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THE IMPACT OF THE THIRD ENERGY MARKET PACKAGE ON NATIONAL RESOURCE MANAGEMENT

1 Summary

This report written for Energi Norge analyses the impact of the EU´s third energy market package on national energy resource management in the EEA Contracting Parties Norway and Iceland. The main conclusions in the report can be summarised as follows:

1. The fundamental principles in the main part of the EEA Agreement, such as the rules on free movement, State aid and competition, apply to the energy sector as to other sectors of the economy. These provisions will continue to apply for the EEA Contracting Parties irrespective of whether the third energy market package is incorporated into the Agreement.

2. The third energy market package builds on the second energy market package that is already incorporated into the EEA Agreement. Consequently, the decision to adopt the third energy market package is not a question of becoming a member of the EU´s internal energy market, but rather a question of continuing and expanding an on-going cooperation.

3. The decision by the EEA Joint Committee to incorporate the third energy market package comprises only the legislation adopted in 2009 and not subsequent EU legislation such as network codes and the Clean Energy for All Europeans package. A decision to incorporate the third energy market package now does not bind the future competence of the EEA Joint Committee any more than the adoption of the second energy market package does in the evaluation of the third package.

4. It follows from Article 125 EEA that each Contracting Party is entitled to pursue a policy of public ownership to energy resources provided that the policy does not contradict the fundamental rules in the main part of the EEA Agreement. In line with this principle, the third energy market package does not include any provisions that directly regulate the right of Member States to pursue a system of public ownership to strategic energy resources.

5. The third energy market package does not influence national decisions to permit the building of new electricity interconnectors to other EU/EEA Member States beyond what already follows from the EEA Agreement.

6. First, the third energy market package does not regulate which national institutions that should be responsible for interconnector license decisions. More specifically, it does not require the Member States to confer competence on the NRAs to decide interconnector licenses. Therefore, each Contracting Party has discretion to determine that such powers should remain with another public body, such as a Ministry or a Directorate.

7. Second, it is clear that ACER (and, correspondingly, ESA in its "ACER function" under the EEA Agreement) does not have competence to decide on matters relating to the evaluation by the competent national authority on whether to grant an interconnector license.

8. Finally, the third energy market package does not introduce any new restrictions for the interconnector license assessments carried out by the competent national authority beyond those obligations already following from the EEA Agreement.

2 Introduction

I have been requested by Energi Norge to carry out a legal analysis of the impact of the EU´s third energy market package on national energy resource management.

The third energy market package is a term comprising five pieces of legislation adopted by the EU on 13 July 2009 in order to promote the further development of the EU´s internal energy market. The legislative package consists of Electricity Directive 2009/72/EC and Electricity Regulation (EC) No. 714/2009 for the electricity market, Gas Directive 2009/73/EC and Gas Regulation (EC) No. 715/2009 for the gas market, and Regulation (EC) No. 713/2009 establishing ACER ("the ACER Regulation") which is relevant for both markets.

The EEA Committee decided to incorporate the third energy market package into the EEA Agreement on 5 May 2017.[1] This incorporation decision becomes binding for the Contracting Parties when national constitutional requirements have been fulfilled, i.e. ratification by the national Parliaments.[2] The Norwegian Parliament, *Stortinget,* ratified the decision on 22 March 2018 following a heated public debate.[3] The necessary amendments to the Norwegian Energy Act were adopted on the same date.[4] The Icelandic Parliament, *Alþingi*, has yet to ratify the decision and is expected to put it to a vote in 2019.

The incorporation of the third energy market package into the EEA Agreement has triggered widespread public debate in both Norway and Iceland. Some in the public debate have claimed that the third energy market package has an impact on key national resource management decisions such as the choice of public ownership to energy resources and whether to issue permits for the building of new interconnectors to other EEA and EU Member States.

The present legal analysis seeks to clarify whether and to what extent the third energy market package affects sensitive issues of national resource management relating to public ownership and building of interconnectors. As part of this analysis I will also consider the views of Professor Peter Ørebech included in a legal opinion dated 23 September 2018.[5]

Given the lack of onshore natural gas transmission and distribution pipelines in both Norway and Iceland, the adoption of internal gas market legislation has been less controversial in these countries than the corresponding implementation of internal

[1] EEA Committee decision No. 93/2017.
[2] Article 3 of decision No. 93/2017 and
[3] See Prop. 4 S (2017-2018) and Innst. 178 S (2017-2018).
[4] See Prop. 5 L (2017-2018) Innst. 175 L (2017-2018) and Lovvedtak 44 (2017-2018). Less controversial amendments to the Norwegian Natural Gas Act were also adopted on the same date, see Prop. 6 L (2017-2018), Innst. 176 L (2017-2018) and Lovvedtak 45 (2017-2018).
[5] Professor Peter Ørebech has also published an article on the topic that will be commented upon in footnotes where relevant, see Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett nr. 3, 2018, s.170-190.

electricity market legislation.[6] In the following I will therefore focus on the legislation relevant for the electricity market. Furthermore, I will not discuss the question of whether the qualified majority procedure in § 115 of the Norwegian Constitution should have been applied for the Norwegian parliamentary procedure. The Parliament chose not to apply this procedure on the basis of two thorough legal opinions submitted by the Legislation Department at the Norwegian Ministry of Justice and Public Security.[7] It is my understanding that the Icelandic Constitution does not include similar qualified majority procedures.

In the following I will first provide a general overview of EEA law relevant for the energy market below in sections 3 and 4. It is important to emphasise that the third energy market package is only one of several parts of the EEA legislation with an impact on energy markets. I will therefore include a brief general overview that also includes other relevant parts of EEA law such as the rules in the main part of the EEA Agreements and the previous energy market packages. Section 5 considers in more detail the impact of the third energy market package on national decisions relating to public ownership to energy resources. The impact of the third energy market package on decisions relating to the building of new interconnectors is analysed in chapter 6.

3 Energy and the main part of the EEA Agreement

The EEA Agreement consists of the main part of the Agreement and secondary legislation included in the attachments to the Agreement. The main part of the EEA Agreement includes the fundamental provisions of EEA law such as the rules on free movement, State aid and competition. The provisions are based on the corresponding rules in the Treaty on the Functioning of the European Union (TFEU) and they apply to the energy sector as to other sectors of the economy.[8] Consequently, there are many examples of cases invoking these provisions in the energy sector, both at EEA and EU level.

The free movement rules prohibit restrictions on the free movement of goods, services, persons and capital and on the freedom of establishment. Such restrictions are only compatible with the Agreement if they pursue further defined legitimate interests and are suitable and necessary to attain those aims.

It has long been settled law that electricity is to be regarded as goods within the meaning of TFEU and, consequently, also within the meaning of the EEA

[6] The Norwegian offshore gas pipeline system on the Norwegian continental shelf owned by Gassled is considered an upstream gas pipeline system which is only subject to modest regulation under the EU´s internal gas market legislation.
[7] Letters from Justisdepartementets lovavdeling 25 April 2016 and 27 Februar 2018, where the latter is available at https://www.regjeringen.no/contentassets/d2f95b6c30824313a887d9b146b61133/svar-fra-lovavdelingen.pdf (last visited 8 January 2019). The Norwegian association Nei til EU on 8 November 2018 initiated a court case before the Oslo City Court claiming that the State is required not to implement the third energy market package in Norwegian law. This case is currently pending.
[8] Except for the specific EEA exceptions applicable for the fisheries and agricultural sectors.

Agreement.[9] Restrictions on the free movement of electricity between Member States may therefore amount to import or export restrictions under Articles 11 and 12 EEA, correspondingly, based on the criteria developed in case law. For example, in case C-573/12, *Ålands vindkraft*, the EU´s Court of Justice found that the Swedish electricity certificate scheme at issue was capable of impeding electricity imports from other Member States and therefore constituted a measure having equivalent effect to quantitive import restrictions under Article 34 TFEU (corresponding to Article 11 EEA).[10] The subsidy scheme was nevertheless considered compatible with the Treaty as the objective of promoting the use of renewable energy resources was a legitimate aim and the measures at issue were suitable and necessary to pursue that aim.[11]

The EFTA Court case E-02/06, *hjemfall*, is another prominent example of how the free movement rules have been subject to scrutiny within the electricity sector. The court considered whether the then-prevailing Norwegian legislation providing time-unlimited licenses for the acquisition of large waterfalls by Norwegian public actors and time-limited licenses followed by reversal to the State ("hjemfall") for all other actors were contrary to the EEA Agreement. More specifically, the Court considered whether the difference in treatment between public and private participants were contrary to the rules on the freedom of establishment and the free movement of capital.[12] The Court ruled that the legislation was contrary to the EEA Agreement, but emphasised that pursuing public ownership to hydropower resources might in itself amount to a legitimate interest on the basis of Article 125 EEA. I will revert in more detail to this case below in section 4.

The *Ålands vindkraft* and *hjemfall* cases are two of many court cases illustrating that the free movement provisions of the EEA Agreement and the TFEU also apply to the electricity sector. As a point of departure, these general principles apply in addition to the secondary legislation, such as the third energy market package.[13] Consequently, it is important to emphasise that even if the third energy market package should end up not being incorporated into the EEA Agreement, the general free movement rules in the EEA Agreement would still apply to the electricity sector, including the import restriction prohibition in Article 11 EEA and the freedom of establishment rules in Article 31 EEA.

According to Article 61 EEA, State aid is prohibited unless declared compatible by the EFTA Surveillance Authority on the basis of prior notification by the Member State. State aid is an aid granted by a Member State or through State resources in any

[9] See case C-393/92, *Almelo*, para. 28.
[10] Case C-573/12, paras 56-75.
[11] Case C-573/12, paras 76-119.
[12] Articles 31 and 40 EEA.
[13] This would be different only if the secondary legislation requires full harmonisation of national laws or if the secondary legislation sufficiently guarantees the specific interests under consideration, see case C-112/97, *Commission v. Italy* and case 72/83, *Campus Oil*, para. 27, corrspondingly. In the latter two situations, a Member State would no longer have recourse to the general exemption grounds from the free movement rules in the EEA Agreement. However, as the third energy market package does not require total harmonisation of national laws and cannot be considered to sufficiently guarantee certain interests, it is clear that the free movement provisions still apply in addition to the third energy market package, see also Henrik Bjørnebye, Investing in EU Energy Security (Kluwer Law International, 2010) p. 83.

form whatsoever which distorts or threatens to distort competition by favouring certain undertakings of the production of certain goods and affects trade between Member States. These conditions have been subject to wide interpretations by the community courts. State aid to the energy sector is the second largest category of aid in the EU Member States, illustrating the importance of these rules to the energy market.[14] It is clear that the State aid provisions in the EEA Agreement apply in addition to the secondary legislation relevant to the energy market, including the third energy market package. This means that the question whether an energy market measure amounts to State aid under Article 61 EEA and may nevertheless be declared compatible with the Agreement based on, for example, the State aid energy and environmental guidelines will be subject to scrutiny regardless of whether the third energy market package is incorporated into the EEA Agreement.

Finally, it is worth noting that also the competition rules of the EEA Agreement, including the prohibitions on the abuse of a dominant position and on agreements and concerted practices restricting competition, apply to the energy markets in addition to the secondary legislation.[15]

In conclusion, this means that even in the absence of secondary legislation the provisions in the main part of the EEA Agreement will apply to the Norwegian and Icelandic electricity market with full effect. Since the provisions in the third energy market package are ultimately based on the overall principles in the main part of the Agreement, the third energy market package as such may arguably have less impact on resource management than perceived in much of the public debate.

4 The internal electricity market

4.1 Introduction

EU efforts to build an internal energy market started in earnest 30 years ago.[16] At the time that the EEA Agreement was signed in Oporto on 2 May 1992, this work was well-known although it was far from well-advanced. As held in a Norwegian report to the Parliament concerning the ratification of the EEA Agreement, the EC did not have a common energy policy at the time, and the energy sector therefore did not have a prominent place in the EEA negotiations.[17]

The development of EU energy policy and law has been enormous over the past decades. At policy level, the efforts to establish a sustainable, secure and competitive internal energy market culminated in 2015 with the establishment of the Energy

[14] Leigh Hancher, Adrien de Hauteclocque and Francesco Maria Salerno, State aid and the energy sector (Hart Publishing, 2018), first page of the editors´preface.
[15] The Svenska kraftnät case initiated by the European Commission is one example from the electricity sector, see Commission decision 14.4.2010, case 39351 – Swedish Interconnectors.
[16] See *inter alia* the Commission working document The internal energy market, COM(88) 238 final, 02.05.1988.
[17] St.prp. No. 100 (1991-92), p. 164.

Union strategy.[18] This strategy consists of five policy dimensions: security, solidarity and trust; a fully-integrated internal energy market; energy efficiency; climate action and decarbonisation; and research, innovation and competitiveness within low-carbon and clean energy technologies. Climate action and renewable energy as well as a focus on consumers are at the top of the agenda of the strategy. Consequently, a large part of the legislation pursuing the Energy Union goals seeks to promote a market design for a future decarbonised and sustainable energy sector at EU level.

The Energy Union is not a legal concept or a body with distinct legal personality. The legislation to pursue EU energy policy must be adopted on the basis of the ordinary legislative procedures enshrined in TFEU, and then made subject to the ordinary EEA Committee procedures for potential EEA incorporation.

There are many different legal bases in TFEU for the adoption of secondary legislation by the EU institutions. The choice of legal basis is important also for the EEA dimension, since the TFEU legal basis is a natural point of departure for the assessment of whether an EU secondary law measure is EEA relevant. Given that the primary function of the EEA Agreement is to extend the EU´s internal market to all EEA Member States, EU legislation adopted pursuant to the internal market provision in Article 114 TFEU (former Article 95 EC) is as a clear point of departure EEA relevant. Secondary legislation adopted at EU level considered EEA relevant is included in the relevant attachments to the EEA Agreement by decision in the EEA Joint Committee.

The internal energy market legislation, including the third energy market package, has been adopted on the basis of Article 114 TFEU. All of this legislation is EEA relevant. I will discuss this legislation below in section 4.2.

A separate legal basis for energy was adopted in the Treaty of Lisbon as Article 194 TFEU and came into force after the adoption of the third energy market package. This provision confers powers on the EU institutions to adopt legislation to ensure the functioning of the energy market as well as security of supply, sustainability and interconnection. A measure adopted pursuant to this provision having other primary aims than ensuring the functioning of the internal energy market, such as for example supply security, is not necessarily EEA relevant. This question must, however, be considered with regard to the specific merits of each measure and on the basis of a broader evaluation of the criteria for determining EEA relevance.

Several secondary law measures have been adopted on the basis of Article 194 TFEU. Moreover, measures pursuing environmental objectives adopted on the basis of the environmental provision in Article 192 TFEU also in many cases have a profound impact on energy markets. Finally, a regulation relevant for the energy market has also been adopted on the basis of the trans-european network provisions in the TFEU. In section 4.3 below, I will briefly describe these other measures of relevance to the electricity market that are not part of the third energy market package.

[18] The Energy Union strategy was launched by the Commission in COM (2015) 80 final, 25.02.2015 and further acknowledged and committed to by the European Council on 19 March 2015.

Following the adoption of the third energy market package in 2009, the EU has adopted and drafted a large body of new legislation relevant to the electricity sector. This legislation has yet to be considered for incorporation into the EEA Agreement and is not subject to approval by the Norwegian and Icelandic Parliaments at this time. An overview of this legislation is presented in section 4.4.

4.2 The internal electricity market legislation

The internal electricity market legislation consists of directives and regulations adopted at EU level on the basis of Article 114 TFEU (former Article 95 EC) with a view to establishing an internal market without internal frontiers for trade in electricity. Three generations of legislation have been adopted for the electricity sector: the first Electricity Directive 96/92/EC was adopted in 1996, the second Electricity Directive 2003/54/EC and a first Electricity Regulation No. (EC) 1228/2003 were adopted in 2003 and the third energy market package was adopted in 2009. Each package repeals and replaces the former. A separate Security of Electricity Supply Directive 2009/89/EC has also been adopted, but this Directive has little substance and it is proposed repealed by the Clean Energy for All Europeans legislative package further described below in section 4.4.

As internal market measures, it is clear that all three generations of energy market packages adopted at EU level are EEA relevant. Consequently, the second package including Electricity Directive 2003/54/EC and Electricity Regulation No. (EC) 1228/2003 were incorporated into the EEA Agreement on 2 December 2005 and there is no doubt that also the third energy market package is EEA relevant.[19]

The internal electricity market legislation contains a number of different requirements for Member States aimed at further developing the internal markets in electricity and natural gas.

The backbone of internal electricity market legislation is the Electricity Directive, where *Directive 2009/72/EC* in the third energy market package builds on and expands the regulation in Directive 2003/54/EC. Since Directive 2003/54/EC is already incorporated into the EEA Agreement, it is of particular importance to identify in what areas the new Directive 2009/72/EC includes new obligations for the Member States that are not already included in the second Directive.

The overall objective of Electricity Directive 2009/72/EC is to improve and integrate competitive electricity markets in the EU.[20] This is in practice the same objective as the second Electricity Directive 2003/54/EC.[21] The facilitation of functioning electricity markets by ensuring non-discriminatory, objective and transparent grid access is an important background for many of the provisions in the Directive. Chapters I, II and III of the Directive includes overall objectives, scope and definitions; organizational rules including the regulation of general public service

[19] Decision of the Joint EEA Committee No. 146/2005 of 2 December 2005 (OJ L 53/43, 23.2.2006).
[20] Article 1 of the Directive.
[21] See inter alia case C-439/06, *Citiworks*, para. 38.

obligations; and overall provisions on electricity generation, respectively. Chapters IV and V concern transmission system operation and include in particular important obligations relating to the unbundling of transmission system operators (TSOs) from other electricity market activities. Chapter VI governs the tasks and activities of distribution system operators (DSOs), while chapter VII contains provisions on transparency of accounts in order to ensure compliance with unbundling requirements. Chapter IX sets out requirements for the national regulatory authorities (NRAs), chapter X deals with electricity retail markets and chapter XI contains final provisions. It is noteworthy that the Electricity Directive is primarily preoccupied with governing grid access on fair terms, and less concerned with electricity generation as such which is primarily touched upon in Article 7 and 8 of the Directive.

When comparing the content of Electricity Directive 2009/72/EC with Electricity Directive 2003/54/EC, the two most important developments in the third Directive concern stricter obligations for the organisation of TSOs and stricter requirements for NRAs. The former rules introduce the concept of ownership unbundling, as well as two other alternatives, for TSOs which were only subject to so-called legal unbundling under Directive 2003/54/EC. This requirement has at the outset been considered acceptable in Norway since the Norwegian TSO Statnett could already be considered ownership unbundled.[22] The latter obligations set out that the NRAs must be legally distinct and functionally independent from any other public or private entity and not seek or take instructions from any government, public or private entity.[23] This requirement has necessitated amendments in the Norwegian institutional set-up and for Norway it is arguably the most important new feature in the third Electricity Directive 2009/72/EC compared to the second Directive 2003/54/EC. I will revert to the Directive´s regulation of NRAs below in more detail below in section 5.

Electricity Regulation (EC) No. 714/2009 became applicable for EU Member States on 3 March 2011, repealing the former second Electricity Regulation (EC) No. 1228/2003 from the same date.[24] When made part of the EEA Agreement, the Regulation adopted by the EEA Joint Committee (including technical amendments) must be implemented in national legislation as such, see Article 7 a) EEA. The overall aims of the Regulation is to enhance competition in the internal market by setting fair rules for cross-border electricity exchange and to facilitate the emergence of a well-functioning and transparent wholesale market with a high level of security of

[22] Statnett SF is wholly owned by the State and the ownership interest is administered by the Ministry of Petroleum and Energy. Since a different ministry (the Ministry of Trade, Industry and Fisheries) administers State ownership to electricity producer Statkraft SF, the ownership undbundling requirements are deemed to be met, see Electricity Directive 2009/72/EC Article 9(1) and (6). Since the ownership unbunbling alternative requires that the TSO in question also owns the transmission infrastructure, certain acquisitions have to be carried out as Statnett owned most of the transmission infrastructure but not all prior to implementation of the Directive.

[23] Article 35 of the Electricity Directive 2009/72/EC.

[24] Articles 25 and 26 of the Regulation.

supply.[25] General rules are included in the Regulation itself which are subject to more detailed provisions in binding Guidelines adopted pursuant to the Regulation.[26]

Electricity Regulation (EC) No. 714/2009 is based on the same structure and builds on Electricity Regulation (EC) No. 1228/2003. In the same way as in the relationship between the third and second Electricity Directives, the new Regulation expands some of the obligations included in the former Regulation, but many of the fundamental provisions remain the same. The most important developments in the new Regulation are arguably that it contributes to strengthen the cooperation between national TSOs by establishing the European Network for Transmission System Operators for Electricity (ENTSO-E) and that it lays down a procedure for the development of comprehensive network codes and guidelines to govern the electricity market. The network codes and guidelines must be incorporated separately by the EEA Joint Committee under the EEA Agreement and they are therefore not a part of the current decision to incorporate the third energy market package. I will comment briefly on these codes and guidelines below in section 4.4.

Regulation (EC) No. 713/2009 establishes the Agency for the Cooperation of Energy Regulators (ACER) at EU level. ACER is one of a number of agencies established at EU level over the past decades, and it replaced the less formalised European Regulators´ Group for Electricity and Gas (ERGEG). ACER´s purpose is to assist the national regulatory authorities for electricity and natural gas *"in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action."*[27] To achieve this aim, ACER may issue opinions and recommendations within a number of areas, contribute to the further development of codes and guidelines as well as to adopt individual decisions within certain defined areas.[28]

In order for ACER to adopt a binding decision a 2/3 majority vote is required in ACER´s Board of Regulators, which consists of one representative from each of the NRAs for electricity and gas in the EU Member States. The EEA incorporation of this model raises some particular challenges. From the perspective of the EU Member States, it is not acceptable to allow representatives from non-EU Member States such as the EFTA States to vote in decisions that are binding for market participants in EU Member States. From the perspective of the EFTA States, it is unacceptable to submit to a procedure where representatives from EU Member States issue decisions directly binding for EFTA country participants. Consequently, the decision in the EEA Committee involves a solution where the representatives from the EFTA States are allowed to participate in the ACER meetings, but without voting rights. A binding decision within areas decided by ACER for the EU Member States shall be formally decided by the EFTA Surveillance Authority when directed to EFTA States. The binding decision by ESA shall be based on a draft provided by ACER. Moreover, ESA´s decision shall not be directly binding for market participants in the EFTA States, but rather be directed towards the national NRA, who in turn will be required to implement the decision towards the national market participants.

[25] Article 1 of the Regulation.
[26] See in particular Articles 18 and 23 of the Regulation.
[27] Article 1(2) of the Regulation.
[28] Article 4 of the Regulation.

The decision-making powers of ACER, and formally for ESA under the EEA Agreement, is discussed in more detailed in section 5 below.

4.3 Other secondary legislation relevant to the energy sector

For the sake of completeness, it is important to emphasise that the EU has also adopted other legislation than internal market legislation of large importance for the energy sector.

First, several measures have been adopted on the basis of the energy title in Article 194 TFEU. While the third energy market package was adopted before Article 194 TFEU came into force, subsequent energy market legislation is likely to be based on this provision. Regulation (EU) No. 1227/2011 on wholesale energy market integrity and transparency (REMIT) was based on Article 194 TFEU and so were also the environmental and energy efficiency related Buildings Directive 2010/31/EU, Energy Labelling Directive 2010/30/EU and Energy Efficiency Directive 2012/27/EU. A new Directive (EU) 2018/844 amending amending the Buildings Directive and the Energy Efficiency Directive has also recently been adopted at EU level. All pieces of legislation have an impact on the energy market in broad terms, but they do not influence the more fundamental questions of resource management raised below in section 5 and 6 below.

Second, important legal measures of relevance to the energy sector have been adopted on the basis of the environmental provision in Article 192 TFEU. Renewables Directive 2009/28/EC has important implications for promotion of new investments in renewables based on the national binding targets for renewable sources in end-use of energy. The former and new EU ETS Directives affect electricity prices and investments by pursuing emission reductions and low-carbon investments through the EU Emissions Trading System.[29] The Water Directive 2000/60/EC setting out to protect and enhance water resources has important implications for hydropower reliant energy systems such as the Norwegian.

Finally, Infrastructure Regulation (EU) 347/2013 concerning energy interconnector projects has been adopted on the basis of the trans-european networks provision in Article 172 TFEU.

Some of the legislation described above has already been considered EEA relevant and has been incorporated into the Agreement. Environmental legislation is as a point of departure considered EEA relevant, and the Renewables Directive 2009/28/EC, the Water Directive 2000/60/EC as well as the former EU ETS Directive 2003/87/EC (and likely soon also the new Directive (EU) 2018/410) have all been incorporated into the Agreement.

With respect to measures adopted pursuant to Article 194 TFEU, REMIT 1227/2011 and the Energy Labelling Directive 2010/30/EU have not yet been incorporated into the EEA Agreement. The Buildings Directive 2010/31/EU and Energy Efficiency

[29] Directives 2003/87/EC and (EU) 2018/410.

Directive 2012/27/EU have not yet been incorporated into the EEA Agreement, but the EFTA States are currently discussing the matter.[30]

The EEA relevance of Infrastructure Regulation (EU) 347/2013 is still being considered by the EFTA States. The EEA relevance of this act is not obvious given that the EEA Agreement does not include provisions corresponding to the trans-european network provisions in TFEU.

4.4 EU measures adopted after the third energy market package

Energy has been high on the EU agenda after the adoption of the third energy market package in 2009, in particular following the adoption of the Energy Union strategy in 2015. At regulatory level, two major developments have taken place since 2009. First, a number of network codes and guidelines have been adopted at EU level pursuant to the provisions of Electricity Regulation (EC) No. 714/2009. Second, the Commission has launched a proposal for an extensive new legislative package entitled Clean Energy for All Europeans (often also referred to as "the Winter Package") where some of the legislation has already been adopted and the rest was recently made subject to political agreement and is expected to be finally adopted soon.[31]

The Electricity Regulation sets out a process in which the European network of transmission system operators for electricity (ENTSO-E) shall elaborate draft network codes within a number of defined areas pursuant to framework guidelines submitted by ACER to be finally adopted by the Commission. The network codes may cover a wide range of areas, such as network security and reliability rules, network connection rules and rules regarding harmonised transmission tariff structures, in addition to a number of other areas.[32] In addition, the Commission may adopt guidelines in practice following similar procedures.[33]

The ordinary process for the adoption of network codes runs through three institutional layers, starting with the Commission establishing an annual priority list in consultation with stakeholders identifying which areas to be included in the code development process.[34] On this basis, the Commission shall require ACER to submit a non-binding framework guideline setting out the overall principles for the development of the network codes.[35]

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[30] See hearing document published by the Norwegian Ministry of Petroleum and Energy on 2 November 2018, available here: https://www.regjeringen.no/no/dokumenter/horing---endringer-i-energiloven-og-naturgassloven-energibruk-i-bygninger-og-store-foretak/id2617849/?expand=horingsnotater (last visited 8 January 2019).

[31] See the Communication from the Commission COM(2016) 860 final, 30.11.2016, as well as an update on the legislative process here: https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans (last visited 8 January 2019).

[32] See further Article 8(6) of the Electricity Regulation.

[33] Article 18 of the Electricity Regulation.

[34] Article 6(1) of the Electricity Regulation.

[35] Article 6(2) of the Electricity Regulation.

ACER shall consult ENTSO-E and other stakeholders in the development of the framework guideline.[36] The Commission may request ACER to review the guideline if it does not, in the Commission's view, contribute to non-discrimination, effective competition and efficient market functioning, and the Commission may also ultimately elaborate the framework guideline itself if ACER should fail to submit or re-submit a guideline.[37]

Upon a request from the Commission, ENTSO-E shall within 12 months at the latest submit to ACER a network code which is in line with the framework guideline.[38] ACER shall, in turn, provide a reasoned opinion on the draft code, and ENTSO-E may amend the code on the basis of the opinion and re-submit the draft to ACER.[39]

ACER shall submit the draft code to the Commission when it finds the draft to be in line with the framework guideline, and it may recommend that the draft is finally adopted by the Commission.[40] Finally, the draft code may then be adopted by the Commission, making it binding as a code pursuant to the Electricity Regulation.[41] The Regulation also confers certain powers on ACER to develop the draft network code if ENTSO-E fails to develop such code, and on the Commission to develop network codes if ENTSO-E or ACER fails to perform their tasks.[42]

Eight electricity network codes and guidelines have been adopted by the Commission. These codes an guidelines concern demand connection, high voltage direct current connections, requirements for generators, system operations, emergency and restoration, forward capacity allocation, capacity allocation and congestion management and electricity balancing.[43]

All eight network codes and guidelines are formally adopted as Commission Regulations. This means that inclusion in the EEA Agreement will need to take place through the ordinary procedures where the EEA Committee determines to incorporate the legislation into the EEA Agreement as separate regulations. These regulations will then in turn have to be implemented in national legislation as such in accordance with Article 7 a) EEA. Consequently, the incorporation of the third energy market into the EEA Agreement does not include the network codes and guidelines, which would rather be subject to separate procedures at a later stage.

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[36] Article 6(3) of the Electricity Regulation.
[37] Articles 6(4) and 6(5) of the Electricity Regulation.
[38] Article 6(6) of the Electricity Regulation.
[39] Articles 6(7) and 6(8) of the Electricity Regulation.
[40] Article 6(9) of the Electricity Regulation.
[41] Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170-190, at p. 171, suggests that decision-making powers have been conferred on ENTSO-E under EU legislastion. Although ENTSO-E in practice plays an important role in developing draft network codes, it is not correct that ENTSO-E has formal decision-making powers under EU law as the codes are ultimately adopted by the Commission.
[42] Articles 6(10) and 6(11) of the Electricity Regulation.
[43] For further information and access to the codes, see https://electricity.network-codes.eu/network_codes/ (last visited 6 December 2018).

The Clean Energy for All Europeans legislative package was launched by the Commission on 30 November 2016 and is now in the final stages of legislative adoption in the EU institutions. The package consists of amendments to Electricity Directive 2009/72/EC, Electricity Regulation (EC) No. 714/2009, ACER Regulation (EC) No. 713/2009, Buildings Directive 2010/31/EU, revised Renewables Directive and Energy Efficiency Directive, as well as new Regulations on energy governance and risk-preparedness.

Directive (EU) 2018/844 amending the Buildings Directive and Energy Efficiency Directive was adopted on 19 June 2018. On 4 December 2018 the Council of the EU adopted three of the legislative proposals included in the Clean Energy for All Europeans package: the new Energy Efficiency Directive requiring EU headline targets on energy efficiency of at least 32,5 % by 2030; a new Renewables Directive setting a headline target of 32 % renewable energy at EU level by 2030; and a Governance Regulation setting out cooperating requirements between Member States and with the Commission.[44] Political agreement on the remaining legislation in the package was reached later in December 2018.[45]

The adoption of all the legislative proposals in the Clean Energy for All Europeans package entails a number of amendments to the legislation comprised by the third energy market package now considered for EEA incorporation. These amendments will have to be considered by the EEA Joint Committee at a later stage. In this respect, the question of EEA relevance is also likely to arise, in particular for the Energy Governance Regulation.

4.5 Conclusion

The third energy market package is just one piece of a larger puzzle of EU and EEA legislation relevant to national management of electricity markets.

First, the provisions in the main part of the EEA Agreement discussed in section 3 above, such as the free movement of goods and State aid provisions, have played and will continue to play an important role in electricity market development. These provisions will continue to apply for the Contracting Parties to the EEA Agreement irrespective of whether the third energy market package is incorporated into the Agreement. Many of the provisions in the third energy market package build on the general principles enshrined in the EEA Agreement. Therefore, the EEA Member States will, for example, still be under an obligation not to restrict the free movement of electricity across borders even if the third energy market package is not incorporated into the EEA Agreement.

Second, the third energy market package builds on earlier internal energy market packages and most notably the second energy market package from 2003 which is

[44] See further https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/energy-efficiency-renewables-governance-of-the-energy-union-council-signs-off-on-3-major-clean-energy-files/# (last visited 8 January 2019).
[45] See press release by the European Commission on 18 December 2018, IP/18/6870, available here: http://europa.eu/rapid/press-release_IP-18-6870_en.htm (last visited 7 January 2019).

already incorporated into the EEA Agreement. In many areas the third energy market package only repeats or slightly develops the provisions in the second package. The most important new developments in the third energy market package are arguably stricter unbundling requirements for TSOs, stricter rules for the organisation of NRAs, the establishment of ACER and the procedure for the development of network codes and guidelines. Other aspects of the third package are to a large extent already adopted at EEA level through the incorporation of the second package. Consequently, the decision to adopt the third energy market package is not a question of becoming a member of the EU´s internal energy market or not, but rather a question of whether to continue the efforts commenced more than two decades ago to facilitate the functioning of the internal energy market.

Third, the third energy market legislation must also be considered in a wider EEA secondary law context where other pieces of legislation such as the Renewables Directive are important for the development of electricity markets and will still have an impact on them even if the third package is not adopted.

Fourth, it is important to distinguish between the third energy market package on the one hand and the legislation adopted or proposed at EU level subsequent to 2009 on the other hand. The decision by the EEA Committee to incorporate the third energy market package only comprises the legislation adopted in 2009. Network codes and guidelines subsequently adopted as regulations at EU level are subject to separate assessment and potential incorporation by the EEA Joint Committee at a later stage. This is also case for the legislation adopted at EU level on the basis of the Commission´s Clean Energy for All Europeans proposal. A decision to incorporate the third energy market package now does not bind the future competence of the EEA Joint Committee any more than the adoption of the second energy market package now does in the evaluation of the third package. For each piece of legislation the question will be whether the legislation at issue is EEA relevant in which case a reservation to incorporate it in principle will trigger the procedure in Article 102 EEA.

5 Public ownership to energy resources

5.1 Introduction

Public ownership to strategic energy resources is considered a fundamental interest in energy resource management in many States, including in Norway and Iceland. The question of public ownership can arise both for primary energy sources and electricity generation and for ownership to strategic transport infrastructure such as transmission grids and interconnectors.

The questions to be addressed in this section are whether the third energy market package affects national ownership policies and, if so, to what extent. This question must, however, be seen in a broader EEA context where also the main part of the EEA Agreement is considered. In particular, Article 125 EEA concerning the system of property ownership is important in this respect.

In the following I will first discuss the main part of the EEA Agreement with particular focus on Article 125 EEA below in section 5.2. The relationship to the internal energy legislation and the third energy market package is then discussed in section 5.3.

5.2 The main part of the EEA Agreement

Article 125 EEA in Part IX "General and final provisions" in the EEA Agreement sets out as follows:

"This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership."

The provision mirrors the wording of Article 345 TFEU (former Article 295 EC). The ECJ has consistently held that systems of property ownership are a matter for Member States by virtue of this provision, but that the article does not have the effect of exempting those systems of property ownership from the fundamental rules of the Treaty.[46]

The reasoning of the ECJ applies correspondingly for the interpretation of Article 125 EEA.[47] This means that each State is entitled to pursue a policy of public ownership to energy resources, but that policy must not contradict the fundamental rules in the main part of the EEA Agreement. The public ownership policy cannot, for example, be structured in a way that entails illegal State aid[48] or amounts to an illegal restriction on the free movement of capital.[49]

In case E-02/06, *hjemfall*, the Norwegian authorities argued, *inter alia*, that the Norwegian legislation on waterfall reversion qualified as rules governing the system of property ownership falling outside the scope of the EEA Agreement on the basis of Article 125 EEA. The EFTA Court did not agree and held, with further reference to ECJ case law, that:

"It follows from the case law of the ECJ on Article 295 EC that Article 125 EEA is to be interpreted to the effect that, although the system of property ownership is a matter for each EEA State to decide, the said provision does not have the effect of exempting measures establishing such a system from the fundamental rules of the EEA

[46] See case 182/83, *Fearon*, para.7, case C-302/97, *Konle*, para. 38, case C-367/98, *Commission v. Portugal*, para. 48 and case T-457/09, para. 387.
[47] See Article 6 EEA and Article 3(2) of the Agreement establishing a Surveillaince Authority and EFTA Court. Peter Ørebech, *EØS-avtalens artikkel 125, med særlig vekt på diskusjonen i NOU 2004:26 Hjemfall*, Lov og Rett No. 1-2 2006, pp. 26-45, argues that Article 125 EEA is subject to a wider interpretation allowing for broader protection of public ownership rights than what is the case for (now) Article 345 TFEU. Peter Ørebech´s views were, however, not followed in the subsequent ruling in case E-02/06, *hjemfall*, where the EFTA Court held that the provisions should be interpreted similarly, se in particular para. 61.
[48] See case T-457/09.
[49] See case C-367/98.

Agreement, including the rules on free movement of capital and freedom of establishment".[50]

The Court then went on to consider whether the national scheme at issue amounted to restrictions on the freedom of establishment and the free movement of capital and concluded that it qualified as restrictions under both Articles 31 and 40 EEA.[51]

With regard to the legitimacy of the aims pursued by the legislation, Norwegian authorities argued that the goal of acquiring and maintaining public ownership over essential energy resources was in itself a legitimate justification under the EEA Agreement.[52] In this respect, the Court held that:

"Article 125 EEA is to be interpreted to the effect that an EEA State's right to decide whether hydropower resources and related installations are in private or public ownership is, as such, not affected by the EEA Agreement. The corollary of this is that Norway may legitimately pursue the objective of establishing a system of public ownership over these properties, provided that the objective is pursued in a non-discriminatory and proportionate manner."[53]

Consequently, the EFTA Court as a matter of principle accepted public ownership as a legitimate interest that could justify free movement restrictions. The Norwegian legislation applicable at the time was, however, not considered sufficiently consistent by the Court to pass a test of non-discrimination and proportionality.[54] The scheme was therefore considered to be contrary to the EEA Agreement. The Norwegian government subsequently amended national legislation to the effect that public ownership to large-scale waterfalls was pursued in a more consistent manner – in effect strengthening the scope of public ownership – and this regime has not been challenged under the EEA Agreement.

The specific questions dealt with by the EFTA Court in *hjemfall* have not been subject to scrutiny by the ECJ and existing ECJ case law does not contradict the EFTA Court´s reasoning. Consequently, the reasoning of the EFTA Court still prevails in EEA law. This entails that Norway and Iceland may legitimately pursue the objective of establishing a system of public ownership to strategic energy resources under the free movement provisions of the EEA Agreement provided that the objective is pursued in a non-discriminatory and proportionate manner.

5.3 The third energy market package

The third energy market package does not include any provisions specifically restricting the right of the Member States to own strategic energy resources or restricting the Member States from pursuing a system of public ownership. This corresponds to the approach under other secondary legislation relevant to the energy

[50] Case E-02/06, para. 62.
[51] Case E-02/06, paras. 64-69.
[52] Case E-02/06, para. 71.
[53] Case E-02/06, para. 72.
[54] Case E-02/06, paras 73-81.

sector, and to EU secondary legislation more generally for that matter, not to govern directly the right to ownership.

There are both political and legal reasons why Member States´ rights to pursue public ownership is not directly regulated in the internal energy market legislation. From a political perspective, the question of public ownership to energy resources is sensitive and controversial not only in Norway and Iceland, but also in a number of EU Member States. It is therefore most likely limited political desire to directly regulate the issue at EU level. From a legal perspective, and partly as a result of the political considerations, Articles 345 TFEU and 125 EEA in my view restrict the right of the EU to abolish public ownership schemes in secondary legislation and consequently to incorporate such legislation into the EEA Agreement. The requirement that TFEU and the EEA Agreement in no way shall prejudice national rules governing the system of property ownership must also be interpreted to encompass rules adopted in secondary legislation.

Articles 345 TFEU and 125 EEA do not necessarily preclude the adoption of secondary legislation that *indirectly* may affect national rules governing the system of property ownership. This corresponds to the situation under the main part of the EEA Agreement, where free movement, State aid and competition rules may affect the means chosen by a Member State to pursue public ownership although the interest as such is legitimate. However, the third energy market package also contains few provisions of indirect relevance to national choices of public ownership. The right to primary energy sources and electricity generation is only lightly regulated in the third energy market package and does not impose significant restrictions to national ownership schemes, even indirectly. General non-discrimination criteria such as those provided in Article 3(1) and 7(1) of Electricity Directive 2009/72/EC may be relevant for the design of national schemes, but similar obligations in any case follow from the main part of the EEA Agreement and corresponding non-discrimination requirements also follow from the second Electricity Directive 2003/54/EC already incorporated into the EEA Agreement.[55]

In principle, one might argue that the main rule for TSO unbundling in Article 9 of Electricity Directive 2009/72/EC could have an impact on public ownership as the requirement that the same entity cannot own both electricity generation and TSO entities could force states with ownership interests in both to divest. However, Since Article 9(6) of the Directive permits that the State owns both interests as long as their control is exercised by two separate public bodies the question of restrictions for public ownership does not arise. Both Norway, Sweden and Denmark has relied on Article 9(6) by ways of having different Ministries controlling the ownership interests in electricity generation and TSOs and the EU Commission has accepted this approach in the certification procedures for the Swedish and Danish TSOs.

Consequently, the third energy market package does not include any provisions that directly regulate the right of Member States to pursue a system of public ownership to strategic energy resources. Moreover, it includes few provisions of indirect relevance to national choices of public ownership. Except for the TSO unbundling rules, the

[55] See Articles 3(1) and 6(1) of Electricity Directive 2003/54/EC.

indirect provisions of any potential relevance relate to general requirements such as non-discrimination that already follow from existing law under the EEA Agreement.

5.4 The conclusion in Peter Ørebech´s legal opinion

In his legal opinion of 23 September 2018, Professor Peter Ørebech concludes that

"Avgjørende blir da hvilke forordninger og direktiver som EØS-landene ønsker å inkorporere i EØS-avtalen. Eller sagt annerledes, dersom Island ikke ønsker at EØS-avtalen artikkel 11, 12 og 13 etc. skal ha ubetinget anvendelse for energisektoren, må en også stemme nei til den «tredje energipakke»."[56]

Professor Ørebech discusses both the main part of the EEA Agreement, and in particular Article 125 EEA, as well as internal energy market legislation and other secondary law measures. It is, however, difficult to understand the arguments leading up to the conclusion above that voting no to the third energy market package is relevant for the applicability of the main part of the EEA Agreement to the energy sector. Irrespective of whether the third energy market package is incorporated into the EEA Agreement or not, the general provisions in the main part of the EEA Agreement will apply to the energy sector in the same manner as to other sectors of the economy. Article 125 EEA is of no relevance to this question. The conclusion above from Peter Ørebech´s opinion is therefore not correct.

5.5 Conclusion

Article 125 EEA must be interpreted to the effect that each State is entitled to pursue a policy of public ownership to energy resources, but that policy must not contradict the fundamental rules in the main part of the EEA Agreement. A public ownership policy cannot therefore, for example, be structured in a way that amount to illegal State aid, is in breach of EEA competition law or amounts to an illegal restriction on the free movement of capital or freedom of establishment. Norway and Iceland may, however, legitimately pursue the objective of establishing a system of public ownership to strategic energy resources under the free movement provisions of the EEA Agreement provided that the objective is pursued in a non-discriminatory and proportionate manner.

The third energy market package does not include any provisions that directly regulate the right of Member States to pursue a system of public ownership to strategic energy resources. The few provisions that in practice may have any indirect relevance for national management and regulation of ownership issues already follow from existing law under the EEA Agreement (except for the specific TSO unbundling provisions mentioned above).

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[56] My translation: The determining issue is then which regulations and directives that the EEA States whish to incorporate into the EEA Agreement. Or, to put it differently, if Iceland does not want that Articles 11, 12 and 13 etc. of the EEA Agreement shall have unconditional applicability to the energy sector, then it must also be voted no to the "third energy market package", see p. 12 of the opinion.

Consequently, Norway and Iceland is entitled to pursue a policy of public ownership to energy resources under the EEA Agreement as long as the policy does not contradict the fundamental rules of the Agreement. In the latter assessment of compatibility, the free movement provisions in the main part of the EEA Agreement are in practice of more importance than the third energy market package which does not govern public ownership issues as such.

6 Licenses to build interconnectors

6.1 Introduction

The questions to be discussed in this chapter are whether and to what extent the third energy market package affects national decisions to permit the building of new electricity interconnectors to other EU or EEA Member States.[57]

The market situations for Norway and Iceland differ considerably in terms of interconnection to other States. Interconnectors have already been built between Norway and the other Nordic countries (except Iceland) as well as to the Netherlands and Russia. A cable between Norway and Germany is currently under construction and at least one cable will be built to the UK. Total interconnector capacity equals around 20 per cent of installed Norwegian production capacity. Consequently, Norway is a fully integrated part of the Nordic electricity wholesale market with power trade on Nord Pool Spot as well as being part of electricity exchange beyond the Nordic countries. The question in Norway is therefore whether to increase the number of interconnectors, integrating the Norwegian market even closer with other parts of the EU´s internal electricity market.

Iceland, on the other hand, is an isolated electricity market region with no interconnections to other countries at the moment. Most of the rules in the third energy market package will nevertheless apply to the Icelandic market if incorporated into the EEA Agreement.[58] The electricity market as such will however remain national for as long as there is no interconnection to other countries. From a market and economic perspective, the decision to permit the building of interconnectors is therefore arguably more important that a decision to accept the third energy market package.

The building of interconnectors has raised much discussion both in the Norwegian and the Icelandic third energy market debate. The questions are essentially whether the third energy market package affects the choice of which public body that issues licenses and whether it affects the assessments made by the issuing body.

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[57] The question whether EEA law and the third energy market package allow Member States to decide that only the national TSO may own and operate interconnectors is beyond the scope of this report and will not be discussed in the following.

[58] Article 44(1) of the Electricity Directive opens up for significant derogations from the Directive if "substantial problems" for the operation of small isolated systems are demonstrated, but requirements relating to, *inter alia*, the organisation of national regulatory authorities are not subject to derogation. Iceland is considered a small isolated system under Electricity Directive 2003/54/EC, see the Decision of the Joint EEA Committee No. 146/2005 of 2 December 2005 (OJ L 53/43, 23.2.2006), para. 22.

The first question of competent public body is a matter of whether the third energy market package governs which institutions that have powers to determine interconnector permits: Is each Contracting Party free to determine which public body that should have the powers to decide on interconnector licensing? And what is the competence of ACER in matters concerning interconnector permits? These questions will be analysed below in sections 6.2 and 6.3, correspondingly.

The second question concerning the content of the assessment raises the substantive issue of whether the third energy market package affects the discretion of the competent authorities to allow or refuse a permit to build an interconnector. I will consider this question below in section 6.4.

6.2 Competence to decide on interconnector licenses

Decisions to invest in and build an interconnector can at the outset be made by TSOs or other market participants. Such decisions require a permit or licence by the competent national authority. The procedures and form of the decision as well as the choice of competent authority may vary from country to country. In Norway, for example, owning or operating an interconnector requires a separate interconnector license to be issued by the Ministry of Petroleum and Energy in addition to the regular construction and operating licence.[59] The question to be addressed in this section is whether the third energy market package restricts the Member States´ choice of which public institution that shall have competence to decide on an interconnector license.

The point of departure under the internal energy market legislation is that Member States shall fulfil the legal requirements *"on the basis of their institutional organisation"*, signifying that it is up to each State to organize its public administration.[60] Each State´s institutional freedom is, however, restricted by the obligations in the Electricity Directive to establish an independent energy regulator which must be vested with a set of minimum market responsibilities. This means that the full institutional freedom of Member States is confined to the areas of energy regulation that do not fall under the competence of the independent regulatory authority.

Article 35 of Electricity Directive 2009/72/EC requires Member States to designate one single national regulatory authority that is legally distinct and functionally independent from any other public or private entity. This authority shall be able to take autonomous decisions independently from any political body, shall not seek or take instructions from any government or other public or private entity and shall have budget autonomy.[61] The independent regulatory authority shall cooperate closely with other independent regulatory authorities at EU level and with ACER. Consequently, the independent regulatory authority is in practice detached from the traditional national public administration and made part of EU-wide regulatory cooperation.

[59] See Sections 4-2 and 3-1 of the Norwegian Energy Act, correspondingly.
[60] See Article 3(1) of Electricity Directive 2009/72/EC.
[61] Articles 35(4)a and b and (5)(a) of Electricity Directive 2009/72/EC.

Such level of independence is contrary to the traditional Norwegian approach to public administration, where a subordinate directorate may typically be subject to instructions from superior ministries and where the decisions of a directorate may be appealed and is subject to full review by the superior ministry. This has also been the case in the electricity sector, where the regulatory authority NVE has been a directorate subject to the decisions of the Ministry of Petroleum and Energy. Therefore, arguably the most significant consequence of implementing the third energy market package for Norway concerns the establishment of the new independent regulatory authority "Reguleringsmyndigheten for energi" (RME), which is organised as an independent body within the broader mandated NVE.[62]

Given the strict independence requirements of the new national regulatory authorities, it is vital to consider what tasks that must be delegated to these authorities by virtue of Electricity Directive 2009/72/EC. These tasks are set out in Article 37 of the Directive, which governs the specific duties and powers of the NRAs. The extensive list of tasks contained in Article 37 Electricity Directive 2009/72/EC significantly expands the NRA tasks included in Article 23 of former Electricity Directive 2003/54/EC. However, both directives focus in particular on the regulatory authorities´ tasks to ensure non-discriminatory and transparent access to existing electricity grids, including interconnectors. The third party access requirements in the Electricity Directives particularly govern access to existing infrastructure, and not physical tie-in of new grids.[63]

Following the approach discussed above, Article 37 of the Electricity Directive sets out that NRAs shall be responsible for, *inter alia*, fixing or approving the methodologies used to establish terms and conditions for access to cross-border infrastructure, including the procedures for the allocation of capacity and congestion management.[64] The latter competence, however, relates to the management of interconnectors already being built, and not to the question of whether an entity should be permitted to build the interconnector in the first place.

Article 37 also includes a wide range of other tasks for the NRAs, but it does not include decisions on licenses or permits for the construction of interconnectors among those tasks. In fact, decisions to grant licenses for the construction of new electricity infrastructure at all, whether electricity generation, transmission or distribution facilities, are not included among the mandatory NRA tasks in Article 37. In considering the influence of NRAs and ACER on national resource management, it is consequently important to take into account that the Electricity Directive does not preclude that such sensitive resource management decisions remain under the control of the traditional State administration.[65]

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[62] See Amendment Act 25 May 2018 No. 21 to the Energy Act, which has yet to come into force.

[63] See Articles 20 of Electricity Directive 2003/54/EC and the corresponding Article 32 of Electricity Directive 2009/72/EC and the ECJ´s interpretation of the former provision in case C-239/07, *Julius Sabatauskas and Others*.

[64] Article 37(6)(c) of Electricity Regulation 2009/72/EC.

[65] This important point is not considered by Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170-190. The powers of RME is therefore in my opinion more limited than what Ørebech seems to argue on pp. 177-180.

Member States are of course permitted to confer competence on NRAs also to issue permits for interconnectors and other electricity facilities, but the Electricity Directive does not require them to do so. The Norwegian approach to implementation of the third energy market package has followed the minimum requirements, delegating to the independent RME tasks typically related to grid tariffs and management and market surveillance. The competence to decide licenses for interconnectors, as well as the competence to decide licenses for other grids and for electricity generation facilities, will, however, still remain with the traditional Norwegian public authorities, i.e. NVE and the Ministry of Petroleum and Energy.

Professor Peter Ørebech seems to assume in his legal opinion that the national NRA shall have the powers to decide on or overrule license decisions for interconnectors.[66] This assumption is, however, not further substantiated and is in my opinion clearly not correct.

Consequently, the third energy market package does not require the Member States to confer competence on the independent NRA to decide on licenses to interconnectors.

6.3 The role of ACER in interconnector licensing

The next question is then whether ACER has any role in the interconnector license decision in the sense that it could either instruct the national competent authority in its licensing decision or that the license decision could be appealed to ACER.

The overall acts of ACER are set forth in ACER Regulation (EC) No. 713/2009 Article 4. According to this provision, ACER may issue opinions and recommendations to TSOs, NRAs and the EU legislator institutions, submit non-binding framework guidelines to the Commission within further defined areas and *"take individual decisions in the specific cases referred to in Articles 7, 8 and 9"*.[67] Specific tasks are also conferred on ACER under other EU legislation, such as REMIT, Infrastructure Regulation (EU) 347/2013 and the network codes, but these are not part of the third energy market package and will not be discussed further here.

The question is whether ACER´s powers to issue binding, individual decisions under Articles 7, 8 or 9 of the ACER Regulation include competence to take decisions on interconnector licensing.[68] At the outset, it would be peculiar if ACER were to have

[66] Professor Peter Ørebech´s legal opinion 23 September 2018, p. 11.
[67] The latter competence to take individual decisions is included in Article 4(d). Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170-190 argues on p. 176 that ACER can manage the income of electricity companies through RME (as the Norwegian national NRA) electricity company income. He seems to be referring to congestion revenue on interconnectors and bases his view on recital 20 and 21 of the Electricity Regulation. Although it is correct that NRAs have a key role in determining tariff methodologies as well as distribution of congestion revenue, the statement by Ørebech is in my view too general.
[68] ACER can only adopt binding decisions within those areas where competence to adopt such decisions have been conferred in the Agency. ACER cannot, for example require a

powers to determine interconnector licensing, given that Electricity Directive 2009/72/EC does not confer such tasks on the NRAs.[69] Given that ACER´s Board of Regulators consists of representatives from the national NRAs, it would be inconsistent to grant this decision-making body powers to decide on matters that are beyond the scope of work for the NRAs.

Article 7 of the ACER Regulation sets out, first, that ACER may adopt decisions on technical issues where those decisions are provided for in the Electricity Directive or Electricity Regulation (and, correspondingly, for the gas market legislation). This competence refers in particular to the powers in Article 5 of the Electricity Directive, which provides that NRAs or Member States *"shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines are developed and made public."* The provision does not concern interconnector licensing as such.

Article 7(7) of the ACER Regulation provides that ACER *"shall decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure), in accordance with Article 8."* The question then is what follows from Article 8.

The heading of Article 8 is "Tasks as regards terms and conditions for access to and operational security of cross-border infrastructure". This heading already signifies that the provision confers competence to decide on interconnector access issues, but not on those concerning licenses for the building of interconnectors. This impression is confirmed by the wording in Article 8(1), which sets out that for interconnectors ACER *"shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only (...)".*[70] Since the competence to adopt interconnector licensing decisions is not conferred on the NRAs pursuant to Electricity Directive 2009/72/EC, ACER does not have the competence to adopt decisions concerning such licensing under Article 8(1) of the ACER Regulation.

Furthermore, Article 8(1)(a) and (b) set out the conditions that ACER may only adopt a decision within its sphere of competence if the NRAs on each side of the interconnector have not been able to agree within six months or if they submit a joint request for an ACER decision. Given that an interconnector license decision would have to be made individually by the competent authority on each side of the interconnectors, it would not make sense to have as a condition for an ACER decision that the NRAs do not agree. A national interconnector license is not subject to agreement between NRAs in the first place.

Member State to export all of its hydropower electricity production. This example, made by Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170-190 on p. 179 is therefore not relevant in the ACER and third energy market package discussion.

[69] See section 6.2 above.

[70] Emphasis added.

Finally, the scope of ACER´s competence under Article 8 relates to "terms and conditions for access to and operational security" of interconnectors. A natural interpretation of this wording suggests that it relates to the rules of access for the use of the interconnector, and not to the assessment of whether the construction of an interconnector should be permitted. Article 8(2) substantiates this finding further by emphasising that those terms and conditions shall include a procedure and timeframe for capacity allocation, congestion revenues and tariffs. These terms are the key conditions for the use of an interconnector. The ECJ´s interpretation in case C-239/07, *Julius Sabatauskas and Others* of the term "access" in Article 20 of Electricity Directive 2003/54/EC (corresponding to Article 32 in Electricity Directive 2009/72/EC) also supports the conclusion above.

Professor Peter Ørebech argues that ACER has the competence to decide on whether interconnectors may be built if the Member States concerned do not agree. He bases this argument on Article 8(1) of the ACER Regulation and he also refers to the Infrastructure Regulation. [71] As emphasised above, Article 8 of the ACER Regulation refers to the rules for access to and use of interconnectors, and not the decision whether to permit the building of interconnectors. The Infrastructure Regulation is not part of the third energy market package, it is not obvious that it is EEA relevant and it is in any case difficult to see how the PCI scheme under that Regulation should have relevance for the question of ACER´s powers in licensing decisions. Professor Peter Ørebech´s argument is therefore in my opinion not correct.

Under Article 9 of the ACER Regulation, ACER also has the competence to finally decide on questions of exemptions from third party access for new interconnectors pursuant to Article 17(5) of Electricity Regulation (EC) No. 714/2009 in cases where national NRAs are unable to agree or submit a joint request to ACER. This exemption possibility, intended to promote the decision of investors to build interconnectors by temporarily shielding them from a market based capacity scheme, does not impact the interconnector licensing decision as such.[72]

Based on the above, it is clear that ACER does not have competence to decide on matters relating to the evaluation by the competent national authority on whether to grant an interconnector license.

The EEA Joint Committee decision on third energy market package incorporation confers competence on the EFTA Surveillance Authority to formally adopt those decisions addressed to the EFTA Member States that would be taken by ACER for

[71] Professor Peter Ørebech´s legal opinion 23 September 2018, p. 10.
[72] Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170-190 discusses this exemption on pp. 175-176. His description of the nature of the exemption possibility is not clear, but he seems to argue that the assessment is of vital importance for the establishment of new interconnectors. This is not necessarily the case. The parties did not, for example, apply for such exemption for the NorNed cable between Norway and the Netherlands. In those cases where the parties have applied for exemptions, the EU Commission appears to follow a fairly liberal practice where exemptions are mostly accepted, see for an overview of cases https://ec.europa.eu/energy/sites/ener/files/documents/exemption_decisions2018.pdf (last visited 8 January 2019).

EU Member States. The scope of ESA´s powers will correspond to ACER´s decision-making competence, and the conclusion above will therefore also apply under the EEA Agreement.

6.4 The third energy market package´s influence on national interconnector licensing decisions

Based on the analysis above, it can be concluded that Norway and Iceland have discretion to decide which national public body that shall have the powers to adopt license decisions for the building of interconnectors, and that ACER/ESA do not have specific competence to overrule these decisions. A different matter to be addressed in this section is whether the third energy market package may nevertheless influence the license decision by restricting the discretion of the relevant national body in its assessment of the license application.[73]

The third energy market package does not include specific provisions concerning the granting of licenses for the establishment of interconnectors. The obligation in Article 3(1) of Electricity Directive 2009/72/EC for Member States not to discriminate between electricity undertakings as regards either rights or obligations applies to all actions by Member States. Consequently, this provision requires Member States not to discriminate between electricity undertakings in decisions relating to interconnector licenses, just as it does for any other public decision in the electricity sector.

The non-discrimination requirement in Article 3(1) of Electricity Directive 2009/72/EC is identical to the same requirement in Article 3(1) of Electricity Directive 2003/54/EC. The third energy market package therefore does not introduce any new obligations at this point that are not already part of the EEA Agreement. Moreover, the requirement in Article 3(1) is only a sector specific expression of the general principle of equality.[74] The prohibition of discrimination is a fundamental principle of EU and EEA law reflected in the general prohibition of discrimination in Article 4 EEA as well as in the prohibitions on free movement restrictions. Consequently, the prohibition in Article 3(1) of the Electricity Directive is in any case unlikely to provide any further restrictions for Member States than what already follows from the main part of the EEA Agreement.

It would be beyond the scope of this report to assess to what extent the provisions in the main part of the EEA Agreement, such as the prohibitions in Articles 4 and 11 EEA, might influence national interconnector licensing decisions. For the purpose of the topic addressed here, it suffices to conclude that the adoption of the third energy market package does not entail any new restrictions for the interconnector license

[73] In such case, the matter may ultimately arise before ESA or the EFTA Court either on the basis of a request for an advisory opinion by a national court to the EFTA Court in a specific case or (submitted to the EFTA Court) or as an investigaton of a failure to fulfil EEA obligations (by ESA and which may ultimately be decided by the EFTA Court). These would be the same procedures under the EFTA Surveillance Authority and Court Agreement (SCA) that applies for enforcement of EEA law in general, and would not be affected by the ACER Regulation or the establishment of ACER as such.

[74] See case C-17/03, *VEMW*, para. 47.

assessments of national authorities that do not already follow from the EEA Agreement.

6.5 Conclusion

The questions discussed in this chapter have been whether and to what extent the third energy market package affects national decisions to permit the building of new electricity interconnectors to other EU or EEA Member States. The conclusion is that the third energy market package as such does not influence such decisions beyond what already follows from the EEA Agreement.

The third energy market package does not set out which national institutions that should be responsible for interconnector license decisions. More specifically, it does not require the Member States to confer competence on the independent national regulatory authority to decide on licenses to interconnectors. Therefore, each Member State has discretion to determine that such powers should remain with another public body, such as a Ministry or a Directorate. Under the Norwegian implementation of the third energy market package, the competence to grant interconnector licenses is conferred on the Ministry of Petroleum and Energy.

Furthermore, it is clear that ACER (and, correspondingly, ESA in its "ACER function" under the EEA Agreement) does not have competence to decide on matters relating to the evaluation by the competent national authority on whether to grant an interconnector license.

Finally, the third energy market package does not introduce any new restrictions for the interconnector license assessments carried out by the competent national authority beyond those obligations already following from the EEA Agreement.

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