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**The incorporation of the EU's Third Energy Package into the EEA – Legal Opinion to the Minister of Foreign Affairs of Iceland**

Executive summary

- Iceland has had the opportunity to provide substantial input during the decision shaping process and the adaptation by the EEA Joint Committee of the Third Energy Package.
- Iceland has not remonstrated against or blocked decisions at any stage of the process.
- Although there is the possibility of refusing the incorporation of new EU law into EEA law, the present case is not the appropriate occasion to pull the emergency brake.
- Iceland's withdrawal from the Third Energy Package could jeopardise its membership in the EEA Agreement.

If Iceland were to refuse to lift the constitutional requirements and to block the incorporation of the Third Energy Package of 2009 into the EEA Agreement, the procedure under Article 102(5) EEA would in all likelihood be triggered. Although the historical Contracting Parties did their utmost to avoid a suspension of parts of the EEA Agreement, the circumstances could prompt the EU to show an exemplary reaction in the EEA Joint Committee. As there is no precedent, there are considerable uncertainties and imponderables.

The circumstances which could be interpreted to the detriment of Iceland are the following:

- Iceland has not objected to the qualification of the acts of the Third Energy Package as being "of EEA relevance".

- The country did not remonstrate when the EEA Council in November 2014 called for an accelerated incorporation of the package into the EEA Agreement.

- Iceland has had the opportunity to provide substantial input as part of decision shaping process and it has done so according to my instructions.

- Iceland has not blocked the decision of the EEA Joint Committee to integrate the package into EEA law, it has merely asserted constitutional requirements. Not until March 2018, when the debate in Norway reached

its peak the discussion on whether the package should be taken over started.

- The country has accepted the new EU financial architecture which is, as regards surveillance, based on the same model with EU agencies cooperating with ESA as the Third Energy Package.

If Iceland were now to require further adjustments by the EEA Joint Committee or to require a general exemption from the Third Energy Package, this might constitute contradictory or inconsistent behaviour. International law speaks of „estoppel“ in this context, in EEA law, the EFTA Court has recognised that the prohibition of abuse of rights is a general principle of EEA law.

Iceland also has a duty of loyalty to its partner states in the EFTA pillar of the EEA. Now that Liechtenstein and Norway have lifted its constitutional requirements, they expect Iceland to do the same. Since all three EEA/EFTA states must speak with one voice, the Third Energy Package could not enter into force for the other two EEA/EFTA States in the event of an Icelandic "No". The chances that the EEA Joint Committee would re-open the dossier are slim.

There have always been voices in Norway that wanted to reinterpret the EEA into a bilateral agreement with the EU, with Liechtenstein and Iceland as free riders, so to speak. These people would be strengthened. It cannot be ruled out that Norway may eventually wish to conclude a bilateral energy agreement with the EU.

In the long term, Iceland's withdrawal from the Third Energy Package could jeopardise its membership in the EEA Agreement.

The EU's negotiations with the UK on a withdrawal agreement and the negotiations with Switzerland on a so-called "framework agreement" have shown that there are only two options for a European non-EU state interested in an association with the EU: Either such a state joins the EEA on the EFTA side or it adopts the model offered by the EU to the three post-Soviet states of Georgia, Moldova and Ukraine.

Formally, conflicts are then decided by an arbitral tribunal with equal representation. The arbitration tribunal must, however, in practically all cases request a binding ruling from the Court of Justice of the European Union. It has thus been said that there's arbitration written on this mechanism, but there's no arbitration in it. Since the EU can unilaterally appeal to its own court at any time, it becomes the de facto supervisory authority of the non-EU state concerned.

The British government has accepted the Ukrainian model, but the House of Commons has rejected it three times. It remains to be seen whether the Swiss Federal Council (Government) will sign the planned "framework agreement".

In the late 1980s/early 1990s, the EEA Agreement was negotiated between the EU and its then twelve Member States on the one hand and the then seven EFTA States. Since 1995, the EFTA pillar has, however, consisted of three rather small States.

All in all, it must be concluded that there is the possibility of refusing to incorporate new EU law into EEA law. However, the present case is not the appropriate occasion to pull the emergency brake.