SUPREME COURT OF NORWAY

J U D G M E N T

given on 31 October 2023 by the plenary of the Supreme Court composed of

Chief JusticeToril Marie Øie
Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Aage Thor Falkanger
Justice Kristin Normann
Justice Henrik Bull
Justice Per Erik Bergsjø
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Borgar Høgetveit Berg
Justice Erik Thyness
Justice Kine Steinsvik
Justice Knut Erik Sæther
Justice Thom Arne Hellerslia

HR-2023-2030-P, (case no. 23-025348SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 7 December 2022

No to the EU	(Counsel Kjell Magnus Brygfjeld) (Assisting counsel Bent Endresen)
v.	
The State represented by the Ministry of Foreign Affairs	(The Office of the Attorney General represented by Fredrik Sejersted and Lisa-Mari Moen Jünge)

(1) Justice **Sæther:**

Issue

(2) The case raises the question whether rules of the Constitution were violated when the Storting, in 2018, consented to the EU third energy market package being incorporated into the EEA Agreement and thus becoming binding on Norway. The establishment of the European Union Agency for the Cooperation of Energy Regulators (ACER) is part of this package.

(3) The consent was granted in accordance with Article 26 subsection 2 of the Constitution, which requires a simple majority. This procedure is applicable for a transfer of powers to an international body when the transfer is "of limited significance". If this threshold is crossed, the decision must be made in accordance with Article 115 of the Constitution, which requires a three-fourths majority and the presence of at least two thirds of the Storting's members, alternatively an amendment to the Constitution under Article 121. The main issue of the case is whether the implementation of the third energy market package entails such a significant transfer of powers that the decision should not have been made under Article 26 subsection 2 of the Constitution.

(4) A transfer of powers normally means that an international organisation is authorised to make decisions that are directly binding on citizens and undertakings in Norway, without this requiring a separate implementing decision by Norwegian authorities.

(5) An issue to consider is how much importance the courts should attribute to the Storting's own opinion on the constitutional issue. Another issue is whether the transfer of powers in the third energy market package should be assessed in isolation or in the light of previous transfers of powers in the energy sector.

Background

Cross-border trade in electricity and energy cooperation with the EU

(6) Norway participates in international energy cooperation to import and export electricity.

(7) Such international energy cooperation is conditional on power cables running from Norway to other countries, so-called foreign cables. From Norway, power cables run to countries in the EU and to the United Kingdom. The transmission of energy in cross-border cables requires international coordination to ensure that the power transmission between countries takes place in an efficient and safe manner.

(8) Originally, all cooperation was based on bilateral agreements, and this is the situation for cooperation between Norway and the United Kingdom. As I will discuss in more detail, cooperation with the EU is regulated partly through the basic principles of free movement in the main part of the EEA Agreement and partly through EU secondary legislation, in this case joined in the EU's "energy market packages". Secondary legislation is made part of the EEA Agreement through decisions by the EEA Joint Committee.

(9) Electricity is considered a product under Article 8 of the EEA Agreement and is covered by Norway's participation in the internal market with free movement of goods, among other things. The European Court of Justice (ECJ) has ruled that no restrictions may be imposed on the export to prevent price increases in the national market, see judgment of 17 September 2020 in Case C-648/18 *Hidroelectrica* paragraphs 42 and 43.

(10) In addition to the general provisions on the free movement of goods, the EU electricity market is regulated by extensive legislation. The first energy market package was adopted in the EU in the latter half of the 1990s, the second in 2003. The rules included in these packages were incorporated into the EEA Agreement. Since Norway had already welcomed competition in the energy market with the Energy Act of 1990, the two first packages did not have much practical significance here. Nonetheless, the second package generated extensive obligations under international law. This package has since been replaced by the third energy market package, which is the one concerned in this case.

The EU's third energy market package

(11) The EU adopted the third energy market package in 2009. The package encompasses Directive 2009/72/EC of the European Parliament and of the Council (the Third Electricity Market Directive), Regulation (EC) No 713/2009 of the European Parliament and of the Council (the ACER Regulation) and Regulation (EC) No 714/2009 (the Cross-Border Exchange Regulation). Gradually, each package has been supplemented by several Commission Regulations. The package largely continues previously applicable law, but also contains some key changes, to which I will return shortly.

(12) The background to the EU's third energy market package is described in the Government's proposition to the Storting to consent to Norway's endorsement, see Proposition 4 S (2017–2018), page 8. Here, it stated that the purpose is "to contribute to further development of the functioning of the internal market in the energy sector, including overcoming obstacles for an internal market in electricity and natural gas".

(13) A main purpose is thus to facilitate trade in electricity and natural gas across borders. The electricity market is central to the case at hand.

(14) The third energy market package includes the establishment of ACER – Agency for the Cooperation of Energy Regulators. Among other things, ACER is to facilitate the cooperation on cross-border exchanges of electricity.

(15) The EU Member States are to designate a single national regulatory authority, see Article 35 *et seq* of the Third Electricity Market Directive. The regulatory authority must act independently from any government or other public or private entity when carrying out the regulatory tasks, see Article 35 (4) (b).

(16) Where the competent national regulatory authorities are not able to reach an agreement, or upon a joint request from these authorities, ACER may decide upon issues such as the operation of cross-border transmission system, see Article 8 of the ACER Regulation. The scope of this decision-making power is central in this case. The national regulatory authority is obliged to comply with and implement such legally binding decisions from ACER.

(17) The Cross-Border Trade Regulation allows the EU Commission to request information directly from the energy undertakings concerned and impose fines for any failure to comply, see Articles 20 and 22.

The implementation of the third energy market package in Norwegian law

(18) Following lengthy discussions, the EEA Joint Committee decided on 5 May 207 to incorporate the legal acts in the EU's third energy market package into the EEA Agreement with agreed adaptations. The adjustments mean that decisions are not made by the EU bodies ACER or the Commission, but by the EFTA Surveillance Authority, often referred to as ESA.

(19) In Norway, the national regulatory authority is established as an independent department in the Norwegian Water Resources and Energy Directorate (NVE) – the Energy Regulatory Authority (ERA).

(20) In accordance with Article 103 of the EEA Agreement, Norway declared that a final approval of the third energy market package was conditional on the fulfilment of Norwegian "constitutional requirements". The Government considered it necessary to obtain the Storting's consent before the EEA Joint Committee's decision could become binding.

(21) The Government presented its proposed consent to the Storting in November 2017, see Proposition 4 S (2017–2018). Three opinions had been obtained from the Legislation Department of the Ministry of Justice on constitutional limits relevant to the accession to the energy market package. With support in the opionions, the Government believed that the Storting's consent could be granted by a simple majority under Article 26 subsection 2 of the Constitution. At the same time, the Government proposed amendments to the Energy Act and the Natural Gas Act, see Proposition 5 L (2017–2018) and Proposition 6 L (2017–2018).

(22) In the Storting, there were differeing views of how to deal with this matter, see Recommendation 178 S (2017–2018). Therefore, on 27 February 2018, another opinion was obtained from the Legislation Department. Following a debate in the Storting on 22 March 2018, several proposals were voted on. One of the proposals was that consent should be granted by a three-fourths majority and with at least two thirds of the Storting's members present as presecrbed in Article 115 of the Constitution. The proposal was voted down by 72 votes to 24. In other words, the Storting itself took a clear stand on the correct procedure according to the Constitution.

(23) Next – in accordance with Article 26 subsection 2 of the Constitution – the Storting consented to the Government's approval of the EEA Joint Committee's decision to incorporate the EU rules in the third energy market package, with adaptations, into the EEA Agreement.

(24) On 27 April, Norway informed the EEA Joint Committee that the constitutional requirement had been met. The necessary legislative amendments were adopted on 25 May 2018. After the Icelandic Allting had also consented, the EEA Joint Committee's decision to incorporate the legal acts into the EEA Agreement entered into force on 3 October 2019. The EU's third energy market package with adaptations thus became binding on Norway under international law.

(25) The legal acts have been implemented in Norwegian law through the amendments in the Energy Act and the Natural Gas Act with regulations, which entered into force in the autumn of 2019.

(26) The third energy market package largely entails obligations of an international-law nature, with no direct effect on citizens and undertakings in Norway. However, some provisions in two of the legal acts – the ACER Regulation and the Cross-Border Trade Regulation – have elements of transfer of powers, which thus raises the question of whether it was adequate that the Storting granted its consent under Article 26 subsection 2 of the Constitution.

(27) The parties agree that the energy market package involves two elements of transfer of powers:

(28) *The first* element is the delegation to ESA of the power to make decisions upon a draft from ACER in cases where ACER has authority in the EU. Such decisions will be addressed to ERA, which in turn makes binding decisions on Norwegian players – primarily Statnett. The state owned enterprise Statnett owns and is the system operator of all electricity cables to and from abroad and is responsible for ensuring that the national electricity grid is in balance at all times.

(29) *The second* element is the delegation to ESA of the power to request relevant information directly from Norwegian energy undertakings and impose fines if such requests are not complied with.

(30) Since then, another four Commission Regulations in the third energy market package have been incorporated into the EEA Agreement and implemented in Norwegian law, including Commission Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management (the CACM Regulation). This took place in a separate process with decisions by the EEA Joint Committee of 11 December 2020 and by the Storting of 11 June 2021.

(31) These four Commission Regulations, which were adopted in the EU from 2015 to 2017, contain detailed rules that, according to Proposition 199 LS (2020–2021), are intended to facilitate a more well-functioning power market between the countries and complement the rules that had already been issued. Based on the Proposition, the Storting assumed that the CACM Regulation contained an element of transfer of powers, but that it was of limited significance. The Storting's consent decision in 2021 was therefore made under Article 26 subsection 2 of the Constitution. There are also some Commission Regulations in the third energy market package that have not been incorporated in the EEA Agreement, see the Proposition page 12.

(32) On 24 April 2023, five and a half years after the Storting's consent decision, ESA made its first – and currently only – decision addressed to ERA, in accordance with Article 8 of the ACER Regulation and Article 15 (1) of the CACM Regulation. I will return to this decision.

(33) The political debate in the Storting on ACER has continued, see for instance Representative Proposition 102 S (2022–2023) to reverse the amendments in internal legislation resulting from the decision to incorporate the legal acts in the third energy market package and to withdraw Norway from the ACER cooperation. The proposal was rejected by the Storting on 18 April 2023 in line with the recommendation of the Committee's majority in Recommendation 277 S (2022–2023).

The EU's fourth energy market package

(34) In the EU, a fourth energy market package was adopted in 2019, with particular focus on the transition to renewable energy. The package is therefore often referred to as the "Clean Energy Package". The legal acts revise and replace, among others, the legal acts in the third energy market package.

(35) The legal acts are considered EEA relevant, but they have so far not been incorporated into the EEA Agreement and have thus not been implemented in Norwegian law.

Proceedings in the courts

(36) On 8 November 2018, No to the EU brought an action holding that the State was obliged not to implement the EU's third energy market package in Norwegian law. This was before the implementation, and the claim was somewhat different from that currently dealt with by the Supreme Court. The issues in dispute, however, are the same.

(37) Principally, the State argued that the action should not be allowed to proceed, as the requirements for bringing an action in section 1-3 of the Dispute Act were not met. The case was temporarily limited to this issue.

(38) On 10 October 2019, Oslo District Court refused to hear the action. No to the EU appealed to Borgarting Court of Appeal, which dismissed the appeal on 18 March 2020. On 1 March 2021, following an appeal from No to the EU, the plenary of the Supreme Court ruled with dissenting opinions that the action should proceed, see HR-2021-417-P *ACER I*.

(39) Upon the request of No to the EU, Oslo District Court sat with two lay judges, see section 9-12 of the Dispute Act, when hearing the merits of the case. On 22 November 2021, the District Court ruled as follows:

> "1. The Court rules in favour of the State represented by the Ministry of Foreign Affairs.
>
> 2. The Parties carry their own costs."

(40) No to the EU appealed to Borgarting Court of Appeal.

(41) During the preparatory phase, No to the EU included in its arguments the Storting's consent of 11 June 2021, which concerned the four Commission Regulations from 2015 to 2017. In response, the State addressed whether No to the EU had submitted a new claim, which No to the EU denied. The Storting's consent from 2021 is thus not a part of the subject matter in dispute.

(42) At the request of No to the EU, two lay judges participated also in the Court of Appeal, see section 29-17 of the Dispute Act and the Supreme Court ruling Rt-2009-345 paragraph 25.

(43) On 7 December 2022, Borgarting Court of Appeal ruled as follows:

> "1. The appeal is dismissed.
>
> 2. Costs are not awarded."

(44) No to the EU has appealed to the Supreme Court, challenging the application of the law and the findings of fact.

(45) On 10 March 2023, the Chief Justice decided that the case should be heard by the plenary of the Supreme Court, see section 5 subsection 4 last sentence, see section 6 subsection 2 of the Courts of Justice Act, and the Supreme Court ruling HR-2023-441-J.

(46) Justice Indreberg and Justice Noer have been absent and not participated in the hearing of the case. Justice Stenvik did not take up his position until after the hearing.

(47) The circumstances of the case are essentially the same as in the previous instances.

The parties' views

(48) The appellant – *No to the EU* – contends:

(49) The implementation of the EU's third energy market package in Norwegian law implied a transfer of powers from Norwegian authorities to the EU and EEA bodies. For a transfer of powers to be decided by a simple majority under Article 26 subsection 2 of the Constitution, the transfer must be considered to be "of limited significance". That is not case in in the case at hand. Therefore, in 2018, the Storting should instead have dealt with the case in accordance with Article 115 of the Constitution, which requires a three-fourths majority with the presence of at least two thirds of its members.

(50) The courts must conduct an independent and thorough a review of the Storting's consent decision. The decision entails a transfer of legislative, administrative and judicial powers to EU and EEA bodies. The review of whether the transfer of powers was of limited significance cannot be compared to a review of the constitutionality of statutory provisions. The trichotomy of the intensity of review carried out by the Supreme Court in the *Kløfta* judgment, see Rt-1976-1, is therefore not directly applicable. It is not solely a question of the working methods or mutual competence of the state powers, but of ceding sovereignty to a foreign organisation and protecting a minority in the Storting. The words of the Constitution must then be given considerable weight. The courts' obligation to conduct an intensive review is also supported by the fact that the case concerns energy supply and thus the functioning of society.

(51) No to the EU agrees with the Court of Appeal that when assessing the scope of the transfer of powers, emphasise should be placed on relevant transfer of powers previously carried out.

(52) When conducting its review, the Supreme Court must consider all materials pertaining to transfers of power known to the Legislation Department of the Ministry of Justice and the Storting at the time of the consent. This includes not only the legal acts covered by the Storting's consent in 2018. Regard must be had to the four Commission Regulations adopted

by the EU in 2015–2017, and which the Storting, in 2021, consented to becoming part of the EEA Agreement. The same applies to the proposal for the EU's fourth energy market package and the EU's 2015 strategy to develop an "energy union". Also of relevance to the Supreme Court's review is the subsequent practice of ACER, ESA, ERA and the European Court of Justice.

(53) If these materials are considered when assessing whether it was appropriate to handle the case under Article 26 subsection 2 of the Constitution, it is clear that ACER's and ESA's legal bases for exercising power are more extensive that what the Storting considered them to be, and that Article 26 subsection 2 of the Constitution could not be applied.

(54) When assessing whether the transfer of powers is more than "of limited significance", one must clarify the scope and nature of the transfer, and its potential effects – legal and factual – on society.

(55) ACER is empowered under Articles 7, 8 and 9 of the ACER Regulation and the Cross-Border Trade Regulation to regulate important elements of the operation of transnational electrical grids. Article 8 in particular is far-reaching, as demonstrated by the four Commission Regulations from 2015 to 2017. It concerns the power to determine far more than technical and professional issues. ACER can make decisions that may affect the energy situation and electricity prices in Norway. Following EEA adaptations, this power vis-a-vis Norway is exercised through ESA, which upon a draft from ACER issues orders to ERA. Since ERA cannot be instructed or controlled by Norwegian authorities, it must be regarded as an EU/EEA body. The reality is therefore that ACER, via ESA and ERA, makes decisions that become binding in Norway.

(56) According to Article 20 of the Cross-Border Trade Regulation, the Commission may request information from energy undertakings and, under Article 22, impose fines for any failure to provide the information requested. Through EEA adaptations, this power is vested in ESA, which thus makes decisions that have a direct effect on Norwegian undertakings. Norwegian companies are precluded from bringing the fines before Norwegian courts.

(57) In both these areas, Norwegian authorities are overridden by the EU.

(58) The electricity supply is vital for Norway's population and industry. The target of the EU's energy policy is a common European energy market, with a free flow of energy and equal prices regardless of where one is located. Through the third energy market package, Norway has endorsed this concept. This leads to higher electricity prices in Norway, reduced competitiveness for Norwegian power-intensive industries and weakened preparedness. The transfer of powers is part of this, and overall, the transfer of powers by far exceeds "of limited significance".

(59) No to the EU asks the Supreme Court to rule as follows:

> "1. The Storting's consent of 22 March 2018 to the EEA Joint Committee Decision No. 93/2017 entailed an approval of elements of transfer of powers that cannot be decided under Article 26 subsection 2 of the Constitution.
>
> 2. The State represented by the Ministry of Foreign Affairs is to compensate the costs of No to the EU in the District Court, the Court of Appeal and the Supreme Court."

(60) The respondent – *the State represented by the Ministry of Foreign Affairs* – contends:

(61) The Storting could consent to the incorporation of the third energy market package into the EEA Agreement in accordance with the procedure in Article 26 subsection 2 of the Constitution by a simple majority. The elements of transfer of powers in the third energy market package are "of limited significance".

(62) The third energy market package contains mostly EEA obligations of an international-law nature, which are not considered a transfer of powers, and which fall outside of the scope of this case. Only a small part of the package raises issues related to transfer of powers.

(63) One element of transfer of powers is that ESA can make decisions in specific cases and on specific conditions, based on a draft from ACER, with effect for ERA of the Norwegian Water Resources and Energy Directorate (the NVE). ERA is obliged to follow up the decisions and, if necessary, make decisions that in practice will be addressed to Statnett, see Article 8 of the ACER Regulation with adaptations set out in EEA Joint Committee Decision No. 93/2017. This is a transfer of administrative powers that are close to the power to make decisions that are binding on Norway with regard to international law only. Formally, ESA's decisions are only binding on the administrative entity ERA and must be implemented in Norway to have effect here. There must be a high threshold for considering such a transfer of powers to be more than "of limited significance". Articles 7 and 9 in the ACER Regulation confer no powers on ESA.

(64) The most striking element of transfer of powers is that ESA's may request information from Norwegian energy undertakings, in practice Statnett, and if necessary impose fines for failure to provide the information requested, see Articles 20 and 22 of the Cross-Border Trade Regulation. This is a delegation of the power to make decisions that are binding in Norway, but in a very limited area. The power to impose orders applies exclusively to information that is necessary to the Commission's work on drafting guidelines, and penalties are only relevant in the event of failure to provide the information requested.

(65) Whether they are considered individually or jointly, these elements constitute only a transfer of powers of limited significance.

(66) The courts' control of the constitutionality of the Storting's decisions under Article 26 subsection 2 of the Constitution must be based on the decision in question and the discussions in the Storting at the time of the decision. Relying on the facts at the time of the judgment would give the courts a different role than merely a controlling one. It would be problematic on a principled basis considering the divison of powers between the legislative and the judicial powers.

(67) This sets limits for the constitutional review of the decision and implies, among other things, that the Storting's consent from 2021 to the incorporation of four Commission Regulations is formally not part of the review. Another factor is that the Commission Regulations may be used to shed light on ACER's powers, as the Storting did in 2018. In the same way, the Supreme Court may look to supplementary regulations and current practice from, among others, ACER.

(68) The intensity of the courts' review of the Storting's assessments must be adjusted to the nature of the decision. The case concerns the working methods and mutual competence of the state

powers. Here, the intensity of review is low, and the view of the Storting's majority must be respected to a large extent. This is particularly the case when the Storting's assessment is based on thorough examinations and extensive debate. The threshold is therefore high for setting aside the view of the Storting's majority. However, this is not decisive in the case at hand, as the Storting's decision from 2018 under any circumstance is undoubtedly in accordance with the Constitution.

(69) As opposed to the Court of Appeal, the State believes that the Storting, when assessing the significance of a transfer of powers, is not obliged to have regard to previous transfer of powers. The same applies to possible future cases. When the Storting considers giving its consent under Article 26 subsection 2 in a specific case, it is this case – as presented by the Government and discussed by the Storting – that must form the framework for the assessment.

(70) The State represented by the Ministry of Foreign Affairs asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. The State represented by the Ministry of Foreign Affairs is awarded costs in all instances."

My opinion

The constitutional provisions on transfer of powers to international bodies

(71) Article 26 of the Constitution, which the Storting applied in this case, reads:

> "The King has the right to call up troops, to engage in war in defence of the realm and to make peace, to conclude and denounce treaties, to send and to receive diplomatic envoys.
>
> Treaties on matters of special importance, and, in all cases, treaties whose implementation, according to the Constitution, necessitates a new law or a decision by the Storting, are not binding until the Storting has given its consent thereto."

(72) In other words, the Government may in principle enter into international agreements without the Storting's consent – the foreign affairs competence is vested in the King in Council, i.e. the Government. This is often referred to as the foreign affairs prerogative.

(73) Nonetheless, the Government needs the Storting's consent to enter into treaties "of special importance" and when "a new law or a decision by the Storting" is necessary. According to established practice, consent is necessary under these criteria when Norway is to endorse the incorporation of new legal acts into the EEA Agreement, see the Supreme Court's expert opinion issued to the Storting on the EU's fourth railway package – HR-2021-655-P *the railway opinion* – paragraph 3.1.

(74) Consent under Article 26 subsection 2 is granted by a simple majority.

(75) Article 115 of the Constitution, which also applies to the conclusion of treaties, requires a three-fourths majority and the presence of at least two thirds of the Storting's members. The procedure under this provision must as a starting point be applied if the Storting is to consent that:

> "… an international organisation to which Norway belongs or will belong shall have the right, within specified fields, to exercise powers which in accordance with this Constitution are normally vested in the authorities of the state…"

(76) The central powers that, according to the Constitution, are "vested in the authorities of the state", are the legislative (Article 75), the executive (Article 3) and the judicial power (Article 88).

(77) As for the content of Article 115 of the Constitution the following is stated in the railway opinion paragraph 3.1:

> "Article 115 does not, according to its subsection 2, apply to participation in international organisations that only make decisions that affect Norway under international law. In other words, a distinction is made between decisions that are only binding *on* Norway, and decisions that are directly binding *in* Norway, i.e. they impose duties on citizens or undertakings in Norway without the need for separate implementing decisions from Norwegian authorities. In other words, consent to membership in organisations that only makes decisions with an international legal effect *on* Norway, may in principle be granted in accordance with Article 26 subsection 2. One may question the extent to which this applies. The power of the King in Council to bind Norway to such cooperation under international cooperation is hardly unlimited, even with consent under Article 26 subsection 2."

(78) In other words, only the transfer of the power to make decisions that are directly binding in Norway without separate implementing decisions falls within the special provision in Article 115. However, decisions that exclusively create international-law obligations for Norway are – at least as a general rule – not covered.

(79) The areas of application of Articles 26 and 115 are to some extent overlapping. Although not expressly stated in Article 26, the railway opinion declares that consent to transfer of powers to an international body may be granted by a simple majority under Article 26 subsection 2 if the transfer is of *limited significance*. This is also the case when powers are transferred to an organisation of which Norway is not a member. If such transfer of powers is more than "of limited significance", a constitutional amendment under Article 121 is required.

(80) Article 26 subsection 2 has provided the legal basis for consenting to all important treaties that Norway has acceded since Article 115 – then Article 93 – was adopted in 1962, with the exception of two – the EEA Joint Committee Decisions on participation in the EEA Agreement in 1992 and participation in the EU Financial Market Surveillance in 2016, respectively. The Storting has on a number of occasions transferred powers on the basis of Article 26 subsection 2 – 22 times in the EEA area.

(81) In its railway opinion, a united Supreme Court found that the Storting could give its consent to incorporate the fourth railway package into the EEA Agreement with legal basis in Article 26 subsection 2. That case concerned transfer of powers to the European Union Agency for Railways, which is an entity within an organisation of which Norway is not a member.

Should the transfer of powers be assessed in isolation or in the context of previous transfer of powers?

(82) The issue has been referred to as a matter of "accumulation". I agree with the parties that this is a poor choice of words, and I will therefore not use the term in the following.

(83) The Storting is free to consider several transfers of powers in context. The question in the Supreme Court is whether the Storting – and the courts in connection with constitutional review – have a *duty* to do so when determining the significance of an individual transfer. This must be decided based on an interpretation of Article 26 subsection 2 of the Constitution.

(84) Neither party contends that there is a duty to consider transfer of powers to which the Storting has been asked to consent along with future transfer of powers. I agree that no such duty can be imposed. No to the EU's argument that regard must be had to all sources that may clarify the nature and the scope of the transfer, including legal acts by the EU that have not been made part of the EEA Agreement at the time of the consent, is a topic I will return when interpreting the ACER Regulation. The question is whether there is a duty to consider transfer of powers in the light of previous transfer of powers in same area.

(85) A natural reading of Article 26 subsection 2 of the Constitution is that the treaty to which the Storting has been asked to consent forms the framework for the assessment of whether the transfer of powers is "of limited significance".The relevant treaty here is the EEA Joint Committee Decision of 5 May 2017 to incorporate the legal acts in the third energy market package into the EEA Agreement.

(86) The consent matter considered by the Storting in 2018 contained several elements of transfer of powers. The elements must then be assessed both individually and in context with each other. A broader assessment, that would include previous transfer of powers, would require a special basis – also when there has been a gradual transfer of powers in the same area.

(87) Nothing in *the wording* of Article 26 gives a basis for establishing a duty to assess the transfer of powers along with previous transfer of powers. Nor is anything to this effect stated in the *preparatory works* to Article 26 or the former Article 93, currently Article 115.

(88) *The Storting's practice on consent decisions* is extensive. However, it contains no examples, when assessing the significance of the transfer of powers, of emphasis being placed on any previous transfer. This may partly be due to the lack of relevance. However, in several cases where gradual transfer of powers has taken place in a particular field, the Storting has had an opportunity to consider whether to make an overall assessment. Yet, no such overall assessment has been made.

(89) I start by mentioning two cases concerning gradual transfer of the King's military command authority. Norway's accession to NATO in 1949 was of an international legal nature. However, in 1951 it was decided that Norway should take part in the establishment of joint command systems and joint defence forces for the Atlantic Treaty countries, see Recommendation S No. 40 (1951) page 66. The application of Article 25 of the Constitution on the King being commander-in-chief was central in the discussion. In 1962, consent was granted to Norway's participation in the establishment of a joint air defence system for the European part of the NATO area, see Recommendation No. 149 (1962–1963) page 331. This meant that the joint air defence system was subordinated to the leadership of the Chief of

European Command, who, under certain restrictions, was given operational command of the Member States' air defence forces. Once more, the transfer of powers was discussed, but it was not considered in the light of the transfer of powers in 1951.

(90) In 2021, the Storting agreed to the conclusion of a supplementary agreement, the so-called SDCA Agreement on defence cooperation between Norway and the United States, which between the two states supplements and partly replaces the 1951 NATO agreement and previous bilateral agreements. On some points, the supplementary agreement involves new elements of transfer of powers to the United States, and thus goes further than previous agreements in granting U.S. forces rights in Norway. But neither the consent proposition nor the recommendation to the Storting, both of which link the supplementary agreement to the cooperation within the scope of NATO, views the issue of transfer of powers in the light of the cases from 1951 and 1962, see Proposition 90 S (2021–2022) page 25 and Recommendation 395 S (2021–2022).

(91) By then, the Government and the Storting had learned about the issue of gradual transfer of powers through a statement in the Supreme Court's railway opinion, to which I will shortly return. As such, there was an occasion to address the issue. The Proposition states on page 29 that "the object of assessment is the overall transfer of powers arising from the same set of agreements". However, it appears from the context that "set of agreements" only refers to the SDCA Agreement. Neither the majority nor the minority of the Storting Committee expresses that regard is had to previous transfer of powers.

(92) There are examples of gradual transfer of powers also in the field of aviation, here to the European Union Aviation Safety Agency, EASA. Norway joined EASA when entering into the EEA Agreement in 2002, see Proposition No. 44 (2004–2005) and Recommendation No. 164 (2004–2005), discussing the application the Constitution. In 2008, EASA's power was extended to new aviation safety areas, see Proposition 27 S (2012–2013) and Recommendation 146 S (2012–2013), and in 2015 the agency was empowered to approve third-country operators, see Proposition 123 S (2014–2015) page 3 and Recommendation 390 S (2014–2015). However, it was only the most recent Regulation, 452/2014, that in 2015 was included in the assessment of the application of Article 26 subsection 2 of the Constitution, see page 4 of the Proposition.

(93) During the Storting's discussions of the latter EASA Regulation in 2015, the majority supported the Proposition, while a minority from the Centre Party and Socialist Left Party found it "problematic that the Government promotes a solution where Norway cedes sovereignty without a more extensive and principled debate on the issue", see Recommendation 390 S (2014–2015) page 2. However, I do not interpret the minority as arguing in favour of including previous transfer of powers. The objection was that time had not been reserved for discussing the case sufficiently thoroughly.

(94) There are more cases from the Storting's practice on gradual transfer of powers, including consents to EEA obligations with elements of transfer of powers in the fields of road transport and the regulation of substances hazardous to health and the environment. Also here, the "of limited significance" assessment has not been made in the light of previous transfer of powers. I do not find any reason to elaborate on this.

(95) Since the Storting itself never seems to have contemplated laying down a requirement that gradual transfer of powers must be assessed as a whole in specific cases, the Storting practice also does not suggest that such a requirement should be laid down. This is particularly the case for the practice after the Government and the Storting had learned about the issue through the railway opinion.

(96) The possibility of assessing transfers of powers jointly was addressed in *the Supreme Court's railway opinion* as part of the discussion of whether there exists a doctrine of transfer of powers of limited significance under Article 26 subsection 2 of the Constitution. The occasion was that it had been pointed out in legal literature as an argument against the doctrine that one, in the event of several transfers of limited significance, might ultimately deal with a transfer that, if presented as one, would have ruled out the application of Article 26 subsection 2. The view was expressed in a submission by two professors to the Supreme Court in connection with the work on the railway opinion, see paragraph 3.9.

(97) In this regard, the following is stated in paragraph 3.10:

> "However, the doctrine of transfer of powers 'of limited significance' does not preclude the assessment of whether the 'limit is crossed' in each case. As the Supreme Court understands the Storting's practice, this is not ruled out. The Supreme Court assumes that such a limit must exist also for gradual transfers of powers. However, this does not imply that such an assessment must be based on speculations of what the next step might be. It must primarily be made in connection with the transfer of powers in question."

(98) The statement must be read in the light of its context. The two first sentences establish that the idea of transfer of powers of limited significance does not *force* the Storting to consider such a case involving transfer of powers in isolation. The Storting is free to make a broader assessment as to whether it is expedient. This point reduces the weight of the arguments against the doctrine of transfer of powers of limited significance. On the other hand, I do not see that the statement provides any guidance for the issue at hand, which is whether the Storting has a *duty* to consider previous cases. When the fourth railway package was discussed, this issue was not relevant.

(99) The continuation of what I have reproduced from the railway opinion is naturally understood to mean that, in some cases there may be a duty to look to previous transfers of powers. This applies in particular to the statement that "such a limit must exists also for gradual transfers of powers". There is no mention of the scope of such a duty, but it is specified that the assessment primarily relates to the transfer of powers in question.

(100) Before I turn to policy considerations, the sources of law may so far be *summarised* as follows: Neither the Constitution's wording nor the preparatory works suggest that transfer of powers must be considered in the light of previous transfer of powers. Nor is this suggested in the Storting's practice. However, the railway opinion supports to some extent that it must be assumed that for gradual transfers of powers, there must be a limit for when it is sufficient to consider the relevant transfer of powers in isolation. However, this statement is part of the discussion of a different issue. Moreover, the issue of gradual transfer of powers is more clarified in the case at hand, and the Storting has, as mentioned, maintained its practice after the opinion was presented.

(101) Some factors may indicate that there is a duty to consider the relevant transfer of powers in the light of previous transfers of powers. The international cooperation, not least the cooperation within the EU/EEA, is in constant development. In cases that are joined together, each transfer of powers may be of limited significance when considered in isolation, but may appear more significant when considered together with others. It may therefore be held that an isolated assessment would diminish the considerations behind the requirement of qualified majority in Article 115 of the Constitution.

(102) International cooperation in a particular area may be developed in stages, but also by replacing previous legal acts by a package of rules. Often, both will take place within one sector: After a period of gradual regulatory amendments, there may be a need for a total revision of the rules, including further elements of a transfer of powers. As noted in the railway opinion, it may seem illogical that the manner in which new international obligations are developed and presented to the Storting should have a bearing on the application of Article 26 subsection 2. This may imply that an overall assessment is required. Considerations of circumvention suggest the same.

(103) Other policy considerations, in turn, argue against such a duty. If the Storting were obliged to carry out an overall assessment, difficult questions would arise related to what constitutes the same complex of cases and whether there is a time limit between the present and the previous transfer of powers. This might cause a lack of predictability and unduly demanding decision-making processes.

(104) Overall, I cannot see that policy considerations decisively argue against the solution supported in the other sources. My conclusion is thus that the Storting, when assessing whether a transfer of powers is of limited significance under Article 26 subsection 2 of the Constitution, does not have a duty to consider it in the light of previous transfers of powers. The same must then apply to the courts' constitutional review.

(105) This case gives no cause to elaborate on whether exceptions can be envisaged in particular cases.

The courts' constitutional review

General remarks

(106) The courts' power and duty to exercise constitutional review has been developed through cases involving the review of whether the application of a statutory provision is contrary to the Constitution. The doctrine has been changing and adapted to changes in society and the development of the law in other fields. The power and the duty to exercise constitutional review was included in Article 89 of the Constitution in 2015.

(107) The review is not limited to statutory provisions. It also includes decisions made by the Storting under Article 26 subsection 2 and Article 115 of the Constitution, see *ACER I* paragraph 71 et seq.

(108) I note that the constitutional review in this case only covers the assessment of whether the transfer of powers is of limited significance, which means that Article 26 subsection 2 is applicable. In other words, the review relates to the *constitutional limits* for the consent

assessment – whether the Storting complied with the rules of procedure and competence when making the decision. Whether or not consent *ought to* have been given, is a political question and not for the courts to review.

(109) Furthermore, consideration of the division of powers between the legislature and the judiciary implies that the constitutional review must be based on the factual circumstances at the time the Storting made its decision. This principle is also applied in case law, see for instance the Supreme Court judgment in Rt-2007-1308 *Sørheim* paragraph 42.

The relevance of the Storting's opinion on the constitutional issue

(110) The State contends that the courts are only to consider the whether the Storting's decision-making process has been adequate. However, Article 88 of the Constitution, stating that the Supreme Court pronounces judgment in the final instance, implies that the Supreme Court – and thus the lower instances – also through the constitutional review as that in the case at hand, must interpret the Constitution on an independent basis. Consideration of the rule of law, see Article 2 of the Constitution, implies that other public authorities should not be able to compel the courts to base their review on any other interpretation of the Constitution than their own. The Storting's opinion may nonetheless have an impact on the courts' interpretation of the Constitution and the individual assessment, in this case of the significance of the transfer of powers in the particular case.

(111) The question is far the courts should go in their review, or, in other words, which weight to be given to the Storting's opinion on the constitutional issue. This is important primarily when there is doubt regarding the constitutional interpretation.

(112) The *Kløfta* judgment, Rt-1976-1, is central. However, I should first consider two plenary judgments from the 1950s concerning the delegation of legislative power.

(113) In Rt-1952-1089 *whale tax*, the issue was the limit of the Storting's power to delegate legislative authority with regard to tax to an administrative body, namely the Price Directorate. The judgment states that the constitutionality of the delegation had to be determined "according to the policy considerations in the present case". The taxes could become substantial, but it was necessary to act quickly to set a number of different taxes, and the multitude of decisions would otherwise have absorbed too much of the Storting's time. The Storting's power to exercise control over the public administration was also emphasised.

(114) The majority of the Supreme Court, all but one of the justices, found that the courts had "no basis for exceeding the legislature's discretion as to how far, under the circumstances, it is necessary and constitutionally appropriate to go". It is further stated, on page 1098:

> "In this regard, I emphasise that the constitutional issue for the courts to consider is the limit for the Storting's power to delegate authority to other administrative bodies. Although this issue also involves the citizens, it is, in my opionion, more critical that the courts exercise constraint in acting beyond the legislature's discretion in such a case than in case concerning whether a statutory provision is contrary to a constitutional provision directly aimed at protecting the citizens, such as Articles 97 and 105 of the Constitution."

(115) Hence, the Supreme Court distinguished between constitutional provisions that directly protect the citizens, and limitations on the power of delegation to other administrative bodies. In the latter case, the Storting's opinion carried much weight.

(116) The result of the case arose from a complex assessment, and builds on the idea that the assessment of the necessity and constitutionality of delegating power should primarily be made by the Storting.

(117) The views expressed in *whale tax* were renewed in a judgment from 1956 on the validity of the decision by the Ministry of Finance on export duty on pulp and paper products, see Rt-1956-952. Once again, the issue was whether delegation of powers was contrary to the Constitution, and, once again, the Supreme Court found that there was no basis for the courts to set aside such delegation as unconstitutional. The Court pointed out the statement from the *whale tax* judgment and highlighted that the constitutional issue had been "carefully discussed" by the Storting, see the judgment page 960.

(118) The issue in *Kløfta* was whether new legal rules on the measure of compensation for expropriation were incompatible with Article 105 of the Constitution on the right to full compensation. The majority of the Supreme Court found that the provision was incompatible with Article 105.

(119) Both the majority and the minority found that the content of constitutional review differs according to which constitutional provisions are involved. The majority expresses it as follows on pages 5–6 of the judgment:

> "There are... differing opinions on what is required before the courts can set aside a law as unconstitutional. I find no reason to comment on this in general. The solution will partly depend on the constitutional provisions in question. If it concerns provisions to protect the personal freedom or security of individuals, I assume that the impact of the Constitution must be considerable. If, on the other hand, it concerns constitutional provisions governing the work or mutual competence of the other branches of government, I believe, as the justice delivering the lead opinion in the plenary judgment in Rt-1952-1089, particularly page 1098 (the *whale tax* case), that the courts to a wide extent must respect the views of the Storting. Constitutional provisions for the protection of economic rights must in turn be placed in an intermediate position."

(120) Regarding constitutional provisions on the protection of economic rights, the following is set out on page 6:

> "I find it clear that the Storting's understanding of the relationship between ordinary legislation and the Constitution is essential when the courts are to determine the constitutionality, and the courts must exercise constraint in placing their assessment above that of the legislature."

(121) The judgment specifies that the courts must accept the legislature's "political assessments" without further ado. Thus, the courts were merely to consider "whether the manner in which the Storting has realised its intentions is compatible with the Constitution."

(122) *Kløfta* builds on the principle that the content of constitutional review depends on the type of constitutional provision concerned. The dichotomy in *whale tax* was further developed into a trichotomy.

(123) As set out in *Kløfta*, constitutional provisions protecting the personal freedom or security of individuals have a great bearing. However, with regard to provisions on the working methods or mutual competence of the state powers, *Kløfta* states that the courts "to a large extent" must respect the view of the Storting.

(124) Constitutional provisions for the protection of economic rights are placed in an intermediary category. The Storting's understanding of the relationship between the Constitution and ordinary legislation "is essential" when the courts are to determine constitutionality, and the courts must "exercise constraint" in placing their assessment above that of the legislature.

(125) With regard to this intermediary category, in *Kløfta* the Supreme Court also stresses the significance of any "reasonable doubt" as to whether the statutory provision will give unconstitutional results. When there is reasonable doubt, and the Storting clearly has debated and concluded that the provision is not uconstitutional, the courts cannot establish the opposite. However, if the courts find that it is beyond reasonable doubt that the provision will give unconstitutional results, the provision must give way.

(126) The requirement that the Storting "clearly" must have "debated and concluded" that the statutory provision is not unconstitutional also means that the Storting's assessments must have a certain *quality* to be attributed significance in the constitutional review. In Rt-2007-1281 *Øvre Ullern Terrasse* it is set out that "… the Storting's opinion must be based on a balanced view, and possible misunderstandings may have an impact on which weight to attribute to the Storting's opinion".

(127) In its case law after *Kløfta*, the Supreme Court has upheld the trichotomy and considered it to be "fundamentally correct", see Rt-1996-1415 *Borthen*. Subsequent case law concerns in particular economic rights protected in Article 97 of the Constitution on the prohibition of giving judgments retroactive effect and in Article 105 on the right to full compensation after expropriation, see also Rt-2006-293 *Arve's driving school*, Rt-2007-1281 *Øvre Ullern Terrasse*, Rt-2007-1308 *Sørheim*, Rt-2010-143 *ship owners tax* and Rt-2010-535 *the Norwegian Church Endowment*. Here, it is emphasised that the categorisation is approximate and involves rights of various natures, see for instance *ship owners tax* paragraph 138.

(128) Within the intermediary category of provisions for the protection of economic rights, the mentioned judgments entail that the rules on constitutional review are confirmed and developed.

(129) The Supreme Court has not had similar cause to elaborate on the extent of review when it comes to constitutional provisions on the working methods and mutual competence of the state powers. Apart from the statement in *Kløfta* that the courts "to a large extent" must respect the views of the Storting, there is little clarification as to how the constitutional review in this third category is different from the intermediary category on the protection of economic rights. However, the trichotomy implies that the constitutional review in the third category – at least as a starting point – is less thorough.

(130) When Article 89 of the Constitution on constitutional review was adopted in 2015, the Storting acknowledged the trichotomy from *Kløfta*, see Recommendation 263 S (2014–2015) page 11. The majority of the Standing Committee on Scrutiny and Constitutional Affairs agreed with a Committee appointed by the Storting to broaden the regulation of human rights in the Constitution that the intensity of review is "complex and therefore unsuited for general regulation". It is also set out that "the intensity of review largely depends on the content, purpose and formulation of each right, as well as on the facts of the individual case".

(131) My conclusion so far is that the trichotomy doctrine is solidly rooted in case law after *Kløfta* and was applied by the Storting upon the adoption of Article 89 of the Constitution. There is no doubt that the doctrine is still applicable. However, it is also clear that the doctrine has developed. The Supreme Court has also pointed out that the categorisation is rather approximate, and that the provisions, also within each category, may be quite different. The same considerations that led to the Storting choosing not to regulate the scope of constitutional review, imply that the courts are not rigid in their application of the trichotomy.

(132) Hence, although the trichotomy doctrine and the placement of each individual provision in one of the three categories create a starting point for determining the intensity of review, a closer assessment must be made in each case of whether the provision has special features giving cause to adjust the intensity. In this assessment, the nature, purpose and wording of the provision, as well as the facts of the case, will play a part.

(133) As emphasised in *ACER I* paragraph 62, Article 26 subsection 2 and Article 115 of the Constitution regulate the relationship between the Government and the Storting, and the procedure in the Storting. We are thus dealing with rules on competence and procedure. It is also a matter of consenting to general obligations. The rules are therefore different from the rules in the Constitution conferring individual rights on the citizens. In my view, Article 26 and Article 115 naturally belong to the category of provisions on the state powers' working method and mutual competence.

(134) This placement, however, does not give a basis for drawing conclusions on the intensity of the courts' review. The individual assessment must take into account that the purpose of the provisions in Article 26 subsection 2 and Article 115 exceeds regulating the state powers' working method and mutual competence. In this regard, the following is set out in *ACER I* paragraphs 63 and 64:

> "It is a guarantee for the public that Norwegian authorities may not enter into particularly important agreements with other countries or international organisations without the consent of popularly elected representatives. The lower limit for when a case must be presented to the Storting under Article 26 subsection 2 of the Constitution is thus important for the democratic control of the Government. In the case at hand, however, the parties agree that the Government could not have agreed to incorporate the rules in the energy market package into Norwegian law without the Storting's consent...
>
> Next, I would like to stress the parliamentary minority guarantee established in Article 115 of the Constitution: The transfer of sovereignty, within specific fields, to an international organisation to which Norway belongs or will belong, may only take place if at least three fourths of the Storting members vote in favour with at least two thirds present. In this lies a democratic guarantee that the powers that are covered by the provision may not be transferred without the support of a sufficiently large majority among the elected representatives. The distinction between Article 26 subsection 2 and Article 115 may therefore be of utmost importance for the public – the voters – and is brought to light in the main action."

(135) The transfer of powers to an international organisation adds an extra dimension to Article 26 subsection 2 and Article 115, separating them from other provisions in the category of state powers' working method and mutual competence. The transfer of powers touches upon basic principles in the Constitution. In my view, the very nature of the provisions implies that the courts must exercise less constraint in their review here than when it involves constitutional

provisions that exclusively regulate the mutual competence and working methods of the state powers.

(136) *Whale tax* largely builds on the Storting itself being responsible for assessing the necessity and constitutionality of delegation. As mentioned, there was a large number of tax decisions that needed to be made, which, if not delegated to the Price Directorate, would absorbe too much of the Storting's time and resources. The Storting's power to conduct a follow-up inspection was also emphasised.

(137) Our case is of a different nature, and the Storting is not always better equipped in this area than the courts to make the assessment. As pointed out in the railway opinion, the "of limited significance" assessment depends on practical-polical discretion, but also involves legal assessments of what constitutes a transfer of powers and the significance thereof. The courts are fully competent to assess the latter.

(138) Against this background, I find that the review of the "of limited significance" assessment under Article 26 subsection 2 of the Constitution should extend beyond what generally applies to the third category of constitutional provisions presented in *Kløfta*. I agree with the Court of Appeal that the constitutional review may be compared to the basis described for the intermediary category of economic rights.

(139) This means that the Storting's opinion on the constitutional issue plays an important role when the courts are to consider it, provided that the Storting has clearly assessed and concluded that the transfer of powers is only "of limited significance". However, the significance of the Storting's opinion gains momentum when the constitutional issue causes reasonable doubt. If the courts finds it clear beyond reasonable doubt that the majority of the Storting has chosen an unconstitutional procedure, the Storting's opinion must be set aside.

(140) For the Storting's view to be given such weight, the Storting must have applied a correct understanding of *what* constitutes a transfer of powers in the individual case. The Storting must also have carried out the "of limited significance" assessment based on the criteria endorsed by the Supreme Court in the railway opinion, paragraph 3.10, to which I will return.

(141) In addition, the Storting must have received sufficient information regarding the transfer to have been able to make a real assessment in the relevant consent case. Also, this assessment must in fact have been carried out. As set out in Rt-2007-1308 *Sørheim* paragraph 42, "general statements that the application of the Constitution has been assessed and deemed appropriate, should not be attributed decisive weight by the courts.

(142) The concept of review I have now accounted for may be summarised as follows:

(143) When determining the proper intensity of the courts' constitutional review, one must – based on the trichotomy presented in *Kløfta* – start by categorising the constitutional provision. Next, on must determine whether the provision has special features that give cause to adjust the intensity of the review. A transfer of powers under Article 26 subsection 2 of the Constitution has special features requiring more intensity than what is generally the case for provisions in the category of the state powers' working method and mutual competence. In practice, the review will coincide with what normally applies to the constitutional protection of economic rights. The Storting's opinion on the constitutional issue is thus significant, but if

it is beyond reasonable doubt that the the Storting has chosen an unconstitutional procedure, the Storting's opinion must give way.

The powers that have been transferred

ACER's powers

(144) I will now assess the scope of the transfer of powers in the case at hand based on ACER's tasks. After that, I will turn to the functions of each of ESA and the national regulatory authority ERA before I discuss the legal bases allowing for a transfer of powers.

(145) On page 8 of the Proposition 4 S (2017–2018), *ACER*'s tasks are described as follows:

> "The establishment of the energy agency ACER entails a strengthened cooperation between regulatory authorities in Europe. The agency has a central role in the development of new regulations to supplement the third package. ACER also functions as an adviser, a supervisory authority and a decision-maker in specific areas."

(146) As already mentioned, ACER may adopt binding individual decisions as set out in Articles 7, 8 and 9, see Article 4 (d), of the ACER Regulation, to which I will return. ACER's activities are further regulated in Chapter II. The purpose of establishing the agency was, according to point 5 of the Preamble "to fill the regulatory gap at Community level and to contribute towards the effective functioning of the internal markets in electricity and natural gas". The agency "should also enable national regulatory authorities to enhance their cooperation at Community level and participate, on a mutual basis, in the exercise of Community-related functions."

(147) As mentioned, ACER may adopt binding individual decisions in cases mentioned in Articles 7, 8 and 9 of the ACER Regulation, see Article 4 (d), to which I will return.

(148) ACER also issues opinions and recommendations to EU institutions, regulatory authorities, operators and transmission system operators (TSOs). The agency also issues opinions on the market in electricity and assists the Commission in the drafting of statutes.

ESA and the cooperation with ACER

(149) In accordance with the two-pillar system of the EEA Agreement, it is ESA, and not ACER, that makes decisions under Articles 7, 8 and 9 of the ACER Regulation addressed to the national regulatory authorities in the EFTA States, see the EEA Joint Committee Decision No. 93/2017.

(150) According to the adaptation rules in Article 1 of the EEA Joint Committee Decision, ACER and ESA shall cooperate closely when adopting decisions, opinions and recommendations. They have the right to participate in each other's work, and ESA may participate in ACER's preparatory bodies when decisions are being drafted.

(151) ACER prepares a draft before ESA makes its decision. It follows from Article 1 (b) of the adaptation rules that decisions by ESA "shall, without undue delay be adopted on the basis of drafts" prepared by ACER. According to Proposition 4 S (2017–2018) page 26, ESA is to prepare "a similar or virtually similar decision". This is also how I interpret the rules.

(152) The Court of Appeal assumes that, in practice, ESA is unlikely to deviate from a draft from ACER. I agree. However, as also noted by the Court of Appeal, the formal decision-making powers are vested in ESA, and neither the ACER Regulation nor the EEA Joint Committees Decision No. 93/2017 givers ACER any direct powers towards national regulatory authorities in the EFTA States.

(153) A separate dispute resolution procedure has been adopted in case of disagreement between ESA and ACER, see Article 1 (3) of the adaptation rules, reproduced in Proposition 4 S (2017–2018) page 38.

(154) ESA's decision may be reviewed by the EFTA Court under Articles 36 and 37 of the Agreement between the EFTA States on the establishment of a surveillance authority and a court of justice.

National regulatory authorities

(155) As mentioned, each Member State is to designate a single national regulatory authority, see Article 35 (1) of the Third Electricity Market Directive. The Member States must guarantee the independence of the regulatory authority and ensure that it exercises its powers impartially and transparently, see Article 35 (4), and that it is legally distinct and functionally independent from any other public or private entities. The Member States must also ensure that staff and persons responsible for the management of the regulatory authority do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. The background to this independence requirement is provided in point 33 of the Preamble to the Directive. Here, it is stated that experience shows that the lack of independence leads to insufficient powers and discretion.

(156) ERA is a Norwegian regulatory authority organised as a separate, independent entity, see section 2-1 subsection 2 of the Regulations on grid regulation and the energy market. ERA is administratively subject to the Ministry of Petroleum and Energy, but according to section 2-3 subsection 2 of the Energy Act, it "may not be instructed on the exercise of power granted". In section 2-1 subsection 4 of the Regulations, a slightly different wording is used. Here, it is set out that ERA may not "be instructed in each case on the fulfilment of tasks and exercise of power granted".

(157) ERA is to ensure that decisions by ESA under the third energy market package are implemented in line with Norway's obligations under EEA law, see section 2-4 subsection 2 of the Regulations. In addition, according to section 2-3 subsection 4 of the Energy Act, ERA is to cooperate with other countries' regulatory authorities and international institutions in line with Norway's obligations under EEA law.

(158) In this respect, ERA cannot freely decide whether ESA's decision should be implemented in Norwegian law, see Article 37 (1) (d) of the Third Electricity Market Directive. ERA's duty to implement decisions requires, however, that ESA has made a decision that is compatible with legal acts that are contained in the EEA Agreement. ERA must follow Norwegian law,

which, for the decisions to be binding in Norway, must contain the necessary legal bases to implement the decisions from ESA. The decisions must also satisfy the requirements in for instance the Public Administration Act.

(159) The decisions by ERA may be appealed to an independent appeals board – the Energy Appeals Board – see section 2-3 subsection 2 of the Energy Act. The validity of decisions from ERA and the Energy Appeals Board may in the ordinary manner be reviewed by Norwegian courts, see section 3 of Regulations on the Energy Appeals Board and Proposition 199 LS (2020–2021) page 22. We are thus not dealing with a transfer of jurisdiction. ESA may bring the case to the EFTA Court if it considers that ERA has failed to fulfil its obligation to implement ESA's decision in Norwegian law, see ODA Article 31, but a ruling by the EFTA Court will affect Norway exclusively under international law.

(160) Against this background, it is clear that ERA is a Norwegian administrative agency; it is established by Norwegian authorities, and ESA's authority towards ERA is of an international-law nature. The requirement that ERA must be independent from the Government, among others, does not make ERA a supranational body.

Article 7 of the ACER Regulation

(161) Article 4 (d) of the ACER Regulation provides that "ACER shall take individual decisions in the specific cases referred to in Articles 7, 8 and 9". I will first consider Article 7.

(162) The parties disagree as to whether Article 7 is merely a reference provision, or whether it constitutes a legal basis for making decisions involving a transfer of powers. The disagreement relates in particular to the interpretation of Article 7 (1), which reads:

> "The Agency shall adopt individual decisions on technical issues where those decisions are provided for in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009."

(163) No to the EU's interpretation of Article 7 (1) is that it does not in itself give ACER a legal basis for making decisions on issues regulated in the legal acts mentioned in the provision. Therefore, the organisation claims, it is irrelevant whether the legal acts referred to in Article 7 (1) contain specific legal bases for ACER's exercise of power.

(164) In support of its view, the organisation highlights point 10 of the Preamble to the ACER Regulation:

> "It is appropriate to provide an integrated framework within which national regulatory authorities are able to participate and cooperate. That framework should facilitate the uniform application of the legislation on the internal markets in electricity and natural gas throughout the Community. As regards situations concerning more than one Member State, the Agency should be granted the power to adopt individual decisions. That power should under certain conditions cover technical issues, the regulatory regime for electricity and natural gas infrastructure that connects or that might connect at least two Member States and, as a last resort, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructure located in more than one Member State."

(165) Regulations must be interpreted based on an EU/EEA-law method, with great emphasis on the wording, purpose and context.

(166) In my view, the wording in Article 7 (1), particularly "where those decisions are provided for in" specific legal acts, indicates that the provision is a reference provision that in itself does not grant decision-making powers.

(167) Point 10 of the Preamble 10 indicates the purpose of granting ACER decision-making powers, and is generally worded. However, the Preamble, also, stipulates that power should be granted "under certain conditions", which implies that specific terms regulate when the agency has decision-making powers. The statements in the Preamble fit well with Articles 8 and 9, under which decision-making powers are granted under specific terms, but would harmonise poorly with the more general powers granted under Article 7.

(168) Article 7 (2) – (6) does not cover decision-making powers, but recommendations, framework for cooperation, opinions and information procedures. Article 7 (7) merely refers to Article 8.

(169) Against this background, I conclude that Article 7 does not in itself grant decision-making powers, but refers to the decision-making powers vested in ACER – and thus ESA – under other provisions in the third energy market package. Like the Court of Appeal, I cannot see that, apart from what follows from Article 8 and the provisions referred to in Article 9 (1), that at the time of the consent there were other legal bases for granting ESA decision-making powers towards ERA.

(170) The question thus remains which powers are transferred under Articles 8 and 9 of the ACER Regulation.

Article 8 of the ACER Regulation

Introduction

(171) Article 8 (1) initially states:

> "For cross-border infrastructure, the Agency 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 …"

(172) I reiterate that ACER's powers, also on this point, apply correspondingly to ESA, see EEA Joint Committee Decision No. 93/2017 Article 1 (5).

(173) According to Article 8 (1) (a) and (b) the decision-making powers only apply

> "(a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities; or
> (b) upon a joint request from the competent national regulatory authorities."

ACER's subsidiary powers

(174) In other words, the national regulatory authorities themselves must reach an agreement on the matters covered by the provision. The decision-making powers of ACER/ESA are conditional either on the national regulatory authorities not agreeing within six months from when the

case was referred to the last of them, or on the same authorities jointly requesting a decision from ACER/ESA. The conditions turn the competence of ACER/ESA into a dispute resolution mechanism that can be used when negotiations between the national authorities fail. The powers are subsidiary and derived from the competence of the national regulatory authorities.

(175) No to the EU contends that the limitations in (a) and (b) have lost much of their relevance, and has invoked a ruling from the Second Chamber of the ECJ, see judgment of 15 February 2023 in case T-606/20 *Austrian Power Grid*.

(176) The subject matter in that case, was that national regulatory authorities, which had received proposed regulations from the system operators for approval, had agreed on everything except for on two points. The national regulatory authorities chose to present the case to ACER by a joint request. ACER considered the issues of disagreement, but also decided issues on which the national regulatory authorities agreed.

(177) In my view, the judgment cannot be construed to mean that Article 8 (1) (a) and (b) have lost their relevance. As I read the judgment, it states that once the conditions of (a) or (b) are met, ACER's assessments are not bound by partial agreement between the national regulatory authorities. As set out in paragraph 42 of the judgment, ACER may then freely decide the issue regarding its competence "as an indivisible whole", so that the entire proposal can be dealt with as one without ACER being bound by the issues upon which the national regulatory authorities have agreed. The judgment has reportedly been appealed, but not on the issue I have now addressed.

(178) I therefore conclude that one of the options in Article 8 (1) (a) or (b) must be met before ACER can deal with the case, which means that ACER's powers are subsidiary. However, once ACER has been handed the case, it is competent to consider all elements of the methodological issue in question.

ACER's powers under Article 8

(179) The central questions when interpreting Article 8 relate to the nature of the powers granted under the provision and the extent thereof.

(180) ACER's – and therefore also ESA's – powers under Article 8 (1) are limited to decisions on cross-border regulatory issues which in principle fall under the national regulatory authorities.

(181) These powers follow from other provisions in the third energy market package, including Chapter IX of the Third Electricity Market Directive, see in particular Article 37. It specifies the obligations of the national regulatory authorities to ensure that the transfer of powers between countries takes place in an efficient and safe manner.

(182) What is meant by "the terms and conditions for access and operational security" in Article 8 (1) is also specified in Article 8 (2) (a) to (d), listing "a procedure for capacity allocation", "a time frame for allocation", "shared congestion revenues" – that is, income generated from capacity limitations between various price areas – and "the levying of charges on the users of the infrastructure".

(183) The use of this keyword terminology clarifies that that the decision-making powers apply in a limited area to achieve good functionality in the infrastructure, but the wording of Article 8 does not leave a precise impression of the extent of ACER's/ESA's decision-making powers. The regulations are designed to provide flexibility, and are therefore somewhat vague.

(184) Based on the wording of Article 8, the preamble to the ACER Regulation and the other regulations, one may nonetheless establish some safe starting points.

(185) ACER's/ESA's powers undoubtedly include making decisions on technical and professional issues related to the operation of foreign cables, so that the capacity may be exploited to its maximum. The primary responsibility for ensuring good functionality lies with the national regulatory authorities, but ACER/ESA should ensure that they are "properly coordinated and, where necessary, completed at the Community level", see point 6 of the Preamble to the ACER Regulation.

(186) It is also clear that Article 8 does *not* provide a legal basis to set electricity prices or make decisions to build new foreign cables or power stations, to lay down ownership rules or to grant licences. Similarly, it is clear that ACER/ESA cannot prohibit Norway to introduce restrictions on export of power. The extent to which such restrictions can be introduced is regulated by ordinary EU/EEA regulations, not least Article 12 of the EEA Agreement on restrictions on export.

(187) Between these extremes, which are not in dispute, the parties have differing opinions on the extent of the powers granted under Article 8. This raises the question of whether, as No to the EU contends, there are other sources that may clarify the extent the powers in Article 8.

Decisions that can be made under Article 8 – the application of the four Commission Regulations, etc.

(188) As mentioned, No to the EU contends that the courts, when assessing the scope of Article 8, must include all source material available at the time of the consent decision in 2018. This includes the four Commission Regulations from 2015 to 2017, incorporated into the EEA Agreement only in 2021. The State argues in turn that although the four Commission Regulations are not directly relevant for the interpretation of Article 8, they may serve to illustrate the tasks of ACER and ESA.

(189) The Commission Regulations are adopted in accordance with Article 18 (5) of the Cross-Border Trade Regulation, which was part of the third energy market package when the Storting gave its consent in 2018. Due to this linkage, it cannot be ruled out that the regulations may contribute to the interpretation of the scope of Article 8, although the regulations had not been incorporated into the EEA Agreement at the time of consent and further extends the competence of ESA. Since the so-called CACM Regulation and case law thereunder have been central in No to the EU's argumentation, I will have a closer look at this.

(190) The CACM Regulation establishes a guideline on the cooperation between system operators and power exchanges, and the coordination of technical matters to ensure efficient and secure use of the cross-border infrastructure for electricity. I refer to the passage regarding the Regulation in Proposition 199 LS (2020–2021) page 14 et seq. An example is the

categorisation into so-called capacity calculation regions, see Article 2 (3). These are geographical regions across borders gathering system operators in various countries that, based on technical conditions and proximity, are most linked to each other and therefore have the greatest need to coordinate their activities, see Article 15 of the Regulation. Capacity calculation regions make it possible to estimate available capacity in the electricity grid, which in turn is instrumental to ensure balance between consumption and production in the electricity system.

(191) No to the EU acknowledges that ACER/ESA cannot set the electricity prices. The prices are determined by the market. However, it is essential to the organisation that ACER/ESA can make decisions that indirectly affect the electricity prices through an export oriented organisation of the market places.

(192) The so-called *Hansa* decision is mentioned in particular. On 24 April 2023, ESA made a decision upon the proposal by ERA and a draft from ACER, see points 6 and 9 of the decision. The decision had its legal basis in Article 8 of the ACER Regulation and Article 15 of the CACM Regulation. It determines the capacity calculation regions and is currently the only decision ESA has made towards ERA. According to the decision, Norwegian foreign cables to the Nordic countries are covered by the region CCR Nordic, while Norwegian foreign cables to Germany, The Netherlands and Luxembourg are covered by the region CCR Hansa. On 18 August 2023, ERA followed up with a decision addressed to Statnett.

(193) No to the EU argues that the Norwegian foreign cables covered by the region CCR Hansa, has a large transmission capacity. The organisation contends that the entire region, which also includes the southernmost part of Norway, will therefore have electricity prices at level with Germany.

(194) This raises the question of whether the transfer of powers under Article 8, interpreted in the light of the CACM Regulation, is suited to influence the electricity prices to such an extent that the transfer is more than "of limited significance".

(195) It is a fact that the electricity prices are set in the market as a function of a number of parameters. I confine myself to mentioning transmission capacity, weather conditions such as wind, rainfall and snow melting, and the price of CO_2-quotas, coal and gas.

(196) ESA's task is to make decisions and otherwise contribute to efficient and rational operation of the foreign cables. In the absence of ESA's decision-making powers, the transmission capacity could have been slightly reduced, which in turn could have an effect on the electricity prices in Norway. The categorisation into capacity calculation regions may also be significant for the economic and legal infrastructure for the energy trade, which in turn is important for the market to function as efficiently as possible.

(197) However, based on what has been presented to the Supreme Court, it is clear to me that the potential price effects of ESA's decision-making powers, considered in isolation, will be marginal compared to what in any case follows from the transmission capacity in the foreign cables and the common European energy market Norway has joined. Moreover, these issues would have had to be resolved also in the absence of ESA's power. Regard must also be had to the factual conditions that influence the prices, and the complex interaction between them. Therefore, in my view, the transfer of powers under Article 8 *in itself*, also in the light of the

CACM Regulation, has no significant impact on the prices. For the same reasons, it has no significant impact on the energy situation in Norway.

(198) No to the EU has further invoked the regulations in the fourth energy market package as a source of law when interpreting Article 8. In the EU, the fourth energy market package replaced the third energy market package and, thus, the legal acts that are central in this case: the ACER Regulation, the Cross-Border Trade Regulation and the Third Electrical Market Directive. However, since the fourth energy market package has not been incorporated into the EEA Agreement, the ACER Regulation from 2009 is still the one applicable in Norway. One therefore operates with two different sets of rules for trade and transmission of electricity in the same market. For that reason, the organisation maintains, a coordination will take place, so that the entire internal market is managed in accordance with the rules applicable in the EU at any given time. In the organisation's view, this coordinating effect entails that Article 8 will be interpreted extensively in the light of the fourth energy market package, which is synonymous with more extensive powers to ACER/ESA than what the Storting intended in 2018.

(199) The fact that Norway and the EU Member States operate with different energy market packages could make the activities of ACER, ESA and the other participants more complex than if one single set of rules applied. However, this has no bearing on the interpretation of Article 8. As long as it is the rules in the third energy market package that apply to Norway, these are the rules that must be interpreted and applied by both ACER and ESA towards the EFTA States and by ERA in Norway. As I have pointed out, however, the wording in Article 8 is sufficiently flexible for the provision to allow development of the law to a certain extent. This must be considered when assessing the significance of the transfer of powers.

(200) No to the EU has also invoked the EU Commission's strategy document "Energy Union Package" from 2015. The document sets out on page 7 that the EU wishes to develop the partnership with Norway, among others. On page 9, the Commission describes how ACER, which in 2015 had "very limited decision-making rights", in time should be allocated more resources and wider powers. This led to the new ACER Regulation – Regulation (EU) 2019/942 of the European Parliament and of the Council – adopted by the EU in 2019 as part of the fourth energy market package, which is not applicable in Norway. However, this in itself does not prescribe a wide interpretation of Article 8 under the 2009 rules to which the Storting gave its consent in 2018. The Commission's description of ACER's decision-making powers under the third energy market package as "very limited" is closer to the interpretation of Article 8 that I have just explained.

The nature of transfer of powers under Article 8

(201) The parties agree that the provision provides a legal basis to make individual decisions; i.e. to exercise public administrative power. No to the EU contends that it also gives ACER/ESA legislative power.

(202) It is set out in Article 4 (d) of the ACER Regulation that the powers referred to in Articles 7, 8 and 9 concern "individual decisions". Even if an individual decision from ACER due to the effects of precedent may seem normative for others than those at whom the decision is addressed, it is correct based on Article 4 to interpret it to mean that only administrative, and

not legislative, power is transferred. This is also assumed in the consent proposition, see Proposition 4 S (2017–2018) page 17.

(203) Against this background, my conclusion so far is that Article 8 of the ACER Regulation gives ACER/ESA administrative power to make individual decisions in a limited area to ensure efficient and secure functioning of existing infrastructure for the transmission of electricity.

The significance of the independence of ERA

(204) The power under Article 8 is vested in ESA whose decisions may only be addressed to one Norwegian administrative agency, ERA. ESA's decision is not directly binding on Norwegian private individuals and undertakings, nor for the state owned enterprise Statnett. One may therefore question whether a transfer of powers to ESA has taken place at all.

(205) To meet requirements of EEA law, ERA has been made an independent regulatory authority that does take direct instructions from Norwegian authorities, see Article 35 (4) of the Third Electrical Market Directive. At the same time, ESA has the power to issue legally binding orders on ERA. When viewing these conditions in context, the Court of Appeal has concluded, like the Legislation Department of the Ministry of Justice, that a transfer of powers to ESA has taken place. Like the parties, I agree with this conclusion.

(206) As pointed out by the Legislative Department in paragraph 3.7 of its statement of 27 February 2018, the preclusion of the King's – the Government's – executive power under Article 3 of the Constitution means the loss of an important administrative opportunity for the highest state powers. Indirectly, it also impacts the possibility to exercise parliamentary and constitutional review. However, the transfer of powers in in the case at hand differs from the more common one, as it is more similar to the obligation under international law to refrain from exercising a specific type of internal power in a limited area.

Article 9 of the ACER Regulation

(207) Article 9 of the ACER Regulation supplements Articles 7 and 8 and regulates other tasks that lie with ACER. Article 9 (1) first sentence reads:

> "The Agency may decide on exemptions, as provided for in Article 17(5) of Regulation (EC) No 714/2009."

(208) This gives ACER decision-making powers if the national regulatory authorities have not reached an agreement within six months, or upon the latters' joint request, when it comes to granting exemptions for new interconnectors, see Article 17 (5) of the Cross-Border Trade Regulation.

(209) This, too, concerns administrative powers, and the powers are subsidiary, similar to what applies under Article 8 (1) (a) and (b) of the ACER Regulation.

(210) According to Article 17 (6) of the Cross-Border Trade Regulation, the Member States may, when requesting an exemption, provide for the regulatory authority or ACER to submit "for formal decision, to the relevant body in the Member State, its opinion on the request for an

exemption". In Norwegian law, this power is vested in the Ministry of Petroleum and Energy, see section 2 subsection 1 second sentence of Regulations on conditions for access to network for cross-border exchange of electricity. Here, the executive power is not limited, which means that we are dealing with an obligation under international law, and not a transfer of powers.

(211) The rest of Article 9 (1) of the ACER Regulation is not relevant to Norway, and (2) does not contain provisions on binding authority.

ESA's power to issue orders and penalties under the Cross-Border Trade Regulation

(212) According to Article 13 (1) of the Cross-Border Trade Regulation, the transmission system operators receive compensation for costs of hosting cross-border flows of electricity on their networks. The Commission decides on the compensation, see Article 13 (4).
Article 18 empowers the Commission to issue guidelines, including on compensation mechanisms between the transmission system operators.

(213) According to Article 20 (1), the Member States and the regulatory authorities shall, upon request and within a reasonable time, provide to the Commission all information necessary for the said purposes. As mentioned, the State possesses information on the day-to-day operation of the undertaking. The information shall be used only for these purposes and – if covered by the obligation of professional secrecy – must not be disclosed, see Article 20 (6).

(214) If the Member State or the regulatory authority does not provide the information within the given time-limit, the Commission may request all information directly from the undertakings concerned, see Article 20 (2). Where the undertaking also does not provide the information, the Commission may by decision require the information to be provided, see Article 20 (5).

(215) In the EFTA States, this subsidiary power lies with ESA, see Article 1 (1) (c) of the EEA Joint Committee Decision No. 93/2017. According to the State, decisions in Norway should primarily be addressed to Statnett as the supreme authority for the grid, but may also be addressed to power exchanges.

(216) Whether an undertaking wilfully or negligently fails to fulfil its duties under Article 20, the Commission may impose fines under Article 22 (2). Also here, the power lies with ESA, see Article 1 (1) (d) of the EEA Joint Committee Decision. Section 10-7 subsection 5 of the Energy Act gives ESA a legal basis under internal law to impose fines. The fine may not exceed 1 percent of the annual turnover, provided this is proportionate, see Article 22 (2).

(217) It is undisputed that this entails a transfer of powers to ESA. Review of ESA's impositions of fines is in principle under the EFTA Court's jurisdiction, see *ACER I* paragraph 182. We are thus dealing with a limited transfer of both administrative and judicial power.

(218) Information has been provided that the Commission so far has not made any decisions on the duty to provide information, or on penalties.

(219) There are also certain other provisions giving ESA a legal basis for requesting information from Norwegian undertakings, see Article 3 (3) of the Cross-Border Trade Regulation on certification of operators for transmission networks and Article 40 (1) of the Third Electrical

Market Directive on supply undertakings with record-keeping obligations. However, here, ESA lacks a legal basis to impose penalties for any failure to provide the information requested.

Is the transfer of powers in the third energy market package of limited significance?

Assessment criteria

(220) As already discussed, Article 26 subsection 2 of the Constitution gives a legal basis for consenting to a transfer of powers as long as it is of limited significance. The doctrine has developed over time by the Storting in interaction with the Government and the Legislation Department of the Ministry of Justice. In the railway opinion, the doctrine was supported by a unanimous Supreme Court.

(221) In paragraph 4 of the railway opinion, the Supreme Court endorses a statement from the Legislation Department of 30 May 2017, summarising the criteria for the assessment as follows:

> "According to case law, among the relevant factors are the nature of the powers that are transferred, the scope of the transfer and, in that regard, whether the transfer relates to a specific and limited area. It is also significant whether the transfer is based on reciprocity and equal participation. Case law also emphasises the extent to which it is possible for Norwegian authorities to remedy any adverse effects of the transfer of powers. Due regard must be had to the nature of the social and political interests affected. In borderline cases, the Storting's position in each case may be decisive for the application of Article 26 of the Constitution."

(222) The Supreme Court states the following in this respect:

> "As can be seen, the criteria are partly of a practical-political nature – the nature of the social and political interests affected – and partly of a more legal-formal nature – typically the nature and scope of the transfer of powers. The overall assessment will thus appear as a 'mixed' discretion. The criteria seem to be based on the more general views previously expressed in the articles by Fleischer ["Article 93 of the Constitution", *Jussens Venner* 1963, pages 73–111] and Eckhoff ["The EC and the Constitution", *Jussens Venner* 1990, pages 196–210] mentioned above. They are consistent with the legal policy justification for interpreting the Constitution so that consent to transfers of power "of limited significance" may be granted by a simple majority under Article 26 subsection 2.
>
> Accordingly, the Supreme Court will apply these criteria, but notes that in practice they may somewhat overlap. For instance, the nature of the social and political interests affected will often depend on the nature and scope of the transfer of powers. Furthermore, one future cases may necessitate further development or supplementation of the criteria.
>
> As mentioned … the issue is different when the powers are transferred to an organisation of which Norway is not a member. The criteria for considering the transfer of powers to be of limited significance will thus be narrower than if similar powers had been transferred to an organisation of which Norway was a member. The influence will be greater in such organisations. This means that the individual assessment will be centered on how close Norway in practice will be to a regular membership. Here, the right to participate and speak in various decision-making and advisory fora will be significant, even without a vote.

> In the Supreme Court's opinion, general distinctions cannot be made based on purely formal criteria for what type of powers may be transferred, for instance so that the power to lay down general rules should never be transferable to an organisation of which Norway is not a regular member. The degree of discretion held by the international body in making decisions is nonetheless important. The power to lay down general rules often entails more freedom of discretion than the power to make decisions in individual cases.
>
> Due regard must be had to the real social impact of the individual transfer of powers, also when powers are transferred to EU bodies. This must be assessed individually based on the relevant area of society, the extent of the powers concerned, and whether it is a matter of exercising professional or limited discretion rather than making broader societal assessments. Regard must also be had to the possibilities of Norwegian authorities to intervene if it turns out that the decisions have unintended adverse effects."

(223) I endorse this.

The individual assessment – starting points

(224) As mentioned, it is only a transfer of the power to make decisions that are directly binding in Norway without separate implementing measures from Norwegian public authorities are relevant for the "of limited significance" assessment under Article 26 subsection 2. The assessment is linked to the elements of a transfer of powers to which the Storting gave its consent in 2018.

(225) In the third energy market package, this relates to ESA's powers to impose penalties and fines under Articles 20 and 22 of the Cross-Border Trade Regulation Article 20 and 22. I addition, regard must be had to ESA being empowered to make decisions under Article 8 of the ACER Regulation towards ERA which ERA must implement, without taking instructions from Norwegian superior administrative authorities.

(226) In other words, the substantive set of rules by which Norway is bound only under the EEA Agreement, including the establishment of an internal market and the main part of the regulations in the third energy market package, falls outside of the scope of this review. These regulations must be incorporated into Norwegian law in order to be directly binding and do not involve a transfer of powers. Thus, the Supreme Court is not to assess the significance of the energy market within the EEA area as such.

(227) The subject of review is the content and the extent of the powers that have in fact been transferred, and the significance thereof. The key issue is what legally characterises the nature and extent of the powers in question.

(228) No to the EU contends that derivative effects of decisions that might be made through the transfer of powers must also be considered when assessing the signifance of the transfer. The contention regarding the transfer's impact on the electricity prices and energy situation in Norway illustrates this.

(229) According to paragraph 4 of the railway opinion, due regard must be had to *the real social impact of* the individual transfer of powers when assessing its significance. In line with this, regard must also be had to the actual effects of any decision made in accordance with the

powers transferred. Actual effects that may be linked to the transfer, but that are more indirect and derivative, will be less relevant for the "of limited significance" assessment the more remote they are. In this regard, one must take into consideration that the rule is intended as a practicable criterion for the choice of voting rules, which means that there should not be unrealistically strict requirements for the mapping of future actual effects of the transfer of powers. The Storting's practice in this area reflects this. The issue is not prominent in the case at hand, as I have concluded that the transfer of powers may not be assumed to have any major impact on the electricity prices or the energy situation in Norway.

(230) Since we are dealing with two different forms of transfer of powers, I will concentrate on Articles 7, 8 and 9 of the ACER Regulation before I turn to Articles 20 and 22 of the Cross-Border Trade Regulation.

The transfer of powers under the ACER Regulation

(231) In the ACER Regulation, as I have explained, transfer of powers is only regulated in Article 8.

(232) It involves a form of transfer of public administrative power, which traditionally is considered less significant than a transfer of legislative and judicial power. The power is transferred to ESA, which is part of an organisation of which Norway is a member, EFTA.

(233) ESA is exclusively empowered to make decisions addressed to ERA, a regulatory authority, and not directly towards Norwegian market players or private individuals. As such, it is only a matter of an ordinary international-law obligation. However, at the same time, the King's – or the Government's – executive power under Article 3 of the Constitution is lost, along with a central control and steering mechanism.

(234) I have already concluded that this must be considered a transfer of powers. However, it is not a transfer of powers in a traditional sense, nor is it at the core what is normally regarded as such a transfer. ERA holds an independent position, but the civil servants in ERA are subject to Norwegian law, including the State Employees Act, the Public Administration Act and the Penal Code. ERA's decisions may be brought before the Energy Appeals Board and Norwegian courts. Although the King's – the Government's – executive power is precluded, many of ERA's tasks are still subject to the Constitution and general Norwegian legislation. Hence, we are at the extreme of what can be considered a transfer of powers, which in itself implies that the transfer is of limited significance only.

(235) Similarly, I stress that the decision-making powers apply in a specific and limited area. The wording in Article 8 is sufficiently wide to allow for a certain development of the law, but the power to make decisions applies to matters of a functional and professional nature. Moreover, the individual decisions will have a direct impact only on a limited number of Norwegian undertakings, as I understand, mainly the governmental undertaking Statnett. The powers must also be exercised under rather strict EEA rules, which have been implemented in Norwegian law.

(236) The decision-making powers under Article 8 are of a subsidiary nature – ESA may only decide on a matter when national regulatory authorities have so requested or they have not reached an agreement within a certain period of time. As such, the power is essentially a dispute resolution mechanism.

(237) As it appears from what I have reproduced from the railway opinion, regard must also be had to the nature of the social and political interests affected.

(238) I agree with No to the EU that this as an important area of society. The supply and transmission of electricity are vital functions for the entire society. However, the powers transferred to ESA through the Storting's consent to the incorporation of the third energy market package into the EEA Agreement, do not relate to major societal choices such as whether or not to build foreign cables, impose export restrictions or set electricity prices. Nor do the powers have an indirect impact on the electricity prices and energy situation in Norway. We are dealing with powers to determine practical and functional solutions for an optimum supply of electricity across country borders when the countries fail to reach an agreement themselves. This limits the social and political impact of the transfer of powers in itself.

(239) When it comes to the reciprocity and equal participation requirement, the Member States have emphasised that although Norway does not have a vote in ACER, ERA may exercise influence on ACER through active participation in boards, working groups and discussions. ERA may also, through its right to express its opinion, influence both ACER's draft to ESA and ESA's draft decision addressed to ERA.

(240) However, when assessing which weight to attribute to these impact opportinuties, one must consider ERA's independent position. The cooperation with ACER and ESA is a task for ERA, without taking instructions "in each case". This means that Norwegian authorities cannot dictate ERA's opinion on the individual issue. One can therefore not assume that ERA's views automatically express those of the Government. Although ERA may convey knowledge and experience based on Norwegian conditions, this reduces the impact of ERA's participation in the decision-making processes.

(241) Norway is – through ERA – obliged under international law to implement ESA's decisions, see Article 37 (1) (d) of the Third Electricity Market Directive and section 2-4 subsection 2 of Regulations on grid regulation and energy market. ERA is to assess *how* ESA's decisions are best implemented in Norwegian law. The parties slightly disagree as to the extent to which ERA can decide on the actual implementation.

(242) The result obligation that follows from the Directive and section 2-4 subsection 2 of the Regulations on grid regulation and energy market, thus gives a small leeway. The leeway must be assumed to be limited to whether ESA has acted beyond its competence, and whether Norwegian internal law allows for a similar decision from ERA without legislative amendments. The possibility to remedy any adverse effects of the transfer of powers, for instance if capacity calculation regions are established that Norwegian authorities consider inexpedient, is thus limited. Norwegian undertakings may submit ERA's decision to the Energy Appeals board and bring a validity action in Norwegian courts.

(243) The circumstances I have now presented show the nuances in determining the significance of the transfer of powers under Article 8. Overall, I am nonetheless certain that the transfer of powers is "of limited significance".

Obligation to provide information and impose penalties

(244) Also when it comes to a transfer of powers under Article 20 and 22 of the Cross-Border Trade Regulation, I use the nature and the scope of the transfer as a starting point.

(245) ESA, which is a part of an organisation of which Norway is a member, has been conferred the administrative power. Decisions on the provision of information and imposition of fines have a direct effect in Norway. The fines may be considerable, but they must be proportionate and can be brought before the EFTA Court for review. The penalities are of an administrative law nature, and not a criminal law nature.

(246) Here, too, we are dealing with subsidiary powers. Norwegian public authorities may – if necessary by enforcement measures – themselves request information from the undertakings. The duty to provide information has one specific purpose – the information must be necessary in the drafting of rules on specific issues for an individual industry. I also attribute some importance to Norway's interest in a system that ensures that the Commission makes decisions and prepares guidelines on a solid factual basis.

(247) As I understand, ESA's requests for information and imposition of penalties for any failure to comply will have very few addressees, in practice only Statnett and power exchanges. According to information provided, this power has yet to be exercised.

(248) Including through participation in working groups, ERA has an influence on which information is necessary to draft sets of rules. The organisation may participate in working groups that assist the Commission and ACER in drafting new sets of rules. However, also here, regard must be had to ERA's independent position. There are also possibilities to influence through Statnett's participation in the European Network of Transmission System Operators for Energy, see Article 5 of the Cross-Border Trade Regulation and Proposition 4 S (2017–2018) page 18.

(249) The social and political interests affected largely coincide with the corresponding assessment under Article 8 of the ACER Regulation. Powers are transferred in an important area of society, but they are of very limited significance.

Overall assessment

(250) In the case at hand, we are dealing with a transfer of powers consisting of two elements. As concerns Article 8, we are at the extreme of what can be considered a transfer of powers at all, and the transfer is limited. In addition, the transfer of powers under Articles 20 and 22 of the Cross-Border Trade Regulation covers, in addition to jurisdiction, more typical public administrative power of a rather significant nature, particularly the power to impose penalties, but the transfer of powers is very narrow. Considered as a whole, I am in no doubt that the transfer of powers is only of limited significance.

(251) Against this background, I assess the constitutional issue in the same manner as the Storting, and the case is clear. Therefore, the question of which weight to attribute to the Storting's assessment under Article 26 subsection 2 of the Constitution does not arise.

Conclusion and costs

(252) My conclusion is that the rules of the Constitution were not violated when the Storting, in 2018, consented to the incorporation of the EU's third energy market package into the EEA Agreement. The procedure laid down in Article 26 subsection 2 of the Constitution was correctly followed since the transfer of powers was of limited significance. The appeal should therefore be dismissed.

(253) The State has won the case, also in the Supreme Court, and is in principle entitled to have its costs compensated under section 20-2 subsection 1 of the Dispute Act. However, the case has raised issues of principle of great social interest that needed clarification. Therefore, there are weighty reasons for exempting No to the EU from liability for the State's costs in the Supreme Court, see section 20-2 subsection 3 of the Dispute Act. I also find no reason to change the Court of Appeal's ruling that the parties carry their own costs in the District Court and the Court of Appeal, see section 20-9 of the Dispute Act.

(254) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. The parties carry their own costs in the Supreme Court.

(255) Justice **Webster:** I agree with Justice Sæther in all material respects and with his conclusion.

(256) Justice **Matheson:** Likewise.

(257) Justice **Falkanger:** Likewise.

(258) Justice **Normann:** Likewise.

(259) Justice **Bull:** Likewise.

(260) Justice **Bergsjø:** Likewise.

(261) Justice **Ringnes:** Likewise.

(262) Justice **Arntzen:** Likewise.

(263) Justice **Falch:** Likewise.

(264) Justice **Bergh:** Likewise.

(265) Justice **Østensen Berglund:** Likewise.

(266) Justice **Høgetveit Berg:** Likewise.

(267) Justice **Thyness:** Likewise.

(268) Justice **Steinsvik:** Likewise.

(269) Justice **Hellerslia:** Likewise.

(270) Chief Justice **Øie:** Likewise.

(271) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. The parties carry their own costs in the Supreme Court.