

EUs energibyrå (ACER) utenlandskabler og beslutningene *[The EU Agency for the Cooperaton of Energy Regulators (ACER), and the cross-border transmission system and decision-makting]*

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«At lögum scal land vårt byggia en eigi at úlögum eyða» -
*Frostatingslova,
Tingfarebolk § 6 (fra ca. 970)*



Hvilke problemstillinger vil bli behandlet?

- I.** Forskjellen på den opprinnelige EØS-avtale Vedlegg IV om energi - og den Tredje Energipakke
- II.** Er rettsstillingen avhengig av om det finnes kraftkabel til utlandet?
- III.** Nasjonal regulerings- og råderett over Islands energiresurser, f.eks. ved privatisering av „Landsvirkjun“
- IV.** Er det mulig å forhandle seg bort fra EØS avtalen Vedlegg IV?
- V.** To-søyle prinsippet er forlatt, f.eks. ved konsesjonsbehandling av sjøkabel
- VI.** De avtalemessige konsekvenser av et islandsk nei til „pakken“
- VII.** Prosessen, som må settes i gang innenfor EU for å tvinge Island ut av EØS som følge av et islandsk Nei til ACER



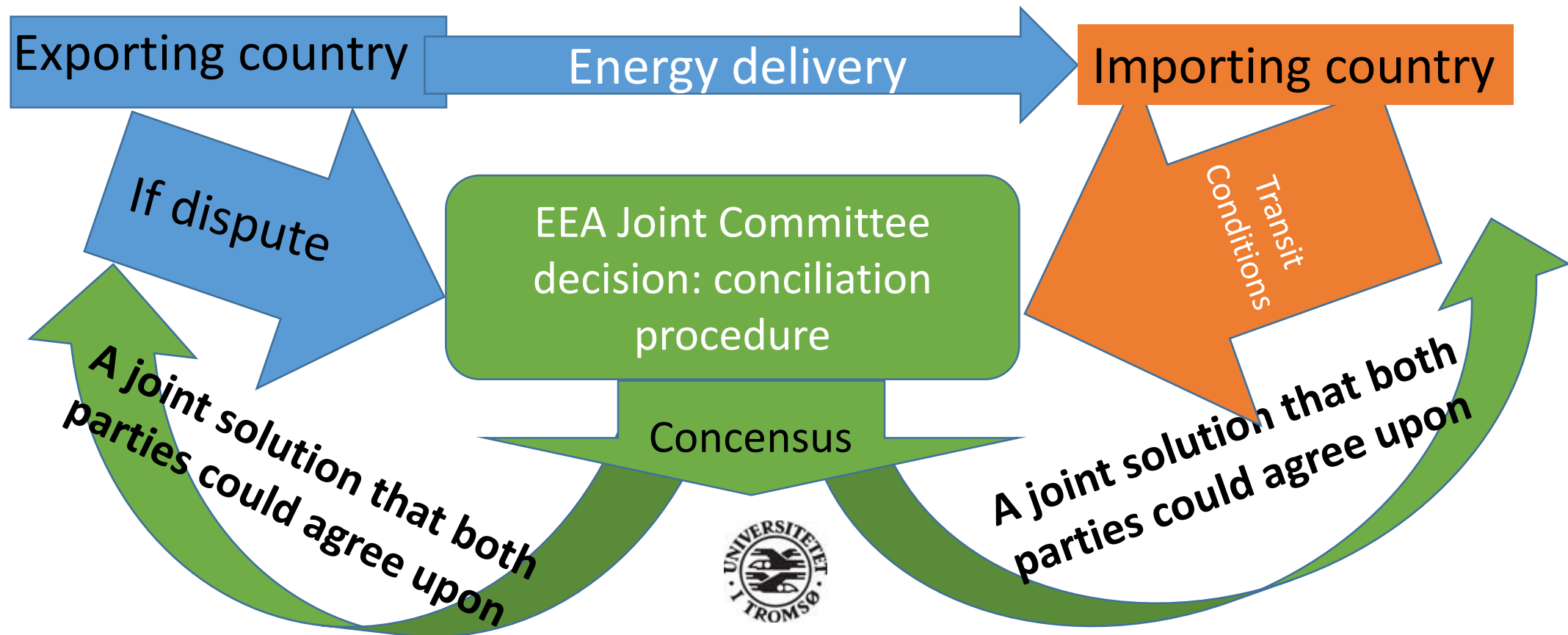
I. Differences between the 1992-solution and the EU third package

- **EØS-avtalen Vedlegg IV pr. 2.mai 1992 (opprinnelig avtale):** ACTS REFERRED TO 390 L 0547: Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ No L 313, 13.11.1990, p. 30).
- «The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations: ...
- (iii) each of the entities concerned may request that, with regard to trade between the Community and an EFTA State, the conditions of transit be subject to a **conciliation procedure** to be decided by the EEA Joint Committee;



The previous and the present organization of energy distribution; EU-EFTA **inter-states** (Figure 1)

EEA agreement, previous to the «third package» - the bilateral concensus, «flat structure» and national autonomy: **The Two-pillar solution**



I. Differences between the 1992-solution and the EU „third package“ (1)

- **(EF) No. 713/2009, The Third Package:** “The decisions of the Board of Appeal may be subject to **appeal before the Court of Justice of the European Communities**”, preamble para. 19.
- “In the event that the Agency fails to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 of the Treaty” (Article 20.2).
- “In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice shall have jurisdiction in any dispute over the remedying of such damage” (Article 29).



I. Differences between the 1992-solution and the EU third package (2)

- REGULATION (EU) No 347/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.
- **Annex V:**
- "(a) in electricity: scenarios for demand, generation capacities by fuel type (biomass, geothermal, hydro, gas, nuclear, oil, solid fuels, wind, solar photovoltaic, concentrated solar, other renewable technologies) and their geographical location, fuel prices (including biomass, coal, gas and oil), carbon dioxide prices, the composition of the transmission and, if relevant, the distribution network, and its evolution, taking into account all new significant generation (including capacity equipped for capturing carbon dioxide), storage and transmission projects for which a final investment decision has been taken and that are due to be commissioned ...
- (b) in gas: scenarios for demand, imports, fuel prices (including coal, gas and oil), carbon dioxide prices, the composition of the transmission network and its evolution, taking into account all new projects for which a final investment decision has been taken and that are due to be commissioned ...



I. Differences between the 1992-solution and the EU third package (3)



Brussels, 3.3.2017
COM(2017) 110 final

2017/0046 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union,
within the EEA Joint Committee concerning an amendment
to Annex IV (Energy) to the EEA Agreement

(Third Energy Package)

«The extension of the EU *acquis* in the EEA EFTA States, through their incorporation into the EEA Agreement is conducted in conformity with the objectives and principles of this Agreement aiming at establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition.

These efforts cover all policies in the area of the free movement of goods, persons, services and capital, as well as flanking and horizontal policies specified in the EEA Agreement» (p. 2).



I. Differences between the 1992-solution and the EU third package (4)

- **EØS Artikkel 11.** *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties*
- **EØS Artikkel 12.** *Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between the Contracting Parties*
- **EØS Artikkel 13.** *The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties*



I. Differences between the 1992-solution and the EU third package (5)

- “The rules on legal and functional unbundling as provided for in Directive 2003/54/EC have not, however, led to effective unbundling of the transmission system operators” (preamble para. 10).¹
- “Directive 2003/54/EC introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government”. (preamble para.33).¹
- «However, it is widely recognised by the sector, and has been proposed by the ERGEG itself, that voluntary cooperation between national regulatory authorities should now take place within a Community structure with **clear competences and with the power to adopt individual regulatory decisions in a number of specific cases**». ²

1. DIRECTIVE 2009/72/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC) preamble para.
2. EU-regulation (EF) 713/2009 preamble para. 3.



I. Differences between the 1992-solution and the EU third package (6)

- “The Member States should cooperate closely, eliminating obstacles to cross-border exchanges of electricity and natural gas with a view to achieving the objectives of Community energy policy». Agency for the Cooperation of Energy Regulators should be established in order to **fill the regulatory gap at Community level** and to contribute towards the effective functioning of the internal markets in electricity and natural gas» (*EU-regulation (EF) 713/2009, preamble para. 5*).
- “The Agency should ensure that regulatory functions performed by the national regulatory authorities in accordance with Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity” (preamble para. 6).
- «Transmission system operators (TSOs) shall endeavour to accept all commercial transactions, including those involving cross-border-trade” (EF 714/2009 Annex I, Guidelines on the management and allocation of available transfer capacity of interconnections between national systems).



I. Differences between the 1992-solution and the EU third package (7)

- «The structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular, the specific role of the national regulatory authorities needs to be taken fully into account and their independence guaranteed» (EU-forordning (EF) 713/2009 preamble para. 16).
- «To that end, it is necessary to **guarantee the independence** of the Agency from electricity and gas producers, transmission and distribution system operators, whether public or private, and consumers and to ensure the conformity of its actions with Community law, its technical and regulatory capacities and its transparency, amenability to democratic control and efficiency].(EU-forordning (EF) 713/2009 preamble para. 6).



I. Differences between the 1992-solution and the EU third package (8)

- De norske juss-professorene Eirik Holmøyvik og Hallvard Haukeland Fredriksen trekker den slutning at
- «Med dette overtar ESA regjeringens kontroll av den delen av norsk energiforvaltning som tilfaller RME ... Og om RME nøler, kan trolig **private aktører fremtvinge** effektueringen ved å anføre for norske domstoler at norsk lov pålegger RME å iverksette ESAs vedtak.»
- [http://rett24.no/articles/grunnlovsstridig-tilknytning-til-eus-energibyra.](http://rett24.no/articles/grunnlovsstridig-tilknytning-til-eus-energibyra)



The previous and the present organization of energy distribution decisions; EU-EFTA inter-states (2)

Subsequent to the «third package», the supra-national structure:

The harmonized One-pillar solution:

The EU court of Justice



The Commission



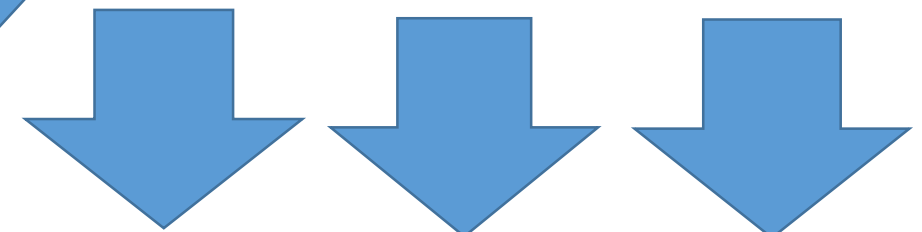
Agency for the Cooperation of Energy Regulators, ACER



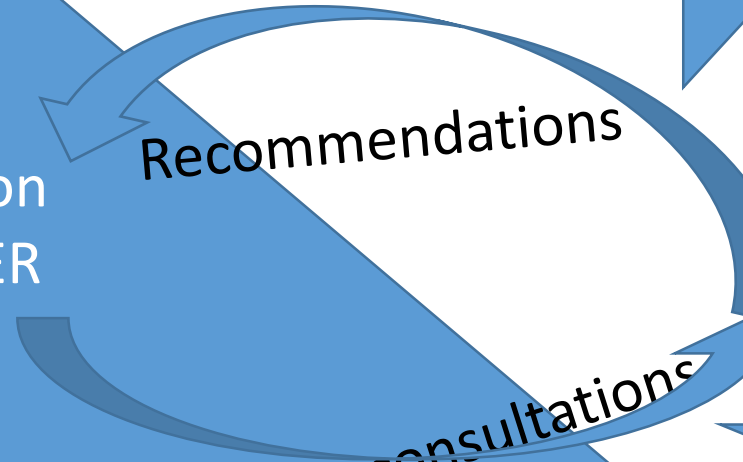
The EU network of transmission system-operators for electricity «ENTSO-E)

Decision-making re all entities, binding; EUs general rules on qualified majority vote

European Economic Authority (ESA) decision: «copy- and paste» + translation system



Recommendations



consultations

RME-Iceland

RME-Liechtenstein

RME - Norway

Binding

Binding

Binding

Iceland

Liechtenstein

Norway



II. Is the legal solution related to the existence of a cross-border cable?

- **(EF) No 714/2009. Article 2.1.** The regulations' only purpose is to embed a future system of smooth and unhampered flow of energy («'new interconnector' ["a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States"] means an interconnector not completed by 4 August 2003”).
- **(EF) No 714/2009. preamble paragraph 23.** «Investments in major new infrastructure should be promoted strongly while ensuring the proper functioning of the internal market in electricity. In order to enhance the positive effect of exempted direct current interconnectors on competition and security of supply, market interest during the project-planning phase should be tested and congestion-management rules should be adopted»
- **(EF) No 714/2009, Article 17.** “New direct current interconnectors may, upon request, be exempted, for a limited period of time, from the provisions of Article 16(6) of this Regulation and Articles 9, 32 and Article 37(6) and (10) of Directive 2009/72/EC under the following conditions:
 - (a) the investment must enhance competition in electricity supply;
 - (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted;
 - (c) the interconnector must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that interconnector will be built ... (),



III. National Icelandic regulatory competency i.a. by privatizing „Landsvirkjun“ (1)

- REGULATION (EU) No 347/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.
- **Chapter III article 3.** «Decision-making powers in the Groups shall be **restricted to Member States and the Commission**, who shall, for those purposes, be referred to as the decision-making body of the Groups. [Beslutningsdygtigheden inden for grupperne **er begrænset til medlemsstaterne og Kommissionen**, der med henblik herpå betegnes som gruppernes beslutningstagende instans].



National Icelandic regulatory competency i.a. by privatizing „Landsvirkjun“ (2)

- **EØS artikkel 125.** «This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership. [*Denne avtale skal ikke på noen måte berøre avtalepartenes regler om eiendomsretten*].
- **Advocate General Ruiz-Jarabo Colomer:** EU-court «appear to render devoid of all practical effect Article 345 EC». (Opinion 6. February 2003. Sak [C-463/00](#) og [C-98/01](#), ECR [2003] I-4581 section 37).
- **JUDGMENT OF THE EFTA COURT, 26 June 2007, Case E-2/06:** «That article [295] does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty».



National Icelandic regulatory competency i.a. by privatizing „Landsvirkjun“ (3)

- **JUDGMENT OF THE EFTA COURT, 26 June 2007, Case E-2/06:**
- “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 Agreement**, including the rules on free movement of capital and freedom of establishment ... In light of the above, the Defendant's submission that the contested rules do not fall within the scope of the EEA Agreement must be rejected” (section 62-63).
- «The Court holds 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» (section 72).



IV. Withdraw from the EEA agreement Annex IV Energy? (1)

- **EØS article 31 Establishment** «Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4”.

[I samsvar med bestemmelsene i denne avtale skal det ikke være noen restriksjoner på etableringsadgangen for statsborgere fra en av EFs medlemsstater eller en EFTA-stat på en annen av disse staters territorium. Dette skal gjelde også adgangen til å opprette agenturer, filialer eller datterselskaper for så vidt angår borgere fra en av EFs medlemsstater eller en EFTA-stat som har etablert seg på en av disse staters territorium.

Etableringsadgangen skal omfatte adgang til å starte og utøve selvstendig næringsvirksomhet og til å opprette og lede foretak, særlig selskaper som definert i artikkel 34 annet ledd, på de vilkår som lovgivningen i etableringsstaten fastsetter for egne borgere, med forbehold for bestemmelsene i kapitlet om kapital]».



IV. Withdraw from the EEA agreement Annex IV Energy? (2)

- **EØS article 40 Investment:** «Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.»
- *[Innen rammen av bestemmelsene i denne avtale skal det mellom avtalepartene ikke være noen restriksjoner på overføring av kapital tilhørende personer bosatt i EFs medlemsstater eller EFTA-statene og ingen forskjellsbehandling på grunn av partenes nasjonalitet, bosted eller stedet for kapitalanbringelsen. Vedlegg XII inneholder de bestemmelser som er nødvendige for å gjennomføre denne artikkel.]*



IV. Withdrawal from the EEA agreement Annex IV Energy?

(3)

- **EØS artikkel 4.** «Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited».

[Enhver forskjellsbehandling på grunnlag av nasjonalitet skal være forbudt innenfor denne avtales virkeområde, med forbehold for de særbestemmelser den selv gir].

- **EØS artikkel 124.** «The Contracting Parties shall accord nationals of EC Member States and EFTA States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 34, without prejudice to the application of the other provisions of this Agreement»

[Avtalepartene skal gi statsborgere fra EFs medlemsstater og EFTA-statene den samme behandling som sine egne statsborgere med hensyn til adgangen til å plassere kapital i selskaper som definert i artikkel 34, med forbehold for anvendelsen av de øvrige bestemmelser i denne avtale].



V. The two pillar system is repealed affecting decisions on new cross-border cables

- “Since the **objective** of this Regulation, namely the provision of a **harmonised** framework for cross-border exchanges of electricity, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective” (EF) No 714/2009. *preamble paragraph 30*).
- “The structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular, the **specific role of the national regulatory authorities** needs to be taken fully into account **and their independence guaranteed**. (EF) No 713/2009. *preamble paragraph 16*).



VI. An EEA termination resulting from an Icelandic NO to the third package?

- **EØS artikkel 102.4:** «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.
- **EØS artikkel 102.5:** 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.



An EEA termination resulting from an Icelandic NO to the third package?

- **EØS artikkel 6: (Homogenitetsprinsippet):** «Without prejudice to future developments of case law, **the provisions of this Agreement**, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, **shall, in their implementation and application, be interpreted in conformity with** the relevant rulings of the Court of Justice of the European Communities given **prior to the date of signature of this Agreement**”.
- **EØS artikkel 7:** «Acts referred to or contained **in the Annexes** to this Agreement or in **decisions** of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order».



VII. Could EU possibly force Iceland to leave the EEA resulting from an Icelandic No to ACER? (1)

- **EØS artikkel 6: (Homogenitetsprinsippet):** «Without prejudice to future developments of case law, **the provisions of this Agreement**, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, **shall, in their implementation and application, be interpreted in conformity with** the relevant rulings of the Court of Justice of the European Communities given **prior to the date of signature of this Agreement**”.
- **EØS artikkel 7:** «Acts referred to or contained **in the Annexes** to this Agreement or in **decisions** of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order».



VII. Could EU possibly force Iceland to leave the EEA, resulting from an Icelandic No to ACER? (2)

- **EØS** Artikkel 127. «Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties. Immediately after the notification of the intended withdrawal, the other Contracting Parties shall convene a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement».
- *[Hver avtalepart kan trekke seg fra denne avtale ved å gi minst tolv måneders skriftlig varsel til de andre avtaleparter. Straks etter varselet om at en avtalepart akter å trekke seg fra avtalen, skal de andre avtalepartene sammenkalle en diplomatisk konferanse for å vurdere de endringer det måtte være nødvendig å gjøre i avtalen].*



Takk for oppmerksomheten!

- ”Saa ber vi eder, at I bær over med os i det, som skorter; ti det skyldes mer vore mange pligter (fjolskylda) ... og vankunna eller gaaløysa enn viljeløysa som man nok kan tenke sig...”

- Magnus Lagabøtes Landslov 1274, fortalen

