incinerated in that installation and the stability and continuity of that production. It is a relevant indicative factor whether the installation from time-to-time substitutes waste with other fuels to generate heat, or whether the installation shuts down when there is lack of waste for incineration, which could indicate that it is an installation for the combustion of fuels or for the incineration of waste, respectively. Whether the installation generates and recovers heat as part of its incineration process, and how and for what purpose such heat energy is used or sold, is not relevant for the assessment above.*

6. Proposed answers to the Referring Court's questions

(122) In light of the observations above, FREVAR and SAREN respectfully propose that the EFTA Court answers the first question raised by the Referring Court as follows:

The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations for the incineration of hazardous or municipal waste are excluded from the scope of the Directive, including those which do not have waste incineration as their sole purpose, provided that they are used for the incineration of other waste only marginally.

(123) If the first question above is answered in the negative, and in light of the observations above, FREVAR and SAREN respectfully propose that the EFTA Court answers the second question as follows:

The first activity listed in Annex I to Directive 2003/87/EC must be interpreted as meaning that all installations that exclusively or for all practical purposes incinerate waste and predominantly incinerate hazardous or municipal waste, including those which do not have waste incineration as their sole purpose, are excluded from the scope of the Directive. For installations that also incinerate other fuels for the purpose of energy production in addition to incinerating waste, it must be assessed whether the installation has the incineration of waste or the production of energy as its main purpose. In this assessment, account must be taken, in particular, of the volume of energy generated by the installation in relation to the quantity of waste incinerated in that installation and the stability and continuity of that production. It is a relevant indicative factor whether the installation from time-to-time substitutes waste with other fuels to generate heat, or whether the installation shuts down when there is lack of waste for incineration, which could indicate that it is an installation for the combustion of fuels or for the incineration of waste, respectively. Whether the installation generates and recovers heat as part of its incineration process, and how and for what purpose such heat energy is used or sold, is not relevant for the assessment above.

* * *

Oslo, 5 May 2025

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Advokat

Henrik Bjørnebye

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