



ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 07.05.2025

Written observations by the Norwegian State

represented by Ms Kristin Hallsjø Aarvik, advocate at the Office of the Attorney General for Civil Affairs, in

***Case E-2/25 Sarpsborg Avfallsenergi AS & others v the Norwegian State,
represented by the Ministry of Climate and Environment***

in which Borgarting lagmannsrett (Borgarting Court of Appeal) has requested an advisory opinion from the EFTA Court 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 the first activity in Annex I to Directive 2003/87/EC establishing a scheme for greenhouse gas emissions allowance trading (the 'ETS Directive').

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1 INTRODUCTION

- (1) The case before Borgarting Court of Appeal concerns the validity of two permits for emissions from combustion installations subject to the obligation to surrender emission allowances pursuant to the ETS Directive¹.
- (2) A brief description of the facts of the case is set out in section 3 of the request for an advisory opinion. In short, the relevant installations incinerate waste. The heat from the incineration process is recovered and is mainly sold as steam to industry. The installations are classified by the competent authority as co-incineration installations subject to the

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

obligation to surrender allowances under the ETS Directive. The basis for this classification is that the installations have as their main purpose the generation of energy and use waste as fuel.

- (3) The questions from Borgarting Court of Appeal concern the scope of the ETS Directive and the interpretation of the first activity listed in Annex I:

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

- (4) Borgarting Court of Appeal has referred the following questions to the EFTA Court:

1. *Must the first activity listed in Annex I to the ETS Directive be interpreted as meaning that all installations for 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?*

- (5) The Norwegian Government submits that the first question must be answered in the negative. The exception in the first activity listed in Annex I only applies to installations that: (i) incinerate hazardous or municipal waste; and (ii) do not have the production of energy as its main purpose. Whether emissions from installations that incinerate waste are excluded from the ETS Directive by virtue of the exception in the first activity in Annex I does, therefore, not solely depend on the composition of the waste. It also depends on the purpose of the installation. Installations whose main purpose is the generation of energy, and which use waste, including hazardous or municipal waste, as fuel, are not excluded from the application of the ETS Directive.

- (6) Relevant factors in the assessment of the main purpose of an installation include, inter alia, the volume of energy generated in relation to the quantity of waste incinerated and the stability or continuity of that production, whether the units incinerating waste are situated at sites with industrial production (within the same installation or outsourced to a separate operator), and whether the incineration of waste replaces production of energy by conventional fuels.

2 LEGAL ANALYSIS

2.1 Preliminary remarks

- (7) Pursuant to Article 1, and in line with recital 7, the ETS Directive establishes a system for greenhouse gas emission allowance trading within the EEA to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner which

contributes to preserving the integrity of the internal market and avoids distortions of competition.² The system seeks to reduce greenhouse gas emission into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is the protection of the environment.³

- (8) The system requires polluters to pay for their greenhouse gas emissions and is based on a 'cap and trade' principle. The cap refers to the limit set on the total amount of greenhouse gas emissions that can be emitted by installations and operators covered under the scope of the system. This cap is reduced annually in line with climate targets, ensuring that overall emissions decrease over time.
- (9) Under the system, operators must monitor and report their emissions on a yearly basis and surrender enough allowances to fully account for their annual emissions. If these requirements are not met, fines are imposed.
- (10) It follows from Article 2(1) ("Scope") that the ETS Directive applies to (emissions from) the activities listed in Annexes I and III, and to the greenhouse gases listed in Annex II.⁴
- (11) Chapter III of the ETS Directive applies to "Stationary installations". Its provisions apply to greenhouse gas emissions permits and the allocation and issue of allowances in respect of activities listed in Annex I other than aviation activities and maritime transport activities.
- (12) Article 4 provides that Member States shall ensure that no installation carries out any activity listed in Annex I resulting in emissions specified in relation to that activity unless the operator holds a permit issued by a competent authority in accordance with Articles 5 and 6.
- (13) It follows from Article 6(1) that the competent authority shall issue a greenhouse gas emissions permit granting authorisation to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is capable of monitoring and reporting emissions. A greenhouse gas emissions permit may cover one or more installations on the same site operated by the same operator.
- (14) Article 3(e) of the ETS Directive defines an "installation" as:

"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".
- (15) Annex I to the ETS Directive is titled "Categories of activities to which this directive applies".
- (16) It follows from point 3 of Annex I that when the total rated thermal input of an installation is calculated to decide upon its inclusion in the EU ETS, the rated thermal inputs of all technical

² Judgment of the EFTA Court of 9 August 2023 in case E-12/23 *Norwegian Air Shuttle* para. 37

³ Judgment of the Court of Justice of the European Union of 6 June 2024 in case C-166/23 *Naturvårdsverket* para. 32 (ECLI:EU:C:2024:465) and *Norwegian Air Shuttle* para. 36

⁴ *Naturvårdsverket* para. 33 and the case-law cited therein.

units which are part of it, in which fuels are combusted within the installation, shall be added together.

- (17) Further, it follows from point 5 of Annex I that when the capacity threshold of any activity in Annex I 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 emissions permit.

- (18) The first activity listed in Annex I is:

"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) The relevant greenhouse gas in the first activity is carbon dioxide.

- (20) Whereas the first activity in Annex I refers to the combustion of fuels in installations generally, the other activities listed in Annex I refer to the production of specific materials, such as coke, metal ore, glass or pulp. Installations involved in the production of these materials typically also combust fuels. Accordingly, the application of the first activity is limited to where the combustion of fuels is a standalone activity, not integrated with or connected to another activity in Annex I that requires a permit under the ETS Directive.

2.2 The interpretation of the first activity in Annex I

I. The wording of the exception to the first activity

- (21) The term "for" typically signifies an objective or purpose. It is commonly used as a function word to denote a purpose. Therefore, the literal meaning of "installations for the incineration of hazardous or municipal waste" is that the installations have as their purpose the incineration of hazardous or municipal waste.

- (22) This is supported by the wording of the exception in different language versions, such as the Danish and German version:

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

Verbrennung von Brennstoffen in Anlagen mit einer Gesamtfeuerungs wärmeleistung von über 20 MW (ausgenommen Anlagen für die Verbrennung von gefährlichen oder Siedlungsabfäll) (emphasis added)

- (23) If the application of the exception in the first activity depended on the composition of the waste which the installations incinerate, this could be expressed by the wording "except for installations that incinerate hazardous or municipal waste".

II. The objective of the ETS Directive

- (24) As set out above, the purpose of the EU ETS Directive is the reduction of greenhouse gas emission and the protection of the environment.⁵ Generally, this objective would imply that the exception to the first activity in Annex I should be interpreted restrictively and that installations that incinerates hazardous or municipal waste, but whose main purpose is the generation of energy, should be subject to the obligation to surrender allowances pursuant to the ETS Directive.
- (25) If installations whose main purpose is the generation of energy, and which use waste as fuel, do not fall within the scope of the ETS Directive, operators of such installations would lack incentives to reduce their emission. Consequently, operators might continue to emit greenhouse gases at higher levels without facing financial or regulatory consequences. This could undermine broader efforts to reduce overall emissions and combat climate change, as these installations would not be contributing to the collective goal of reducing greenhouse gas emissions.
- (26) Additionally, it could create an uneven playing field where other energy producers, who are subject to the ETS Directive, bear the costs of emission reductions, while waste-to-energy installations do not. The energy sector generally falls within the scope of the ETS Directive. Installations that incinerate waste, but whose main purpose is the generation of energy, should be treated similarly to other energy-generating installations.
- (27) The classification of an installation having as its main purpose the generation of energy depends on several factors, including the volume of energy produced relative to the quantity of waste incinerated and the stability or continuity of energy production. For these installations, the sale of energy is a significant source of income. By selling the energy they produce, these installations contribute to the energy market and support their operations financially. Therefore, treating them under the same regulatory framework as other energy-generating installations ensures a level playing field and promotes the overall goal of reducing emissions across the energy sector.

III. Contextual arguments

- (28) Article 2(1) of the ETS Directive states that it applies to the activities listed in Annex I and III, while Article 2(2) specifies that it applies without prejudice to any requirements pursuant to Directive 2010/75/EU on industrial emissions (the 'IED').⁶
- (29) Furthermore, Article 8 of the ETS Directive mandates that Member States take necessary measures to ensure that, where installations carry out activities that are included in Annex I to the IED, the conditions and procedure for issuing a greenhouse gas emissions permit are coordinated with those for issuing a permit under the IED. The requirements laid down in

⁵ *Naturvårdsverket* para. 32 and *Norwegian* para. 36

⁶ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)

Articles 5, 6 and 7 of the ETS Directive may be integrated into the procedures provided by the IED.

- (30) The IED is, therefore, an important context for interpreting the ETS Directive.
- (31) The IED establishes rules for the integrated prevention and control of pollution from industrial activities.⁷ Its object is to prevent or, where prevention is not practicable, to reduce industrial emissions into air, water, and land, and to prevent waste generation, to achieve a high level of environmental protection.
- (32) According to Article 4(1) of the IED, Member States shall take the necessary measures *"to ensure that no installation or combustion plant, waste incineration plant or waste co-incineration plant is operated without a permit"*. Article 5(1) states that the competent authority shall grant a permit if the installation complies with the requirements of the IED.
- (33) The plants mentioned in Article 4(1) are, accordingly, distinct. Further, the classification of a plant may be important, since the requirements for its operation differ according to the type of installation in question.⁸ Generally, the emissions into air from waste incineration plants must not exceed the emission limit values set out in Annex VI, whereas emissions from waste co-incineration plants must not exceed the emission limits set out in Annex II.
- (34) In the IED, an 'installation' is defined in Article 3(3) as:

"a stationary technical unit within which one or more activities listed in Annex I (...) are carried out, and any other directly associated activities on the same site which have a technical connection with the activities (...) and which could have an effect on emissions and pollution"

- (35) This largely mirrors the definition of an 'installation' in the ETS Directive. Further, the first activity listed in Annex I to the IED is:

"Combustion of fuels in installations with a total rated thermal input of 50 MW or more"

- (36) According to Article 3(25) of the IED, a 'combustion plant' means:

"any technical apparatus in which fuels are oxidised in order to use the heat thus generated"

- (37) According to Article 3(40) of the IED, '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 [...]"

⁷ Cf. Article 1 of the IED

⁸ Judgment of the Court of Justice of the European Union of 11 September 2008 in case C-251/07 *Gävle Kraftvärme* para. 20

- (38) According to Article 3(41) a ‘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 [...]”

- (39) The IED repealed and replaced Directive 2000/76/EC on the incineration of waste (the ‘Waste Directive’).⁹ The definitions of ‘waste incineration plant’ and ‘waste co-incineration plant’ in the IED are the same as in the Waste Directive. In respect of those definitions, the CJEU has held that it is clear from the wording that a ‘co-incineration plant’ constitutes a particular form of incineration plant and that it is based on the main purpose of a plant that the assessment of whether it is an ‘incineration plant’ or a ‘co-incineration plant’ is to be made.¹⁰
- (40) Further, assessment of the main purpose of the plant is made on the basis of facts existing at the time of that assessment, that is to say, on the capacity and function of that plant or, if the plant in question has not yet been built, on the basis of the plan in relation to which the application for an operating permit was made.¹¹ It is not appropriate to base the assessment on the purpose for which the unit in question was built.¹²
- (41) The assessment of the main purpose of an incineration unit must be assessed objectively based on several facts. In the context of such an assessment, it is for the competent authorities to examine the specific circumstances of each plant. In particular, they are to take account of the volume of energy generated or material products produced in relation to the quantity of waste incinerated in the plant in question and the stability or continuity of that production.¹³
- (42) The objective of the IED is broader than that of the ETS Directive.¹⁴ Further, some activities subject to the ETS Directive, such as certain stationary installation activities as well as aviation and maritime activities, do not require a permit pursuant to the IED. However, most stationary installations subject to the ETS Directive must also have a permit under the IED. Therefore, the IED and the ETS should be aligned as much as possible, and the assessment of an installation’s main purpose under the IED should also be relevant for determining whether that installation falls within the scope of the ETS Directive. This interpretation is supported by the Commission’s Guidance on the Interpretation of Annex I of the ETS Directive, as outlined in point IV below.

IV. The European Commission’s Guidance

⁹ Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste

¹⁰ *Gävle Kraftvärme* para. 37

¹¹ *Ibid* para. 38

¹² *Ibid* para. 39-40

¹³ *Ibid* para. 44-45

¹⁴ *Naturvårdsverket* para. 52

- (43) The European Commission has published a [Guidance on Interpretation of Annex I of the EU ETS Directive](#).¹⁵ Section 3 addresses the definitions of Annex I activities.
- (44) Guidance on the application of the first activity in Annex I is provided in section 3.4.3 ("Waste incineration and co-incineration"). The Commission states that installations for the incineration of municipal waste or hazardous waste are excluded and that the competent authority determines whether a particular installation falls into one of these categories based on the relevant definitions in the IED.
- (45) The Commission refers to the definition of 'waste incineration plant' in the IED (cf. para. 37 above). Further, it states that:

*"If an installation is found to be the competent authority to fall under this definition, **and** if the waste incinerated falls predominantly under the category "municipal" or "hazardous" (according to the European Waste List¹⁶), then it is not subject to the EU ETS Directive in respect of any incineration that takes place at that installation, **except for cases discussed in chapter 6.**"*

- (46) The Commission also refers to the definition of 'waste co-incineration plant' in the IED (cf. para. 38 above). Further, it states that:

"If the status of individual technical units cannot be derived unambiguously from the IED permit, the following considerations may serve as guidance: Units burning waste, which are situated at sites with industrial production¹⁷ (within the same installation or outsourced to a separate operator), are usually to be classified as co-incineration, because their main purpose is the supply of energy to the production of industry goods. This fact is often supported by the substitutability of the waste unit by units fired with conventional fossil fuels. As evidence for such suitability may serve inter alia:

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

¹⁵ See version history on page 2 of the Guidance

¹⁶ Commission Decision of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC in establishing a list of hazardous waste (2000/532/EC)

¹⁷ Including both, activities listed in Annex 1, and other industrial activities

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

- (47) The guidance on interpreting the first activity in Annex I has remained unchanged since its initial publication in 2010. Although it is not legally binding, it is applied by the competent authorities in EU/EFTA states. Consequently, since at least 2010, competent authorities have based its assessment of the obligation to surrender emission allowances pursuant to the ETS Directive on the above interpretation of the first activity.
- (48) Furthermore, the guidance was updated in December 2024 to implement the judgment in case C-166/23 *Naturvårdsverket*.¹⁸ No amendments were made regarding the interpretation of the first activity in Annex I. Therefore, it is the understanding of the Norwegian Government that the Commission does not consider that judgment to be relevant for the interpretation of the first activity in Annex I.

2.3 Case C-166/23 *Naturvårdsverket*

I. Preliminary remarks

- (49) The judgment in case C-166/23 *Naturvårdsverket* is the underlying reason for Borgarting Court of Appeal’s request for an advisory opinion.¹⁹ Since that judgment only concerns the interpretation of point 5 of Annex I, it is not clear whether or to what extent it is relevant for the interpretation of the first activity in Annex I.
- (50) The interpretation of point 5 and the first activity, respectively, is technical. To determine if the CJEU’s interpretation of point 5 is relevant to the interpretation of the first activity, a detailed examination of the facts of the case and its arguments is required.

II. The facts of the case

- (51) The case concerned an operator, Nouryon, with an installation producing bulk organic chemicals. Since its production volume exceeded the capacity threshold for this (23rd) activity in Annex I, the installation was subject to a greenhouse gas emissions permit for that purpose within the framework of the EU ETS.²⁰
- (52) The production of bulk organic chemicals created hazardous waste contained in residual water. Pursuant to its production permit, Nouryon was required to process such water in an incinerator or have the water treated in another authorised installation for hazardous waste. Nouryon chose to process the hazardous waste from its production in an incinerator at its installation.²¹ As this incinerator was technically linked to the production process, it constituted a part of the installation for the production of bulk organic chemicals within the

¹⁸ See version history on page 2.

¹⁹ The request for an advisory opinion page 5

²⁰ *Naturvårdsverket* para. 21 and 36-37

²¹ *Ibid* para. 22-23 and 38

meaning of Article 3(e).²² The dispute in the national proceedings concerned whether that incinerator had to be authorised in the same way as the rest of the installation under the ETS Directive, or whether that was not necessary by virtue of the exception referred to in point 5 of Annex I.²³

III. The interpretation of point 5 of Annex I

- (53) The Commission submitted, *inter alia*, that for the exception in point 5 to apply, the unit for the incineration of hazardous or municipal waste could not form part of an installation whose activity is referred to in Annex I, and that the incineration of such waste had to be its main purpose. The CJEU, however, rejected such an interpretation.²⁴
- (54) The CJEU observed that that it follows from the wording of point 5 that the provision expressly contemplates a situation where an installation requiring permit for the emission of greenhouse gases, such as an installation producing bulk organic chemical, comprises several units in which fuels are combusted. In such a case, those units must be included in the permit, other than units for the incineration of hazardous or municipal waste. Therefore, it held that the wording of point 5 appears to exclude a unit for the incineration of hazardous waste from being included in the monitoring plan for the installation requiring permit on the ground that the unit is an integral part of that installation. The wording does not indicate that the exclusion of units for the incineration of hazardous or municipal waste from a greenhouse gas emissions permit depends on the purpose for which that waste is incinerated.²⁵
- (55) In addition, the CJEU held that since exceptions must be interpreted strictly, the exception in point 5 must be limited to units genuinely dedicated to the incineration of hazardous or municipal waste and which, consequently, incinerate other waste only marginally. By contrast, the wording of point 5 does not indicate that the exclusion of units for the incineration of hazardous or municipal waste from a greenhouse gas emissions permit depends on the purpose for which that waste is incinerated.²⁶
- (56) The CJEU held that the same follows from a systematic and teleological interpretation.
- (57) In this respect, the CJEU referred to the general objective of the ETS Directive of reducing greenhouse gas emissions. The exception in point 5 does not, however, pursue that objective as its priority. Rather it responds to a secondary objective of the establishment of the EU ETS to not impede the disposal of hazardous and municipal waste by incineration.²⁷
- (58) It also referred to Directive 96/61 (now the IED) concerning integrated pollution prevention control and Article 3(c) therein, which expressly provides for the recovery and disposal of waste. It concluded that the EU legislator intended to promote the incineration of hazardous

²² Ibid para. 24 and 39

²³ Ibid para. 40

²⁴ Ibid para. 42-44

²⁵ Ibid para. 45-46

²⁶ Ibid para. 47-48

²⁷ Ibid para. 51

and municipal waste by removing them from the obligation to be authorised under the EU ETS. To limit the scope of that exception using the concept of a “main purpose” was inconsistent with that objective.²⁸

- (59) The CJEU also held that the interpretation advanced by the Commission, according to which a unit for the incineration of hazardous or municipal waste which contributes, by supplying it with heat, to the functioning of an installation within the EU ETS, should itself fall within the scope of the application of the EU ETS, was contrary to the principal objective of the ETS Directive. Such an interpretation would lead to the benefit of that derogation being reserved to units for the incineration of hazardous or municipal waste, the heat produced by which is not recovered by an installation covered by the ETS Directive, which would result in a waste of energy and an increase in emissions.²⁹

- (60) Accordingly, the CJEU held in para. 57 and in its answer to the request 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.*³⁰

IV. The relevance of the judgment to our case

- (61) The first question from Borgarting Court of Appeal is whether:

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

- (62) The question pertains to the interpretation of point 5 of Annex I set out above. Essentially, it asks whether the installation exception in the first activity should be interpreted in the same way as the unit exception in point 5. However, the question in our case omits the CJEU’s reference to the incineration units in point 5 being integrated within an installation falling within the scope of the ETS Directive. As set out below, this point is relevant for the distinction between the unit exception in point 5 and the installation exception in the first activity and for understanding the judgment in *Naturvårdsverket*.
- (63) As set out above in para. 54, the CJEU’s starting point is that point 5 applies where an installation is subject to a permit for the emission of greenhouse gases (i.e., carries out an activity listed in Annex I) and comprises several units in which fuels are combusted. Our case,

²⁸ Ibid para. 52-54

²⁹ Ibid para. 55-56

³⁰ Ibid para. 57

on the other hand, concern the initial question of whether the installation is subject to a permit for the emission of greenhouse gases. It does not concern which combustion units that must be included in the permit for an installation carrying out an activity listed in Annex I. Thus, and for the reasons below, it is unclear whether the interpretation of point 5 in *Naturvårdsverket* is relevant for interpreting the exception in the first activity in Annex I.

- (64) First, the judgment concerns the interpretation of an exception for a different situation.
- (65) Under the first activity listed in Annex I, combustion of fuels with a thermal input exceeding 20 MW is an independent (standalone activity) in the greenhouse gas emissions allowance system. Point 5 of Annex I, on the other hand, concerns the inclusion of individual incineration units. Point 5 applies when the capacity threshold of an activity in Annex I is found to be exceeded in an installation and ensures that all units in which fuels are combusted are included in the greenhouse gas emission permit for that activity, except units for the incineration of hazardous or municipal waste. Whether the capacity threshold of any activity in Annex I is exceeded, is determined in accordance with point 3 of Annex I. The unit rule in point 5 is therefore an independent and separate rule that does not form part of the assessment of whether activities listed in Annex I are subject to the obligation to surrender allowances. Even though both provisions refer to installations and units "*for the incineration of hazardous or municipal waste*", the exceptions are different.
- (66) Point 5 applies once the capacity threshold of an activity in Annex I is exceeded in an installation and concerns units within that installation in which fuels are combusted. Accordingly, point 5 only deals with the inclusion of directly associated activities pursuant to Article 3(e), i.e., activities which have a technical connection with an activity listed in Annex I.³¹ The exception in point 5 means that units for the incineration of hazardous or municipal waste do not have to be included in the permit for the activity the incineration is associated with, provided that the units are used for the incineration of other waste only marginally. The exception in the first activity listed in Annex I, however, excludes the entire installation from the greenhouse gas emissions allowance system all together.
- (67) Second, the judgment concerns a situation where the incineration constitutes "disposal" of waste produced during an activity listed in Annex I, such as the incineration of waste water produced during the production of bulk organic chemicals. The CJEU referred to Article 3 of Directive 96/61, which sets out general principles governing the basic obligations of the operator. According to Article 3(c):

"... waste production is avoided in accordance with [Directive 75/442/EEC]; 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" (emphasis added)

³¹ See the Commission's Guidance on Interpretation of Annex I of the EU ETS Directive section 3.4.4

- (68) Directive 96/61 has been replaced by the IED. The general principles governing the basic obligations of the operator is now set out in Article 11, including in point e) that:

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

- (69) In our case, the incineration of waste is assessed as waste "recovery" since the waste is used to produce energy. The distinction between "disposal" and "recovery" of waste is outlined in Annex I and II to Directive 2008/98/EC (the Waste Framework Directive).³² Recovery includes, e.g., the use of waste principally as a fuel or other means to generate energy.

- (70) The CJEU only addressed the issue of "disposal" of waste in *Naturvårdsverket*. In its assessment of the scope of the exception in the unit rule in point 5 of Annex I, it stated at para. 51 that:

"[...] the establishment of a system for the allocation of emission allowances must not impede the disposal of hazardous and municipal waste by incineration" (emphasis added)

- (71) Thus, it is unclear whether the distinction between "recovery" of waste (through energy production) and "disposal" of waste (through incineration) affects the interpretation of the exception in point 5 of Annex I. This uncertainty regarding the relevance of that distinction also applies to the interpretation of the first activity in Annex I.

- (72) In the Norwegian Government's view, there are valid reasons to assess the waste market and the energy market differently for the purpose of greenhouse gas emission allowances, given that the energy sector falls within the scope of the ETS Directive. The latter is clear from, e.g., recital 25 of the preamble, which states that policies and measures should be implemented at Member State and Community level across all sectors of the European economy, and not only within the industry and energy sectors, in order to generate substantial emissions.

- (73) Third, it is not clear that the CJEU's statements about a systematic and teleological interpretation should be construed in the same way for installations in which the incineration of waste constitutes "recovery" of waste as opposed to "disposal" of waste, in the form of energy production. As set out above, for these installations, the sale of energy is a significant source of income.

- (74) In this respect, the CJEU refers to the interpretation advanced by the Commission, which would reserve the benefit of the exception in point 5 to units for the incineration of hazardous or municipal waste the heat produced by which is not recovered by an installation

³² Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

covered by the ETS Directive, which would result in a waste of energy and an increase in emissions.³³

- (75) The reasoning is that operators of an installation carrying out an activity listed in Activity I would be disincentivised to recover heat from the incineration of its hazardous waste from that activity if emissions from such incineration must also be authorised under the ETS Directive.
- (76) For the incineration of waste as a standalone activity, this is not an issue where the incineration is part of the installation production. Waste incineration installations can have energy production and sale of energy as an important source of income. For such installations, where the primary purpose of the installation is energy generation, it makes no sense not to recover the heat from the incineration.
- (77) These points highlight the complexities in interpreting the ETS Directive's exceptions and the importance of considering the broader objectives of energy efficiency and emission reduction.
- (78) Fourth, if the exception in the first activity in Annex I is to be interpreted in the same way as the exception in point 5, the exception would be difficult to apply in practice.
- (79) The first activity applies where the combustion of fuels is a standalone activity, including the incineration of waste. The other activities in Annex I concern the production of specific materials. Incineration units within an installation for another production activity, such as Nouryon's installation producing bulk organic bulk chemicals, typically incinerate waste from that production process. In those cases, it is easy to keep a record of the waste composition. For installation where the incineration of waste is a standalone activity, the composition of the waste is of a completely different character.
- (80) To the best of the Norwegian Government's knowledge, there is no EU/EEA law requiring recipients of waste to keep records of the quantity of received hazardous and/or municipal waste compared to other types of wastes. If the composition of waste was decisive for determining whether a waste incineration installation falls within the scope of the ETS Directive pursuant to the first activity in Annex I, operators would be obligated to record and quantify their waste composition.
- (81) Given the environmental significance of the ETS Directive, its application to (emissions from) the combustion of fuels in installations where that is a standalone activity cannot be based on whether those installations incinerate other waste than hazardous or municipal "only marginally".
- (82) The aggregation rule in point 3 of Annex I and the capacity threshold in the activities listed in Annex I underscore the importance of having clear and precise criteria for including or

³³ *Naturvårdsverket* para. 55-56

excluding installations from the ETS Directive. A threshold based on incinerating other waste than hazardous or municipal “only marginally” is unclear and impractical.

- (83) Furthermore, it is unclear who bears the burden of proof. In the Norwegian Government’s view, it is insufficient for operators to evade the obligation to surrender allowances by merely asserting that their installations incinerate other waste than hazardous or municipal waste only marginally. If the installation exception in the first activity in Annex I is nevertheless to be interpreted in the same way as the unit exception in point 5 of Annex I, it must be the operator’s responsibility to document to the competent authorities that their installation incinerates other waste only marginally.

2.4 The second question

- (84) By its second question, Borgarting Court of Appeal seeks guidance on the application of the exception to the first activity in Annex I, assuming that the first question is answered negatively.
- (85) The Norwegian Government submits that the exception in the first activity applies to installations that: (i) incinerate hazardous or municipal waste; and (ii) do not have the production of energy as its main purpose. Therefore, the application of the exception is not limited to an assessment of the composition of the waste incinerated by the installation. It also includes an assessment of the purpose of the installation, in accordance with the definitions of ‘waste incineration plant’ and ‘co-incineration plant’ in the IED.
- (86) The initial assessment is, therefore, whether the installation predominantly incinerates “hazardous” or “municipal” waste as per the European List of Waste. If it does not, the ETS Directive applies to its emissions, regardless of its purpose. If the installation incinerates hazardous or municipal waste, the ETS Directive applies to its emissions if the installation has as its main purpose the production of energy.
- (87) Relevant factors in assessing the main purpose of an installation include, inter alia, the volume of energy generated relative to the quantity of waste incinerated and the stability or continuity of the energy production, whether the units incinerating waste are located at sites with industrial production sites (either within the same installation or outsourced to a separate operator), and whether waste incineration replaces conventional fuel-based energy production.

3 ANSWER TO THE QUESTIONS FROM BORGARTING COURT OF APPEAL

- (88) On this basis, the Norwegian Government respectfully submits that the question from Borgarting Court of Appeal should be answered as follows:
1. *The first activity listed in Annex I to the ETS Directive cannot be interpreted as meaning that all installations for 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. *The first activity listed in Annex I to the ETS Directive includes combustion in installations whose main purpose is the generation of energy, and which use waste, including hazardous or municipal waste, as fuel. Such installations are not excluded from the ETS Directive. Relevant factors in the assessment of the main purpose of the installation include, inter alia, the volume of energy generated in relation to the quantity of waste incinerated and the stability or continuity of that production, whether the units incinerating waste are situated at sites with industrial production (within the same installation or outsourced to a separate operator), and whether the incineration of waste replaces production of energy by conventional fuels.*

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