JUDGMENT OF THE COURT

11 November 2025*

(*Directive 2003/87/EC – Emissions trading scheme – Environmental protection – Waste incineration – Hazardous or municipal waste – Homogeneity – Internal consistency*)

In Case E-2/25,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in the case between

The municipality of Fredrikstad, represented by Fredrikstad Vann Avløp og Renovasjonsforetak, and Saren Energy Sarpsborg AS,

and

The Norwegian State, represented by the Ministry of Climate and Environment,

concerning the interpretation of Directive 2003/87/EC, as amended, establishing a system for greenhouse gas emissions allowance trading,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann (Judge-Rapporteur) and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

– the municipality of Fredrikstad, represented by Fredrikstad Vann Avløp og Renovasjonsforetak ("FREVAR"), and Saren Energy Sarpsborg AS

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

("SAREN"), represented by Henrik Bjørnebye and Thomas K. Svensen, advocates;

– the Norwegian Government, represented by Kristin Hallsjø Aarvik, acting as Agent;

– the Icelandic Government, represented by Hendrik Daði Jónsson and Daníel Arnar Magnússon, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Sigurbjörn Bernharð Edvardsson, Johanne Førde, Kyrre Isaksen and Melpo-Menie Joséphidès, acting as Agents; and

– the European Commission ("the Commission"), represented by Geert Wils and Bart De Meester, acting as Agents,

having heard oral argument of FREVAR and SAREN, represented by Henrik Bjørnebye; the Norwegian Government, represented by Kristin Hallsjø Aarvik; the Icelandic Government, represented by Hendrik Daði Jónsson and Daníel Arnar Magnússon; ESA, represented by Sigurbjörn Bernharð Edvardsson and Johanne Førde; and the Commission, represented by Geert Wils and Bart De Meester, at the hearing on 5 June 2025,

gives the following

JUDGMENT

I INTRODUCTION

1 This request for an advisory opinion concerns the interpretation of the first activity listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC ("the ETS Directive"). The request has been made in proceedings between FREVAR, SAREN and the Norwegian Government concerning the validity of two decisions by the Norwegian Environment Agency granting permits for emissions subject to an obligation to surrender allowances in accordance with the ETS Directive.

2 The referring court seeks guidance on whether the first activity in Annex I to the ETS Directive must be interpreted such 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. Central to that question is whether the reasoning in the judgment of the European Court of Justice ("ECJ") of 6 June 2024 in

Naturvårdsverket, C-166/23, EU:C:2024:465, concerning the interpretation of point 5 of Annex I to the ETS Directive applies in a similar manner to the first activity listed.

II LEGAL BACKGROUND

EEA law

3 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 and amending Regulation (EU) No 525/2013 ("the Effort Sharing Regulation") (OJ 2018 L 156, p. 26; and Norwegian EEA Supplement 2019 No 102, p. 384) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 269/2019 of 25 October 2019 (OJ 2023 L 11, p. 38; and Norwegian EEA Supplement 2023 No 5, p. 32) ("JCD No 269/2019"). JCD No 269/2019 added the Effort Sharing Regulation as paragraph 8(a) of Article 3 (Environment) of Protocol 31 to the EEA Agreement. Constitutional requirements were indicated by Iceland. The requirements were fulfilled by 10 March 2020 and the decision entered into force on 11 March 2020.

4 Article 2(1) of the Effort Sharing Regulation, entitled "Scope", reads:

> *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.*

5 The ETS Directive (OJ 2003 L 275, p. 32; and Norwegian EEA Supplement 2011 No 71, p. 1792) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 146/2007 of 26 October 2007 (OJ 2008 L 100, p. 92; and Norwegian EEA Supplement 2008 No 19, p. 90) ("JCD No 146/2007"). JCD No 146/2007 inserted the ETS Directive as point 21al of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 28 December 2007 and the decision entered into force on 29 December 2007. The Directive has been amended a number of times. The wording and numbering of the provisions set out here are as they stood at the material time, which, according to the request, is the period 2014 to 2017 ("the material time").

6 Recital 7 to the ETS Directive read:

> *Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.*

7 Article 1 of the ETS Directive, entitled "Subject matter", read, in extract:

> *This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the 'Community scheme') 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.*
>
> *...*

8 Article 2(1) of the ETS Directive, entitled "Scope", read:

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

9 Article 3 of the ETS Directive, entitled "Definitions", read, in extract:

> *(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;*

10 The first activity listed in Annex I to the ETS Directive read:

> *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).*

11 The first activity listed in Annex I to the ETS Directive was originally included in a section entitled "Energy activities" and worded:

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

12 Point 5 of Annex I to the ETS Directive read:

> *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.*

13 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives ("Directive 2008/98" or "the Waste Framework Directive") (OJ 2008 L 312, p. 3; and Norwegian EEA Supplement 2015 No 76, p. 940) was incorporated into the EEA Agreement by Decision of the EEA Joint

Committee No 85/2011 of 1 July 2011 (OJ 2011 L 262, p. 57; and Norwegian EEA Supplement 2011 No 54, p. 71) ("JCD No 85/2011"). JCD No 85/2011 inserted the Waste Framework Directive as point 32ff of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Iceland. The requirements were fulfilled by 6 September 2012 and the decision entered into force on 1 November 2012.

14 Article 4(1) of the Waste Framework Directive, entitled "Waste hierarchy", reads:

> *The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:*
>
> *(a) prevention;*
>
> *(b) preparing for re-use;*
>
> *(c) recycling;*
>
> *(d) other recovery, e.g. energy recovery; and*
>
> *(e) disposal.*

15 Article 23(4) of the Waste Framework Directive, entitled "Issue of permits", reads:

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

16 Point 12 of Annex IVa to the Waste Framework Directive, entitled "Examples of economic instruments and other measures to provide incentives for the application of the waste hierarchy referred to in Article 4(3)", was not in force at the material time. It was inserted into the Waste Framework Directive by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste ("Directive 2018/851") (OJ 2018 L 150, p. 109; and Norwegian EEA Supplement 2023 No 43, p. 582) which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 318/2021 of 29 February 2024 (OJ L, 2024/522, 29.2.2024, ELI: http://data.europa.eu/eli/dec/2024/522/oj; and Norwegian EEA Supplement 2024 No 19, p. 59) ("JCD No 318/2021"). JCD No 318/2021 inserted Directive 2018/851 in point 32ff of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Norway. The requirements were fulfilled by 22 June 2022 and the decision entered into force on 1 August 2022. Since 1 August 2022 it has read:

> *Economic incentives for regional and local authorities, in particular to promote waste prevention and intensify separate collection schemes, while avoiding support to landfilling and incineration.*

17 Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community ("Directive 2009/29") (OJ 2009 L 140, p. 63; and Norwegian EEA Supplement 2016 No 64, p. 144) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 152/2012 of 26 July 2012 (OJ 2012 L 309, p. 38; and Norwegian EEA Supplement 2012 No 63, p. 43) ("JCD No 152/2012"). JCD No 152/2012 added Directive 2009/29 in point 21al of Annex XX (Environment) to the EEA Agreement. No constitutional requirements were indicated and the decision entered into force on 27 July 2012.

18 Annex I to Directive 2009/29 reads, in extract:

> *Annex I to Directive 2003/87/EC shall be replaced by the following:*
>
> *'**ANNEX I***
>
> ***CATEGORIES OF ACTIVITIES TO WHICH THIS DIRECTIVE APPLIES***
>
> ...
>
> *5. 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.*
>
> ...

Activities	***Greenhouse gases***
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)	*Carbon dioxide*

> ...

19 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) ("Industrial Emissions Directive") (OJ 2010 L 334, p. 17; and Norwegian EEA Supplement 2020 No 57, p. 1524) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 229/2015 of 25 September 2015 (OJ 2017 L 85, p. 53; and Norwegian EEA Supplement 2017 No 19, p. 52) ("JCD No 229/2015"). JCD No 229/2015 inserted the Industrial Emissions Directive as point 1f of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein. The requirements were fulfilled by 10 June 2016 and the decision entered into force on 1 August 2016. The Industrial Emissions Directive repealed and replaced Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste ("Directive 2000/76" or "the

Waste Incineration Directive") (OJ 2000 L 332, p. 91; and Norwegian EEA Supplement 2005 No 16, p. 324), which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 57/2003 of 16 May 2003 (OJ 2003 L 193, p. 38; and Norwegian EEA Supplement 2003 No 39, p. 23) ("JCD No 57/2003"). JCD No 57/2003 inserted the Waste Incineration Directive as point 32de of Annex XX (Environment) to the EEA Agreement. No constitutional requirements were indicated and the decision entered into force on 17 May 2003.

20 Article 3 of the Industrial Emissions Directive, entitled "Definitions", reads, in extract:

> *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*.

21 Article 9(1) of the Industrial Emissions Directive, entitled "Emission of greenhouse gases", 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 gas, unless necessary to ensure that no significant local pollution is caused.*

22 Article 11(e) of the Industrial Emissions Directive, entitled "General principles governing the basic obligations of the operator", reads:

> *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;*

23 Article 44 of the Industrial Emissions Directive, entitled "Applications for permits", reads, in extract:

An application for a permit for a waste incineration plant or waste co-incineration plant shall include a description of the measures which are envisaged to guarantee that the following requirements are met:

...

(b) the heat generated during the incineration and co-incineration process is recovered as far as practicable through the generation of heat, steam or power;

24 Article 50(5) of the Industrial Emissions Directive, entitled "Operating conditions", reads:

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

25 Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system ("Directive 2023/959") (OJ 2023 L 130, p. 134; and Norwegian EEA Supplement 2025 No 26, p. 641) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 335/2023 of 8 December 2023 (OJ L, 2024/1420, 13.6.2024, ELI: http://data.europa.eu/eli/dec/2024/1420/oj; and Norwegian EEA Supplement 2024 No 48, p. 76) ("JCD No 335/2023"). JCD No 335/2023 added Directive 2023/959 in point 21al of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Iceland and Norway. The requirements were fulfilled by 29 December 2023 and the decision entered into force on 30 December 2023, with 1 January 2024 as the date for compliance in the EEA.

26 Recital 98 of Directive 2023/959 reads:

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, including with a view to their inclusion from 2028, and provide an assessment of the potential need for an option for a Member State to opt out until the end of 2030, taking into account the importance of all sectors contributing to emission reductions. Inclusion of municipal waste incineration installations in the EU ETS would contribute to the circular economy by encouraging recycling, reuse and repair of products, while also contributing to economy-wide decarbonisation. The inclusion of municipal waste incineration installations would reinforce incentives for sustainable management of waste in line with the waste hierarchy and would create a level playing field between the regions that have included municipal waste incineration under the scope of the EU ETS.

To avoid diversion of waste from municipal waste incineration installations towards landfills in the Union, which create methane emissions, and to avoid

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

National law

27 The ETS Directive and accompanying legal instruments incorporated into the EEA Agreement were implemented into Norwegian law by Act No 99 of 17 December 2004 on emissions allowance obligations and greenhouse gas emissions allowance trading (*lov 17. desember 2004 nr. 99 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteloven)*) ("the Greenhouse Gas Emissions Allowance Act") and Norwegian Regulation No 1851 of 23 December 2004 on emissions allowance obligations and greenhouse gas emissions allowance trading (*forskrift 23. desember 2004 nr. 1851 om kvoteplikt og handel med kvoter for utslipp av klimagasser (klimakvoteforskriften)*) ("the Greenhouse Gas Emissions Allowance Regulation").

28 The first and second paragraphs of Section 3 of the Greenhouse Gas Emissions Allowance Act read, at the material time:

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 Section 4 of the Greenhouse Gas Emissions Allowance Act provided for the obligation to surrender allowances. At the material time, it read, in extract:

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 According to the request, amendments to both provisions of the Act effective from 1 January 2024 have no substantive implications for the present case.

31 Under Section 3 of the Greenhouse Gas Emissions Allowance Act, at the time of the decisions, Section 1-1 of the Greenhouse Gas Emissions Allowance Regulation provided more specifically for which activities are subject to the obligation to surrender allowances. The first activity listed read:

> *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 According to the request, amendments to the Greenhouse Gas Emissions Allowance Regulation effective from 1 January 2024 had no substantive implications for the present case. Section 1-3 now contains the main rule, while Section 1-3a(b) and the second paragraph of Section 1-3a provide for the exception.

III FACTS AND PROCEDURE

33 FREVAR and SAREN each operates an incineration plant, respectively situated in Fredrikstad and Sarpsborg municipalities, Norway. FREVAR and SAREN brought proceedings seeking to have decisions of the Norwegian Environment Agency (*Miljødirektoratet*) and the Ministry of Climate and Environment declared invalid. These decisions permitted greenhouse gas emissions subject to the obligation to surrender allowances for emissions under the European Union Emissions Trading System ("ETS").

34 On 18 March 2010, the Commission issued "Guidance on Interpretation of Annex I of the EU ETS Directive (excl. aviation activities)" ("the Commission Guidance"). Section 3.3.2 of the Commission Guidance, entitled "Waste incineration and Co-incineration", read, in extract:

> *Installations for the incineration of municipal waste or hazardous waste are thus excluded in Annex I to the EU ETS Directive. It is for the competent authority to determine whether a particular installation falls into one of these categories taking account the relevant definitions in the WID (Waste Incineration Directive). Installations falling under the WID have a permit under that Directive which should clearly state the status of the incineration or co-incineration units. This Directive defines an "incineration plant" as a technical unit*
>
> > *"dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated."*

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

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

> *"whose main purpose is the generation of energy or production of material products and:*
> *— which uses wastes as a regular or additional fuel; or*
> *— in which waste is thermally treated for the purpose of disposal.*
> *If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4."*

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

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

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

35 In 2011, the Norwegian Climate and Pollution Agency (*Klima- og forurensningsdirektoratet*, now the Norwegian Environment Agency) assessed both installations, applying the Commission Guidance. The referring court notes that in doing so the agency stated, inter alia, that:

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

36 The Norwegian Climate and Pollution Agency classified both installations as co-incineration installations subject to the obligation to surrender allowances.

37 On 16 November 2012, FREVAR and SAREN applied for permits for emissions subject to the obligation to surrender allowances. The Norwegian Environment Agency adopted decisions on permits for emissions subject to this obligation, concerning SAREN on 22 January 2014 and FREVAR on 30 January 2014.

38 FREVAR appealed against the decision concerning its installation. On 13 February 2017, the decision was upheld by the Ministry of Climate and Environment, which also applied the Commission Guidance. The referring court notes that the ministry stated, inter alia:

The European Commission's Guidance states that it is up to the competent authority to determine whether an installation is deemed to be a co-incineration installation or waste incineration installation. The European Commission's Guidance highlights various factors that can provide guidance. …

A key assessment factor under the Guidance is whether an installation's main purpose is energy production: see the reference to the definition of co-incineration installation in the EU's former Waste Incineration Directive, now continued in the Industrial Emissions Directive (IED). The Guidance further points to the installation's geographical location, including whether the installation is situated at the same location as industrial production. In the Guidance, the reason given for the relevance of the installation's location is that it provides an indication as to whether the installation's main purpose is to supply energy for industrial production. The Ministry interprets this to mean that the connection to industry is a key factor in the assessment of the installation's main purpose. The Guidance's focus on energy production and connection to industry suggests that installations which supply a large share of energy for industrial production must be presumed to have as their main purpose the production of energy. The Ministry also emphasises that the rule for waste incineration installations in the EU's ETS Directive is formulated as an exception provision. The predominant general rule is that the combustion of fuels with a thermal input exceeding 20 MW is to be subject to the obligation to surrender allowances.

39 The referring court observes that the assessment of the Norwegian Environment Agency and the Ministry of Climate and Environment entails that installations for the incineration of waste which supply heat for industrial steam are subject to the obligation to surrender allowances, while those which supply heat for district heating are not.

40 On 25 March 2022, FREVAR and SAREN requested that the (now) Norwegian Environment Agency reverse its decisions on the permits. The Norwegian Environment Agency declined to do so. FREVAR and SAREN lodged an appeal, which the Ministry of Climate and Environment dismissed on 8 August 2022.

41 On 29 September 2022, FREVAR and SAREN lodged proceedings at Søndre Østfold District Court, seeking to have the decisions of the Norwegian Environment Agency and the Ministry declared invalid. The District Court ruled in the State's favour on 10 May 2023. FREVAR and SAREN appealed to Borgarting Court of Appeal.

42 By letter of 17 February 2025, registered at the Court on 25 February 2025, Borgarting Court of Appeal referred the following questions to the Court:

> 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?*

43 The referring court notes that the ECJ judgment of 6 June 2024 in *Naturvårdsverket*, C-166/23, cited above, was an essential reason for its decision to make a reference to the Court. The referring court considers that the question is whether the appellants' installations are installations subject to the obligation to surrender allowances for the combustion of fuels, or installations for the incineration of hazardous or municipal waste which are not subject to the obligation to surrender allowances. Whether the installations' main purpose is relevant to their classification is a central point at issue. Additionally, if the installations' main purpose is decisive for their classification, the referring court seeks a clarification of the legal and factual subject-matter for the assessment of their main purpose. The referring court further considers the amendments to the ETS Directive made by Directive 2023/959 to be without implication for this case.

44 The Commission Guidance was last updated on 4 December 2024 and issued as "Guidance on Interpretation of Annex I of the EU ETS Directive (excl. aviation and maritime activities) – Update applicable from 2024" ("the Updated Commission Guidance"). The referring court considers the Updated Commission Guidance not to have made substantive changes to the content of Section 3.3.2 of the Commission Guidance, which is now found at Section 3.4.3 of the Updated Commission Guidance.

45 Reference is made to the written observations published on the Court's website for a fuller account of the arguments and proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

IV ANSWER OF THE COURT

46 By its first question, the referring court asks, in essence, whether an installation with a total rated thermal input exceeding 20 MW which incinerates hazardous or municipal waste is exempted from the ETS Directive's emissions trading scheme on the basis of the exclusion in the first activity listed in Annex I to the directive or whether the first activity should be interpreted in the manner described in Section 3.3.2 of the Commission Guidance, and Section 3.4.3 of the Updated Commission Guidance.

47 The purpose of the ETS Directive is to establish an emission allowance trading system which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (see the judgment of 9 August 2024 in *Norwegian Air Shuttle*, E-12/23, paragraph 36 and case law cited).

48 Pursuant to Article 1 of the ETS Directive, and in line with recital 7 thereof, that directive establishes a system for greenhouse gas emission allowance trading within the EEA in order 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 which avoids distortions of competition (see the judgment in *Norwegian Air Shuttle*, E-12/23, cited above, paragraph 37).

49 The economic logic underlying the emissions trading system is that it encourages participants to emit quantities of greenhouse gases that are less than the greenhouse gas emission allowances originally allocated to them, in order to sell the surplus to another participant which has emitted more than its allowance (see the judgment in *Norwegian Air Shuttle*, E-12/23, cited above, paragraph 39 and case law cited).

50 Pursuant to Article 2(1) of the ETS Directive, the directive shall apply to emissions from the activities listed in Annex I thereto and the greenhouse gases listed in Annex II including, in particular, carbon dioxide (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraph 33 and case law cited). The first activity listed in Annex I to the directive refers to the "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)" producing carbon dioxide as a greenhouse gas.

51 ESA, the Icelandic Government, and at the hearing, FREVAR and SAREN, have highlighted the complementary nature of the ETS Directive and the Effort Sharing Regulation.

52 Pursuant to Article 2(1) of the Effort Sharing Regulation, that regulation applies to the greenhouse gas emissions from Intergovernmental Panel on Climate Change source categories of energy, industrial processes and product use, agriculture and waste, excluding greenhouse gas emissions from the activities listed in Annex I to the ETS Directive. Therefore, greenhouse gas emissions, including carbon dioxide, from the waste sector are either to be accounted for under the ETS Directive or the Effort Sharing Regulation, pursuant to which they are the responsibility of the EEA States.

53 The Commission submitted at the hearing that the Effort Sharing Regulation is based on commitments by the EEA States to reduce emissions from sectors not covered by the ETS Directive but it does not impose any direct obligations on installations. At the hearing, the Norwegian Government stated that, in order to fulfil its obligations under the Effort Sharing Regulation, Norway imposes levies on carbon dioxide emissions as a matter of national law.

54 The Court observes that, in the present case, if the incineration plants do not come within the scope of the first activity of Annex I to the ETS Directive, they are to be considered under the Effort Sharing Regulation.

55 Article 3(e) of the ETS Directive defines "installation" as meaning 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. Incineration plants, such as those at issue in the main proceedings, constitute installations for the purposes of Article 3(e) of that directive, as they are formed of one or more units incinerating municipal waste.

56 In its judgment in *Naturvårdsverket*, C-166/23, cited above, the ECJ interpreted point 5 of Annex I to the ETS Directive. At the material time, point 5 of Annex I provided 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 shall be included in the greenhouse gas emission permit, other than units for the incineration of hazardous or municipal waste.

57 In *Naturvårdsverket*, the ECJ considered the Commission Guidance, which interpreted Annex I to the ETS Directive to the effect that it is insufficient that a unit predominately incinerates hazardous or municipal waste for it to be excluded from the scope of application of the directive. Pursuant to the Commission Guidance, it is necessary, first, that the unit for the incineration of hazardous or municipal waste is not part of an installation whose activity is referred to in Annex I to that directive and, secondly, that the incineration of such waste is its main purpose. However, the ECJ found that such an interpretation of point 5 of Annex I is not supported by the literal, systematic and teleological methods of interpretation upon which the ECJ and the Court normally rely (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraphs 42 to 44).

58 In its judgment in *Naturvårdsverket* the ECJ held that point 5 of Annex I to the ETS Directive must be interpreted in a literal, systematic and teleological manner, finding that that provision 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 (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraphs 45, 49, 51 and 55 to 57).

59 In the present case, FREVAR and SAREN, together with ESA, submit, in essence, that the reasoning in *Naturvårdsverket* concerning point 5 of Annex I to the ETS Directive is applicable *mutatis mutandis* to the first activity listed in that annex. The Norwegian and Icelandic Governments and the Commission essentially contend that the reasoning in *Naturvårdsverket* is not applicable *mutatis mutandis* and effectively that the first activity should be interpreted in the manner described in Section 3.3.2 of the Commission Guidance, which is found in Section 3.4.3 of the Updated Commission Guidance.

60 The Court recalls that guidance issued by the Commission cannot be regarded as producing binding legal effects, in and of itself, as a matter of EEA law. Accordingly, such guidance does not have binding effect on the courts of an EEA State applying EEA law. Nevertheless, it is for the courts of an EEA State to take such guidance into consideration in order to resolve the disputes submitted to them, in particular when that guidance is intended to supplement binding provisions of EEA law (see the judgment of 25 January 2024 in *A Ltd*, E-2/23, paragraph 72 and case law cited).

61 The Court observes that the relevant wording of the first activity listed in Annex I to the ETS Directive read at the material time "except in installations for the incineration of hazardous or municipal waste", while in *Naturvårdsverket* the relevant wording of the legal provision at issue in point 5 of Annex I is "other than units for the incineration of hazardous or municipal waste". The Court observes that the nature and wording of the exception in both provisions is essentially identical.

62 The Court recalls that a number of provisions in the EEA Agreement are intended to ensure that the interpretation of that agreement is as uniform as possible throughout the EEA. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those in EU law are interpreted uniformly and homogenously within the EFTA States (see the judgment of 7 May 2025 in *TC and AA*, Joined Cases E-1/24 and E-7/24, paragraph 49 and case law cited).

63 The wording of the first activity listed in Annex I to the ETS Directive does not indicate that the exclusion of installations for the incineration of hazardous or municipal waste from a greenhouse gas emissions permit depends on the purpose for which that waste is incinerated (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraph 48). Although, the use of the word "for" in the first activity listed in Annex I in the Danish, Dutch, English, German, Italian, and Swedish versions of the directive may be read in two ways, the French, Portuguese and Spanish versions, which use "*d'*", "*de*", and "*de*" respectively, cannot. Therefore, as ESA correctly submitted, not all of the language versions can be interpreted literally as referring to a purpose test. Indeed, as ESA submitted, the directive uses "for the purpose of" very frequently elsewhere in other contexts where the legislature sought to express the notion of "purpose".

64 Moreover, the Court observes that the Norwegian Government additionally seeks to distinguish the first activity and point 5 of Annex I to the ETS Directive on the basis that the latter refers to units disposing of waste produced in an installation subject to the directive. However, this disregards the inclusion of municipal waste, which is not

produced in processes subject to the ETS Directive, but rather by individuals within a municipality. “Hazardous or municipal waste” thus relates to two distinct categories of waste.

65 Turning to the systematic interpretation of the first activity listed in Annex I to the ETS Directive, the same or similar terms should be interpreted consistently, especially when found in the same legal act, or in this case within the same annex to a directive. Given the high degree of similarity between the first activity listed and point 5 of Annex I to that directive, they should be interpreted consistently in order to ensure the internal consistency of that directive (compare, in that regard, the opinion of Advocate General Ćapeta of 6 February 2025 in *France* v *CWS Powder Coatings and Others*, Joined Cases C-71/23 P and C-82/23 P, EU:C:2025:65, point 126) and, in the present case, in line with the interpretation made in *Naturvårdsverket*.

66 Both the first activity listed and point 5 of Annex I to the ETS Directive perform the same function, exempting certain incineration activities from the ETS which would otherwise fall within its scope. Given the interpretation of point 5 undertaken in *Naturvårdsverket*, it would be contrary to its systematic interpretation to disregard that directive’s internal consistency in favour of an interpretation in light of other legal acts. Therefore, the fact that the present contextual reading of the first activity differs from the definitions of “waste incineration plant” and “waste co-incineration plant” in Article 3(40) and (41) of the Industrial Emissions Directive illustrates the different intentions of the legislature in these different legal acts. The rationale for the Court’s interpretation is reinforced by the obligations placed upon the Commission by paragraph 7 to Article 30 of the ETS Directive, as inserted by Article 1(28)(d) of Directive 2023/959. This, as referred to by the Commission, requires the Commission to assess and report on the feasibility of including municipal waste incineration installations in the ETS by 31 July 2026, with a view to their inclusion from 2028, with the implication that municipal waste incineration installations are presently excluded from the directive’s emission allowance trading system.

67 The Court recalls that, as held above, the purpose of the ETS Directive is to establish an emission allowance trading system which seeks to reduce greenhouse gas emissions (see paragraph 48 above, and case law cited; and compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraph 50). Nevertheless, the exemption provided for in the first activity listed in Annex I to the ETS Directive for installations for the incineration of hazardous and municipal waste does not pursue that objective as its priority. Rather, similar to point 5 in Annex I, the exception responds to a secondary objective of that directive, as the EU legislature considered that the establishment of a system for the allocation of emission allowances must not impede the disposal of hazardous and municipal waste by incineration (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraph 51).

68 In this regard, the Court observes that the waste hierarchy set out in Article 4(1) of the Waste Framework Directive promotes energy recovery, such as incineration, over disposal, such as landfill. As with point 5 of Annex I of the ETS Directive, the exemption made by the legislature for installations for the incineration of hazardous or

municipal waste in the first activity listed in Annex I to the directive seeks to allow for the disposal of hazardous and municipal waste by incineration. Therefore, the legislature sought to promote the incineration of hazardous and municipal waste by removing them from the obligation to be authorised under that directive (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraph 54).

69 The Court reiterates that exempting installations for the incineration of hazardous or municipal waste from the ETS Directive's emission allowance trading system does not exclude such emissions from being accounted for under the environmental protections established at the national level in accordance with the Effort Sharing Regulation (see paragraph 54 above).

70 Further, the submission made by the Norwegian Government and the Commission that, in effect, a level playing field for energy producers requires self-standing installations which incinerate hazardous or municipal waste as fuel for energy to be included within the scope of the ETS Directive cannot be upheld. This argument presupposes that such installations are directly comparable to other installations which produce energy by combusting fuels.

71 The Court observes that hazardous or municipal waste differs from materials or substances specifically intended or produced to be used as fuel, such as oil, gas or biomass-based fuels. Further, the exclusion provided for in the first activity pursues the secondary objective of the ETS Directive: the disposal of hazardous and municipal waste by incineration. Therefore, installations which both perform this function and produce energy cannot be directly compared to installations which simply produce energy. Furthermore, construing the derogation in the manner proposed by the Norwegian and Icelandic Governments and the Commission could result in a waste of energy and an increase in emissions (compare the judgment in *Naturvårdsverket*, C-166/23, cited above, paragraphs 55 and 56).

72 Moreover, the inclusion of certain activities within the scope of the ETS Directive while ostensibly comparable activities are excluded does not necessarily violate the principle of equal treatment (compare the judgment of 16 December 2008 in *Société Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraphs 46, 61 and 63). Since the directive legitimately takes an incremental approach, progressively expanding to encompass more activities, as further indicated by recital 98 of Directive 2023/959, other energy producers are not unjustifiably disadvantaged by the incineration of hazardous and municipal waste currently falling outside that directive's scope.

73 Consequently, it follows from the above that the first activity listed in Annex I to the ETS Directive must be interpreted consistently with point 5 thereof as meaning that all installations which incinerate hazardous or municipal waste are excluded from the scope of that directive, including those 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.

74 In light of the above, the answer to the first question referred must be that the first activity listed in Annex I to the ETS Directive must be interpreted as meaning that all installations which incinerate hazardous or municipal waste are excluded from the scope of the Directive, including those 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.

75 Given the Court's answer to the first question, there is no need to address the second question referred.

V COSTS

76 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal (*Borgarting lagmannsrett*) hereby gives the following Advisory Opinion:

The first activity listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union must be interpreted as meaning that all installations which incinerate hazardous or municipal waste are excluded from the scope of the directive, including those 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.

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 11 November 2025.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President