EUROPEAN COMMISSION

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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

OBSERVATIONS

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

Case E-2/25

Sarpsborg Avfallsenergi AS and Others (Plaintiff),

v

Staten ved Klima- og miljødepartementet (Defendant)

in which the Borgarting Court of Appeal requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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I. INTRODUCTION

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

2. The Borgarting Court of Appeal (Borgarting Lagmannsrett) requests an Advisory Opinion from the EFTA Court for use in Borgarting Court of Appeal Case 23-123554ASD-BORG/03. The Appellants in the case before the Brogarting Court of Appeal are the municipality of Fredrikstad (Fredrikstad kommune), represented by the water drainage and renovation undertaking Fredrikstad Vann Avløp og Renovasjonsforetak FREVAR KF ('FREVAR') and Saren Energy Sarpsborg AS (formerly Sarpsborg Avfallsenergi AS) ('SAREN'). The respondent is the Norwegian State, represented by the Ministry of Climate and Environment (Staten v/Klima- og miljødepartementet).

II. THE FACTUAL AND LEGAL FRAMEWORK

II.1. The subject-matter of the dispute

3. The subject-matter of the dispute is the validity of the decision of the Norwegian Environment Agency (Miljødirektoratet) to permit greenhouse gas emissions subject to the obligation to surrender allowances concerning SAREN dated 22 January 2014 and the decision of the Ministry of Climate and Environment concerning FREVAR dated 13 February 2017.

4. The Agency and the Ministry based themselves on the European Commission's 'Guidance on interpretation of Annex I of the EU ETS Directive' of 18 March 2010. The question is whether the installations of SAREN and FREVAR are subject to the obligation to surrender allowances for the combustion of fuels, or installations for the incineration of hazardous or municipal waste which are not subject to the obligation to surrender allowances.

5. At the time of taking the decisions to issue a permit, it followed from the first activity listed in Annex I that the combustion of fuel in installations with a rated thermal input exceeding 20 MW, other than units for the incineration of hazardous or municipal waste, was covered by the greenhouse gas emissions

allowance system. Point 5 of Annex I provided that all units in which fuels were combusted, other than units for the incineration of hazardous or municipal waste, were to be included in the permit for emissions subject to the obligation to surrender allowances when the abovementioned input was exceeded in an installation.

6. According to the Norwegian State, the installations have as their main purpose the supply of energy for industrial purposes, as opposed to solely the disposal of waste. They are therefore considered co-incineration installations and not installations for waste incineration.

7. The Appellants take the view that the decisive factor to determine whether the installations are installations for municipal or hazardous waste under 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 (**"the ETS Directive"**) is what the installations are built for and actually incinerate. Whether the installations' main purpose is deemed to be waste incineration or the supply of recovered heat from waste incineration for industrial purposes is, in the Appellants' submission, not relevant in the assessment.

8. The parties also disagree on how to legally and factually assess the main purpose of the installation, in the event that the State is successful on its point referred to in para. 6 above.

II.2. The facts of the dispute

9. Waste is incinerated at a very high temperature. During the cooling-down process heat is formed. It is a requirement under EEA law and Norwegian law that all heat from the incineration process is recovered in so far as practicable. The main areas of use for such heat are hot water for district heating, and steam for industry and electricity production.

10. FREVAR's installation incinerates and disposes of waste. FREVAR currently sells approximately 80% of recovered heat as steam to industry. In February 1981, the Fredrikstad municipal council adopted a decision to build combustion installations for waste inter alia because there was not enough space for a landfill. The installation has been in operation since 1984 and is situated at the business and industrial area of Øra in Fredrikstad. There was no district heating in Fredrikstad at the time when the installation was built, but nearby industry was able to make use of the heat from the installation.

11. SAREN's installation incinerates and disposes of waste. SAREN sells all recovered heat as steam to industry. The installation is situated in Sarpsborg municipality (Sarpsborg kommune) and has been in operation since 2010.

II.3. Relevant legal provisions

12. Article 2 of the ETS Directive defines the scope of the ETS Directive, in relevant part, as follows:

> *1. This Directive shall apply to the activities listed in Annexes I and III, and to the greenhouse gases listed in Annex II. […]*
> *2. This Directive shall apply without prejudice to any requirements pursuant to Directive 2010/75/EU of the European Parliament and of the Council.*

13. The first activity in Annex I to the ETS Directive is defined as follows:

> *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)*
> *From 1 January 2024, combustion of fuels in installations for the incineration of municipal waste with a total rated thermal input exceeding 20 MW, for the purposes of Articles 14 and 15.*

14. Point 3 of Annex I to the ETS Directive reads as follows:

> *When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the EU ETS, the rated thermal inputs of all technical units which are part of it, in which fuels are combusted within the installation, shall be added together. Those units may include all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units. Units with a rated thermal input under 3 MW shall not be taken into account for the purposes of this calculation.*

15. Point 5 of Annex I to the ETS Directive reads as follows:

> *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.*

III. THE ANALYSIS BY THE COMMISSION OF THE QUESTIONS REFERRED TO THE EFTA COURT

16. The Borgarting Court of Appeal refers two questions to the EFTA Court, which are considered separately below.

III.1. The first question

17. The first question is as follows:

Must the first activity listed in Annex I to Directive 2003/87/EC 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?

18. The Commission notes that the Appellants and the referring court refer to the Judgment of the European Court of Justice in Case C-166/23, where the European Court of Justice found that Point 5 of Annex I to the ETS Directive 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, 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.[1]

19. The Commission stresses that, in Case C-166/23, the Court of Justice did not interpret the first activity in Annex I to the ETS Directive. In that case, the Court ruled exclusively on Point 5 of Annex I, without any interpretation of the first activity. Rather, the activity that was at stake in Case C-166/23 and that brought Nouryon's installation within the scope of the ETS Directive, was the twenty-third activity in Annex I, namely: "*Production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, with a production capacity exceeding 100 tonnes per day*". The question at stake was whether a unit that incinerates hazardous waste resulting from this twenty-third activity and for which the resulting heat was used again in the production process should be included in the ETS.

20. The underlying issue to the first question of the Borgarting Court of Appeal is whether the exclusion of "***installations*** *for the incineration of hazardous or*

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[1] Judgment of the Court of 6 June 2024 in Case C-166/23, *Naturvårdsverket v Nouryon Functional Chemicals AB*, EU:C:2024:465, para. 57.

municipal waste" from the activity "*Combustion of fuels in installations with a total rated thermal input exceeding 20 MW"* in Annex I, row one, should be interpreted in the same way as Point 5 of Annex I to the ETS Directive, which excludes "***units*** *for the incineration of hazardous or municipal waste*".

21. According to the European Court of Justice in Case C-166/23, the decisive factor under Point 5 of Annex I is what is actually incinerated. The distinction between co-incineration and waste incineration, which turns on an assessment of the "main purpose", is, according to the Court, not relevant at unit level in the context of Point 5 of Annex I.

22. The Commission's position is that the interpretation by the European Court of Justice of Point 5 cannot be extended to the first activity of Annex I to the ETS Directive, because of the differences between activity one and Point 5 of Annex I.

23. Indeed, the exclusion mentioned in the first activity of Annex I relates to "*installations for the incineration of hazardous or municipal waste*". These are excluded from being covered by the EU ETS as part of the activity "*Combustion of fuels in installations with a total rated thermal input exceeding 20 MW*". These are self-standing installations of considerable capacity which combust fuels to produce energy and are included in the EU ETS because greenhouse gas emissions from energy generation should be reduced, if not altogether avoided by deploying alternative energy generation technologies which do not produce greenhouse gas emissions, such as solar, wind, or hydropower.

24. Point 5 meanwhile refers to the units to be included in the greenhouse gas emissions permit of an installation. Point 5 mandates that when the capacity threshold of any activity in Annex I is found to be exceeded, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, must be included in the greenhouse gas emission permit of the installation. Case C-166/23 provides the perfect example. It related to an installation that produces bulk organic chemicals. As already pointed out, the reason for the inclusion in the EU ETS of the installation was the production or processing of a certain product (bulk organic chemicals) that generates a considerable amount of greenhouse gas emissions. The combustion of fuels in Point 5 is therefore *accessory* in nature to the production of the product, rather than the central reason for the inclusion in the EU ETS. For this reason, the European Court of Justice's interpretation of the exclusion of units for the

incineration of hazardous or municipal waste, in that context is not directly applicable to activity one of Annex I.

25. For the current case, because of these differences, the Commission thus considers that the literal, systematic and teleological methods of interpretation must be applied anew, this time to activity one of Annex I in order to establish the correct interpretation of the scope of that activity.

III.1.1. Literal interpretation

26. As indicated, the first activity in Annex I to the ETS Directive is defined as "*[c]ombustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)".*

27. Activity one of Annex I has been included in the EU ETS from the start of the system and covers the production of energy. Indeed, combustion of fuels is made to generate energy.

28. This appears also clearly from the original version of Annex I of Directive 2003/87/EC, which, in its original version, contained sections with a title. The activity "combustion" was included under the section "Energy activities":

Activities	**Greenhouse gases**
Energy activities	
Combustion installations with a rated thermal input exceeding 20 MW (except hazardous or municipal waste installations)	Carbon dioxide

29. The wording that is subject to the discussion in the present case was introduced by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009. This new wording refers to "*installations **for** the incineration for hazardous or municipal waste*", rather than "*hazardous or municipal waste incineration installations*" under the old formulation. The use of the word "for" points to the focus on the *purpose* of the activity to determine the scope of activity one, as well as the exception. The purpose of combustion of fuels is energy generation. The purpose of the activity that is exempted from activity one is incineration of hazardous or municipal waste, rather than energy generation. The other language versions confirm this.[2]

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[2] See also p. 12 of the Request of an Advisory Opinion: "*As is apparent from the different language versions of the text of the Directive, the exception is limited in its application to combustion*

30. The same Directive 2009/29/EC also changed the words *"combustion installations*" in the old formulation into "*combustion **of fuels** in installations*". Recital (37) of Directive 2009/29/EC clarifies that a definition of "combustion" was added "[*i]n order to clarify the coverage of **all kinds of** boilers, burners, turbines, heaters, furnaces, **incinerators**, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units by Directive 2003/87/EC*".[3] This demonstrates that the objective of these changes in the ETS Directive was to be expansive in the coverage of combustion of *any substance* that is used to provide heat or power.[4]

31. Therefore, the Commission considers that the interpretation of the wording should consider the essential role of the word "for" in the formulation of activity one in Annex I. The Commission thus agrees with the Norwegian State that, if the waste composition was sufficient to come within the scope of the exception, the wording could have reflected this in a simpler manner, for example, with the words "which incinerate".[5] The use of the word "for" thus pleads in favour of a teleological interpretation of activity one in Annex I.

III.1.2. Systematic interpretation

32. Before turning to the teleological interpretation, the Commission first considers the systematic interpretation of activity one in Annex I.

33. A systematic interpretation of activity one in Annex I requires examining the legal context of this activity. The waste and industrial emissions legislation forms part of this legal context. The Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste ("**Waste Incineration Directive**") and the Directive 2010/75/EU of the European

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installations for the combustion of hazardous [or] municipal waste. The word "for" indicates that the purpose of the installation is key to the assessment: see the English-language use of "for", the Danish-language use of "til" and the Swedish-language use of "för"… If the waste composition was sufficient to come within the scope of the exception, the wording ought to have and could have reflected this in a simple manner, for example, with the wording "which incinerate."

[3] Emphasis added.

[4] See also the definition of "fuel" in the Cambridge Dictionary*: (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.* [Emphasis added]

[5] See p. 12 of the Request of an Advisory Opinion.

Parliament and of the Council of 24 November 2010 on industrial emissions ("**Industrial Emissions Directive**") distinguish between waste incineration plants and co-incineration plants on the basis of the *purpose* of the combustion.

34. Indeed, the Waste Incineration Directive defined "incineration plant" in Article 3(4) as "*any stationary or mobile technical unit and equipment 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*". In turn, "co-incineration plant" is defined in Article 3(5) as "*any stationary or mobile 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."[6]

35. The Industrial Emissions Directive defines "waste incineration plant" in Article 3(40) as "*any stationary or mobile technical unit and equipment dedicated to the thermal treatment of waste,* ***with or without recovery of the combustion heat generated****, through the incineration by oxidation of waste as well as other thermal treatment processes, such as pyrolysis, gasification or plasma process, if the substances resulting from the treatment are subsequently incinerated*". In turn, "waste co-incineration plant" is defined in Article 3(41) as "*any stationary or mobile technical unit* ***whose main purpose*** *is the generation of energy or production of material products and which uses waste as a regular or additional fuel or in which waste is thermally treated for the purpose of disposal through the incineration by oxidation of waste as well as other thermal treatment processes, such as pyrolysis, gasification or plasma process, if the substances resulting from the treatment are subsequently incinerated*".[7]

36. Therefore, this legal context in which the ETS Directive was established demonstrates that installations in which waste is incinerated are distinguished on the basis of the *main purpose* of the combustion.

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6 Emphasis added.

7 Emphasis added.

III.1.3. Teleological interpretation

37. This systematic interpretation of activity one in Annex I to the ETS Directive is also in tune with the teleological interpretation of the ETS Directive.

38. Article 1 of the ETS Directive indicates that the ETS is meant to promote reductions of greenhouse gas emissions "*in a cost-effective and economically efficient manner*". To this end, it establishes a system for greenhouse gas emission allowance trading within the European Union, designed to reduce greenhouse gas emissions into the atmosphere to a level which prevents dangerous anthropogenic interference with the climate system, with the ultimate aim of protecting the environment.[8]

39. The European Court of Justice in Case C-166/23 also stated that it is "*clear, inter alia, from both recital 25 and Article 1 of Directive 2003/87, [that] 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*".[9]

40. The distinction between incinerators and co-incinerators is precisely meant to incentivise emission reductions from the energy-generation sector. Including co-incinerators in the scope of activity one of Annex I ensures a level-playing field for all energy production processes. This guarantees that the carbon price signal (imposed by the ETS) guides economic choices towards the less-emitting processes. In cases where the main purpose of incineration of waste is to generate energy, lower emitting energy-generation methods should be used, in particular renewable energy sources, or fossil fuel-based energy sources, which can be less emission-intensive depending on the composition of the waste.

41. In Case C-166/23, the European Court of Justice considered that emission reductions would be incentivised if all waste incineration units that predominantly use municipal waste or hazardous waste were excluded from the scope of the EU ETS. The Court considered that, otherwise, the derogation in Point 5 of Annex I would be limited to units from which the heat was not recovered by an installation covered by the ETS Directive. This would, in turn, result in a waste of energy and

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[8] See, in particular, Judgment of 8 March 2017, *ArcelorMittal Rodange and Schifflange*, C-321/15, EU:C:2017:179, para. 24.

[9] Judgment of the Court of 6 June 2024 in Case C-166/23, *Naturvårdsverket v Nouryon Functional Chemicals AB*, EU:C:2024:465, para. 50.

an increase in emissions.[10] In that Case C-166/23, the chemical production process at stake created hazardous waste in wastewater resulting from the process. Energy was recovered from the disposal treatment of that water.

42. The Commission considers that this argument does not apply to independent, self-standing, energy generation installations that combust fuels (covered by activity one in Annex I). It is of essential importance for the energy and circular economy transition that the EU pursues as part of its Green Deal that the energy systems of Member States do not become dependent on the treatment of waste for their energy generation where alternative sources of energy are available or can be used. At the same time, greater circularity of materials must be encouraged. Such dependence arises when the *purpose* of the treatment is energy generation, and not simply when energy is generated. Indeed, the Waste Incineration Directive and Industrial Emissions Directive do not distinguish waste incineration and co-incineration on the basis of the energy recovery. Rather, as explained, the applicable definitions focus on the *main purpose*.

43. The teleological interpretation that the Commission advances is also in line with the "waste hierarchy", which has been part of EU law since 1975.[11] Article 4 (1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste ("**the Waste Framework Directive**") provides as follows:

> *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;*
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> *(c) recycling;*
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> *(d) other recovery, e.g. energy recovery; and*
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> *(e) disposal.*

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[10] Judgment of the Court of 6 June 2024 in Case C-166/23, *Naturvårdsverket v Nouryon Functional Chemicals AB*, EU:C:2024:465, para. 56.

[11] See Article 3 of Council Directive 75/442/EEC of 15 July 1975 on waste. It can be noted that Recital (24) of the Waste Incineration Directive provides that "*The requirements for recovering the heat generated by the incineration or co-incineration process and for minimising and recycling residues resulting from the operation of incineration or co-incineration plants will assist in meeting the objectives* ***of Article 3 on the waste hierarchy of Directive 75/442/EEC****."* (emphasis added)

44. The waste hierarchy prefers prevention, preparing for re-use and recycling over incineration. Annex IVa of the Waste Framework Directive provides several examples of economic instruments and other measures to provide incentives for the application of the waste hierarchy, including "*Economic incentives for regional and local authorities, in particular to promote waste prevention and intensify separate collection schemes, **while avoiding support to landfilling and incineration***".[12] Including co-incineration plants within the scope of activity one of Annex I (and thus excluding them from the exception) precisely avoids incineration and rather incentivises policies and activities towards prevention, preparing for re-use and recycling.

45. The Commission considers that the application of the waste hierarchy gives a different result in respect of waste incineration units with heat recovery that are part of an installation that performs an activity manufacturing products and that is, because of that latter activity, within the scope of the ETS (like Nouryon), on the one hand, and waste co-incineration installations that have as main purpose to generate energy, on the other hand. In the case of a unit processing wastewater resulting from the production of chemicals and recovering heat from this waste treatment process, the only alternative would be to dispose of the wastewater. This is situated lower on the waste hierarchy. However, in case of waste co-incineration in a self-standing installation, this activity, at a larger scale, is part of a much wider activity of waste treatment, where the waste hierarchy points towards policies that incentivise waste prevention, re-use, and recycling.[13] If co-incineration installations were exempted from the ETS, the signals in favour of these broader waste policies would be distorted and the policies consequently undermined.

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[12] See Point 12 of Annex IVa of the Waste Framework Directive (emphasis added).

[13] The direction of such policies can be noticed in EU legislation. For instance, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 ('Taxonomy Regulation') helps to direct investments to the economic activities most needed for the circular economy transition. Sustainable activities can contribute to one or more environmental objectives, but they must not cause "significant harm" to the others. Economic activities that do significant harm to environmental objectives are presented in the Article 17 of the Taxonomy Regulation. It is specifically stated that an activity that "*leads to a significant increase in the generation, incineration or disposal of waste, with the exception of the incineration of non-recyclable hazardous waste*" does harm the objective of the circular economy transition. Meanwhile, it provides that an activity has a substantial contribution to the transition to a circular economy where it "*minimises the incineration of waste and avoids the disposal of waste, including landfilling, in accordance with the principles of the waste hierarchy*" (Article 13).

46. Beyond the objectives of the circular economy, when again focusing on the climate impact of incineration, the Commission wants to underline that emissions reductions are necessary even where disposal is the only option to treat waste, after prevention, reuse and recycling are maximised in line with the waste hierarchy. The European Climate Law writes into law the objective set out in the European Green Deal for Europe's economy and society to become climate-neutral by 2050.[14] The law also sets the intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. To meet these targets, emissions from the incineration of fossil-based products need to be addressed, which can happen in two ways, either (i) by avoiding the production of these fossil-based products, as recycling has limited cycles and the products may still end up in incineration; or (ii) by installing carbon capture. Carbon pricing incentivises both alternatives.[15]

47. Finally, the Commission wants to underline that the Industrial Emissions Directive requires that both waste incineration and co-incineration plants recover the heat generated as far as possible. Indeed, Article 50(5) of the Industrial Emissions Directive requires that "*[a]ny heat generated by waste incineration plants or waste co-incineration plants shall be recovered as far as practicable*". Moreover, waste incineration plants as well as waste co-incineration plants that apply for a permit must describe the measures taken to meet the requirement that heat is recovered as far as practicable.[16] The level of heat recovery is determined in the permit and is a requirement for all plants.[17] Therefore, no matter whether

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[14] See Article 2 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("**European Climate Law**").

[15] The EU Industrial Carbon Management Strategy envisages a future in which all emissions from waste incineration are captured to create a circular carbon economy. See Section 4.4 of the Communication of the Commission, "Towards an ambitious Industrial Carbon Management for the EU", COM/2024/62 final, 6 February 2024, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2024:62:FIN. The Commission is currently carrying out an impact assessment on the potential inclusion of all waste management processes in the EU ETS, in particular incineration (regardless of the purpose of the incineration). See Recital 98 of Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023. Therefore, the current coverage by the ETS of waste co-incinerators must be seen as a step in the process towards climate neutrality, to which the waste incineration sector will have to contribute.

[16] Article 44 of the Industrial Emissions Directive.

[17] In line with this requirement, the Best Available Techniques (BAT) Reference (BREF) Document for Waste includes two BATs in relation to Energy Efficiency (section 5.1.4): "BAT 19. In order to increase the resource efficiency of the incineration plant, BAT is to use a heat recovery boiler"; and

waste incineration installations are exempted from the ETS or not, heat recovery, to the extent possible, will always be mandatory. Hence, it is not the exemption from the ETS that would promote heat recovery.

48. In sum, all plants in the EU that have as their main purpose energy generation must compete on an equal footing. To this end, the interpretation of the exclusion mentioned in activity one in Annex I must be interpreted in a restrictive manner. If all such installations are within the scope of the EU ETS, they will have the correct incentives to reduce emissions, switch towards emission-free generation techniques or capture the emissions they generate. This is essential for the objective of carbon-neutrality that the EU has set as target for 2050. This interpretation also finds support in the waste hierarchy, which seeks to incentivise waste prevention, re-use and recycling, rather than incineration.

49. Before turning to the second question, the Commission wants to stress that this restrictive interpretation of the exemption in activity one in Annex I has been applied by the Commission and the Member State authorities since 2003. A broad interpretation of the exemption, i.e. excluding municipal and hazardous waste incineration installations from the ETS even when their main purpose is energy-generation, would have retroactive effects and affect legal certainty. In this regard, the Commission notes that the European Court of Justice may, in application of the general principle of legal certainty inherent in the Union legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships.[18] The Commission considers that such situation is at stake here and would respectfully request the EFTA Court, in case it were to conclude that a broad interpretation of

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"BAT 20. In order to increase the energy efficiency of the incineration plant, BAT is to use an appropriate combination of the techniques given below", including several techniques related to heat recovery and electricity generation. BAT conclusions are the final, legally binding assessments of the best available techniques for a particular industrial sector, as determined in the context of the Industrial Emissions Directive (IED). They are a key part of every BREF and are used by authorities to set permit conditions for installations covered by the IED. See Best Available Techniques (BAT) Reference (BREF) Document for Waste Treatment, 2018, available at https://eippcb.jrc.ec.europa.eu/sites/default/files/2019-11/JRC113018_WT_Bref.pdf.

[18] See Judgment of the Court of 27 March 1980 in Case 61/79, Denkavit, EU:C:1980:100, para. 17.

the exception in activity one of Annex I should be applied, to limit the effects of its judgment to the future.

III.2. The second question

50. The second question from the referring court is as follows:

If question 1 is answered in the negative, what is to be the subject-matter of assessment and which factors are relevant in the assessment of the exception in the first activity listed in Annex I to the ETS Directive?

51. As explained, the Commission considers that the first question must indeed be answered in the negative. The factors that are relevant for the assessment of the exception in the first activity in Annex I to the ETS Directive are those set out in Section 3.4.3 of the Guidance Document No. 0 of the Commission.[19] The assessment must be based on the *purpose* of the incineration of waste. This Guidance Document indeed refers to the above-mentioned definition of "waste incineration plant" in the Industrial Emissions Directive. If an installation is found by the competent authority to fall under this definition, and if the waste incinerated falls predominantly under the category "municipal" or "hazardous", then it is not subject to the EU ETS Directive in respect of any incineration that takes place at that installation.

52. The competent authority determines whether a particular installation falls into one of these categories taking into account the relevant definitions in the Industrial Emissions Directive. Installations falling under the Industrial Emissions Directive have a permit under that Directive, which should clearly state the status of the waste incineration or waste co-incineration units.

53. In case the status of individual technical units cannot be derived unambiguously from the Industrial Emissions Directive permit, the Guidance Document provides further considerations that may serve as a guidance. As the assessment of the main purpose remains with the Member States, they have the flexibility to ensure that an accurate assessment of the purpose is made case by case, considering the technical features and background for setting up the plant.

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[19] See Guidance on the Interpretation of Annex I of the EU ETS Directive (excl. Aviation and maritime activities), Updated Version, 4 December 2024, available at https://climate.ec.europa.eu/document/download/edc93136-82a0-482c-bf47-39ecaf13b318_en?filename=policy_ets_gd0_annex_i_euets_directive_en.pdf.

IV. CONCLUSION: THE PROPOSED RESPONSE

54. In the light of the preceding discussion, the Commission proposes to respond to the questions from the referring court as follows:

First question: The first activity listed in Annex I to Directive 2003/87/EC must not 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.

Second question: When assessing whether the exception in the first activity listed in Annex I to Directive 2003/87/EC applies, the main purpose of the waste incineration installation must be considered, as set out in the Commission Guidance Document No. 0. If the main purpose is energy generation, the installation is within the scope of the ETS. If the main purpose is not the generation of energy and if the waste incinerated falls predominantly under the category "municipal" or "hazardous", the installation is not within the scope of the ETS.

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