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**LEGAL OPINION TO THE MINISTRY FOR FOREIGN AFFAIRS OF ICELAND ON  
THE FOLLOWING QUESTIONS:**

If Iceland would decide not to lift the constitutional requirements to the Decision of the EEA Joint Committee No 93/2017 of 5 May 2017, and would decide to take the matter back to the EEA Joint Committee with the wish to adopt another decision of the EEA Joint Committee incorporating the Third Energy Package into the EEA Agreement with a different adaptation text:

**Which procedure would that trigger?**

**Which implications would that have for the EEA Agreement and the other EEA EFTA States? Which implications would it have in the short term and which in the long term?**

**How do you estimate the chances of Iceland succeeding in negotiating an exemption from Regulation (EC) No 713/2009, so it would not apply to Iceland?**

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## **I. Historical development**

### **1. Adoption of the Third Energy Package in the EU**

1. On 13 July 2009, the European Parliament and the Council adopted the “Third Internal Energy Market Package”. The Third Energy Package is a set of legislative measures on electricity and natural gas. It consists of five elements: unbundling of energy suppliers from network operators; strengthening the independence of regulatory authorities; the establishment of the Agency for the Cooperation of Energy Regulators (ACER); cross-border cooperation between transmission system operators; and the creation of European networks for transmission system operators. The package was adopted to improve the functioning of the internal energy market and to solve structural problems. It is intended to create greater transparency in retail markets for the benefit of consumers.

2. The package includes, *inter alia*, Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 713/2009, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

### **2. Assessment of EEA relevance**

3. That the EU Third Energy Package has “EEA relevance” (this means that it constitutes legislation that is “governed by this Agreement” within the meaning of Article 102(1) EEA) has not been contested by any of the three EEA/EFTA States. This is only logical, as the EEA/EFTA States have already incorporated and implemented the First and Second Energy Packages. It is also uncontested that the Third Energy Package affects Annex IV of the EEA Agreement.

### **3. Conclusions of the EEA Council**

4. The conclusions of the 42nd meeting of the EEA Council in Brussels of 19 November 2014 contain the following section:

“16. With regard to the Third Package for the Internal Energy Market, the EEA Council underlined the importance of stepping up efforts to incorporate this legislative Package into the EEA Agreement in order to establish a fully functional internal market for energy, and in particular encouraged the parties to identify mutually acceptable solutions for appropriate EEA EFTA participation in the Agency for the Cooperation of Energy Regulators (ACER).”

5. The meeting was chaired by *Aurelia Frick*, Minister of Foreign Affairs of Liechtenstein, who led the EEA/EFTA delegation, accompanied by *Vidar Helgesen*, Minister of EEA and EU Affairs at the Office of the Prime Minister of Norway, and *Beradís Ellertsdóttir*, Ambassador and Head of the Mission of Iceland to the EU. The EEA/EFTA delegation also included *Kristinn F. Arnason*, Secretary General of EFTA and *Oda Helen Sletnes*, President of the EFTA Surveillance Authority (“ESA”). The EU delegation was led by *Benedetto Della Vedova*, Secretary of State at the Ministry of Foreign Affairs and International Cooperation of Italy, accompanied by representatives of the General Secretariat of the Council, the European Commission and the European External Action Service.<sup>1</sup>

6. From the foregoing, one must conclude that the package had the basic support of the whole EFTA pillar at the outset.

#### **4. Decision shaping**

7. As regards decision-shaping under Articles 99 to 101 EEA, Iceland has, according to my instructions, been actively involved by giving input on the expert level. It is to be noted that Iceland had been granted some derogations from the Second Energy Package because it was deemed to constitute a small, isolated system. Iceland nevertheless fully implemented the Second Energy Package, but in certain circumstances, ESA could grant an exemption.

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<sup>1</sup> 15-1671-Rev3.1-20150518 EEA Council minutes 19 November 2014.docx.

## 5. Adaptations by the EEA Joint Committee

8. The negotiations on the incorporation of the Third Energy Package into the EEA Agreement lasted several years. Iceland participated actively in these negotiations. As a result, Iceland obtained derogations, in particular from the acts regarding natural gas and specific adaptations regarding Directive 2009/72/EC (the Third Electricity Directive).

9. Regulation 713/2009 establishing ACER was adapted to the EEA two pillar system. ESA was given the competence to adopt decisions in accordance with Article 7(7) and Article 8 of the Regulation upon a draft made by ACER. This adaptation is essentially the same as the one made when the new European financial supervisory framework was incorporated into the EEA Agreement.

## 6. Incorporating decision of the EEA Joint Committee

10. On 5 May 2017, the EEA Joint Committee adopted Decision No 93/2017, amending Annex IV (Energy) to the EEA Agreement, incorporating the Third Energy Package into the EEA Agreement. The Decision was unanimously approved (cf. Article 93(2) EEA). It was adopted with constitutional requirements from all the three EEA/EFTA States, Iceland, Liechtenstein and Norway.

11. Liechtenstein and Norway have lifted their constitutional requirements to Decision No 93/2017: Norway in April 2018, and Liechtenstein in May 2018.

12. In Case E-6/01 *CIBA Speciality Chemicals Water Treatment Ltd and Others vs. The Norwegian State, represented by the Ministry of Labour and Government Administration*, the EFTA Court held:

“The EEA Joint Committee is designed to function as an institution working in the pursuit of the common interest of the Community side

and the EFTA side. As pointed out by the Commission of the European Communities at the oral hearing, a decision of the EEA Joint Committee may constitute a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other.”<sup>2</sup>

## 7. Opposition in Iceland

13. Incorporation led to an intense political debate in Iceland starting in March 2018, when the parallel discussion took place in Norway in connection with the Norwegian parliamentary procedure.

14. Iceland is an isolated system not connected with an interconnector (submarine cable) to the EU internal electricity market. Due to this lack of interconnector, there are currently no imports or exports of electricity to or from Iceland. Nevertheless, the matter induced a broad debate on transfer of powers, compatibility with the Icelandic constitution, utilization of energy resources, etc. Opponents question whether ESA should have competence in this area. Opponents claim also that ACER will decide about energy resources in Iceland and indeed whether a submarine cable will be connected to and from Iceland. The latter concerns the two-pillar system of the EEA Agreement.

15. The main matter of concern for the opponents seems to be the incorporation of Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators (ACER). It was claimed that Iceland should bring the matter up again in the EEA Joint Committee, with the aim to negotiate a different adaptation for Iceland for the Third Energy Package, especially to Regulation (EC) No 713/2009. That would do no harm.

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<sup>2</sup> [2002] EFTA Ct. Rep. 281, paragraph 33, emphasis added.

## 8. Joint understanding EU-Iceland

16. Before the proposal for a parliamentary resolution was tabled in Parliament on 1 April 2019, the Minister for Foreign Affairs *Gudlaugur Thór Thórdarson* and the European Commissioner for Climate Action and Energy *Miguel Arias Cañete* discussed the incorporation of the Third Energy Package into the EEA Agreement. On 22 March 2019 they issued a joint understanding on the application of the Third Energy Package towards Iceland. The joint understanding reads as follows:

“Minister Gudlaugur Thor Thordarson and Climate Action and Energy European Commissioner Arias Cañete discussed on 20 March 2019 the EU Third Energy Package, taking into account the unique situation in Iceland as concerns renewable energy and energy markets. They noted that Iceland's participation in the EEA (European Economic Area) has been highly beneficial for Icelandic citizens as well as for the EU. Iceland and the other EEA partners have successfully been applying EU energy rules, adapted to the EEA specific situation, for more than a decade. Indeed, these rules have brought more choice for customers and helped energy markets become more efficient.

Concerning the incorporation of the Third Energy Package in Iceland, the situation in Iceland is markedly different from countries with a cross-border energy network. Therefore, the special regime for Iceland that was agreed within the EEA Joint Commission [recte: Committee], which avoids all unnecessary burdens, is the best fit for Iceland's circumstances.

The Icelandic electricity system is currently an isolated system and it is not connected with an interconnector between Iceland and the EU's internal energy market. In this regard, large parts of the provisions of the Third Energy Package, namely those that concern cross-border exchanges and infrastructure in electricity, do not apply or have no practical relevance to Iceland in the absence of any interconnection. As



a result, the provisions on ACER (Agency for the Cooperation of Energy Regulators) and the Regulation on cross-border electricity exchanges will not have any tangible impact on Iceland's sovereign decision-making on energy matters.

Were cross-border infrastructure to be put in place in the future, the EFTA Surveillance Authority (ESA) would be responsible to decide on cross-border issues concerning Iceland, and not ACER. This has been agreed in the relevant adaptation text of the EEA Joint Committee Decision No 93/2017 from 5 May 2017, which reflects the autonomy of the EFTA institutions under the “two pillar system” of the EEA Agreement.

The applicable provisions of the EU Third Energy Package affects in no way the Government of Iceland's full sovereign control over Iceland's energy resources and the authority on how they shall be utilized and managed. Decisions on electricity interconnectors between Iceland and the EU's internal electricity market lie entirely within the competence of Icelandic authorities. The provisions of the Third Energy Package as applicable to Iceland do not alter the current legal situation in this regard.”<sup>3</sup>

## **9. Icelandic parliamentary process**

17. According to my instructions, the Icelandic Parliament was actively informed and consulted on an ongoing basis during the whole process in accordance with the rules of the Parliament on the handling of EEA matters. The matter was dealt with in a transparent manner with regular briefings and memoranda provided for the competent committees since 2010, together with annual reports of the Foreign Minister.

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<sup>3</sup> [https://ec.europa.eu/info/news/joint-understanding-application-third-energy-package-towards-iceland-2019-mar-22\\_en](https://ec.europa.eu/info/news/joint-understanding-application-third-energy-package-towards-iceland-2019-mar-22_en), emphases added.

18. The Icelandic parliamentary process requires two readings of the Resolution permitting the Government to ratify the acts in question. Between the readings the matter is examined by standing committees of the parliament. Provided it ends with a positive result, the Government of Iceland will be able to lift the constitutional requirements to EEA Joint Committee Decision No 93/2017.

19. In order for Iceland to lift the constitutional requirements to Decision No 93/2017, the Minister for Foreign Affairs tabled on 1 April 2019 at the Icelandic Parliament a proposal for a parliamentary resolution. It suggested that Parliament give the Government its consent to approve the decision of the EEA Joint Committee No 93/2017. Subsequently, the Minister of Tourism, Industry and Innovation tabled a bill for implementing legislation and a bill amending the Electricity Act as well as a proposal amending a Parliamentary Resolution requiring the consent of the Parliament for connecting Iceland with a submarine cable.

20. There were 16 annexes attached to the Minister for Foreign Affairs' parliamentary proposal. They included five legal opinions from Icelandic authors on the matter. These opinions covered, *inter alia*, constitutional aspects.

21. The first reading took place in Parliament on 8 and 9 April 2019. Subsequently, the matter was referred to the Foreign Affairs Committee of the Parliament, where it is now. The Foreign Affairs Committee has launched a consultation process and invited around 130 stakeholders to submit to the Committee their views on the matter before the end of April 2019. Anyone interested can submit their view on the matter

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## **II. Which procedure would that trigger?**

### **1. General**

22. The deliberations of the EEA Joint Committee were concluded with Decision No 93/2017 of 5 May 2017 to incorporate the Third Energy Package into the EEA Agreement by amending its Annex IV (Energy). To my knowledge it has not happened before that a Contracting Party wishes to take the case back to the EEA Joint Committee in order to push through a different adaptation text two years later. Whether the EEA Joint Committee would open the dossier again is doubtful. But even if it were to do that, it is unlikely that the text agreed on 5 May 2017 would be amended. If Iceland does not lift its constitutional requirements, the Article 102(5) EEA procedure will in all probability start (Article 103(2) EEA).

23. Article 102 EEA reads as follows:

“1. In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement. To this end, the Community shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee.

2. The part of an Annex to this Agreement which would be directly affected by the new legislation is assessed in the EEA Joint Committee.

3. The Contracting Parties shall make all efforts to arrive at an agreement on matters relevant to this Agreement. The EEA Joint Committee shall, in particular, make every effort to find a mutually acceptable solution where a serious problem arises in any area which, in the EFTA States, falls within the competence of the legislator.

4. If, notwithstanding the application of the preceding paragraph, an agreement on an amendment of an Annex to this Agreement cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation. Such a decision shall be taken at the latest at the expiry of a period of six months from the date of referral to the EEA Joint Committee or, if that date is later, on the date of entry into force of the corresponding Community legislation.

5. If, at the end of the time limit set out in paragraph 4, the EEA Joint Committee has not taken a decision on an amendment of an Annex to this Agreement, the affected part thereof, as determined in accordance with paragraph 2, is regarded as provisionally suspended, subject to a decision to the contrary by the EEA Joint Committee. Such a suspension shall take effect six months after the end of the period referred to in paragraph 4, but in no event earlier than the date on which the corresponding EC act is implemented in the Community. The EEA Joint Committee shall pursue its efforts to agree on a mutually acceptable solution in order for the suspension to be terminated as soon as possible.

6. The practical consequences of the suspension referred to in paragraph 5 shall be discussed in the EEA Joint Committee. The rights and obligations which individuals and economic operators have already acquired under this Agreement shall remain. The Contracting Parties

shall, as appropriate, decide on the adjustments necessary due to the suspension.”

24. I will not deal with paragraph 6 of Article 102 EEA since it has no relevance in the given context.

25. As far as the history of Article 102 EEA is concerned, the 1993 EEA Commentary is revealing, the main author of which is the most important founding father of the EEA Agreement, and subsequently the Swedish Judge at the EFTA Court, *Sven Norberg*.<sup>4</sup> Important contributions to the interpretation of Article 102 EEA have also been written by the former EFTA Assistant Secretary-General *Georges Baur*.<sup>5</sup> *Knut Almestad*, another founding father of the EEA Agreement and the first President of ESA - from 1993 to 2001 - is another contemporary witness who has published on Article 102 EEA.<sup>6</sup> The provision has, moreover, been dealt with in the 2018 Norwegian EEA Commentary.<sup>7</sup>

26. That the EFTA States have reached this sophisticated solution must be regarded as a success. The Community originally favoured an automatic termination clause on the template of the EEC-Switzerland Direct Insurance Agreement from 10 October 1989.<sup>8</sup> Article 39(8) of that treaty provides that if the respective Joint Committee does not reach agreement on the decisions to be taken in case of an amendment of legislation within six months of the date on which the matter has been referred to it, the Agreement shall be regarded

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<sup>4</sup> *Sven Norberg/Karin Hökborg/Martin Johansson/Dan Eliasson/Lucien Dedichen*, *The European Economic Area, EEA Law. A Commentary on the EEA Agreement*, Stockholm: CE Fritzes AB (Kluwer) (1993).

<sup>5</sup> *Decision-Making Procedure and Implementation of New Law*, in: Baudenbacher, Ed., *The Handbook of EEA Law*, 2016, 45 ff.; Id., *Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures*, in: Baudenbacher, Ed., *The Handbook of EEA Law*, 2016, 69 ff.

<sup>6</sup> *Reflections on the Postal Services Directive and the EEA Review*, in: EFTA Court, Ed., *Judicial Protection in the European Economic Area*, Stuttgart 2012, 77 ff.; Id., *The Notion of ‘Opting Out’*, in: Baudenbacher, Ed., *The Handbook of EEA Law*, 2016, 85 ff.

<sup>7</sup> *Marthe Kristine Fjeld Dystland/Fredrik Bøkman Finstad/Ida Sørebrø*, in: Arnesen et al., *Agreement on the European Economic Area. A Commentary*, Baden-Baden 2018.

<sup>8</sup> *Agreement between the European Economic Community and the Swiss Confederation on Direct Insurance Other than Life Assurance*, OJ L 205, 27.7.1991, p. 3-44.

as ended on the day the legislation in question is implemented. For the sake of completeness, it must be noted that the same drastic rule is also contained in Article 11(3) of the Schengen Agreement concluded by Iceland and Norway with the Council of the EU in 1999.<sup>9</sup>

27. The EEA Contracting Parties have taken further steps to avoid the suspension of EEA law. According to Article 102(3) EEA, they

“shall make all efforts to arrive at an agreement on matters relevant to this Agreement. The EEA Joint Committee shall, in particular, make every effort to find a mutually acceptable solution where a serious problem arises in any area which, in the EFTA States, falls within the competence of the legislator”.

28. In this respect, *Knut Almestad* has emphasised:

“that the EFTA States, albeit having retained their full legislative powers, have taken upon themselves a legal obligation under international law to make all efforts to add new, relevant EU legislation to the Agreement”.<sup>10</sup>

29. According to Article 102(4) EEA, if an agreement on an amendment can nonetheless not be reached,

“the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision

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<sup>9</sup> Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis, OJ L 176, 10.7.1999, p. 36-62.

<sup>10</sup> Reflections on the Postal Services Directive, loc. cit., 79 f., emphasis added.

necessary to this effect, including the possibility to take notice of the equivalence of legislation”.<sup>11</sup>

## 2. Two cases so far under Article 102(4) EEA

30. In two cases Article 102(4) EEA has become relevant. They relate to the incorporation of the second Anti-Money Laundering Directive (Directive 2001/97/EC) and the Citizenship Directive (Directive 2004/38/EC). In both cases, a solution was found without Article 102(5) being triggered.<sup>12</sup>

## 3. The Postal Services Directive *intermezzo*

31. In 2011, the Norwegian government declared that the country wouldn't implement the EU's Postal Service's Directive (2008/6/EC) about competitiveness for letter mail weighting less than 50 grams.<sup>13</sup> The announcement caused quite a stir. On 12 December 2012, the Council of the European Union used this opportunity in order to make some general statements with respect to the purpose of Article 102 EEA. The Council expressed considerable frustration at the way in which new EU law with EEA relevance is incorporated into the EEA Agreement. It stated, *inter alia*:

“The procedure in case of disagreements on the incorporation of new EU acquis into the EEA Agreement is governed by its Article 102. Under this provision, contracting parties are to make every effort to find a mutually acceptable solution when such a problem arises. If an agreement cannot be reached, the EEA Joint Committee may, within a period of six months following the referral of the problem, take any decision necessary to maintain the good functioning of the EEA Agreement, including the possibility to take notice of the equivalence of

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<sup>11</sup> Emphasis added.

<sup>12</sup> See *Georges Baur*, Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures, *loc. cit.*, 73.

<sup>13</sup> <https://www.newsenglish.no/2011/05/23/historic-no-to-an-eu-directive/>.

legislation. If within an additional period of six months, no decision on an amendment of an Annex to the EEA Agreement has been taken by the Joint Committee, the part of the Annex to the Agreement which would be directly affected by the new legislation would be regarded as provisionally suspended. In order to effectively oppose any attempt by an EEA EFTA partner to incorporate EEA-relevant EU legislation in a selective manner, the EU side should, evidently, ensure that the part of the Annex to be ultimately suspended would impact negatively on the partner's interests, rather than merely suspend parts of the Agreement that the contravening partner wishes to ignore.

The procedure under Article 102 has never been invoked, let alone followed to its point of conclusion, since the EEA Agreement entered into force. On the one hand, this might be considered a success because the potential consequences of its possible use have acted as a deterrent. On the other hand, it has caused lengthy negotiations and unproductive situations of public political controversy, which have often seen media reports in the EEA EFTA countries concluding to an alleged imposition from Brussels. Moreover, despite the provisions in the EEA Agreement related to the resolution of disagreements on the incorporation of new EU acquis, there are a number of unresolved cases"<sup>14</sup>.

32. As *Knut Almestad* noted, the Norwegian opposition to the inclusion of the Postal Services Directive in the EEA Agreement was not based on the lack of EEA relevance. In fact, the directive constituted the last step of a liberalisation process which was already part of the EEA Agreement.<sup>15</sup> Rather, the Norwegian "no" fell

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<https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017626%202012%20INIT>, 9 f., emphases added; see also the Commission Staff Working Document "A review of the functioning of the European Economic Area" of 7 December 2012, SWD(2012) 425 final, [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/swd/2012/0425/COM\\_SWD\(2012\)0425\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2012/0425/COM_SWD(2012)0425_EN.pdf).

<sup>15</sup> Reflections on the Postal Services Directive and the EEA Review, loc. cit. 80.



“into a category which was specifically foreseen by the negotiators and somewhat disrespectfully referred to as ‘parliamentary accidents’. In the language of Article 102 EEA, this is when a serious problem arises in any area which in the EFTA States falls within the competence of the legislator. The EFTA States might therefore expect a rather matter-of-fact process when the EEA Joint Committee now shall search for a remedy but, given the fact that a liberalization measure is at stake, it becomes difficult to envisage any other outcome than the provisional suspension of the affected part of the Agreement, whatever that may be. Article 102 EEA further provides that acquired rights of individuals and economic operators shall not be affected.

All in all, this is a very constructive way to handle problems which, although being capable of causing incongruities as regards market access and conditions of competition, are accepted consequences of the general system of the Agreement and its constitutionality in the EFTA States.

However, it becomes very important to recognize that Article 102 EEA is very far from any use of language which might indicate that the EFTA States have a general right to veto or to reserve themselves against the inclusion of relevant new legislation. On the contrary, they have a duty to contribute to this taking place in an expedient manner. There is certainly nothing in the Agreement which can support the notion that there exists a right of veto for the EFTA States which can be evoked at will, regardless of the circumstances. That would indeed be incompatible with the general principle of loyalty of the Agreement. For that reason the political semantics which have developed during recent years can hardly contribute to confidence-building and be apt to further co-operation and future negotiations<sup>16</sup>”.

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<sup>16</sup> *Knut Almestad*, Reflections on the Postal Services Directive and the EEA Review, loc. cit. 80, emphasis added.

33. As regards *Knut Almestad's* remark that the directive constitutes the last step of a liberalisation process which is already part of the EEA Agreement, there is an obvious parallel to the case at hand.

34. Norway gave up its resistance against the incorporation of the Third Postal Services Directive into the EEA Agreement in 2014. Norway's change of attitude was a consequence of the fact that a new government had taken over on 16 October 2013 headed by the leader of the Conservative Party, *Erna Solberg*. When European Commission President *José Manuel Durão Barroso* met the new Norwegian Prime Minister on 3 December 2013 in Brussels, he welcomed the

“announcement to lift Norway's reservation vis-a-vis the incorporation of the Third Postal Directive into the EEA Agreement” as “an encouraging signal”<sup>17</sup>.

35. However, a debate was still ongoing in the Icelandic Parliament.<sup>18</sup> In fact Iceland has not yet given its consent to the incorporation of that directive into the EEA Agreement. A bill of law was presented to the Parliament recently.<sup>19</sup>

#### **4. No case so far under Article 102(5) EEA**

36. Article 102(5) EEA describes the consequences, if six months from the date of the meeting of the EEA Joint Committee at which the new EU law act stands for the first time on the agenda no agreement to amend an Annex of the EEA Agreement has been reached. *Norberg et al.* state in this regard:

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<sup>17</sup> Statement by President Barroso following his meeting with Prime Minister Erna Solberg of Norway, [http://europa.eu/rapid/press-release\\_SPEECH-13-1006\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-1006_en.htm).

<sup>18</sup> Annual Report of the EEA Joint Committee 2014. The Functioning of the EEA Agreement (Article 94(4)), point 26.

<sup>19</sup> <https://www.althingi.is/altext/pdf/149/s/0293.pdf>.

“In such a case the worst thing that could happen would be that the part of the Annex directly affected by the new [...] [Union] legislation is regarded as provisionally suspended.”<sup>20</sup>

37. *Norberg et al.* underline that

“it is always possible for the Contracting Parties to decide that the suspension shall not take effect. This possibility is important, for example in order to avoid cases where the effects of a suspension would be more detrimental to the good functioning of the Agreement than the effects of two different sets of rules, the new Community internal rules and the ‘old’ EEA rules, being applicable in a specific field”<sup>21</sup>.

38. Some have contended that the scope for suspension may be rather broad<sup>22</sup>. However, this interpretation fails to take account of the fact that Article 102(5) EEA contains an expression of the proportionality principle. *Georges Baur* assumes that it is unlikely that a complete annex will be suspended, but only the part directly concerned. The author argues with the principle of *favour contractus*, which in his view is inherent in EEA law. According to this maxim it is preferable to seek the maintenance rather than the termination of a given treaty. *Georges Baur* points to Article 112(2) EEA which states that

“safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement”<sup>23</sup>.

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<sup>20</sup> *Norberg et al.*, 143 f.

<sup>21</sup> *Norberg et al.*, 144,

<sup>22</sup> *Jóhanna Jónsdóttir*, Can the EU Make Iceland Comply? Paper submitted to Workshop 7 at the ECPR Joint Sessions in Rennes, April 2008, pages 13 and 14.

<sup>23</sup> Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures, loc. cit., 72.

39. Such an analogy appears, in principle, justified.<sup>24</sup>

40. *Norberg at al.* conclude that in light of the effects of a suspension

“on all Contracting Parties, it would seem obvious that it would only be in exceptional circumstances that the Contracting Parties would let the situation go so far that a provisional suspension under Article 102(5) would take effect.”<sup>25</sup>

41. That is why the Contracting Parties have stated in an “Agreed Minute Ad Article 111 EEA” that

“suspension is not in the interest of the good functioning of the Agreement and all efforts should be made to avoid it”<sup>26</sup>.

42. 25 years later, *Dystland/Finstad/Sørebrø* have stated in the Norwegian EEA Commentary:

“The practical consequences of the suspension shall be discussed in the EEA Joint Committee and the Contracting Parties shall, as appropriate, decide on necessary adjustments to the suspension. This might for example entail arranging for other parts of the Annex affected to continue to apply. There are no actual examples of what the consequences of a suspension are, as suspension of a part of an annex under Article 102(5) has never occurred. At the time of the entry into force of the Agreement, it was assumed that the possibility of suspension under Article 102(5) would only be considered in exceptional circumstances. After more than two decades, it is evident that this

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<sup>24</sup> Further support for this understanding may be found in *Niels Fenger/Michael Sánchez Rydelski/Titus Van Stiphout*, European Free Trade Association (EFTA) and European Economic Area (EEA), Kluwer (2005), paragraphs. 421 and 424.

<sup>25</sup> *Loc. cit.*, 146.

<sup>26</sup> The Agreed Minute refers to Article 111 EEA, but it also applies to Article 102(5) EEA; see *Norberg et al.*, 146, footnote 54.

assumption was fair. Even in the two known cases where Art. 102(4) was applied, continued discussions beyond the deadline were chosen over the option of invoking a suspension.”<sup>27</sup>

43. In view of the serious consequences of the failure to find a solution at the end of the procedure, i.e. the suspension of part of an Annex to the EEA, it is necessary to determine the start of the procedure.

44. The Contracting Parties are obliged to take a decision on the inclusion of an EU act within “six months” of the date of referral to the EEA Joint Committee. In practice, also from the perspective of legal certainty, it seems insufficient that a particular matter is merely “discussed” in the EEA Joint Committee. A Contracting Party must explicitly indicate that it assumes that the 6-month period has started. In fact, in both cases, where the discussions in the EEA Joint Committee reached the Article 102(4) EEA stage, the EU explicitly stated that the six-month period referred to in Article 102(4) EEA had started to run.<sup>28</sup> According to my instructions, such a declaration has not been made by the EU in the case at hand.

### **III. Which implications would that have for the EEA Agreement and the other EEA/EFTA States? Which implications would it have in the short term and which in the long term?**

#### **1. Short term implications**

##### **(1) Preliminary remarks: Lack of precedent**

45. Since the Article 102(5) EEA procedure has never been used in the 25 years since the EEA Agreement was concluded, there is no precedent. If the

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<sup>27</sup> Article 102, in: Arnesen et al., Agreement on the European Economic Area. A Commentary, Baden-Baden 2018, paragraph 41, emphasis added.

<sup>28</sup> *Georges Baur*, Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures, loc. cit., 71.

Joint Committee were to refuse to take up the matter again and Iceland were to stick to its constitutional requirements, the relevant protagonists would therefore have to break new ground. This in itself entails uncertainties and imponderables.

46. Based on my experience as a Judge and President of the EFTA Court and as an advisor to the parliaments and governments of the United Kingdom and Switzerland in matters of EEA law and policy, I will discuss below the points of argument that I believe may be relevant.

## (2) Decisive role of the EU

47. The EEA Agreement does not contain a definition of what is meant by the affected part of the Annex concerned. One can certainly argue that there must be no overshooting of the mark. I explained above that the treaty's drafters wanted to avoid just that.<sup>29</sup> I may also point out that the 2012-2013 White Paper of the Norwegian Government "*The EEA Agreement and Norway's other agreements with the EU*" has deduced from a joint reading of Article 102(2) and (5) EEA that

"only the part of the relevant Annex that is directly affected can be suspended."<sup>30</sup>

48. In the same document, the Norwegian Government has, however, also underlined that:

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<sup>29</sup> Supra, paragraphs 36 ff.

<sup>30</sup> Meld. St. 5 (2012–2013) Report to the Storting (White Paper), <https://www.regjeringen.no/contentassets/fc5aa7428fd04f23af2a251d1c8c6710/en-gb/pdfs/stm201220130005000engpdfs.pdf>, 25.

“[i]n practice, it is up to the EU to decide whether a reservation by an EFTA state should result in parts of the EEA Agreement being provisionally suspended or not”.<sup>31</sup>

49. One may even assume that the EU will have the decisive say as to which parts of the annex shall be provisionally suspended. It is also clear that political considerations would play a role. Finally, it should not be forgotten that a decision on the provisional suspension of EEA law is not subject to review.

### **(3) Factors that may be taken into account in the case at hand**

#### **(i) Significance of the legislation in question**

50. A first factor that presumably will be taken into account is the significance of the legislation whose incorporation into EEA law was prevented or, in other words, the degree of distortion of the EEA internal market which results from the lack of incorporation. This follows from the very concept of a homogeneous and dynamic EEA, as defined in many provisions of the Agreement.

51. In that regard, one must say that energy policy is, also from a global perspective, of paramount importance for the EU. The Third Energy Package is an important intermediate step in a fast evolving sector. In February 2015, the Commission set out a respective vision based on five pillars.<sup>32</sup> There has been talk about setting up an “Energy Union”. From the many relevant speeches given by European leaders, I may cite that of EU Commissioner for Energy *Günther Oettinger* of 6 May 2014 entitled “An integrated European energy

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<sup>31</sup> Meld. St. 5 (2012–2013) Report to the Storting (White Paper), loc. cit., 25, emphasis added.

<sup>32</sup> See, for example, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551310/EPRS\\_BRI\(2015\)551310\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551310/EPRS_BRI(2015)551310_EN.pdf).

market is more important than ever. The European Parliament adopted a “*Clean Energy for All Europeans Package*” on 26 March 2019.<sup>33</sup>

52. In view of the foregoing, it cannot be assumed that the EU would regard a non-acceptance of the Third Energy Package by the EEA/EFTA States as trivial, quite the opposite. It is therefore unlikely that the scope of a suspension would be particularly narrowly defined. On the contrary, it must be assumed that the EU, which in the recent past has increasingly relied on the use of agencies, will prompt a serious response.<sup>34</sup>

(ii) EEA/EFTA States’ input

53. The EEA/EFTA States have been able to provide input to the Third Energy Package in the decision shaping phase, i.e. on the expert level, and they have done so. After the adoption of the new legislation in the EU, they were able to negotiate important adaptations in the Joint Committee, in particular as regards the safeguarding of the EEA two pillar system, and the EU has shown considerable accommodation. This will be taken into account when a decision is made on the scope of provisional suspension.

54. In particular, Iceland has received assurances from the European Commission concerning its sovereign powers. These assurances are also legally relevant and against the backdrop of 25 years of practice, it is highly unlikely that ESA will question them at any stage in the future.

55. Whether the EU would be guided by the principle of *favour contractus*<sup>35</sup> under these circumstances is an open question.

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<sup>33</sup> [http://europa.eu/rapid/press-release\\_IP-19-1836\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1836_en.htm).

<sup>34</sup> See already the Council Conclusions of 12 December 2012, *supra*, II. 3.

<sup>35</sup> *Supra*, paragraph 38.



(iii) Iceland's contradictory behaviour

56. Iceland neither protested against the qualification of the Third Energy Package as being of “EEA relevance” within the meaning of Article 102(1) EEA nor prevented the EEA Council from concluding in November 2014 that the integration of Third Energy Package into the EEA Agreement needed to be accelerated. It has furthermore not averted the EEA Joint Committee from deciding on the incorporation of the adapted Third Energy Package into the EEA Agreement in 2017. Nevertheless, there are those who want Iceland to seek to have the package incorporated into the EEA Agreement with a different adaptation text or even that Iceland be completely exempted from the adoption of the package at this late stage of the procedure.

57. This *modus operandi* could amount to something that is comparable to estoppel. Under the doctrine of estoppel, a person is prevented from taking a possible legal position because he/she has bound him/herself by previous behaviour and a change would lead to harm others who trusted in it. Estoppel is a legal instrument in the Common Law, but it is also a concept of international law.<sup>36</sup> In the Civil Law, the functional equivalent of estoppel would be abuse of right in the form of “*venire contra factum proprium*” (contradictory behaviour). It is to be noted that according to established EFTA Court case law the prohibition of abuse of rights is part of EEA law.<sup>37</sup>

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<sup>36</sup> See, for example, *Thomas Cottier/Jörg Paul Müller, Estoppel*, Max Planck Encyclopaedia of Public International Law, 2007.

<sup>37</sup> EFTA Court E-15/11 *Arcade Drilling AS and The Norwegian State, represented by Tax Region West*, 2012 EFTA Court Report, 676, paragraphs 85 ff.; Joined Cases E-3/13 and E-20/13 - *Fred. Olsen and Others v the Norwegian State*, [2014] EFTA Ct. Rep. 400, paragraphs 164 ff.; E-28/15 *Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board*, [2016] EFTA Ct. Rep. 575, paragraph 80; E-15/16 *Yara International ASA and the Norwegian Government, represented by the Ministry of Finance*, [2017] EFTA Ct. Rep. 434. 47 ff.; see the analysis by Laura Melusine Baudenbacher, *Vom gemeineuropäischen zum europäischen Rechtsmissbrauchsverbot*, Ph.D thesis University of Zurich 2016, III. Teil A.

(iv) Inconsistency of Iceland's eventual disagreement

58. Bearing in mind ACER, it must be acknowledged that EU agencies do not easily fit into the two-pillar system of the EEA Agreement. However, the EFTA States have succeeded in negotiating adjustments that have allowed a takeover in other fields without harming the two pillar structure. The litmus test was made when it came to the incorporation of the EU's new financial architecture into the EEA Agreement.

59. On 30 September 2016, ESA has published the following text on its website under the heading "First package of acts on European Financial Supervisory Authorities incorporated into EEA Agreement":

"The EEA Joint Committee has today adopted nine decisions by written procedure incorporating 31 legal acts into the EEA Agreement, all relating to the European financial supervisory framework.

Incorporating the regulations establishing the European Financial Supervisory Authorities (ESAs) into the EEA Agreement is key to safeguarding a homogenous Internal Market in Financial Services throughout the European Economic Area. The decisions adopted by the EEA Joint Committee extend the post-crisis institutional structure outlined below to the EEA EFTA States, in part by granting new powers to the EFTA Surveillance Authority (the Authority). They allow for the incorporation of numerous acts aimed at rectifying flaws in the pre-crisis financial regulatory framework, and secure continued access for financial undertakings from the EEA EFTA States to the Internal Market.

**Regulatory framework**

The ESAs – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) – started operating in 2011. Their main aim is to improve the functioning of the Internal Market by ensuring appropriate, efficient and harmonised European regulation and

supervision. The European Systemic Risk Board (ESRB) was established alongside the three ESAs and is responsible for macroprudential oversight in the EU. Importantly, the national supervisory authorities remain in charge of daily supervision of financial undertakings and markets, except for some types of highly specialised undertakings that are cross border in nature. This institutional framework represents the structural backbone of the European regulatory response to the global financial crisis.

### **Role of the ESAs**

The powers of the ESAs include the drafting of technical standards, mediation in cases of conflict between national supervisors, the possibility to ban certain financial products to protect consumers on financial markets, and coordination in emergency situations. In certain instances, they can also issue binding decisions to national authorities and market participants.

### **Role of the Authority**

The Joint Committee Decision (JCD) incorporating the regulations establishing the ESAs and related legal acts adapt the EU framework to the two-pillar structure of the EEA Agreement, following a political agreement reached between the Finance Ministers of Iceland, Liechtenstein, Norway and the EU Member States in October 2014. They agreed that, in accordance with the two-pillar structure of the EEA Agreement, the Authority would take formal decisions addressed to the EEA EFTA competent authorities and market operators in the EEA EFTA States, mirroring the role of the ESAs vis-à-vis the EU Member States. The ESAs will continue to have a non-binding role vis-à-vis the EEA EFTA States, whilst supervisory authorities of the EEA EFTA States and the Authority will be able to participate fully in the work of the ESAs.

## From political agreement to incorporation

In March 2016, following extensive negotiations between the EFTA States and EU on how to transform the political agreement into legal texts, the EEA EFTA States submitted the nine draft JCDs including 31 legal acts to the European External Action Service for the incorporation of this regulatory framework into the EEA Agreement. In addition to the three regulations establishing the ESAs and the ESRB, the EEA EFTA States submitted JCDs regarding credit rating agencies, over-the-counter derivatives, central counterparties and trade repositories, short-selling and credit default swaps, and alternative investment fund managers.”<sup>38</sup>

60. Were Iceland to take the opposite view today as regards ACER, it exposed itself to the accusation of inconsistency.

61. The principle of consistency may be viewed as some sort of a general legal principle. Consistency both in legislation and application of the law is a prerequisite for legal certainty and predictability; it is part of the rule of law. There are voices which even speak of a general principle of law in EU law.<sup>39</sup> Whether general or not, the principle should also be recognised in EEA law.

62. *Skúli Magnússon* who has submitted a legal opinion on the constitutional issues of the Third Energy Packet has stated that the nature and scope of the functions of ESA

“do not differ from what has previously been considered to be compatible with the Constitution”.<sup>40</sup>

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<sup>38</sup> <https://www.efta.int/EEA/news/First-package-acts-European-Financial-Supervisory-Authorities-incorporated-EEA-Agreement-499496>, emphasis added.

<sup>39</sup> *Eberhard Schmidt-Aßmann*, *Kohärenz und Konsistenz des Verwaltungsrechtsschutzes*, Tübingen 2015.

<sup>40</sup> [https://www.althingi.is/altext/pdf/149/fylgiskjol/s1237-f\\_XII.pdf](https://www.althingi.is/altext/pdf/149/fylgiskjol/s1237-f_XII.pdf), unofficial translation.

63. According to my instructions, *Skúli Magnússon* has also submitted a legal opinion regarding the incorporation of the EU ESAs and the ESRB into the EEA Agreement.

64. It can, according to him, even be argued that the delegation of powers under the Third Energy Package is more limited than in the case of financial supervision. As far as I can see, none of the Icelandic authors of legal opinions considers that the EEA two pillar system is negatively affected by ACER. *Stefán Már Stefánsson* and *Friðrik Árni Friðriksson Hirst* imply that this amounts to a rubber-stamp arrangement where ACER is de facto taking the decisions. This is discussed in detail by *Skúli Magnússon* who argues that the influence of the EFTA Pillar rather boils down to their political fire power than legal deficiencies. Hence Skúli considers the adaptation in question to confirm with “equality and reciprocity in international relations” as regards the transfer of Icelandic Sovereign Powers to ESA/ACER.<sup>41</sup>

65. From the perspective of the interests of the Icelandic people, the following may be added. What has been said with regard to the delayed incorporation of the package of regulations concerning financial agencies into the EEA Agreement holds, at least *mutatis mutandis*, also true for the Third Energy Package, namely that suspending the respective Annex IX

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<sup>41</sup> *Friðrik Árni Friðriksson Hirst/Stefán Már Stefánsson*, Opinion on constitutional questions relating to the transfer of state authority to the EU / EFTA institutions in connection with the EU's Third Energy Package, dated 19 March 2019, Annex XIII to proposal for a Parliamentary Resolution on the acceptance of the decision of the EEA Joint Committee No 93/2017 amending Annex IV (Energy) to the EEA Agreement (Third Energy Package), parliamentary document 1237, item 777, 149th legislative session, webpage: [www.althingi.is/altext/pdf/149/fvlgiskiol/s1237-f\\_XIII.pdf](http://www.althingi.is/altext/pdf/149/fvlgiskiol/s1237-f_XIII.pdf); *Skúli Magnússon*, Opinion on constitutional questions regarding implementation of Articles 7, 8 and 9 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, dated 15 March 2019, Annex XII to proposal for a Parliamentary Resolution on the acceptance of the decision of the EEA Joint Committee No 93/2017 amending Annex IV (Energy) to the EEA Agreement (Third Energy Package), parliamentary document 1237, item 777, 149th legislative session, webpage: [www.althingi.is/altext/pdf/149/fvlgiskiol/s1237-f\\_XII.pdf](http://www.althingi.is/altext/pdf/149/fvlgiskiol/s1237-f_XII.pdf)

“would have led to major negative effects for the financial sectors in the EFTA States, and in a suspension scenario, they would not have been helped in any significant degree by applying the Main Part of the Agreement”.<sup>42</sup>

#### (4) Current political climate

##### (i) Centrifugal forces in the EU

66. Since the 2008/2009 financial crisis, there has been talk about centrifugal forces in the European Union. Then German Foreign Minister *Frank Walter Steinmeier*, today President of the Federal Republic of Germany, said as early as 5 July 2015 that

“strong centrifugal forces are chipping away at Europe’s foundations”.

67. In that regard, *Frank Walter Steinmeier* referred to:

“the Greek crisis, the unresolved problem of refugees and migrants, as well as the difficult discussions with Britain, which is struggling to define its relationship with the EU”.<sup>43</sup>

68. In the meantime, the rift between Western and Eastern Europe has become a central topic. It must also be mentioned that the founding EEC-State Italy, which was once extremely EU-friendly, has distanced itself to a great extent from political integration. The Austrian population voted in favour of the country’s entry into the EU in 1994 with a record result of 66.6%. In the meantime, enthusiasm has cooled off considerably here as well.

69. By far the most important centrifugal movement has been the Brexit decision of the British people of 23 June 2016. Whether Brexit is good for

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<sup>42</sup> *Dystland/Finstad/Sørebrø*, Article 102, loc. cit., paragraph 44.

<sup>43</sup> <https://www.auswaertiges-amt.de/en/newsroom/news/150706-tagesspiegel/273118>.

Icelanders as then President *Ólafur Ragnar Grímsson* said in 2016 remains open. But it cannot be denied that the decision of the British people is

“the most serious setback the leadership of the European Union has seen for a very long time”.<sup>44</sup>

70. After Brexit, the free trade oriented northern EU Member States will lose their blocking minority under the EU’s system of qualified majority voting. These countries were used to look to London when it came to dealing with fundamental questions of economic policy. They feel “orphaned” by Brexit and have some time ago formed an alliance within the EU, the so-called “New Hanseatic League”.<sup>45</sup>

71. I will argue that the dispute over the modalities of a Brexit has led to a clarification of the crucial questions of surveillance and judicial control of non-EU states that want to have close economic relations with the EU.<sup>46</sup>

72. As indicated, political considerations would play a role in the EU’s decision pursuant to Article 102(5) EEA. It is also clear that the overall political climate in Europe and in the world would have an impact. Firstly, there is a feeling in Brussels that the EU should be reluctant to give in to special requests of (Member and non-member) States, but that the Union must be tough in order to show the British that they are about to make a mistake with Brexit. Secondly, the EU is determined to end Switzerland’s special situation, which it largely considers, rightly or wrongly, to be a permanent cherry-picking process. Thirdly, the EU may be tempted to close ranks (including the EEA ranks) to meet the challenges of President Trump’s United States of America, and President Xi Jinping’s China. For these reasons too, Iceland cannot expect that

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[https://icelandmonitor.mbl.is/news/politics\\_and\\_society/2016/06/25/brexit\\_is\\_good\\_news\\_says\\_president\\_of\\_iceland/](https://icelandmonitor.mbl.is/news/politics_and_society/2016/06/25/brexit_is_good_news_says_president_of_iceland/).

<sup>45</sup> See *Carl Baudenbacher*, The EEA, Brexit and a New Hanseatic League, in: *Stefánsbok*, Rit til heiðurs Stefáni Má Stefánssyni, Reykjavík 2018, 371 ff.

<sup>46</sup> *Infra*, paragraphs 103 and 104.

any unilateral action with regard to the Third Energy Package will have a sympathetic hearing.

73. The examples of the United Kingdom and Switzerland are particularly revealing. Both countries were founding members of EFTA in 1960. The United Kingdom joined the EEC in 1973, Switzerland refused to join the EEA on the EFTA side in 1992 and has since shaped its relationship with the EU through sectoral bilateral agreements without supranational institutions (i.e. without a surveillance authority and a court of justice).<sup>47</sup> Since 2008, the EU has called on Switzerland to recognise a supranational monitoring and judicial mechanism and to conclude a “framework agreement” with the EU which should function as an institutional umbrella for the most important sectoral agreements. In 2013, the Swiss Federal Council (Government) proposed the ECJ as the court which would decide on conflicts with the EU. The government did not dare to say this openly, but it is clear that this was meant to be a point of no return on the road to future EU membership. Negotiations on the conclusion of a so-called framework agreement started in 2014. However, the internal political resistance in Switzerland against the ECJ was too great. The EU then (in autumn 2017) brought into play the dispute resolution mechanism contained in the Association Agreements with the three post-Soviet states of Georgia, Moldova and Ukraine.<sup>48</sup> According to these agreements, conflicts between the EU and one of the three states are to be decided pro forma by an arbitral tribunal. Each side can unilaterally invoke the arbitration panel. The crucial feature is, however, that the arbitration tribunal must always involve the ECJ, the court of the other side, when EU law or agreement law identical in substance to EU law is at issue. In fact, the draft Institutional Agreement EU-

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<sup>47</sup> See with regard to Switzerland’s position in European integration *Carl Baudenbacher*, *Judicial Independence. Memoirs of a European Judge*, 2019. Chapter 30.

<sup>48</sup> [https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830\(02\);https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02);https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0830(01)&from=en);  
[https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc\\_155103.pdf](https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf)



Switzerland<sup>49</sup> obliges the arbitration panel to seize the ECJ whenever EU law is “implied”. The term “implied” (in the original French text “*implique*”) in Article 4(3) of the draft framework agreement covers both the law of the Union itself and the law derived from it which is identical in content. In an expert opinion of 8 February 2019 for the Committee of Economic Affairs and Taxation of the Swiss National Council (the lower house of Parliament), I have come to the conclusion that the arbitral tribunal has practically no discretion in deciding to bring such a matter before the ECJ<sup>50</sup>. I have thus characterised the Ukraine-style arbitration tribunal as a fake arbitration panel due to its inherent lack of independence.

74. Until the Brexit referendum of 23 June 2016, the EU showed no particular haste in the negotiations with Switzerland. After the referendum, however, the EU increased the pace and increased the pressure. In recent months, Switzerland has been told quite clearly that it must accept the Ukraine-style arbitration tribunal. Otherwise its industry would suffer disadvantages in terms of access to the internal market.

75. In December 2017, the EU granted Switzerland’s stock exchanges access to its internal market. However, the access decision was granted for one year only. Other venues such as the U.S., Hong Kong and Australia were recognised without such a limitation. A European Commission official openly stated that the limitation was the “political consequence” of the stalled negotiations over the framework agreement. The official said straightforwardly:

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<sup>49</sup> [https://www.dfae.admin.ch/dam/dea/fr/documents/abkommen/Accord-inst-Projet-de-texte\\_fr.pdf](https://www.dfae.admin.ch/dam/dea/fr/documents/abkommen/Accord-inst-Projet-de-texte_fr.pdf).

<sup>50</sup> See my legal opinion for the Committee for Economic Affairs and Taxation of the Swiss National Council of 8 February 2019, <https://www.parlament.ch/centers/documents/de/rechtsgutachten-professor-carl-baudenbacher.pdf>

“There is dissatisfaction that no progress has been made on the institutional talks. Freedom for financial services are not a human right.”<sup>51</sup>

76. Swiss President *Doris Leuthard* called the EU’s decision “discriminatory”.<sup>52</sup>

77. The Swiss negotiators informally agreed to the pro forma arbitration panel in spring 2018 at the behest of the Foreign Ministry. The EU then presented the Ukraine model of dispute resolution to the British government. The latter accepted it not only as part of the EU-UK Withdrawal Agreement, but also as part of the Political Declaration, which is relevant for Britain’s future relationship with the EU.<sup>53</sup> The House of Commons has rejected the draft Withdrawal Agreement three times. But it cannot be ruled out that it will be put to a vote again by the government. For the sake of completeness, I add that if Britain were to leave the EU without a deal or if it were to opt for the so-called “Canada model”, its industry would lose access to the EEA internal market.<sup>54</sup>

78. On 23 November 2018, the EU-Switzerland negotiations were terminated<sup>55</sup>. On 7 December 2018, the Swiss Federal Council (Government) decided not to sign the draft framework agreement despite considerable pressure from the EU. Instead, the draft was sent for consultation. It is inherent in a consultation that it is open-ended. The European Commission declared

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<sup>51</sup> *Mehreen Khan*, EU sparks Swiss anger with temporary market access deal, <https://www.ft.com/content/e705c25e-ce90-3854-b09c-03459a53e124>.

<sup>52</sup> <https://www.thelocal.ch/20171222/switzerland-in-new-row-with-eu-over-discriminatory-market-access>.

<sup>53</sup> *Carl Baudenbacher*, UK Government White Paper shows unrealistic hopes, <https://www.prospectmagazine.co.uk/politics/former-european-court-president-uk-government-white-paper-shows-unrealistic-hopes>

<sup>54</sup> See, for example, <https://www.ceps.eu/publications/theresa-may%E2%80%99s-brexite-model-many-questions-not-least-%E2%80%98whv-leave%E2%80%99>.

<sup>55</sup> [https://www.fdfa.admin.ch/dam/dea/fr/documents/abkommen/Accord-inst-Projet-de-texte\\_fr.pdf](https://www.fdfa.admin.ch/dam/dea/fr/documents/abkommen/Accord-inst-Projet-de-texte_fr.pdf).

that it respected this step, but added that it expected “the consultation to be swift” and that it hoped “that its outcome will be positive”.<sup>56</sup>

79. On 17 December 2018, the EU decided to extend market access for Swiss stock exchanges, but only for another six months.<sup>57</sup>

80. In January 2019, Swiss newspapers reported that the European Commission had stated in an internal letter that without a framework agreement, the existing bilateral Swiss-EU treaties granting Swiss industry access to the EU internal market will only be updated if this is in the EU’s interest.<sup>58</sup>

81. Whether the Federal Council will sign the framework agreement is an open question. The consultation has led to 512 questions and concerns.<sup>59</sup>

#### **(5) Iceland’s obligations towards the two other EEA/EFTA States**

82. According to Article 93(2) EEA, the EFTA States must “speak with one voice” in the EEA Joint Committee. The pooling of the votes of the EEA/EFTA States occurs in the so-called Standing Committee. It was said that the speaking with one voice requirement “represents one of the main challenges to the operation of the EEA Agreement”<sup>60</sup>. In spite of rumours to the contrary, there is, however, no majority voting in the Standing Committee. *Georges Baur*

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<sup>56</sup> *Michael Shields/Francesco Guarascio*, Swiss risk EU anger after dodging EU treaty deadline <https://www.reuters.com/article/us-swiss-eu-cabinet/swiss-risk-eu-anger-after-dodging-eu-treaty-deadline-idUSKBN1O52LZ>.

<sup>57</sup> <https://www.euractiv.com/section/economy-jobs/news/eu-grants-six-month-reprieve-to-swiss-exchanges/>.

<sup>58</sup> <https://lenews.ch/2019/01/22/internal-eu-letter-says-no-concessions-for-switzerland/>.

<sup>59</sup> <https://twitter.com/swissMFAeurope/status/1112615951323811840>.

<sup>60</sup> *Dora Sif Tynes*, Article 93, in: in: Arnesen et al., Agreement on the European Economic Area. A Commentary, Baden-Baden 2018, paragraph 4, referencing *Prince Nikolaus of Liechtenstein*, The EEA Joint Committee - A Political Assessment, in: Baudenbacher/Speitler/Pálmarsdóttir, Ed., The EEA and the EFTA Court, Decentred Integration, Oxford/Portland Oregon 2014, 475, 481.

has clearly rejected suspicions that potentially reluctant EFTA States could be put under political pressure and has concluded:

“The Standing Committee still operates with the rule of unanimity”<sup>61</sup>.

83. If Iceland does not lift its constitutional requirements, the Third Energy Package cannot enter into force in the whole EFTA pillar.

84. However, after 25 years of EEA membership, Iceland is bound by a duty of loyalty towards the two other EEA/EFTA States Liechtenstein and Norway. The legitimate interests of these two countries must be taken into account in a situation such as the one at hand. That means, *inter alia*, that one cannot change a path once taken without very good reasons. Internal political differences are not such good reasons. This ties together with the principle of consistency noted above.

85. In that regard, I have written in the *liber amicorum* for *Davíð Þór Björgvinsson*, two years ago:

“The most recent EEA-related sovereignty debate has circled around the incorporation of the European financial supervision system into the EEA Agreement. Following a legal opinion by Professors *Björg Thorarensen* and *Stefán Már Stefánsson* of 2012, the idea to transfer the authority to apply Regulations (EU) No 1093/2010, 1094/2010 and 1095/2010 to EU institutions was dropped. The authors noted that a solution could be found based on the two-pillar structure of the EEA Agreement, if certain conditions for the transfer of state authority were met. After protracted negotiations, the new financial architecture was in fact based on the two-pillar structure of the EEA Agreement. The Court’s former registrar, Judge *Skúli Magnússon*, in another opinion stated that the transfer of

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<sup>61</sup> *Georges Baur/Michael Sánchez Rydelski/Carsten Zatschler*, *European Free Trade Association (EFTA) and the European Economic Area (EEA)*, 2<sup>nd</sup> ed., 2018, paragraph 275.

state authority was within the limits set out in the Constitution and comparable to the transfer made to ESA in competition law. After further difficulties which were caused by other scholars disagreeing with *Skúli*, the resolution was passed in Parliament in September 2016.

This means that pragmatism and a sense of proportion have finally also prevailed in this matter. The EU had given itself a push and accepted the EEA two pillar structure. But others paid a high price. The Liechtensteiners could, after having been a faithful ally for over two decades, have expected that their partner States in the EFTA pillar would not unduly delay the matter. Their financial actors were for years prevented from selling certain financial products in the single market. Firms from EU Member States profited from that”.<sup>62</sup>

86. In Liechtenstein the Third Energy Package was not controversial. The Liechtenstein Parliament unanimously approved its adoption on 6 September 2017.<sup>63</sup> Deputy Prime Minister and Minister of the Interior, Justice and Economic Affairs *Thomas Zwiefelhofer* had said in a speech of 27 April 2015:

“Security of supply also includes a good mix, good diversification among energy suppliers and integration into the EU’s 3rd internal energy market package, which covers the electricity and gas markets.”<sup>64</sup>

87. Norway is by far the largest Contracting Party in the EFTA pillar of the EEA. Many Norwegian EEA protagonist see their country as the EFTA pillar super power. Given the importance of Norway’s energy sector for its economy, it can be assumed that an Icelandic “No” to the Third Energy Package would not sit well with Norway.

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<sup>62</sup> Whose sovereignty?, in: Fullveldi í 99 ár. Safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum, Afmælisrit til heiðurs Davíð Þór Björgvinssyni, 2017.

<sup>63</sup> <https://www.landtag.li/protokolle/default.aspx?lpid=623&typ=eintrag&id=8710>.

<sup>64</sup> [https://www.regierung.li/files/medienarchiv/LIHK-Impulsveranstaltung\\_Energie\\_27-04-2015.pdf](https://www.regierung.li/files/medienarchiv/LIHK-Impulsveranstaltung_Energie_27-04-2015.pdf)., unofficial translation.

88. On 22 March 2018, the Norwegian Parliament accepted the Third Energy Package. There had been fears that the country might lose control of its hydroelectric resources. To put these fears into perspective, the centre-right minority government entered into a compromise with the opposition Labour Party according to which all power cables connecting Norway to other countries had to be state-owned.<sup>65</sup>

89. Norwegian leaders then made it clear that they were satisfied with this development and expected Iceland to adopt the package too.

90. In her biannual address to the Norwegian Parliament on important EU and EEA matters of 22 May 2018, Minister of Foreign Affairs *Ine Eriksen Søreide* stated, *inter alia*:

“Most of our energy exports go to the EU, and Norway currently meets about a quarter of the EU’s demand for gas.

In the area of energy, our starting point is in many ways different to that of our neighbours. Nevertheless, it is a great advantage for us to take part in the European energy cooperation.

The Storting has approved the incorporation of the EU’s third energy package into the EEA Agreement and Norway’s participation in the EU Agency for the Cooperation of Energy Regulators (ACER). This means that we can take part in and influence this energy cooperation. The opportunity to exert an influence in this area is important for Norway. As you are aware, Norway will retain full sovereignty over its energy resources”.<sup>66</sup>

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<sup>65</sup> <https://www.euractiv.com/section/energy/news/norway-accepts-eu-energy-rules-avoids-dispute-with-brussels/>.

<sup>66</sup> [https://www.regjeringen.no/en/aktuelt/biannual\\_180522/id2601713/](https://www.regjeringen.no/en/aktuelt/biannual_180522/id2601713/).

91. On 5 February 2019, Minister of Petroleum and Energy *Kjell-Børge Freiberg* gave the opening speech at the 4th EU-Norway Energy Conference in Brussels. He said, *inter alia*:

“The Nordic power market is closely integrated with Europe. It is important that the EEA Agreement ensures harmonized market rules. The third energy market package is an important step forward.

A decision to incorporate the package into the EEA Agreement was adopted in May 2017. Norway is eager to implement the package:

- A majority in the Norwegian Parliament has accepted the package.
- Necessary amendments in Norwegian law have also been approved by the Parliament.

The Icelandic parliament must now also give its consent. As far as I know, the Icelandic Parliament will consider the case this spring. I hope there will be no further delays.

[...]

Let me underline the good and close relationship between Norway and the EU in the energy field. This is not self evident.

A good relationship is never established once and for all. It takes effort and work - every day!

With the EEA agreement, the EU and Norway can celebrate 25 years of strongly committed relationship. I think we should be proud of this. And I look forward to a continued our close cooperation going forward”.<sup>67</sup>

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<sup>67</sup> <https://www.regjeringen.no/no/aktuelt/working/id2628180/>, emphasis added.

92. Norwegian industry is afraid that further delays or even a rejection of the Third Energy Package by Iceland could weaken investment in Norway.<sup>68</sup>

93. The following must not be lost sight of: Since the downsizing of the EFTA pillar to three states, there have always been influential actors in Norwegian politics and academia who wanted to reinterpret the multilateral EEA Agreement into a bilateral arrangement between the EU and Norway with the two smaller partners as free riders. Such efforts have not been successful so far. But if Iceland were to refuse to incorporate the EU's Third Energy Package into the EEA Agreement, these circles would be strengthened. It could not be ruled out that Norway would then consider concluding a bilateral energy agreement with the EU. That this would not be good for the future of the EEA does not need to be justified.

## **2. Long term implications**

### **(1) Putting the EEA Agreement at risk?**

94. Compared to the two occasions in which paragraph 4 (but not paragraph 5) of Article 102 EEA was applied,<sup>69</sup> the case at hand is of much greater significance. Not only can the EEA/EFTA States not expect special leniency when it comes to the definition of the affected part of Annex IV. On the contrary, there is a risk that a withdrawal from the Third Energy Package would at least in the medium term have a negative impact on Iceland's EEA membership.

95. It must be noted in this context that during the debate on the Third Energy Package in Norway the Norwegian Government feared

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<sup>68</sup> *Snjólfur Richard Sverisson*, Iceland no to EU rules may delay investments - Energy Norway, <https://www.montelnews.com/en/storv/iceland-no-to-eu-rules-may-delay-investments--energy-norway/938969>.

<sup>69</sup> Supra, paragraph 30.



“that rejecting the EU’s Third Energy Package [...] would put Norway on a slippery slope to a Brexit-like ending of its close EU relations.”<sup>70</sup>

96. It should also not be forgotten that some in Iceland have taken the conflict over the incorporation of the Third Energy Package as an opportunity to reflect in principle on the country’s EEA membership in the EFTA pillar. This called on the pro-Europeans who defended Iceland’s membership of the EEA. The anti- and pro-EEA discourse of the last years has vividly been described and analysed by *Ólafur Árni Jónsson* in his political science thesis with the title “Iceland and Europe: Is the discourse changing? How the British decision to leave the EU in June 2016 has shaped discourses on Iceland’s relationship with the EU since then”<sup>71</sup>. *Ólafur Árni* found that there have recently been changes in the Icelandic European debate. Brexit is said to have produced some effect, but there were other factors such as a growing nationalism in Europe and the West. At the end of the day, the author concludes that Brexit gave the eurosceptics the ammunition they needed to attack the EEA which in turn prompted the pro-Europeans to react.

97. If the incorporation is rejected, Iceland will in fact send a signal that could jeopardise its participation in the EEA. In other words, the Icelandic people have to ask themselves whether they want to put membership in an agreement at risk that has guaranteed them unhindered access to the internal market for the past 25 years because of changes to energy law with manageable implications.

98. *Dystland/Finstad/Sørebrø* have stated that “although unquestionably to the benefit of all Contracting Parties”, the EEA Agreement “is of greater significance to the EFTA States and their economies.”<sup>72</sup> This is particularly true

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<sup>70</sup> <https://www.euractiv.com/section/energy/news/norway-accepts-eu-energy-rules-avoids-dispute-with-brussels/>, emphasis added.

<sup>71</sup> University of Iceland, February 2019.

<sup>72</sup> Article 102, paragraph 43.

for Iceland. The Norwegian GDP is 16.5 times higher than the Icelandic GDP. Liechtenstein for its part is not only a Contracting Party to the EEA Agreement, but also to a Customs and Currency Union with Switzerland. It can therefore be argued that Iceland is the most vulnerable country in the EFTA pillar.

99. In the late 1980s/early 1990s, the EEA Agreement was negotiated by seven EFTA States on the one side and the EC and its then twelve Member States in the other. Since 1995, the EFTA pillar has consisted of three States. *Knut Almestad* is one of many who has underlined that the EEA Agreement is a very favourable treaty for the EEA/EFTA States. But few have done so in such a pronounced way. *Knut Almestad* has stated that in terms of market access in practice, the EEA Agreement “is tilted in the disfavour of the Union”. He gives the following examples:

“(1) Direct effect of directives and direct applicability of regulations entail that the rights they confer on individuals and economic operators are enforceable by national courts in the Internal Market immediately upon their entry into force at Union level. In the EFTA States these rights are not enforceable before the legal acts in question have been transposed to national law with primacy over conflicting national law. Hence, all delays in the incorporation of legal acts in the Agreement and their subsequent implementation in the national legal systems are liable to cause imbalances and lack of reciprocity as regards market access. However, when the EFTA Court in its milestone *Sveinbjörnsdóttir* ruling corrected some of this imbalance by pronouncing that there like in the EU could be State liability for losses sustained by individuals and economic operators caused by non-implementation or flawed implementation, the reaction on the EFTA side was to (unsuccessfully) ask the Court in a subsequent case to reverse this important principle.<sup>73</sup>

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<sup>73</sup> At this point, *Knut Almestad* refers to the EFTA Court’s judgment in E/4/01 *Karl K. Karlsson hf. v The Icelandic State*, [2002] EFTA Ct. Rep. 240. See regarding *Karlsson Carl Baudenbacher*, *Judicial Independence*, loc. cit., Chapter 10, 3.5.

(2) Economic operators of the EFTA States were in practice accorded unimpeded access to the Internal Market from the first day, in spite of the fact that it lasted 3 to 4 years to bring an enormous backlog of Community legal acts into the Agreement. One might have expected that during this period the EFTA States would have exercised prudence and caution. However, the tendency was rather the opposite. ESA received in this period a stream of visits by politicians and officials who pleaded that the legal content of rules meant to be identical in substance were still negotiable. Arguments were that the EEA Agreement, having a more limited scope than the Community Treaties, had to be interpreted in a more flexible manner or, as the EEA Agreement did not foresee participation in Community policies, EFTA States retained full rights to formulate policy measures at will, even where such measures would restrict fundamental rules of the Agreement or render them inapplicable.

(3) In 1997 the Community launched a Single Market Action Plan as a precursor to multiannual Internal Market Strategies which are vital elements in the Lisbon agenda. But, whereas the Lisbon process generally was very warmly embraced by the EFTA States, the practical implications of the Internal Market Strategies were met with considerable resistance when it emerged that this, *inter alia*, meant the removal of unwarranted restrictions on the provision of services, investments and related establishment. It was frequently purported, even before the EFTA Court, that these were developments which brought elements into the Agreement of which one had not been aware at the time of the negotiations.”<sup>74</sup>

100. Although *Knut Almestad's* article was published in 2012, his conclusion in the form of a warning has lost nothing of its topicality: He calls on the responsible actors

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<sup>74</sup> Reflections on the Postal Services Directive and the EEA Review, loc. cit., 82.

“to abstain from the temptation further to engage in acts of political brinkmanship aimed at one-sided reductions of the scope of the Agreement”.

101. If the EEA/EFTA States were to rock the boat or to disturb sleeping dogs, he concluded,

“we could perhaps sing with the Beatles to our friends in the Union: ‘Let it be’. Maybe they will listen.”<sup>75</sup>

102. This caveat must also be taken seriously in the present context.

## **(2) What could be an alternative to Icelandic EEA membership?**

103. Given the possible negative consequences of a refusal to lift Iceland’s constitutional requirements, the question must be asked as to what the possible alternatives to the country’s EEA membership might be. In this respect, the situation of post-Brexit United Kingdom, Switzerland and the three post-Soviet states of Georgia, Moldova and Ukraine must be examined in a comparative manner. What is crucial here is that the EU is quite obviously pursuing the strategy of a single model for engaging with states beyond the EEA: the model that characterises the association agreements with the three post-Soviet republics mentioned above.

104. All in all, it is thus clear that there are only two options for European States that want to have an association relationship with the EU: Either they become Contracting Parties to the EEA Agreement, or they have to accept the Ukrainian model. The latter would in fact mean that they submit to the *de facto* supervision of the European Commission and the *de facto* jurisdiction of the European Court of Justice. The British author *Martin Howe QC* has called a

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<sup>75</sup> Reflections on the Postal Services Directive and the EEA Review, loc. cit., 83.

Ukrainian style arbitral panel “a postbox for sending the dispute to the ECJ” and “a rubber stamp when the answer comes back.”<sup>76</sup> Other British authors, but also prominent Belgian and Norwegian scholars, have blown the same horn.<sup>77</sup> In fact, this is a fake arbitration tribunal. There’s arbitration written on it, but there’s no arbitration in it.<sup>78</sup> That each side can appeal unilaterally to the arbitral tribunal without the other side being involved means that the EU can bring a dispute before its own Court of Justice at any time.

105. In the Icelandic debate, the argument has been used that the outcome of the *Icesave* conflict with the rejection by the EFTA Court of the ESAs action against Iceland on 28 January 2013,<sup>79</sup> showed that Iceland could also assert itself against very strong opposition. This of course compares apples with pears. *Icesave* was a court case and the competent tribunal was not the court of the EU, but the own court of the EEA/EFTA States. There are those who think that had the case ended up before the ECJ, Iceland would have lost.<sup>80</sup> The conflict was decided not politically, but legally, in a procedure consisting of both a written part and a public oral hearing. The judgment was broadly, but succinctly reasoned. A conflict arising from Iceland’s refusal to surrender its constitutional requirements against the incorporation of the Third Energy Package into the EEA Agreement, on the other hand, would essentially be decided politically. The decision-making power would to a large extent lie with

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<sup>76</sup> <https://www.spectator.co.uk/2018/11/mavs-brexit-deal-the-legal-verdict/>; see also my remarks in FT of 15 November 2019, <https://www.ft.com/content/6def3d2e-e8fa-11e8-885c-e64da4c0f981>.

<sup>77</sup> See my legal opinion for the Committee for Economic Affairs and Taxation of the Swiss National Council of 8 February 2019, <https://www.parlament.ch/centers/documents/de/rechtsgutachten-professor-carl-baudenbacher.pdf>; also *Michael-James Clifton*, Roadmap for Brexit, Summer 2017, European Advocate, page 8; from a Norwegian perspective *Mads Andenæs*, <https://www.linkedin.com/feed/update/urn:li:activity:6472397967755091968/>.

<sup>78</sup> See *Gerhard Schwarz/Rudolf Walser*, Switzerland and the EU: Important, correct and forgotten “red lines”, *Neue Zürcher Zeitung* of 9 April 2018, <https://www.nzz.ch/meinung/die-schweiz-und-die-eu-wichtige-richtige-und-vergessene-rote-linien-ld.1369453>.

<sup>79</sup> E-16/11 *ESA v Iceland*, [2013] EFTA Ct. Rep. 4.

<sup>80</sup> *Damian Chalmers*, *Icesave – Limited Homogeneity and Unlimited Judicial Interpretation*, in: EFTA Court., Ed., *The EEA and the EFTA Court: Decentered Integration*, Hart, Oxford/Portland Oregon 2015, 407 ff.; *Damian Chalmers/Gareth Davies/Giorgio Monti*, *European Union Law*, Cambridge University Press, 3d ed., 2014.

the monitoring body of the opposite side, the European Commission. Nor would the decision have to be substantiated in the manner in which a court judgment is motivated.

#### **IV. How do you estimate the chances of Iceland succeeding in negotiating an exemption from Regulation (EC) No 713/2009, so it would not apply to Iceland?**

106. Based on the foregoing considerations, I believe that the chances of Iceland negotiating an exception are slim. Due to the delay in the EFTA pillar, there have been two sets of rules in the area concerned for quite a long time. The EU Member States are governed by the Third Energy Package whereas the EEA/EFTA States are governed by the Second Package. *Dirk Buschle* and *Birgitte Jourdan-Andersen* have aptly remarked in this respect:

“This leads to different levels of liberalisation in both pillars, in particular with regard to the level of unbundling of transmission system operators and the independence and competences of national regulatory authorities. It also entails legal questions, for example with regard to potential cross-border infrastructure built between an EEA/EFTA State and an EU Member State. As the rules for granting exemptions from certain principles of the *acquis* differ both in terms of substance (the Third Package allows for exemptions also from unbundling) and procedure (under certain conditions, ACER could be competent to take the exemption decision on the EU side), ad hoc solutions for bridging the regulatory gap would have to be found in order to proceed with the project.”<sup>81</sup>

107. As the case at hand shows, the EU may be prepared to show patience in difficult circumstances. But that the EU would agree to what it would have to

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<sup>81</sup> Energy Law, in: Baudenbacher, Ed., *The Handbook of EEA Law*, 2016, 773 ff., 785.

see as a permanent distortion of the EEA internal market in such an important area is in my view out of the question.

108. I understand that the transfer of powers is a particularly delicate undertaking for a country with Iceland's history and geographical location. I am also aware of the fact that the Icelandic Constitution does not contain an article on transfer of powers. The expert opinions I have seen, however, have all come to the conclusion that this danger does not exist in the specific case.

109. Of course, Iceland with its natural resources and its highly skilled workforce would not go down even if the EEA were weakened or if it left the EEA ("Icelexit"). This could also open up opportunities for other types of cooperation with European and non-European partners. Such a path would, however, be fraught with considerable uncertainties.

## **V. Answers**

110. Based on the foregoing considerations, I answer the questions put to me in the following way:

"If Iceland would decide not to lift the constitutional requirements to the Decision of the EEA Joint Committee No 93/2017 of 5 May 2017, and would decide to take the matter back to the EEA Joint Committee with the wish to adopt another decision of the EEA Joint Committee incorporating the Third Energy Package into the EEA Agreement with different adaptation text, this would most probably trigger the Article 102(5) EEA procedure. In the short term, it would mean that the Third Energy Package could not be incorporated into the EEA Agreement.

Given the crucial role that the EU would play and the importance of the legislation in question, the fact that the EU has come a long way to accommodate Iceland, the fact that Iceland is behaving in contradiction to its earlier policy in this matter and the further fact that Iceland would

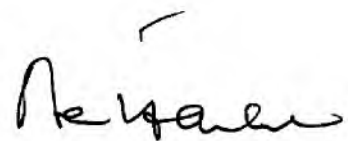
act inconsistently, it is to be feared that the EU would in the short term set an example.

In the long run, Iceland's membership in the EEA could even be endangered. It should be noted that, due to recent developments, there are only two models for European states that want to be associated to the EU without being members of the EU: The EEA model with its own monitoring authority and its own court for the EFTA-States, and the Ukraine model with (at least factual) monitoring by the European Commission and (factual) jurisdiction of the ECJ. The arbitral tribunal that is foreseen under the Ukrainian model has hardly any competences of its own.

In order to avoid any misunderstanding, I wish to emphasise that the right of Iceland to initiate proceedings under Article 102(5) EEA is undisputed. In the present case, however, there is no sufficient reason to use this emergency valve.

The chances of Iceland succeeding in negotiating an exemption from Regulation (EC) No 713/2009 are slim. That the EU would agree to a permanent distortion of the EEA internal market in such an important area is in my view out of the question.”

5 May 2019

A handwritten signature in black ink, appearing to read 'Reisner', with a small checkmark above the 'i'.