Reykjavík, 7 May 2025

**To the President and Members of the EFTA Court**

# Written Observations

submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 90 of the Rules of Procedure of the EFTA Court by

## the Government of Iceland

represented by
Mr. Hendrik Daði Jónsson, Legal Adviser, Ministry for Foreign Affairs,
and Mr. Daníel Arnar Magnússon, Legal Adviser, Ministry of Environment, Energy and Climate, acting as Agents in

**Case E-2/25**

***Sarpsborg Avfallsenergi AS and Others***
**v**
***Staten ved Klima- og miljødepartementet***

in which the Borgarting Court of Appeal (Borgarting Lagmannsrett) has requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of point 5 of Annex I to Directive 2003/87/EC of the European Parliament of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC.

The Government of Iceland has the honour of lodging the following Written Observations.

## I. Introduction

1. With a request dated 17 February 2025 ("the Request" or "the Request for an Advisory Opinion"), the Borgarting Court of Appeal ("the Referring Court") requested the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the interpretation of a provision of the EEA Agreement relevant to an appeals proceeding before it.

2. The EFTA Court is requested to advise on the interpretation of the first activity of Annex I to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 (the "ETS Directive"), which exempts installations for the incineration of hazardous or municipal waste from the scope of the EU Emissions Trading System ("the Emission Trading System" or "the ETS") within the European Economic Area ("the EEA"). The Referring Court seeks guidance in the task of determining whether installations operated by the Appellants, and which carry out such waste incineration, come within the remit of the exemption.

3. For further details on the factual background of the case, the Government of Iceland refers to the Request for an Advisory Opinion.

4. The Government of Iceland observes that the Advisory Opinion of the EFTA Court will have broad relevance for the EEA-wide operation of the ETS, both in relation to installations for the incineration of waste, on the one hand, and for the interpretation of provisions demarcating its scope, on the other hand. While no large-scale waste incineration plants are currently operating in Iceland, the Government of Iceland is currently evaluating the establishment of a national waste incineration facility.

5. With reference to the letter of the EFTA Court of 7 March 2025, and in light of the foregoing, the Government of Iceland avails itself of its right to submit written observations in the present case, in service of the objective of securing legal clarity and considering the case's practical relevance to Icelandic regulatory, environmental, and investment policy.

## II. Questions Referred

6. The questions referred by the Referring Court to the EFTA Court are as follows:

   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?*

## III. Legal Analysis

7. At the outset, the Government of Iceland observes that the present Request for an Advisory Opinion seeks the guidance of the EFTA Court on the interpretation of a provision of the regulatory framework of the EEA Agreement seized with combatting climate change. As was expressed in the joint Written Statement by the Governments of the Nordic countries to the International Court of Justice in its advisory opinion case on the *Obligations of States in respect of Climate Change*, "[c]limate change caused by anthropogenic emissions of greenhouse gases and the severe detrimental effects it has on the climate system and other parts of the environment is a common crisis and concern of humankind."[1]

8. The ETS Directive, which the Request for an Advisory Opinion concerns, is one strand of the regulatory framework that collectively serves to address the crisis of climate change as a matter of EEA law. The Directive establishes the ETS as a system for greenhouse gas emission allowance trading within the EEA. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No

[1] See: Written Statement by the Governments of Denmark, Finland, Iceland, Norway and Sweden to the International Court of Justice in relation to its Advisory Opinion on the Obligations of States in respect of Climate Change (General List No. 187), accessible at <www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-11-00-en.pdf>, para 45.

146/2007 and subsequent amending acts have regularly been incorporated into the Agreement, thereby resulting in an EEA-wide application of the system.

9. The ETS is engineered as a tool to combat climate change, for reducing greenhouse gas emissions in a cost-effective manner, and enabling the EEA Contracting Parties to fulfil their international commitments pursuant to the Kyoto Protocol, and now the Paris Agreement, to the United Nations Framework Convention on Climate Change.

10. Inherent in the logic of the ETS is the polluter-pays principle, which holds that the cost of pollution should be borne by the party that produces it.[2] The ETS Directive thus attains its objective of safeguarding the environment through the creation of economic incentives for reducing greenhouse gas emissions within the EEA.

11. The Government of Iceland submits that the provisions of the ETS Directive must be interpreted in a manner that preserves the climate goals of the ETS and ensures a systematic and uniform interpretation of the Directive across the EEA, especially where exemptions are concerned. This position is further supported by the EFTA Court's reasoning in Case E-12/23 *Norwegian Air Shuttle ASA* v *the Norwegian State, represented by the Ministry of Climate and Environment*, where the Court reaffirmed the importance of ensuring a uniform application of ETS obligations across the EEA.[3] Furthermore, in its reasoning, the Court underscored that the integrity of the ETS depends on strict adherence to its legal structure.[4]

12. The Government of Iceland submits that the same logic applies to the interpretation of Annex I and that exemption from ETS coverage must be applied consistently, in a way that preserves both the environmental effectiveness and internal coherence of the ETS.

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2 The Government considers it pertinent to note the unfolding jurisprudence among international courts recognising anthropogenic emissions of greenhouse gases as a form of pollution under international law. In particular, the Government of Iceland notes that the International Tribunal of the Law of the Sea has, in its Advisory Opinion of 21 May 2024, held that anthropogenic emissions of greenhouse gases "constitute pollution of the marine environment" within the meaning of Article 1(1)(4) of the United Nations Convention on the Law of the Sea (see para 179 of the Advisory Opinion).

3 E-12/23, *Norwegian Air Shuttle ASA* v *the Norwegian State, represented by the Ministry of Climate and Environment*, judgment of 9 August 2024, para 50.

4 See, *inter alia*, ibid paras 48 and 49.

### 3.1 Climate Regulatory Consequences of Exemptions from the ETS Directive

13. The Government of Iceland considers it material to highlight the regulatory consequences that exclusions from the scope of the ETS have, in the context of the wider EEA regulatory framework to combat climate change.

14. Where emissions fall outside the ETS, they instead fall under Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 ("the Effort Sharing Regulation" or "the ESR"), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 269/2019.

15. The ESR establishes a framework for the mitigation of emissions in sectors of economic activity which are not included within the scope of the ETS, including within the fields of transport, buildings, agriculture, and non-covered waste and smaller industrial activities. The ESR imposes national annual emissions targets on EEA States in these non-ETS sectors, which are binding upon the Contracting Parties. These targets are implemented through annual emission allocations ("AEAs"), which are distributed to each EEA State based on relevant criteria and must be met through domestic measures.

16. It follows that, if emissions from installations such as the Appellants in the present case are not covered by the ETS, the EEA State in question would become directly responsible, and financially liable, for those emissions under the ESR.

17. Unlike the ETS, which imposes obligations at the installation-level and creates direct price signals for emitters, the ESR operates through State-level administrative measures. It does not impose market-based incentives for emission reductions.

18. The ETS is a more effective regulatory mechanism for driving down emissions, including from high-capacity waste incinerators. Inclusion in the ETS creates economic efficiency through market mechanisms, ensures that the polluter pays, and encourages technological innovation, e.g. carbon capture and storage ("CCS") and energy optimisation which creates incentives for installations such as ones for waste incineration.

19. However, when waste incineration is used only to safely dispose of waste, and not as energy production, it is reasonable that such activities are excluded from the ETS. These facilities provide an important public service to a community, and are typically

not operated on a for-profit basis. Their inclusion in the ETS could result in adverse environmental impacts that would be counterproductive for the attainment of the climate objectives of the ETS Directive, and of EEA environmental law more broadly, as it could make safe waste treatment more expensive or lead to more waste being sent to landfill.

20. On the other hand, the Government of Iceland submits that exclusion of waste recovery-based incinerators, which serve objectives inherently different from incinerators for waste disposal, such as producing energy for industry, would not only misalign with the structure and objectives of the ETS Directive, but would also transfer regulatory burdens to public authorities under the ESR, which could simultaneously entail higher societal compliance costs and weaker environmental outcomes.

21. In light of the foregoing, the Government of Iceland submits that the exclusion of units for the incineration of hazardous or municipal waste under the first activity of Annex I to Directive 2003/87/EC must be interpreted considering the full context of the ETS Directive. In particular, Article 3(e) of the ETS Directive defines an "installation" as any stationary technical unit in which one or more Annex I activities are carried out, including directly associated activities that have a technical connection and may affect emissions and pollution.

### 3.2 Distinction between the First Activity and Point 5 of Annex I

22. The Government of Iceland notes that the wording employed to set out an exemption from the first activity listed in Annex I is identical with the wording employed in Point 5 of Annex I to set out which units in which fuels are combusted are to be excluded from the greenhouse gas emissions permit.

23. Nevertheless, the Government supports the position of the Norwegian State, as outlined in the Request, that a distinction must be drawn between the first activity listed in Annex I and Point 5 of Annex I.

24. The first activity defines "the combustion of fuels in installations with a total rated thermal input exceeding 20 MW" as within the remit of the ETS, save in cases of installations for the incineration of hazardous or municipal waste. Such installations are excluded from the scope of the system.

25. In contrast, Point 5 of Annex I acts as a supplementary scope provision, determining whether individual combustion units must be included in the ETS permit within an installation that already falls under the scope of the ETS due to another activity.

26. Thus, the legal structure and function of the two provisions are materially different: the first activity governs when an installation is subject to the ETS, whereas Point 5 governs which units within that installation are subject to inclusion, or exclusion in the case of incineration of hazardous or municipal waste, in the greenhouse gas emission permit of the installation. The exemption in Point 5 must therefore be interpreted with careful regard to its role within a broader, already-regulated ETS installation.

27. In this respect, the Government of Iceland submits that the general purpose of the installation, becomes legally relevant for interpreting the first activity listed in Annex I.

28. The Government of Iceland shares the view of the Norwegian State, as reflected in the Request, that the term "for" in the phrase "for the incineration of hazardous or municipal waste" has legal meaning in relation to the first activity of Annex I. The Government submits that the term must be given full meaning as a preposition in that phrase, which suggests a functional purpose of the exemption. If the exemption was instead intended to capture any installation combusting hazardous or municipal waste, then the provision could readily have been worded in a clearer manner by employing a conjunction (such as "that") instead of the preposition "for". The Government observes that this interpretation is also consistent with the one set out in the European Commission's 2010 Guidance on Annex I, which remains relevant for applying the Directive.

### 3.3 Relevance of the Judgment of the CJEU in Case C-166/23

29. Against this backdrop, the Government of Iceland turns to addressing the degree to which the judgment of the CJEU in Case C-166/23 holds relevance for the present case.[5]

30. The Government of Iceland recognises that the CJEU in Case C-166/23 found that the exemption under Point 5 does not formally require that the incineration of waste be

[5] C-166/23, *Naturvårdsverket* v *Nouryon Functional Chemicals AB*, ECLI:EU:C:2024:465.

the main purpose of the unit. However, the Court also confirmed that the exemption must be interpreted strictly and applies only to units genuinely dedicated to the incineration of municipal or hazardous waste, not to those that burn such waste only marginally.[6]

31. While the Court dismissed the "main purpose test" as a formal requirement,[7] it did not exclude the possibility that the functional integration and operational role of a unit may be relevant. The Court stated that the wording of Point 5 "does not indicate" that the exemption depends on the purpose of the incineration, though its choice of language leaves some ambiguity as to whether such a purpose-based assessment may still be relevant in practice, especially in relation to the assessment of the first activity in Annex I.[8]

32. This reinforces the need for a careful, case-by-case assessment of the unit's overall function and role within the installation, especially in situations where the waste stream is mixed or where the unit is closely integrated into energy or industrial systems.

33. The Government of Iceland acknowledges that in complex industrial installations, it is necessary and appropriate to consider the broader context when applying the ETS Directive. However, the abovementioned distinction between the first activity listed in Annex I and Point 5 of Annex I is paramount in this context. That distinction is particularly important when assessing whether an installation, as a whole, is within the scope of the ETS Directive, rather than just a unit of the installation in question. The former assessment cannot be done without assessing the general purpose of the entity in question.

### 3.4 Perspectives on the Disposal or Recovery of Waste

34. Finally, the Government of Iceland supports the argument put forward by the Norwegian State, as presented in the Request, that a distinction must be drawn between the disposal and recovery of waste, in accordance with Annexes I and II to Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 ("the Waste Framework Directive"), which was incorporated into the EEA

6 ibid para 47.
7 ibid para 48.
8 ibid, see also para 51.

Agreement by Decision of the EEA Joint Committee No 85/2011. In the present case, the Appellants have been assessed by the competent authorities as energy recovery installations, where waste is used to generate usable energy.

35. The Government of Iceland notes that the installation at issue in Case C-166/23 was primarily designed for the disposal of hazardous process wastewater.

36. While the factual background of that case indicates that some energy was recovered from the incineration process, the permit and design of the facility were focused on environmental protection through safe waste elimination. Energy recovery was only a by-product and, consequently, it was not the focus when assessing whether or not the installation would fall under the scope of the ETS Directive.

37. This distinction is significant, as it confirms that the CJEU addressed a disposal-oriented facility whose main purpose was based primarily on ensuring the safe elimination of hazardous waste, whereas the installations at issue in the present case are regulated as energy recovery plants and operated with a focus on generating usable energy, a different rationale that aligns more closely with the objectives of the ETS Directive.

38. As a consequence, the Government of Iceland considers the CJEU's reasoning to be grounded in the specific context of hazardous waste disposal, where there is less room for disruption. That concern helps explain the Court's approach to the interpretation of the exemption in paragraph 51, where the Court stated that: "... the establishment of a system for the allocation of emission allowances must not impede the disposal of hazardous and municipal waste by incineration."

39. This statement reflects a concern that inclusion in the ETS might disincentivise essential waste disposal. However, this concern does not apply with the same force to facilities engaged in energy recovery. Waste-to-energy plants that are designed and operated to generate electricity, steam or heat serve a different function as they extract economic value from the waste stream and are often integrated into industrial or municipal energy systems. These recovery installations, while managing waste, are mainly designed to produce energy rather than to dispose of waste.

40. Moreover, recovery operations are already subject to efficiency standards and environmental requirements under EEA law. Including such operations in the ETS,

where their emissions are monitored in comparison to other combustion units, promotes regulatory consistency without undermining the waste management goals.

41. The Government of Iceland therefore submits that the rationale of the CJEU for the exclusion under Point 5 in Case C-166/23 would not be applicable to energy recovery installations. In such cases, where the installation is integrated into an energy system and the combustion process produces usable energy, inclusion in the ETS is appropriate and aligned with both the climate objectives of the Directive and the polluter-pays principle.

42. In this context, the Government of Iceland considers it essential to reaffirm the value of the "main purpose test" as a practical and legally sound approach for assessing the scope of the activities listed in Annex I. As demonstrated by the comparison with Case C-166/23, and the differences between disposal and recovery operations, installations may share external features while serving fundamentally different functions within the ETS framework.

43. The test serves as a clear, accessible and predictable tool for competent authorities to navigate areas of ambiguity, as has been highlighted in the foregoing, in a manner which also safeguards the capacity of operators to identify their position within or outside of the ETS. The application of the test helps to preserve the integrity of the ETS Directive's structure and ensures that exemptions, which serve targeted purposes in the context of the broader EEA regulatory framework for climate change, are not coopted to circumvent climate obligations by passing the financial burden for emissions from the polluter to the EEA State in question.

## IV. Answer to the Questions Referred

44. The Government of Iceland respectfully submits that the EFTA Court should answer the questions of the Referring Court as follows:

1. *The first activity listed in Annex I to Directive 2003/87/EC should be interpreted as excluding from the scope of the Directive installations with a total rated thermal input exceeding 20MW, the primary purpose of which is the incineration of hazardous or municipal waste.*

2. *The assessment of whether an installation comes within the scope of Directive 2003/87/EC should consider whether the incineration of hazardous or municipal waste constitutes a primary or a marginal purpose for the operation of the installation in question.*

For the Government of Iceland,

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Agents