ESA | EFTA Surveillance Authority

Brussels, 7 May 2025
Case No: 93685
Document No: 1524044

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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Kyrre Isaksen and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-2/25

Sarpsborg Avfallsenergi AS and Others

v

The Norwegian State, represented by the Ministry of Climate and Environment (Staten ved Klima- og miljødepartementet)

in which the Borgarting Court of Appeal (*Borgarting Lagmannsrett*) requests the EFTA Court to give an Advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation of the scope of the exemption under the first activity listed in Annex I to Directive 2003/87/EC on the establishment of a scheme for greenhouse gas emission allowance trading and amending Council Directive 96/61/EC.

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1 INTRODUCTION

1. The present written observations were prepared with support from Frederik De Ridder and Kristine Aaland, Legal Officers of the Authority's Internal Market Affairs Directorate.

2. The present request for an advisory opinion ("**the Request**") concerns the interpretation of the first activity listed in Annex I to Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading ("**the ETS Directive**").[1]

3. The national proceedings giving rise to the Request were brought by Fredrikstad municipality, represented by its water drainage and renovation undertaking, Fredrikstad Vann Avløp og Renovasjonsforetak ("**FREVAR**"), and Saren Energy Sarpsborg AS (formerly Sarpsborg Avfallsenergi AS, "**SAREN**") ("**the appellants**"), against the Norwegian State, represented by the Ministry of Climate and Environment.

4. The appellants operate installations that incinerate and dispose of hazardous or municipal waste and supply recovered heat to nearby industrial facilities.[2] The Norwegian Environment Agency and the Ministry of Climate and Environment determined that these are co-incineration installations whose *main purpose* is energy production, as opposed to waste disposal.[3] On that basis, the installations were deemed subject to the emissions trading regime under the ETS Directive. By judgment of 10 May 2023, the Søndre Østfold District Court upheld those decisions.[4]

5. The appellants argue that their installations are exempt under the first activity listed in Annex I to the ETS Directive, as it was "*at the time of the decisions*",[5] as they incinerate

[1] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25. 10. 2003, page 32.
[2] The Authority notes that the parties appear to agree that the appellants' installations incinerate hazardous or municipal waste, and their installations have an input exceeding 20 MW, see the Request, page 2. Furthermore, the Request on page 4 states that FREVAR currently sells approximately 80% of recovered heat as steam to industry while SAREN sells all recovered heat as steam to industry.
[3] According to page 4 of the Request, the Norwegian Environment Agency adopted its decisions on 22 January and 30 January 2014. The Ministry of Climate and Environment upheld the decisions on 13 February 2017.
[4] The Request, page 2 and 5.
[5] The Request, page 2.

municipal or hazardous waste, regardless of energy use or operational purpose. The parties also dispute how the "*main purpose*" should be assessed, if deemed relevant.

6. For further information about the factual circumstances of the case, the Authority respectfully refers to the Request.[6]

2 EEA LAW

2.1 The ETS Directive

7. The ETS Directive establishes a system for greenhouse gas ("**GHG**)" emission allowance trading within the EEA to promote cost-effective and economically efficient reductions of GHG emissions into the atmosphere, with the ultimate objective of protecting the environment.[7] The Directive was incorporated into the EEA Agreement by Decision of the Joint Committee of 26 October 2007,[8] and has been amended several times to align the system with the overarching climate targets.[9]

8. Recitals 4 and 5 to the ETS Directive, read:

> "*(4) Once it enters into force, the Kyoto Protocol, which was approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (7), will commit the Community and its Member States to reducing their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8 % compared to 1990 levels in the period 2008 to 2012.*

[6] The Request, pages 3-5.
[7] Judgment of 9 August 2024, Case E-12/23 *NAS*, para. 36.
[8] Decision of the EEA Joint Committee No 146/2006 of 26 October 2007, OJ L 100, 10.4.2008, p. 92.
[9] The most recent amendments to the EU legal act which are also incorporated into the EEA Agreement were made by Directive (EU) 2023/959, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee of 8 December 2023, No 335/2023, OJ L, 2024/1420, 13.6.2024. The Authority notes that Article 10a of the ETS Directive was amended by Regulation (EU) 2024/795. However, this Regulation has not yet been incorporated into the EEA Agreement. In the Authority's view, the amendments introduced by the Regulation are not relevant to the present case.

(5) The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly, in accordance with Decision 2002/358/EC. This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment."

9. Recital 25 to the ETS Directive, reads:

"(25) Policies and measures should be implemented at Member State and Community level across all sectors of the European Union economy, and not only within the industry and energy sectors, in order to generate substantial emissions reductions. The Commission should, in particular, consider policies and measures at Community level in order that the transport sector makes a substantial contribution to the Community and its Member States meeting their climate change obligations under the Kyoto Protocol."

10. Article 1, which sets out the subject matter of the ETS Directive, reads:

"This Directive establishes a system for greenhouse gas emission allowance trading within the Union in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

This Directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change. It contributes to the achievement of the Union's climate-neutrality objective and its climate targets as laid down in Regulation (EU) 2021/1119 of the European Parliament and of the Council and thereby to the objectives of the Paris Agreement.

This Directive also lays down provisions for assessing and implementing a stricter Union reduction commitment exceeding 20 %, to be applied upon the approval by the Union of an international agreement on climate change leading to greenhouse gas emission reductions exceeding those required in Article 9,

as reflected in the 30 % commitment endorsed by the European Council of March 2007."

11. Article 2 sets out the scope of ETS Directive. That provision reads, insofar as relevant:

"1. This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II. […]*"*

12. Article 3, titled "*definitions*", reads, in relevant parts:

"(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;"

"(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;"*

13. Article 12, titled "*Transfer, surrender and cancellation of allowances*", reads, insofar as relevant:

"3. *The Member States, administering Member States and administering authorities in respect of a shipping company shall ensure that, by 30 September each year:*

(a) the operator of each installation surrenders a number of allowances that is equal to the total emissions from that installation during the preceding calendar year, as verified in accordance with Article 15;"

14. Article 14, titled "*Monitoring and reporting of emissions*", reads:

"(…) 3. Member States shall ensure that each operator of an installation or an aircraft operator monitors and reports the emissions from that installation during each calendar year, or, from 1 January 2010, the aircraft which it operates, to the competent authority after the end of that year in accordance with the acts referred to in paragraph 1."

15. Article 15, titled "*Verification and accreditation*" reads:

> "*Member States shall ensure that the reports submitted by operators and aircraft operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article, and that the competent authority is informed thereof.*
>
> *Member States shall ensure that an operator or aircraft operator whose report has not been verified as satisfactory in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator or aircraft operator has been verified as satisfactory.*"

16. Article 19, titled "*Registries*", reads:

> *"1. Allowances issued from 1 January 2012 onwards shall be held in the Union registry for the execution of processes pertaining to the maintenance of the holding accounts opened in the Member State and the allocation, surrender and cancellation of allowances under the Commission Acts referred to in paragraph 3.*
>
> *Each Member State shall be able to fulfil the execution of authorised operations under the UNFCCC or the Kyoto Protocol.*
>
> *2. Any person may hold allowances. The registry shall be accessible to the public and shall contain separate accounts to record the allowances held by each person to whom and from whom allowances are issued or transferred. (…)"*

17. Article 24, titled "*Procedures for unilateral inclusion of additional activities and gases*", reads:

> *"1. From 2008, Member States may apply emission allowance trading in accordance with this Directive to activities and to greenhouse gases which are*

not listed in Annex I, taking into account all relevant criteria, in particular the effects on the internal market, potential distortions of competition, the environmental integrity of the EU ETS and the reliability of the planned monitoring and reporting system, provided that the inclusion of such activities and greenhouse gases is approved by the Commission, in accordance with delegated acts which the Commission is empowered to adopt in accordance with Article 23.

2. When the inclusion of additional activities and gases is approved, the Commission may at the same time authorise the issue of additional allowances and may authorise other Member States to include such additional activities and gases.

3. On the initiative of the Commission or at the request of a Member State, these acts may be adopted on the monitoring of, and reporting on, emissions concerning activities, installations and greenhouse gases which are not listed as a combination in Annex I, if that monitoring and reporting can be carried out with sufficient accuracy. (…)"

18. In accordance with Article 2(1), Annex I to the ETS Directive contains a table listing the activities to which that directive applies. The first activity listed, reads:

"*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)"*

19. Point 5 of Annex I to the Directive reads:

"*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.*"

2.2 The Effort Sharing Regulation

20. The Effort Sharing Regulation (the "**ESR**") establishes national targets for the reduction of GHG emissions by 2030, which apply outside the scope of the ETS Directive.[10] The Regulation was incorporated into the EEA Agreement by way of Decision of the Joint Committee of 25 October 2019.[11]

21. Article 2(1), which sets out the scope of the ESR, reads:

> *"1. This Regulation applies to the greenhouse gas emissions from IPCC source categories of energy, industrial processes and product use, agriculture and waste as determined pursuant to Regulation (EU) No 525/2013, excluding greenhouse gas emissions from the activities listed in Annex I to Directive 2003/87/EC."*

2.3 The IED

22. Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) ("**IED**")[12] establishes a framework for regulating emissions from industrial installations to air, water, and land.[13] The Directive replaces several previous directives, including Directive 2000/76/EC on the incineration of waste ("**WID**").

23. Article 3 of the IED titled "*definitions*", reads, in relevant parts:

> *"(3) "installation" means a stationary technical unit within which one or more activities listed in Annex I or in Part 1 of Annex VII are carried out, and any other directly associated activities on the same site which have a technical*

[10] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, OJ L 156, 19.6.2018, p. 26.
[11] Decision of the EEA Joint Committee No 269/2019 of 25 October 2019, OJ L 11, 12. 1. 2023, p. 38. As part of a package aimed at reducing the Union's net greenhouse gas emissions by 55% by 2030 (the "Fit for 55" package), the ESR was revised in 2023 by way of Regulation (EU) 2023/857. The revised version is not yet incorporated into the EEA Agreement.
[12] 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.
[13] The IED was incorporated into the EEA Agreement by way of Decision of the EEA Joint Committee No 229/2015 of 25 September 2015, OJ L 85, 30.3.2017, p. 53. The Authority notes that the IED has been amended by Directive (EU) 2024/1785 in the EU, but the amending Directive has not yet been incorporated into the EEA. It will therefore refer to the version currently in force in the EEA.

connection with the activities listed in those Annexes and which could have an effect on emissions and pollution"

"(40) "waste incineration plant" means 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"

"(41) "waste co-incineration plant" means 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;"

24. Article 9(1) of the IED reads:

"Where emissions of a greenhouse gas from an installation are specified in Annex I to Directive 2003/87/EC in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that greenhouse gas, unless necessary to ensure that no significant local pollution is caused."

25. Article 44(b) of the IED, concerning applications for permits, requires that the heat generated by the incineration or co-incineration process is recovered as far as practicable, through the generation of heat, steam or power.

26. Article 50(5) of the IED, concerning operating conditions, provides that any heat generated by incineration or co-incineration plants shall be recovered as far as practicable.

3 NATIONAL LAW

27. The ETS Directive is transposed into Norwegian law by way of the Greenhouse Gas Emission Allowance Act[14] and the Greenhouse Gas Emissions Allowance Regulation.[15] The Authority notes that both acts have been amended since the adoption of the decisions challenged by the appellants, but the referring court considers that these amendments do not affect the substance of the relevant provisions.[16] The Authority will therefore refer to the Norwegian law cited in the Request.

28. The scope of the Greenhouse Gas Emissions Allowance Act is set out in Section 3. That provision reads, in relevant parts:

> "*This Act shall apply to emissions of greenhouse gases from stationary industrial operations and aviation activities.*
>
> *The King may lay down more specific provisions by regulation providing for which greenhouse gases, activities and operations shall be subject to the obligation to surrender allowances*."

29. The obligation to surrender allowances is set out in Section 4 of the Greenhouse Gas Emissions Allowance Act. That provision reads, insofar as relevant:

> *"Anyone who has emissions subject to the obligation to surrender allowances from operations or activities as referred to in a regulation issued pursuant to section 3 must surrender allowances corresponding to their emissions subject to the obligation to surrender allowances in accordance with the provisions of section 12. […]"*

30. In accordance with the second subparagraph of Section 3, the Greenhouse Gas Emissions Allowance Regulation defines more specifically the scope of the Act.

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[14] LOV-2004-12-17-99, Lov om kvoteplikt og handel med kvoter for utslipp av klimagasser (*klimakvoteloven*).
[15] FOR-2004-12-23-1851, Forskrift om kvoteplikt og handel med kvoter for utslipp av klimagasser (*klimakvoteforskriften*).
[16] The Request, pages 5-6.

Section 1-1 provides that the obligation to surrender allowances applies to emissions resulting from the activities listed in the table set out in that provision.

31. The first activity listed in that table corresponds to the first activity listed in Annex I to the ETS Directive. It reads:

> *"Combustion of fuel in installations with a rated thermal input exceeding 20 MW (the obligation to surrender allowances nevertheless does not apply to the combustion of fuel in installations for the incineration of hazardous and municipal waste)."*

32. Further, the Norwegian Regulation on Recycling and Treatment of Waste[17] transposes the IED. Section 10-10 of that Regulation, which transposes Article 44(b) IED, reads:

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

4 THE QUESTIONS REFERRED

33. The referring court has asked the EFTA Court the following questions:

> 1. "*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?*
> 2. *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?*"

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

5 LEGAL ANALYSIS

5.1 Preliminary remarks

The Effort Sharing Regulation and the Emission Trading System Directive

34. As a preliminary point, the Authority notes that the European Union has established a framework for achieving economy-wide climate neutrality, in which the ETS Directive is aligned with a wider international framework for combating climate change.[18] The climate policy framework comprises multiple instruments designed to address GHG emissions across various sectors. Two key components of this framework are the Effort Sharing Regulation and the European Union Emissions Trading System (the "**EU ETS**") established by the ETS Directive.

35. Together, the ESR and the ETS Directive aim to ensure comprehensive coverage of EU emissions, promoting cost-effective reductions and equitable distribution of responsibilities among the EEA States. The ETS Directive covers sectors accounting for roughly 40 % of the GHG emissions in the EU,[19] while the ESR covers sectors accounting for the remaining 60 % of the emissions.[20]

36. The ESR establishes for each EEA State a national target for the reduction of GHG emissions by 2030, compared to 2005 levels. This overall target applies to emissions from the following sectors: domestic transport (excluding aviation), buildings, agriculture, small industry and waste.[21]

37. The ETS Directive establishes a market-based GHG trading system within the EEA, aimed at reducing emissions to levels that prevent dangerous anthropogenic interference with the climate system, thereby ensuring environmental protection.[22] It sets an overall cap on emissions from covered activities, including electricity and heat

[18] As pointed out by the EFTA Court in Case E-12/23 *NAS*, para. 35.
[19] European Commission's webpage, "About the EU ETS", accessible here: About the EU ETS - European Commission (visited 5 May 2025).
[20] European Commission's webpage, "Climate Action", accessible here: Overview - European Commission (visited 5 May 2025).
[21] See e.g. Article 2 and recital 2 of the ESR. See also the European Commission's webpage, "Effort sharing 2021-2030: targets and flexibilities", accessible here: Effort sharing 2021-2030: targets and flexibilities - European Commission (visited 5 May 2025).
[22] Case E-12/23 *NAS*, para. 36 and case-law cited.

generation, industrial manufacturing and aviation,[23] with allowances distributed to operators accordingly. The system incentivises operators to reduce emissions below their allocated amount and sell the surplus, thus promoting cost-effective reductions while preserving the integrity of the internal market and avoiding distortion of competition.[24]

38. The limit on emissions progressively declines in line with the EU's climate target, and the number of allowances decreases, meaning that operators will increasingly have to pay for their emissions.[25] Moreover, the EU ETS gradually extends carbon pricing to new sectors of the economy to support their emissions reductions, in particular road transport and heating fuels, and maritime transport.[26] Procedures for unilateral inclusion of additional activities and gases are established in Article 24 of the ETS Directive, meaning that EEA States may include emissions not explicitly covered under the ETS if the procedural and substantive requirements of Article 24 are met.

39. The overall system of the ETS Directive is "*based on the strict accounting of the issue, holding, transfer and cancellation of allowances*", which is "*inherent in the very purpose of the Directive*".[27] Operators who do not comply with the requirement to surrender allowances face financial penalties under Article 16 of the ETS Directive.[28]

GHG Emissions from Waste

40. Pursuant to Article 2 ESR, the Regulation generally applies to GHG emissions from the waste sector. However, it excludes emissions from activities listed in Annex I to the ETS Directive. Accordingly, if emissions from waste incineration are covered by the ETS Directive, they fall outside the scope of the ESR. Conversely, if they are

[23] European Commission's webpage, "EU ETS emissions cap", accessible here: EU ETS emissions cap - European Commission (visited 5 May 2025).
[24] Case E-12/23 *NAS*, para. 37.
[25] Judgment of 21 June 2018, Case C-5/16 *Poland v Parliament and Council*, EU:C:2018:483, para. 66.
[26] COM/2024/196, *Report from the Commission to the European Parliament and The Council on the operation of the European Climate Law and of the Effort Sharing Regulation, and on the Emissions Trading System Directive in the context of the global stocktake*, accessible here: EUR-Lex - 52024DC0196 - EN - EUR-Lex.
[27] Case E-12/23 *NAS*, para. 40 and case law cited. See also judgment of 16 December 2008, Case C-127/07 *Arcelor Atlantique and Lorraine and Others*, EU:C:2008:728, para. 31.
[28] See e.g. judgment of 17 October 2013, Case C-203/12 *Billerud Karlsborg and Billerud Skärblacka*, EU:C:2013:664.

excluded from the ETS, they may fall within the scope of the ESR, provided the sector is otherwise covered.

41. According to Article 2(1) of the ETS Directive, the Directive applies to emissions from the activities listed in Annex I and the GHG listed in Annex II, including carbon dioxide.[29] The first activity referred to in Annex I includes the combustion of fuels in installations[30] with a total rated thermal input exceeding 20 MW.[31] However, installations for the incineration of municipal waste or hazardous waste are currently excluded from the scope of the ETS Directive for the purposes of surrendering allowances. Following recent amendments to the ETS Directive, municipal waste incineration installations are included under the ETS solely for monitoring and reporting obligations under Articles 14 and 15.[32] Recital 98 of Directive (EU) 2023/959 and Article 30(7) of the ETS Directive reflect the EU legislator's intention to include municipal waste incineration installations fully within the ETS as of 2030, at the latest.

42. To the Authority's understanding, the ETS Directive and the ESR are complementary. GHG emissions from the waste sector are generally covered by the responsibility of the EEA States under the ESR. However, if the waste incinerator fulfils the requirement of combusting fuels exceeding the thermal requirement put forth in the first activity of Annex I to the ETS Directive, the CO^2 emissions may be covered by the ETS Directive instead.[33]

5.2 The CJEU judgment in *Nouryon*

43. A crucial question in the present case is the extent to which it is similar to or can be distinguished from the Court of Justice's ("**CJEU**") judgment of 6 June 2024 in Case

[29] Judgment of 16 December 2021, Case C-575/20 *Apollo Tyres*, EU:C:2021:1024, para. 25.
[30] Incinerating waste creates heat and is an example of fuel combustion. It is a requirement of EEA law and the implementing Norwegian law that all heat from the incineration process is to be recovered insofar as practicable. This derives from Articles 44(b) and 50(5) of Directive 2010/75/EU and the corresponding Section 10-10 of the Norwegian Regulation on recycling and treatment of waste.
[31] Paragraph 3 of Annex I to the ETS Directive lays down an aggregation rule which specifies the conditions under which it is necessary to assess whether the total rated thermal input within an installation exceeds 20 MW.
[32] See the second subparagraph of the first activity listed in Annex I. This partial inclusion of municipal waste derives from amendments to the ETS Directive through Directive 2023/959 of the European Parliament and of the Council of 10 May 2023, OJ L 130, 16.5.2023, p. 134.
[33] See Article 2(1) of the ESR, which provides that the scope of the Regulation does not cover greenhouse gas emissions from the activities listed in Annex I to the ETS Directive

C-166/23 ("***Nouryon"***).[34] Therefore, the Authority considers it appropriate to summarise the relevant reasoning in that case.[35]

44. In ***Nouryon***, the questions referred to the CJEU essentially concerned whether the exemption for *units* for the incineration of hazardous waste under point 5 of Annex I to the ETS Directive applied to all such units, or whether the unit's purpose should be determinative for the exemption's applicability. In ***Nouryon***, the activity that was covered by the ETS Directive was an installation producing bulk organic chemicals.[36] The chemical production process generated hazardous waste (water) that was then incinerated in a unit within the installation. The energy released by the incineration was recovered in the form of steam to be used in the production process. As such, the energy production was an ancillary activity to the central activity covered by the EU ETS (the production or processing of bulk organic chemicals).

45. The Commission's 2010 Guidance on the interpretation of Annex I to the ETS Directive provided that a unit incinerating hazardous or municipal waste was not automatically excluded from the scope of the ETS Directive. According to the Guidance, the exemption applied only if (i) the unit was not part of an installation carrying out Annex I activities and (ii) the incineration of such waste was the unit's main purpose.[37]

46. The CJEU expressly rejected that position as regards point 5 of Annex I, holding that the Commission's interpretation was not supported by the literal, systematic or teleological interpretation of the Directive.[38] It emphasised that the wording of point 5 appeared to exclude units incinerating hazardous or municipal waste without reference to purpose.[39] Thus, such units are excluded even when integrated into installations otherwise covered by the ETS, and although they do not have the incineration of that waste as their sole purpose, provided that they incinerate other waste only marginally.[40]

[34] Judgment of 6 June 2024, Case C-166/23 *Nouryon*, EU:C:2024:465.
[35] See also the summary of that judgment provided on pages 8-9 of the Request.
[36] Which is covered by the twenty-third activity listed in Annex I to the ETS Directive.
[37] Case C-166/23 *Nouryon*, paras. 42-43.
[38] Ibid., para. 44.
[39] Ibid., para. 46.
[40] Ibid., para. 47.

47. The CJEU further held that while exemptions must be interpreted strictly, the exemption in point 5 of Annex I must not be restricted by criteria, such as "*main purpose*", that are not grounded in the Directive's wording. Instead, the decisive factor is whether the unit actually incinerates hazardous or municipal waste.[41]

48. Regarding the Directive's objectives, the CJEU noted that the exemption in point 5 of Annex I reflected a secondary objective of the ETS Directive, namely, promoting the incineration of hazardous and municipal waste, rather than the primary objective of reducing GHG emissions. The CJEU held that limiting the scope of that exemption using the concept of a "*main purpose*" was inconsistent with that objective.[42]

49. Furthermore, the Court rejected the view that a unit supplying recovered heat to an ETS-covered installation should be excluded from the scope of the exemption, as that would be contrary to the Directive's primary objective. It held that such an interpretation would render the exemption ineffective, disincentivise energy recovery, and lead to increased emissions.[43]

50. Accordingly, the Court concluded that point 5 of Annex I must be interpreted as meaning that all units that incinerate hazardous or municipal waste are excluded from the scope of the ETS Directive, including those which are part of a larger ETS installation, irrespective of whether the unit has the incineration of waste as their sole purpose, provided that incineration of any other waste is only marginal.[44]

5.3 The Commission's Guidance on the Interpretation of Annex I of the ETS Directive

51. The Request summarises the relevant parts of the 2010 Commission's Guidance on Interpretation of Annex I of the ETS Directive (the "**Guidance Document**").[45] The Authority highlights that the Guidance Document has been updated twice since 2010. First, on 19 March 2023 and then on 4 December 2024 in response to the CJEU's judgment in ***Nouryon***.

[41] Ibid., paras. 47-48.
[42] Ibid., paras. 49-54.
[43] Ibid., paras. 55-56.
[44] Ibid., para. 57.
[45] The Request, pages. 9-10.

52. The 2024 update of the Guidance Document amended the Commission's interpretation of point 5 of Annex I. In line with the CJEU's judgment in ***Nouryon***, the Guidance Document no longer expresses the purpose of incineration as a determining factor for whether a unit may qualify for the exemption under point 5 of Annex I. However, no changes were made to the interpretation of the first activity in Annex I. In that regard, the Guidance Document still presumes that all waste incineration carried out by installations is covered by the ETS Directive, including waste incineration of municipal or hazardous waste, if the main purpose is to produce energy. This is based on the distinction between incineration and co-incineration plants under the definitions set out in the IED. As a result, the Guidance Document still states that installations whose main purpose is the generation of energy, or the production of material products, fall outside the scope of the exemption and are subject to the ETS Directive.[46]

53. For the sake of completeness, the Authority recalls that, while the purpose of the Guidance Document is to contribute to transparent and predictable criteria in the ETS Directive, guidance documents and other similar non-binding instruments can merely *supplement* or help clarify an EEA measure, not impose new obligations or criteria not found in legislation.[47]

5.4 The first question referred

5.4.1 Preliminary remarks

54. The Authority recalls that the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that EEA rules imposing obligations on individuals or undertakings must be clear, precise, and predictable in their effect.[48] Undertakings subject to such rules must be able to ascertain

[46] See *Guidance on Interpretation of Annex I of the EU ETS Directive (excl. aviation and maritime activities)*, updated version 4 December 2024, section 3.4.3.

[47] Judgment of 25 January 2024, Case E-2/23 *A ltd.*, para. 72, concerning Guidelines issued by an EU agency. See also Case C-575/20 *Appollo Tyres*, para. 38 and the case-law cited. There, the CJEU stated that the Commission's Guidance on Interpretation of Annex I of the EU ETS Directive, "*while not binding, may serve to* ***clarify*** *the general scheme of that directive*" (emphasis added). The Authority notes that the present Guidance Document, issued by a Directorate General, is not a legal act of the Union pursuant to Article 288 TFEU.

[48] Case C-5/16 *Poland v Parliament and Council*, para. 100. See also judgment of 10 September 2009, Case C-201/08 *Plantanol*, EU:C:2009:539, para. 43, where the CJEU recalled that "*principles of legal certainty and protection of legitimate expectations form part of the Community legal order. On that basis, these principles must be respected by the Community institutions, but also by Member States in the exercise of the powers conferred on them by Community directives*".

unequivocally the extent of their legal obligations and arrange their affairs accordingly.[49] This principle applies with particular stringency to provisions liable to entail financial consequences.[50]

55. In light of the principle of legal certainty, the scope of Annex I to the ETS Directive must be applied based on transparent and predictable legal criteria. To be subject to the ETS Directive, an installation's activities must correspond to those listed in Annex I and give rise to emissions listed in Annex II.[51]

56. The Authority notes that although point 5 of Annex I to the ETS Directive, which was interpreted by the CJEU in ***Nouryon***, concerns "*units*" while the first activity listed concerns "*installations*", the wording, "*for the incineration of hazardous or municipal waste*", is identical for both exemptions. The interpretive question under both exemptions is the same, that is, whether the application of the exemption is subject to a "*main purpose*" requirement.

57. The CJEU held in ***Nouryon*** that a "*main purpose*" requirement for the applicability of point 5 of Annex I lacks basis in the Directive's text, purpose, and structure. The question then becomes whether there are reasons for interpreting the exemption to the first activity listed in the same Annex differently.

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[49] Judgment of 21 June 2007, Case C-158/06 *ROM-projecten*, EU:C:2007:370, para. 25 and of 10 May 2011, Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and others v the EFTA Surveillance Authority*, para. 156.

[50] In Case C-158/06 *ROM-projecten* at para. 26, the CJEU emphasised that "*the imperative of legal certainty must be observed all the more strictly in the case of rules liable to have financial consequences*."

[51] See, e.g., Judgment of 28 February 2018, Case C-577/16 *Trinseo Deutschland*, EU:C:2018:127, para. 45, where the CJEU emphasised that "*according to the very wording of Article 2(1) of Directive 2003/87, the activities referred to in Annex I to that directive fall within the scope of that directive and, therefore, of the emissions allowance trading scheme established by that directive* ***only*** *if they generate greenhouse gas 'emissions' listed in Annex II to that directive*" (emphasis added). See also judgment of 19 January 2017, Case C-460/15 *Schaefer Kalk*, EU:C:2017:29, paras. 32-39, 44-45 and 49, where the CJEU considered the validity of Article 49(1) of Commission Regulation (EU) No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to the ETS Directive. Article 49(1) of the Regulation defined "emissions" to include CO_2 that was chemically bound and not released into the atmosphere. The Court held that by doing so, the Commission had exceeded its mandate under the ETS Directive by, inter alia, expanding the concept of "emissions" beyond what was laid down in the clear text of Article 3(b) of the ETS Directive.

5.4.2 Literal interpretation

58. Prior to the judgment in ***Nouryon***, the scope of both the exemption provided under the first activity of Annex I to the ETS Directive and the exemption provided in point 5 of that annex, was determined based on the distinction between *incineration* and *co-incineration*. The main factor in order to distinguish between *incineration* and *co-incineration,* as set out in the IED, is whether the *main purpose* is the production of energy.

59. In ***Nouryon,*** the CJEU placed particular emphasis on the wording and the literal interpretation of point 5 of Annex I and held that the exemption "[appeared] *to exclude a unit for the incineration of hazardous waste* […]".[52] The CJEU pointed out that the wording did not indicate that the exemption depends on the purpose for which that waste is incinerated.[53]

60. At the outset, the Authority recalls that identical or similar terms within the same legal instrument must be interpreted consistently unless the legislature clearly intended otherwise.[54] The Authority also notes that although exemptions must be interpreted strictly so the general objectives or principles of the instrument in question are not undermined,[55] such interpretation must not be so restrictive as to deprive the exemption of its intended effect.[56]

61. Consequently, just like point 5 of Annex I, it could be argued that the wording of the first activity listed excludes installations for the incineration of hazardous or municipal waste from the scope of the Directive, irrespective of whether the installation has incineration of waste as their main purpose, provided that incineration of any other waste is only marginal.[57]

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[52] Case C-166/23 *Nouryon*, para. 46.
[53] Ibid., para. 48.
[54] Judgment of 8 June 2023, Case C-540/21 *Commission v Slovakia*, EU:C:2023:450, para. 30. See also judgment of 15 September 2016, Case C-400/15 *Landkreis Potsdam*, EU:C:2016:687, para 37 and case-law cited and judgment of 17 March 2021, Case C-459/19 *Wellcome Trust*, EU:C:2021:209, para 35.
[55] Judgment of 16 July 2009, Case C-5/08 *Infopaq*, EU:C:2009:465, para 56 and case-law cited. See also judgment of 4 October 2024, Case C-633/22 *Real Madrid*, EU:C:2024:843, para. 34
[56] Judgment of 4 March 2021, Case C-581/19 *Frenetikexito*, EU:C:2021:167, para. 22.
[57] In that regard, the Authority notes that the ETS Directive's definition of an "installation" under its Article 3(e) does not refer to an installation's purpose.

62. In this context, the Authority also notes that the first Activity listed in Annex I refers to the *"[c]ombustion of fuels in installations with a total rated thermal input exceeding 20 MW*" (the main rule) while providing for an exemption for "*installations **for** the incineration of hazardous or municipal waste*". The term "installations" thus appears twice within the same sentence. Since the main rule includes all combustion installations above 20 MW, including co-incineration plants, introducing a *main purpose* test would require interpreting the same term differently within a single sentence. The principles outlined in paragraph 60 above do not seem to support such a divergent reading of identical language in a single sentence unless the use of the word "for" in the exemption is considered to require it.

63. In that regard, the Authority notes that the same wording appears in point 5 of Annex I, which was considered by the CJEU in ***Nouryon***. There, the CJEU found no basis to infer a *main purpose* test from using the word "for". The Authority observes no apparent sources of literal interpretation supporting a different reading of the first activity listed in Annex I.[58]

5.4.3 Systematic and teleological interpretation

64. In ***Nouryon***, the CJEU examined the legislative history of the ETS Directive and, while underlining that the general objective of that directive is to achieve a reduction of emission of GHG, it highlighted the secondary objective of promoting the incineration of hazardous and municipal waste. According to the CJEU, limiting the scope of the exemption under point 5 of Annex I by using the concept of "*main purpose*" is inconsistent with that objective.[59]

[58] The Authority notes that although not raised by the CJEU in Case C-166/23 *Nouryon*, the Court's reasoning suggests that the word "for" was understood as describing the activity carried out by the installation, not its main purpose. This reading seems to align with broader legislative practice. Where the EU legislature intends to refer to purpose, it often does so explicitly, using the formulation "for the purposes of." For example, Article 3(41) of the IED defines waste co-incineration plant 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* […]". Article 3(10) of Directive 2008/98/EC defines "collection" as "*the gathering of waste, including the preliminary sorting and preliminary storage of waste **for the purposes of** transport to a waste treatment facility*". Furthermore, the ETS Directive itself includes the phrases "for the purposes of" and "for the purpose of" 45 times, although many are dictated by syntactic necessity. Accordingly, the ETS Directive's use of "for" in the exemption to the first Activity listed in Annex I does not necessarily warrant the imposition of a main purpose test absent express wording to that effect.

[59] Case C-166/23 *Nouryon*, paras. 51-54.

65. While the CJEU in ***Nouryon*** did not interpret the first activity listed in Annex I to the ETS Directive, the teleological interpretation set out in paragraphs 55 to 56 of that judgment seems relevant for the interpretation of the first Activity listed in Annex I. There, the CJEU rejected that a unit could be excluded from the point 5 exemption merely because it supplied energy to an ETS installation. Such an interpretation, the CJEU held, would be contrary to the Directive's environmental objectives, as it would reserve the benefit of the exemption to waste incineration units that do not recover heat, thus leading to energy waste and increased emissions. That reasoning seems to have rested on the broader purpose of promoting energy recovery from waste incineration and avoiding emissions increases. The Authority notes that the ETS Directive does not distinguish between units and installations in relation to that objective. This suggests that, following the CJEU's reasoning in ***Nouryon***, interpreting the exemption under the first activity listed in Annex I in a way that excludes installations based on their purpose would equally undermine the Directive's objectives.

66. Nonetheless, the Authority recognises two material differences between ***Nouryon*** and the present case. First, ***Nouryon*** concerned the twenty-third activity listed in Annex I to the ETS Directive (the production of bulk organic chemicals). The production process generated hazardous waste, which was incinerated in a unit within the installation.[60] Therefore, waste incineration and energy recovery were ancillary to the chemical production. By contrast, in the present case, waste incineration and energy recovery are not ancillary, as there is no other central process they relate to. Second, in ***Nouryon***, the recovered energy (in the form of steam) was used internally in the installation, whereas in the present case, the energy is sold externally, primarily to industry. The Authority notes that under Articles 44(b) and 50 of the IED, recovery of heat from waste incineration is a legal requirement as far as practicable, which could be seen as reducing the concern of wasting energy or emissions increases.[61]

60 Ibid., paras. 21 and 22.

61 Compare Case C-166/23 *Nouryon*, para. 16, where the CJEU cites the relevant provision setting out the scope of the obligation to recover the energy generated in the unit concerned. While waste production should be avoided, where waste is produced, "*it is recovered or, where that is technically and economically impossible, it is disposed of while avoiding or reducing any impact on the environment*."

67. The ETS Directive aims to establish a level playing field for energy producers and to create a market-based system that attaches a price to GHG emissions. This pricing mechanism is intended to incentivise the transition toward cleaner energy sources over time. Exempting installations whose primary purpose is *energy production* through the incineration of municipal or hazardous waste from the scope of the ETS Directive could weaken these incentives, as such emissions would not be priced under the EU ETS. This may distort market signals and delay the intended shift to more sustainable energy sources, contrary to the ETS Directive's ultimate objective of protecting the environment.

68. That said, it is necessary to consider how such emissions are addressed elsewhere in the legal framework. The Authority notes that while the ETS Directive covers emissions from energy production, the ESR generally governs the waste sector. To avoid regulatory overlap, Article 2 of the ESR excludes from its scope activities in the waste sector already covered by the ETS Directive. Accordingly, if waste incineration installations are exempt from the ETS, their emissions seem to fall within the scope of the ESR and be counted against the EEA States' national emissions reduction target. EEA States would thus have to adopt appropriate regulatory and policy measures to meet their ESR targets. Moreover, such installations remain subject to permit requirements under Article 4(1) of the IED, including applicable emission limits pursuant to Article 9(1). Further, under Article 24 of the ETS Directive, EEA States retain the option to unilaterally extend the scope of the ETS, given that the procedural and substantive requirements of that article are met.

69. The Authority recognises that applying the CJEU's reasoning in ***Nouryon*** to the first activity listed in Annex I could lead to a different distribution of regulatory responsibilities and perhaps different consequences from those arising under point 5 of Annex I. If those differences are considered undesirable from a policy perspective, one way to respond would be for the EU legislature to amend the Directive and address those concerns through the legislative process. Indeed, recital 98 of Directive (EU) 2023/959, which amended the ETS Directive, states that "*by July 2026, the Commission should also assess and report to the European Parliament and to the Council on the feasibility of including municipal waste incineration installations in the EU ETS* […]." Furthermore, pursuant to amendments to the first Activity listed in Annex

I under the same amending Directive, as of 1 January 2024, the combustion of fuels in installations for the incineration of municipal waste with a total rated thermal input exceeding 20 MW falls within the reporting and monitoring obligations of Articles 14 and 15 of the Directive.

5.4.4 Conclusion

70. In light of the above, the Authority acknowledges that there are certain differences between the present case and ***Nouryon.*** These differences could be used as arguments for distinguishing the cases. Nevertheless, based on the literal, systematic and teleological interpretation relied upon by the CJEU in ***Nouryon***, the Authority finds it difficult to reach a different conclusion in the present case. In a situation where the CJEU recently has pronounced itself on the interpretation of a similarly worded concept of EEA law within the same Directive, the threshold for distinguishing cases must be high, especially taking into account the principle of legal certainty.

71. Consequently, ESA submits that the first question referred should be answered in the affirmative: The first activity listed in Annex I to the ETS Directive 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 main purpose, provided that they are used for the incineration of other waste only marginally.[62]

5.5 The second question referred

72. As outlined in paragraphs 66 to 69 above, the Authority acknowledges that there are certain differences between the present case and ***Nouryon.*** If the Court were to determine that the exemption in the first activity listed in Annex I to the ETS Directive does require consideration of the main purpose, the referring court asks what is to be the subject-matter of assessment and which factors are relevant in the assessment.

73. In the Authority's understanding, a premise for the question is that the distinction between *incineration* and *co-incineration* applies to the incineration of hazardous or municipal waste, and that the exemption in the first activity listed in Annex I to the ETS

[62] The Authority highlights that according to section 3.4.4 of the Guidance Document, marginal incineration of other wastes is considered to take place if it represents less than or equal to 5% of the mass of the waste.

Directive only applies to *waste incineration*. The main factor in order to distinguish between *incineration* and *co-incineration,* as set out in the IED, is whether the *main purpose* is the production of energy.

74. The first activity listed in Annex I to the ETS Directive concerns the combustion of fuels in installations, except in installations for the incineration of hazardous or municipal waste. Generally, the combustion of fuels can have two objectives or purposes: 1) disposing of waste and/or 2) producing energy. Hence, the Authority submits that the subject matter of the assessment in practice means assessing whether the *main purpose* of the incineration is *producing energy* or *disposing of waste*.

75. The Authority submits that any assessment of whether the main purpose is the production of energy or disposal of waste, to the extent possible, should be conducted based on clear, transparent, and objective factors, to ensure legal certainty and equal treatment of operators.

76. Waste incineration plants and waste co-incineration plants are subjected to a permit requirement under the IED.[63] The permit must clearly indicate whether an installation is classified as one or the other.[64] Accordingly, the classification of the installation in its IED permit, specifically whether it is designated as a waste incineration or waste co-incineration installation in its IED permit, may be relevant for the assessment of the installation's main purpose.

77. In the Guidance Document, one factor indicating that energy production is the main purpose is the substitutability of the waste by units fired with conventional fossil fuels.[65] As evidence for such substitutability, the Guidance Document sets out the following:

- The waste unit is operated in technical connection with other boilers or combined heat and power ('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;

[63] See Article 4(1) of the IED.
[64] Guidance Document, page 22.
[65] Guidance Document, pages 21-22.

- A significant amount of the thermal input in the waste unit is provided by conventional fuels or other waste than hazardous or municipal waste.

78. Another factor could, in the Authority's view, be to what extent the installation has or will replace landfilling or other disposal of waste.

79. The Authority submits that the responsible authority and the national courts should take the factors mentioned above into account when assessing whether the *main purpose* of the incineration is *producing energy* or *waste disposal.*

6 CONCLUSIONS

Accordingly, the Authority respectfully submits to the Court that the answer to the Request should be as follows:

1. 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.
2. If the first question is answered in the negative, the assessment of whether an installation falls within the exemption should focus on whether the *main purpose* of the incineration is energy production or waste disposal. Installations whose main purpose is to dispose of hazardous or municipal waste fall within the exemption. Conversely, installations whose main purpose is energy production may fall under the ETS. To ensure legal certainty and equal treatment of operators, the assessment of the main purpose should rely on clear and objective criteria. Relevant factors may include the installation's operating permits and how its primary function is classified, the substitutability of waste with fossil fuels, and the extent to which the incineration has or will replace landfill disposal or other disposal of waste.

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