SUPREME COURT OF NORWAY

O R D E R

issued on 1 March 2021 by the plenary of the Supreme Court composed of

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HR-2021-417-P, (case no. 20-072085SIV-HRET)
Appeal against Borgarting Court of Appeal's order 18 March 2020

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

(1) Justice **Kallerud:**

Legal issue

(2) The case concerns an action brought by the organisation No to the EU against the State to stop the incorporation of the EU's third energy market package into Norwegian law. The organisation claims – somewhat simplified – that the Storting's consent to include the energy market package in the EEA Agreement is contrary to the provisions in the Constitution on relinquishment of sovereignty. According to No to the EU, the Storting should not have given consent under Article 26 subsection 2 of the Constitution, which only requires a simple majority. In the organisation's view, the consent involved such a radical transfer of sovereignty that it required a three-fourths majority in the Storting, see Article 115 of the Constitution.

(3) Whether the Storting acted in accordance with the Constitution, is not at issue here. The issue to be decided by the Supreme Court, as in the lower courts thus far is whether the requirements in section 1-3, cf. section 1-4, of the Dispute Act are met for the action to be admissible in its current form. The case also raises issues about the scope of constitutional review under Article 89 of the Constitution. If the action does not meet the requirements of these provisions, it must be ruled inadmissible.

Background

The EU's third energy market package

(4) Since the late 1980s, the EU has worked to develop an internal energy market. Norway has been involved in this work through its membership of the EEA, among other things by the incorporation of rules in previous energy market packages into the EEA Agreement.

(5) The EU adopted the third energy market package in 2009. This package includes a number of regulations and directives. While the package largely maintains the existing set of rules, it also contains some key amendments, which I will address soon.

(6) The background to and purpose of the EU's third energy market package are described in the Government's proposal that the Storting consent to Norway implementing the package, see Proposition 4 S (2017–2018) page 8:

> "The purpose of the EU's third energy market package is to contribute to further development of the functioning of the internal market within the energy sector, and to overcome hindrances to an internal market for energy and natural gas."

(7) A main objective is thus to facilitate the cross-border sale of energy and natural gas. The parties agree that the main concern for Norway is the energy market.

(8) To determine whether the requirements for bringing an action are met, it is not necessary to detail the contents of the third energy market package. I confine myself to highlighting some main features related to the transfer of sovereignty issue.

(9) One of the legal acts – Regulation (EC) No. 713/2009 – contains organisational and procedural rules for the establishment of ACER – Agency for the Cooperation of Energy Regulators. ACER's tasks include the facilitation of cross-border trade in energy by enhancing the cooperation between national regulatory authorities. ACER is also to develop the rules for this trade, see Proposition 4 S (2017–2018) page 6. The tasks are summarised as follows on page 8:

> "The establishment of the energy agency ACER entails enhancing the cooperation between regulatory authorities in Europe. ACER plays a key role in the creation of a new set of rules to complement the third package. ACER also functions as an adviser, a supervisor and a regulatory authority in certain areas."

(10) The Regulation's chapter II provides detailed rules on ACER's competence. Articles 7, 8 and 9 of the same chapter are particularly relevant to case at hand. Article 8 (1) sets out that ACER, in cases regarding cross-border infrastructure "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". For example, the State has mentioned that ACER may decide upon issues related to the use of a cross-border energy cable. According to Article 8 (1), such a decision may only be made "where the competent national regulatory authorities have not been able to reach an agreement" or "upon a joint request from the competent national regulatory authorities".

(11) Directive 2009/72/EC provides that each Member State shall designate a single national regulatory authority at national level, see Article 35 et seq. The national regulatory authority shall comply with and implement all legally binding decisions by ACER and by the EU Commission. The regulatory authority shall work independently from any government or other public or private entity when carrying out its regulatory tasks.

(12) Regulation (EC) No. 714/2009 sets out that the EU Commission may request information directly from the undertakings concerned, and impose fines for any failure to supply the requested information, see Articles 20 and 22.

The third energy market package in Norwegian law – the elements of transfer of sovereignty

(13) On 5 May 2017, after lengthy negotiations on adaptations to the EEA cooperation, the EEA Joint Committee decided to incorporate the legal acts of the EU's third energy market package into the EEA Agreement, with the agreed adaptations. For use in this work, three opinions had been obtained from the Ministry of Justice's Legislation Department on the constitutional requirements for consenting to the inclusion of the energy market package into the EEA Agreement. Significant to the case at hand is that decisions addressed to the regulatory authorities in the EFTA States are not made by ACER or the EU Commission, but by the EFTA Surveillance Authority (ESA). At issue in the main action is the importance of organising the cooperation so as to avoid that binding decisions affecting Norwegian undertakings are not issued directly from an EU regulatory body.

(14) In Norway, the national regulatory authority referred to in Directive 2009/72/EC, is established as an independent division of the Norwegian Water Resources and Energy Directorate (NVE), namely the Norwegian Energy Regulatory Authority (RME). RME manages the regulations applicable in Norway. The division participates in the work of

ACER, but does not have vote.

(15) In accordance with Article 103 of the EEA Agreement, Norway maintained that a final approval of the third energy market package depended on the fulfilment of Norwegian "constitutional requirements". The Article's first paragraph reads:

> "If a decision of the EEA Joint Committee can be binding on a Contracting Party only after the fulfilment of constitutional requirements, the decision shall, if a date is contained therein, enter into force on that date, provided that the Contracting Party concerned has notified the other Contracting Parties by that date that the constitutional requirements have been fulfilled."

(16) In other words, the Government concluded that it was necessary to obtain the Storting's consent before the decision of the EEA Joint Committee could become binding.

(17) The Government presented a draft consent to the Storting in November 2017, see Proposition 4 S (2017–2018). Supported by the mentioned statements from Legal Affairs Department, the Government found that the Storting's consent could be given by a simple majority under Article 26 subsection 2 of the Constitution. At the same time, the Government presented draft amendments to the Energy Act and the Natural Gas Act, see Proposition 5 L and 6 L (2017–2018).

(18) In the Storting, the views on the procedure differed, see Recommendation 178 S (2017–2018). Following a debate on 22 March 2018, several proposals were voted on; one of them being that the consent had to be given by a three-fourths majority in accordance with Article 115 of the Constitution. The proposal was rejected by 72 against 24 votes. Hence, the Storting itself expressly considered the correct procedure under the Constitution. The Storting then gave consent – in accordance with Article 26 subsection 2 – to the Government's approval of the EEA Joint Committee's decision to make the EU's third energy market package, with adaptations, part of the EEA Agreement. For the sake of completeness, I mention that during the Storting debate, one additional statement on the constitutional issues was obtained from the Legislation Department.

(19) On 27 April 2018, Norway notified the EEA Joint Committee that the constitutional requirement was now fulfilled. Necessary amendments were adopted on 25 May 2018. Because one also had to wait for the Icelandic Allting's consent, the Committee's decision to make the legal acts part of the EEA Agreement entered into force only on 3 October 2019. With that, the EU's third energy market package with amendments became binding on Norway under international law.

(20) The legal acts were incorporated into Norwegian law through amendments in the Energy Act and the Natural Gas Act with related regulations, which entered into force in the autumn of 2019.

(21) The parties agree that the implementation of the EU's third energy market package entails a certain *transfer of sovereignty from Norwegian organs of state to an international organisation*. Two factors may prompt the question of whether it was sufficient that the Storting gave its consent under Article 26 subsection 2 of the Constitution.

(22) *First*, the process involves a transfer of competence to ESA to make decisions in accordance with proposals from ACER in the types of cases where ACER has such competence in the

EU. Such decisions will in that case be addressed to RME, which in turn may issue binding decisions on Norwegian undertakings – primarily Statnett. Here, I note that No to the EU contends that the actual decision is made by ACER, which ESA is automatically obliged to follow. The Norwegian regulatory body – RME – must then implement ESA's decisions towards the Norwegian undertaking, in practice Statnett. Thus – the organisation claims – these decisions are in fact made by an EU regulatory body.

(23) *Secondly*, it involves a transfer of authority to ESA to request the supply of relevant information from Norwegian energy undertakings and impose fines if the undertaking concerned fails to supply the requested information.

(24) I will not elaborate on the characteristics of these two elements of transfer of sovereignty, nor on how radical they are. These issues are part of the main action, if it proceeds to court. I mention nonetheless that up to this point in time, no measures have been taken – and no decisions have been issued to Norwegian regulatory authorities or undertakings – that entail any form of exercise of authority. No information has been provided as to whether Norwegian undertakings have supplied information to ESA without being ordered to do so.

(25) Following the initial enactment of the EU's third energy market package, more legal acts have been adopted within the scope of this package. The EEA Joint Committee has decided to include also these in the EEA Agreement. According to information provided, during the spring of 2021, the Government will ask for the Storting's consent to the incorporation of this set of rules into the EEA Agreement. EU has also adopted a fourth energy market package. For the time being, the EEA Joint Committee has not made any decision in this regard. Although the new legal acts in package III and the new package IV are not at issue in this case, they demonstrate the considerable work being done in the EU in this area.

The court proceedings

(26) On 8 November 2018, No to the EU brought an action claiming that the State has a duty to refrain from incorporating the EU's third energy market package into Norwegian law. The organisation contends, as mentioned, that the incorporation involves a relinquishment of sovereignty at such a level that the Storting's consent should have been granted by a three-fourths majority in accordance with Article 115 of the Constitution. The Storting's consent decision of 22 March 2018 is therefore, in No to the EU's view, unconstitutional.

(27) The State claimed in response that the procedural requirements in section 1-3 of the Dispute Act are not met, and requested the court, principally, to rule the case inadmissible. The case is currently limited to concern this issue.

(28) Oslo District Court conducted an oral hearing of the admissibility question and issued an order on 10 October 2019, ruling to dismiss the case. The District Court found that the case neither concerned a "legal claim" nor was sufficiently relevant to No to the EU, see section 1-3 of the Dispute Act.

(29) No to the EU appealed the order to Borgarting Court of Appeal. Following a written hearing, the Court of Appeal issued an order 18 March 2020, dismissing the appeal. The Court of Appeal found that the requirements for bringing an action were not met.

(30) No to the EU has appealed to the Supreme Court against the order of the Court of Appeal on grounds of erroneous procedure and application of the law. The Supreme Court's Appeals Selection Committee dismissed the appeal against the procedure on 18 June 2020, see HR-2020-1274-U. In the same ruling, the Committee referred the appeal against the application of the law to a division of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act. On 9 September 2020, the Chief Justice decided to refer the case to the plenary of the Supreme Court pursuant, see section 5 subsection 4 last sentence, cf. section 6 subsection 1 second sentence, of the Courts of Justice Act, see HR-2020-1749-J.

(31) Justice Matningsdal, who has been on sick leave, and Justice Høgetveit Berg, who is on study leave, have not participated in the proceedings.

(32) According to section 5 subsection 5 second sentence of the Courts of Justice Act, the justice with the shortest seniority must withdraw to avoid an even number of justices. This entails that Justice Steinsvik will not take part in the voting.

(33) The claim in the underlying action has been altered several times. It now reads:

> "The State represented by the Ministry of Foreign Affairs had a duty to refrain from incorporating the Energy Market Package III into Norwegian law."

(34) Before the Court of Appeal, the claim was worded also to involve a review of the legality of subordinate legislation. Based on the current wording of the claim in the main action, this is not at issue in the Supreme Court.

(35) Apart from this, the case remains the same as in the previous instances.

(36) The case has been heard by video link in accordance with section 3 of the Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak.

The parties' views

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

(38) The requirements for bringing action in section 1-3 of the Dispute Act are met in the form the case is currently raised. The action stems from an individual decision – the Storting's consent related to the EU's third energy market package. This decision is based on individual facts, namely the set of rules that has been made part of the EEA Agreement, including the transfer of sovereignty to ESA and the newly established RME. The purpose of the main action is to obtain a declaration that the Government's approval of the third energy package was unlawful because the Storting acted contrary to the Constitution when giving consent under Article 26 subsection 2, and not under Article 115. Based on the organisation's objective, No to the EU has a genuine need to have this claim decided. Representing parts of civil society, the organisation has a legal right to demand that the Storting apply the Constitution correctly. No to the EU's contention in the main action is that the transfer of sovereignty is more than "non-radical", which means that the Storting could not give consent under Article 26 subsection 2. The courts must accept this contention without further review when deciding whether the case is admissible.

(39) The action concerns an issue of principle. It is of great public interest that powers are not transferred contrary to the Constitution. Electricity supply is also vital for a modern society and thus for its citizens. The transfer of sovereignty in dispute may lead to increased electricity prices. This will affect, among others, consumers and cornerstone companies in peripheral areas and thus be significant for employment and settlement patterns.

(40) It is currently not possible to concretise the action any further. The courts would also have a poorer basis for carrying out a constitutional review if compelled to wait for an individual administrative decision being made in the future. It is the overall transfer of sovereignty that must be examined in the light of the Constitution. A future individual administrative decision will apply only to a limited part of the transfer. Also relevant here is the constant development of EU law, not least in this area. Transfer of sovereignty therefore takes place piece by piece.

(41) If the requirements in section 1-3 of the Dispute Act should not be considered met, an exception must be interpreted into it similar to that established by the Danish Supreme Court in 1996 – the so-called Maastricht exception. Like the Danish case, our case raises an issue of principle, of which there is a clear and genuine need to seek clarification. Also in Norwegian case law, these factors are attributed much weight. However, one cannot make the same strict requirements under Norwegian law as reflected in Danish case law. Nonetheless, the conditions under the Maastricht exception are met in the case at hand.

(42) Allowing this action is clearly within the courts' jurisdiction under Article 89 of the Constitution.

(43) No to the EU has requested the Supreme Court to rule as follows:

> "Principally:
> The case is admissible.
>
> Alternatively:
> Borgarting Court of Appeal's order is set aside.
>
> In both circumstances:
> The State represented by the Ministry of Foreign Affairs is to compensate No to the EU's costs in the District Court, in the Court of Appeal and in the Supreme Court."

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

(45) The requirements for bringing an action in section 1-3 of the Dispute Act are not met.

(46) The contention in the main action does not concern a "legal claim", but an abstract legal issue that cannot be challenged through legal action. According to the Dispute Act, a judgment may only be given for concrete legal claims. An action must – also here – be aimed at an individual decision on the rights or duties of an individual physical or legal person. No such decision has been made. Instead, No to the EU asks that the courts examine whether the Storting gave consent in the correct manner. The action is thus aimed at the Storting's own procedure. That it concerns an abstract claim is clear from the fact that the challenged consent decision has not so far had legal consequences for any one. The courts will have a better basis for assessing the transfer of sovereignty if the constitutional issue is raised in a specific context.

(47) The organisation also does not have a "genuine need" to have the claim decided; at least not in the form it is brought. The requirement of relevance is therefore not met. It is also unclear if the organisation has sufficient connection to the claim. At least two of the conditions in section 1-3 of the Dispute Act are thus not met. Then, there is no basis for an overall assessment of whether it nonetheless would be natural and reasonable to hear the dispute. Such assessments are only required in cases of doubt.

(48) There is no legal basis for abandoning the traditional requirements for bringing an action and for interpreting a "Maastricht exception" into Norwegian law. The background to Danish case law is utterly distinctive. Should such an exception nonetheless exist in Norwegian law, the requirements must be at least as strict as in Denmark. It is clear that the action by No to the EU does not meet the requirements laid down in Danish law. Although the EU's third energy market package is important, the dispute does not involve aspects of paramount importance to the public. The two cases where the Danish Supreme Court has allowed abstract actions – ratification of the Maastricht and Lisbon treaties – were of a completely different nature. It is illustrative that corresponding actions on the Schengen cooperation and on participation in the war in Iraq were ruled inadmissible.

(49) In any case, Article 89 of the Constitution precludes such constitutional review as No to the EU is trying to obtain. It is an open question whether the courts are competent at all to examine a decision by the Storting as in the case at hand. Such examination may in any case not be carried out in such an abstract manner as No to the EU has intended. The preparatory works to Article 89 clearly do not support such a review. In addition, substantive and constitutional considerations strongly suggest that this action should not be admissible. Should the courts agree to carry out an abstract review, it would signify a fundamental and constitutional change to the relationship between the judiciary and the legislature.

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

> "The appeal is dismissed."

My view on the case

The Supreme Court's jurisdiction

(51) The Court of Appeal has ruled the action inadmissible on the grounds that the requirements in in section 1-3 of the Dispute Act are not met. The Supreme Court thus has full jurisdiction, see section 30-6 (a) of the Dispute Act.

The issue at hand and the further discussion

(52) The core issue in the main action is whether the Storting was competent under Article 26 subsection 2 of the Constitution to consent to the incorporation into Norwegian law of the rules involving a transfer of sovereignty in the EU's third energy market package, or whether the transfer was of such a scope that the consent could only be given by a three-fourths majority under Article 115. I note for the record that the decision in its entirety simply stated

that the Storting consented to the Government's approval of the decision of the EEA Joint Committee No. 93/2017 of 5 May 2017 to make the legislative acts contained in the third energy market package part of the EEA Agreement. The parties agree that the issue in the main action is whether the Storting acted contrary to the Constitution when giving this consent.

(53) For the time being, the question is whether the action may brought in its current form. Alternatively, the constitutional issue may only be considered if an administrative decision is made based on the set of rules to which the Storting allegedly consented to unconstitutionally, if the requirements for bringing an action are otherwise met at that time.

(54) The question in the case at hand relates to both the interpretation of Article 89 of the Constitution on the courts' power and duty to exercise constitutional review and to the requirements for bringing an action in section 1-3 of the Dispute Act, cf. section 1-4. On a more general level, these provisions are connected since it is a vital condition for constitutional review under Article 89 that the claimant is entitled to bring the action. This right is regulated in section 1-3 of the Dispute Act, and, for organisations, in section 1-4. On the other hand, the requirements for bringing an action must of course be applied within the limitations that might follow from Article 89.

(55) My overall view is, however, that Article 89 of the Constitution, and the preparatory works to that provision, does not restrict the right to bring an action beyond what is currently regulated in section 1-3, cf. 1-4, of the Dispute Act and in related case law. The background to this view is particularly, as I will address soon, the fact that the Storting, when adopting Article 89, stressed that the purpose was to continue constitutional review as it had developed up to that point. In my view, there was also no conflict at that time between constitutional review and the requirements for bringing an action. As I see it, it is therefore crucial to determine to which extent an action as that we are dealing with may be brought under section 1-3, cf. 1-4, of the Dispute Act.

(56) In the following, I will first discuss the provisions on relinquishment of sovereignty in Articles 26 and 115 of the Constitution. These are the provisions that the Storting did not apply correctly according to No to the EU, and which will be key in the main action if it proceeds. Next, I will discuss Article 89 of the Constitution on the courts' power and duty carry out constitutional review and assess whether Storting decisions under Articles 26 and 115 are subject to such review. I will then assess the Storting's intent to continue previously applicable law when enshrining constitutional review in the Constitution, and how this affects the scope of the review. Here, I will address the delimitation against "abstract" constitutional review, and the connection between constitutional review and the procedural requirements for bringing an action under the Dispute Act. The next main topic concerns the interpretation of sections 1-3 and 1-4 of the Dispute Act, above all related to the possibility to bring an action of a more general scope. Finally, I will take make an individual assessment of whether No to the EU's action should be allowed to proceed.

The Constitution's provisions on transfer of sovereignty when entering into international agreements

(57) Article 26 of the Constitution 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."

(58) According to Article 26 subsection 1, it is the "King" – i.e. the Government – that has the competence to enter into "treaties". At the outset, the Government does not need the Storting's consent to enter into international agreements. But this is modified in subsection 2 for treaties "on matters of special importance" and in cases where "a new law or a decision by the Storting" is necessary. As mentioned, this is the provision the Storting applied – in line with the Government's recommendation – when giving consent with a simple majority.

(59) Article 115, also, applies to the accession to treaties. The procedure described herein must be applied by the Storting when consenting to

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

(60) According to Article 115, a three-fourths majority is required, as well as the presence of at least two thirds of the Storting's members.

(61) According to the Storting's practice, the distinction between Article 26 subsection 2 and Article 115 is transfer of sovereignty that is considered "non-radical". No to the EU finds that it was more than "non-radical" to incorporate legislative acts in the EU's third energy market package into the EEA Agreement. Therefore, the organisation contends, the Storting could only give consent pursuant to the procedure in Article 115.

(62) The provisions in Article 26 and Article 115 of the Constitution regulate the relationship between the Government and the Storting, and the procedure in the Storting. In other words, they have the form of rules on the division of powers and procedural rules. The provisions thus differ from those in the Constitution providing the citizens with individual rights, such as freedom of expression, the right to a fair trial and protection against retroactive laws. Articles 26 and Article 115 have nonetheless significance beyond regulating the relationship between the Storting and the Government and providing rules on the procedure of the Storting.

(63) 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.

(64) 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.

(65) For the sake of completeness, I finally mention that also the upper limit for the application of Article 115 may raise extensive issues of public interest: In which cases may not even Article 115 be applied to give consent to the accession to an international agreement? In other words, when is a constitutional amendment required, with the special guarantees that come with the procedure for this?

(66) With an increasingly close international cooperation, not least through the development of the EEA Agreement, these constitutional issues are essential, also in a legal perspective. Consequently, it is important to establish whether constitutional review extend to consent decisions made under Article 26 subsection 2 and Article 115 of the Constitution. As previously pointed out, in its submissions to the Supreme Court, the State has left it open whether such decisions may be reviewed by the courts. Also essential to the case at hand is the question of which further limitations lie in the doctrine of constitutional law that constitutional review may not be abstract.

(67) I will now turn to the scope of constitutional review under constitutional law.

Constitutional review and Article 89 of the Constitution

Generally on the courts' power and duty to carry out constitutional review

(68) When the court-created doctrine of constitutional review was developed in cases on review of the contents of a statutory provision against a provision in the Constitution. Since the 19th century, the courts have assessed contentions that it would be against the Constitution to apply a statutory provision in the specific case pending in court. The doctrine has been amendment and adjusted to new societal conditions and the development of the law in other areas. As I will revert to shortly, one result of this development is that today, constitutional review is not limited to statutory provisions.

(69) Of particular importance for the case at hand is that the possibility to bring cases before the courts over time has been materially extended. It concerns in particular organisations' right to bring actions to defend idealist or general public interests. Constitutional review has been extended in line with this.

(70) In 2015, the courts' power and duty to carry out constitutional review was included in Article 89 of the Constitution. After an amendment in 2020 the provision reads:

> "In cases brought before the Courts, the Courts have the power and the duty to review whether applying a statutory provision is contrary to the Constitution, and whether applying other decisions under the exercise of public authority is contrary to the Constitution or the law of the land."

Does constitutional review comprise Storting decisions made under Articles 26 and 115 of the Constitution?

(71) Constitutional review is thus principally a creation of case law developed through cases in

which the content of a statutory provision has been examined against a provision in the Constitution. The question I am now to consider is whether also decisions made by the Storting under Article 26 subsection 2 and Article 115 of the Constitution may be subject to review. If so, it will not involve a review of the content of the Storting's decisions, as is normal for review of statutory provisions, but of whether the Storting acted within its competence and followed procedural rules when making the decision.

(72) In the landmark plenary ruling in Rt-1976-1 (the Kløfta case), the Supreme Court clarified, with reference to a previous plenary ruling in Rt-1952-1089 (the whale tax case), that also "constitutional provisions regulating the procedures of the other branches of government as well as their competence vis-à-vis each other", is comprised by the constitutional review. The Supreme Court thus based itself on the view that constitutional review is more general, and concluded, among other things, that also competence provisions, as Article 26 subsection 2 and Article 115 of the Constitution in fact are, may be comprised by the constitutional review. The statement applies directly only to what Justice Blom describes as "setting aside a statutory provision as unconstitutional". But there is no reason why constitutional review should not include Storting decisions other than legislative decisions, although this was not explicitly mentioned. The Supreme Court emphasised that in such cases, the courts "must generally respect the Storting's own view".

(73) This principle was maintained when constitutional review was established in the Constitution. The courts' "power and duty" to carry out constitutional review also applies to "other decisions made under the exercise of public authority". According to the wording, this includes all kinds of government decisions, including Storting decisions, although it seems primarily to refer to administrative decisions. And it is clear that the adoption of Article 89 was intended as a continuation of already applicable law. This is perhaps most evident from Recommendation 263 S (2014–2015) page 10, where the majority in the Standing Committee on Scrutiny and Constitutional Affairs states that the "… sole purpose of the draft amendment is to enshrine in the Constitution constitutional review with its current contents and scope".

(74) I note that the majority in the Standing Committee on page 11 in the Recommendation mentions review of "constitutional provisions regulating procedures of the other branches of government as well as their competence vis-à-vis each other ". Modelled on the Kløfta case, the majority states that the courts through such a review "to a great extent will respect the Storting's opinion on the constitutional issue".

(75) I also note that a different type of consent decision by the Storting was indirectly an issue in the plenary ruling in HR-2020-2472-P (the climate case). Formally, the case concerned the validity of the Government's decision to grant petroleum production licences. But the decision was "based on the Storting's consent", and was "conclusively" based on this, see paragraph 81. Hence, in practice, the Storting's consent was the subject of review. In paragraph 141, it is set out that "obvious rule of law considerations suggest that the courts must be able to set limits for a political majority when it comes to protecting constitutionalised values".

(76) Finally, it is established law that the courts may examine whether the procedure for legislative decisions prescribed in the Constitution is complied with, see HR-2016-296-A paragraph 77.

(77) Against this background it is, as I see it, clear that the courts under Article 89 in principle may examine all forms for Storting decisions – provided the requirements for bringing an action

are met. The question is then whether the provision must be interpreted restrictively, such that consent decisions under both Articles 26 and 115 of the Constitution are nonetheless not covered, as the State left open.

(78) In my assessment, constitutional review of the Storting's consent decision under Article 26 and Article 115 conforms well with a long Norwegian legal tradition, provided the general requirements for bringing an action are met.

(79) As mentioned with regard to Articles 26 and 115 of the Constitution, the overall purpose of the provisions is to protect against a transfer of Norwegian sovereign powers to an international organisation without the conditions for such a transfer being met, i.e. including if need be a qualified majority in the Storting. Indirectly, the provisions also protect the public, as a transfer of sovereignty covered by Article 115 may only be implemented if a qualified majority of the democratically elected representatives vote in favour. If the courts were always precluded from controlling this, it would be up to a simple majority in the Storting whether the votes of a qualified majority is required.

(80) In my assessment, it would be contrary to clear rule of law considerations to preclude the courts in all circumstances from examining whether a political majority has acted within the Constitution's limitations in an area such as this. As I will address under my discussion of section 1-3 of the Dispute Act, it is also a precondition in the preparatory acts that a case of this nature proceeds to court, see Norwegian Official Report 2001: 32 A page 192 and Proposition to the Odelsting No. 51 (2004–2005) page 504, referencing the Danish Maastricht case.

(81) Against this background, there is no legal basis for deviating from Article 89 of the Constitution with the effect that Storting decisions made under Articles 26 and 115 may never be reviewed. On the contrary, important considerations suggest that the courts should be able to review the constitutionality of a decision, to control that the parliamentary minority guarantee in Article 115 is observed. However, I repeat that this requires that the general requirements for bringing an action are met.

Not abstract constitutional review

(82) According to a long-standing doctrine in constitutional law, it is not the statutory provision in itself that is to be examined in the light of the Constitution, but the individual application thereof. The provision as such may thus not be set aside as invalid. Castberg, *Norges statsforfatning* [Norway's constitution], 3rd edition, 1964 page 172, expresses it as follows:

> "The courts are not competent to pronounce a judgment, stating that an act or an individual provision therein is invalid. If an act or a provision is found unconstitutional, it may only have the effect that the court refrains from applying the unconstitutional norm to the case at hand."

(83) I also refer to Smith, *Konstitusjonelt demokrati* [constitutional democracy], 4th edition, 2017 on page 281–282, stating:

> "Constitutional review carried out by courts of general jurisdiction, as is the case in Norway, is concrete: … If necessary to decide the case, the court has the power and duty to consider the contention: It must apply the Constitution, not only acts and regulations,

> as positive law.
>
> …
>
> While the review in courts of general jurisdiction is normally concrete, constitutional courts are (also) competent to carry out abstract review. This entails that it is the disputed statutory provision that is examined, not the manner in which it is *applied* in the specific case: Is the provision unconstitutional in itself?"

(84) And in the article *'Prøvingsretten' omsider grunnlovsfestet* [constitutional review eventually enshrined in the Constitution], in *Jussens Venner*, 2020 page 334, Smith wrote:

> "The form of constitutional review that over the years has developed in Norway, concerns the manner in which legislation is or will be *applied* in the specific case. This also entails that the review as a main rule is subsequent (*ex post*) and that the result has formal legal effects only between the litigant parties (*inter partes*), not in general towards us all (*erga omnes*)."

(85) Finally, I mention Andenæs and Fliflet, *Statsforfatningen i Norge* [the constitutional law of Norway], 11th edition, 2017 page 427 et seq.

(86) The essence of the constitutional law theory is thus that a statutory provision in itself cannot be set aside as invalid. If it could, a ruling on invalidity would have had consequences for all, as the provision would cease to apply. Such a review may be characterised as abstract constitutional review, which has never been practiced in Norway. And, as I will turn to soon, it cannot be implemented here without amending the Constitution. The opposite of abstract constitutional review is that the ruling may only affect the parties to the specific case. As Castberg put it: If a statutory provision is found unconstitutional, the consequence under Norwegian law is that the court refrains from applying it in the case it is considering. Such review has been referred to as concrete constitutional review.

(87) I will return to the civil procedural framework in the next section, but mention for the sake of context that the principle in procedural literature, as in constitutional law, is that one may not bring an action to have a statutory provision ruled invalid because it is contrary the Constitution, see Tore Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 2.5, Juridika, revised on 1 December 2019, and Skoghøy, *Tvisteløsning* [dispute resolution], 3rd edition, 2017 page 396. The general starting points are clear, and not subject to controversy in civil procedure.

(88) I will also return to No to the EU's legal action, and for now limit myself to briefly placing it in the context I am now discussing: The legal action is not "abstract" in the sense that it is a goal for the organisation that a possible ruling on the unconstitutionality of the contested decision will have a formal legal effect on others than the litigant parties. The claim in the main action relates to the Government's use of a Storting decision that the organisation considers unconstitutional as basis for the Government's decision. The purpose of the action is thus not to obtain a declaration that the Storting's consent is invalid. At the same time, the action undoubtedly has a more general reach than usual, particularly since it will not have such concrete legal effects as are often the result of regular disputes.

(89) The question is then whether there are constitutional bars against such actions with a more general reach.

(90) As I perceive Justice Matheson, he considers the requirement in constitutional law that constitutional review must concern a concrete dispute based on individual facts to be nearly absolute. Han emphasises that in this case, no decision is made, or expected to the made, in line with the transfer of sovereignty, and that it is uncertain whether such a decision will be made. In his opinion, therefore, no dispute exists involving a concrete legal issue.

(91) Although most actions involving constitutional review undoubtedly are of such concrete nature as Justice Matheson believes is required, I cannot see that sources of constitutional law indicate that it must always be so. These sources mostly discuss the distinction between concrete and abstract constitutional review in general terms. The further implications of "concrete" constitutional review are not clarified apart from it being in contrast to "abstract". Here, as elsewhere, I find that one should be careful of drawing firm conclusions from single formulations of a general nature.

(92) As far as I am aware, the general starting point that the subject of review is the individual application of the law is not elaborated on in any sources of constitutional law. And I have not observed that such requirements as laid down by Justice Matheson have been addressed. Nor is the effect between the parties, naturally, highlighted for in-depth discussion in any treatises on constitutional law.

(93) Nor has the Supreme Court expressly considered whether an action – for constitutional reasons – should be ruled inadmissible for being too abstract in cases whose purpose is not to set aside a statutory provision, and where the ruling is not intended to have legal effects for others than the parties. In most constitutional cases dealt with in court, the issue has been examined as part of the individual application of the law and with ordinary legal effects between the parties. If needed, however, constitutional review has been carried out with a more general scope.

(94) The plenary judgment Rt-2010-535 (the Norwegian Church Endowment) is a good example of this. The case concerned an instruction from the Government on redemption and stipulation a ground rent on terms that were more advantageous to the lessees than what followed from the Ground Lease Act. The instruction concerned properties with the State as lessor, including leased land owned by the Norwegian Church Endowment. Somewhat simplified, the main issue in dispute was that the claimant – an ecclesiastical employer and interest group – contended that the instruction had the effect that the Norwegian Church Endowment had to give up substantial values and income, contrary to Article 106 of the Constitution, the current Article 116. The case was brought against the State. Neither the Norwegian Church Endowment nor the relevant large, and unrestricted, group of lessees was a party.

(95) The judgment states initially that the case "concerns the interpretation Article 106 of the Constitution" and that it "raises the question whether the instruction yields results contrary to Article 106 of the Constitution", see paragraphs 1 and 3. In other words, the case did not concern the very application of the instruction, but its content was examined in the light of the Constitution.

(96) The disputed instruction had its legal basis in section 5 subsection 2 of the Funds Act, which gave the King the power to issue provisions on redemption and ground rent, see paragraph 7. Of particular interest to the case at hand, is Justice Støle's statement in paragraph 145:

> "I first note that, as the case stands, it is not of importance that it is a royal decree that formally is subject to constitutional review. The discussion in the Storting of section 5 subsection 2 of the Funds Act is directly related to the instruction."

(97) As it appears, it was in practice the Storting's legislative decisions that were examined under the Constitution without it being a topic whether, and possibly how, the disputed instruction was applied in individual ground leases. The Supreme Court thus accepted an action of a more general scope on the constitutionality of a decision by the Government, where the decision's basis in a legislative act of the Storting was stressed as crucial. If the plenary of the Supreme had found that the action was too general in its scope, the court would have been compelled to rule it inadmissible of its own initiative, even if the parties had not requested it.

(98) My *conclusion* thus far is that constitutional law, as it read before the constitutional amendment, did not set stricter limitations on the right to bring action than what already followed from section 1-3 of the Dispute Act, cf. section 1-4, and case law related to these provisions.

(99) Against this background, I will now assess whether Article 89 of the Constitution and its preparatory works nonetheless preclude what I, from now on, will refer to as actions of a more general scope.

(100) As Article 89 of the Constitution read in 2015, it was not specified that the courts may only examine whether it is unconstitutional "to apply" a statutory provision or other decisions made during the exercise of public authority. I will now turn to the background for the amendment in 2020.

(101) The inclusion of constitutional review in the Constitution was proposed by the Lønning Commission, see Document 16 (2011–2012) page 78. Under the description of the applicable state of the law, the Commission stressed the well-established doctrine of constitutional review of statutory provisions – the court may not, on a general basis, examine the constitutionality of a statutory provision. However, this limitation was not included in the Commission's draft constitutional amendment.

(102) The Storting Standing Committee considered including a specification to this effect in the constitutional provision, but the majority did not consider it necessary, see Recommendation 263 S (2014–2015) page 11. The majority pointed out that the proposal "[did] not give rise to interpretative doubt and that it [did] not give the courts more power than what they currently [had]". Furthermore, it was emphasised on page 12 that the proposed amendment did not "provide the courts with a basis for developing a new and more extensive constitutional review of statutory provisions and other decisions in the exercise of public authority". It was thus traditional constitutional review, as it had developed over time, that was to be constitutionalised.

(103) When it came to the further formulation of the new provision, the majority stated on page 11 that constitutional review should be carried out in "cases brought before the courts". A main point here was that constitutional review in Norway is carried out by courts of general jurisdiction. This was presented as a contrast to "systems where constitutional review is exercised by special constitutional courts or bodies other than courts of general jurisdiction". The majority continued:

> "The wording also indicates that constitutional review is carried out after a statutory

> provision has entered into force (*ex post*), as opposed to systems where a provision may be subject to such review before the final legislative decision (*ex ante*). The wording also indicates that constitutional review in Norway is concrete and deals with the application of the law in specific cases, and whose legal effect is formally limited to the litigant parties (*inter partes*). The effect of Norwegian courts ruling a statutory provision unconstitutional is thus that the provision in question is not applicable in that specific case. Then, it is formally up to the Storting to assess whether and how the provision should be amended in accordance with the Constitution. This is in contrast to systems where the courts on an abstract basis examine whether the statutory provision itself is unconstitutional, and where unconstitutional statutory provisions are ruled invalid with legal effect on everyone (*erga omnes*), both private and other State bodies."

(104) As it appears from the quote, the majority of the Committee is stressing the distinction towards "special constitutional courts" of other judicial systems.

(105) On page 33–34 in *Høyesterett og folkestyret* [the Supreme Court and the democracy], 1993, Smith gives a general description of the characteristics of such courts:

> "These 'constitutional courts' are in principle independent from and superior to the regular supreme courts. Their composition, also, deviates more or less clearly from the composition of the courts of general jurisdiction in the individual country.
>
> Other general characteristics are that the rulings by constitutional courts are formally binding also beyond the case or the facts from which they arise, and that the issues are often decided without being linked to such concrete disputes as are brought before courts of general jurisdiction: Constitutional courts in Europe are normally empowered to carry out *abstract* review, such that the decisions are 'legally binding' *erga omnes*."

(106) For our purposes, the core, in my view, is this: The formal legal effect of the rulings in Norwegian courts is *"limited to the litigant parties"*. A distinction is thus made at the formal legal effect *on others than the parties*. This is in contrast to rulings by such constitutional courts as the Storting did not wish to copy. Their rulings are formally binding on all, for instance in the sense that a statutory provision may be ruled invalid altogether. In the constitutional courts of other countries, cases are also often decided without any connection to an individual dispute, thus without the involvement of litigant parties. Such a system was not to be implemented in Norway. In my opinion, it is impossible to derive anything from this in the direction of a requirement that a judgment must have a certain legal effect, or that it must relate to an individual administrative decision, in order for an action to proceed. This is regulated in section 1-3, cf. section 1-4, of the Dispute Act.

(107) Although the majority of the Storting Committee, in 2015, found that the wording that was adopted "[did] not give rise to interpretative doubt", a clarification was nonetheless made in connection with the amendment in 2020: What the courts may review, is whether "applying" a statutory provision or other decisions in the exercise of public authority is contrary to the Constitution. Also in 2020, the crucial issue was to retain the traditional Norwegian constitutional review as opposed to that carried out in what Recommendation 258 S (2019–2020) refers to as "specialised constitutional courts". On the arguments for the proposed amendment, the majority commented the following on page 3:

> "It is the view of *the Committee's majority, the members from the Labour party, the Conservative Party, the Centre Party and the Liberal Party*, that it may be necessary to clarify that it is not the statutory provision as such that is subject to constitutional review,

> as the wording might suggest. Such 'abstract review' is a typical feature of specialised constitutional courts that are currently found in many states in and outside of Europe. *The majority* points out that the Norwegian system for constitutional review has been aimed at the application of the law in the specific case at hand ('concrete review'), and that this is clearly what the Storting intended to constitutionalise when adopting the current Article 89. The purpose of the wording's clarification on this point is to avoid that constitutional review develops in a direction that is alien to Norwegian legal tradition as well as to the relationship between the courts and today's politics."

(108) The Storting was thus once more concerned with drawing a line at such review as is exercised by "specialised constitutional courts". The review must be "concrete", not "abstract", it is "the application of the law in the specific case" that is to be examined in the light of the Constitution. It must not give way for a development that is "alien to Norwegian legal tradition as well as to the relationship between the courts and today's politics".

(109) As mentioned, it appears clear from the preparatory works that the adoption of Article 89 in 2015 entailed merely a continuation of previously applicable law. The new wording given by the amendment in 2020 was meant to express even more clearly what constitutional review means, as it had developed through case law, see Recommendation 258 S (2019–2020) page 3. There are no traces of a wish to limit the already applicable principles on the courts' power and duty to carry out constitutional review. In addition, no requirement can be found in the preparatory works that constitutional review must have certain legal effects before an action may proceed to court, or that it must arise from an individual decision. And there is no reason to assume that the Storting intended that something else should apply to the review of consent decisions under Article 26 and Article 115 than to the review of legislative decisions.

(110) A practically important aspect of constitutional review is which cases proceed to court. I cannot see how the introduction into the Constitution of an Article on the already established principle of constitutional review might impact the requirements for bringing an action under the Dispute Act, particularly not by way of limiting the already established right to bring an action. In other words, the new Article of the Constitution entailed no protection for the State against such actions as may be brought under the Dispute Acts. If the intention had been to make such a radical change, it would in my view undoubtedly have been clearly expressed. I mention in particular that the Storting when demarcating against "abstract review" does not address organisations' right to bring action under section 1-4 of the Dispute Act, although it is not a requirement in such cases that the action has a legal effect between the litigant parties.

(111) I have thus arrived at a key issue with regard to the Storting's adoption of Article 89 of the Constitution: the continuation of previously applicable law, including which cases are admissible in court, and the already established admissibility of actions of a more general scope. As I will substantiate in my discussion of sections 1-3 and 1-4 of the Dispute Act, there existed, long before the Storting's work on Article 89, a certain right to bring an action for clarification of more general legal issues. But – as my discussion will show – this does not mean that the type of "abstract" constitutional review that the Storting was reluctant to implement, is an option in civil proceedings. Hence, deviating from principles under constitutional law is out of the question.

(112) It is also relevant that the Supreme Court, as late as in 2020, heard the so-called climate case – HR-2020-2472-P – without it being questioned whether the case was too general to be examined in court. Formally, the case concerned the Government's decision; in practice, it concerned the Storting's consent. A judgment in the claimants' – the environmental groups' –

favour would not have had a formal legal effect on either them or their members. The formal legal effect on the defendant – the State – would have been limited to an obligation to consider revoking the production licences. As the licensees – the oil companies – were not parties to the case, their rights and obligations were not at issue.

Conclusion: Article 89 of the Constitution does not preclude a review of a consent decision under Article 26 if the requirements for bringing an action under the Dispute Act are met

(113) Based on the sources of law and rule of law considerations for which I have accounted, I find it clear that the courts are competent to examine whether the Storting has acted in accordance with the Constitution's provisions in Article 26 subsection 2 and Article 115, to the extent the requirements for bringing an action in section 1-3 of the Dispute Act, cf. section 1-4, are met.

(114) If the court should find that the Storting acted beyond its competence under the Constitution when giving consent, the Storting broke the law. It is up to the Storting and the Government themselves to consider which effect this should have. Hence, it is not a question of setting aside a decision by the Storting or the Government with a formal effect on others than the parties. In my view, the action is therefore within the constitutional limitations Article 89 sets.

(115) In addition, allowing this action to proceed would not resemble such constitutional review as the Storting Committee warned against in 2020. It would not be "alien to Norwegian legal tradition". An examination of whether the Storting acted within the framework of the Constitution when giving its consent would also not challenge "the relationship between courts and current politics". On the contrary, it is a question of reviewing the legality of a Storting decision. The scope and intensity of such a review will be a topic if the main case proceeds.

(116) Article 89 of the Constitution does not preclude a review of the case brought by No to the EU. I will now turn to whether the conditions in section 1-3 of the Dispute Act, cf. section 1-4, are met.

The requirements for bringing an action in section 1-3, cf. section 1-4, of the Dispute Act

Introduction

(117) As mentioned, No to the EU contends that the Storting's choice of procedure was unconstitutional. The formal contention – that the State was under an obligation to refrain from incorporating the third energy market package into Norwegian law – derives from the constitutional breach the Storting had committed, according to the organisation.

(118) The State contends that the action is thus brought in a form that does not meet the requirements in section 1-3 of the Dispute Act. No to the EU disputes this.

(119) In the following, I will first give an overview of the requirements for bringing an action in section 1-3, cf. section 1-4, of the Dispute Act. Then I will discuss the sources that are significant for the possibility in civil proceedings to bring an action of a more general scope challenging the constitutionality of statutory provisions and other Storting decisions.

The general requirements for bringing an action

(120) Section 1-3 of the Dispute Act reads:

> "**The subject matter in dispute, the parties' connection to the dispute and the dispute situation**
> (1) An action may be brought before the courts for legal claims.
>
> (2) The claimant must demonstrate a genuine need to have the claim decided against the defendant. This shall be determined based on an overall assessment of the relevance of the claim and the parties' connection to the claim."

(121) As concerns the overall interpretation, I point out briefly the three conditions that appear from the wording. First, the subject matter in dispute must be "a legal claim". Subsection 2 sets out a requirement of "relevance"– there must be genuine need to have a legal issue clarified. Finally, there is a requirement of "connection" to the claim – the claimant must demonstrate a genuine need to have the claim decided against the defendant.

(122) At the outset, an action must relate to certain facts and a specific and disputed legal issue between the litigant parties that may be decided under legal rules; for example, a party may not seek judgment on the general interpretation of a legal rule.

(123) In their general form, the legal principles I have now mentioned are clear, see for instance the Dispute Act Committee in Norwegian Official Report 2001: 32 A page 186–187, Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 2.1, Juridika, revised on 1 December 2019, and Skoghøy, *Tvisteløsning* [dispute resolution], 3rd edition, 2017 page 396. However, as I will return to, actions of a more general scope are admissible to a certain extent.

(124) The requirements in section 1-3 overlap and may mutually influence each other. There is no sharp distinction between them, and an overall assessment is often required. This starting point is established both in the preparatory works and in older case law. I mention as an example the summary in Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 1.1, Juridika, revised on 1 December 2019:

> "There is reason to emphasise, particularly if one is dealing with a borderline case, that the requirements of a legal claim, the parties' connection to the claim and the relevance of the claim may become subject to an overall assessment.
>
> …
>
> The need for an overall assessment is essential to all conditions in section 1-3. In some situations, it may be unclear whether one is facing a legal claim. The need to have the claim decided will thus be an important factor also when assessing the requirement in subsection 1. Generally, there is reason to emphasise that in unclear borderline cases, the requirements laid down must be subject to an overall assessment – and first of all balanced against the need to have the claim that has been brought decided by courts of law, see HR-2018-1463-U paragraphs 23 and 27, and Rt-2008-362 paragraphs 52 to 61. Such an overall assessment was also made with regard to section 54 of the Dispute Act, see Rt-1981-1268 and Rt-2006-460. Any change here is not intended."

(125) In the case at hand, the need for an overall assessment is demonstrated by fact that the requirement of a legal claim and the requirement of relevance overlap to quite some extent.

Section 1-4 of the Dispute Act

(126) The starting points laid down in section 1-3 were modified when it became possible for an organisation or foundation to bring an action in its own name on matters falling within its purpose and normal scope of activity. Such an option was first recognised in case law and later established in section 1-4 of the Dispute Act adopted in 2005. As emphasised in Norwegian Official Report 2001: 32 A page 193, this allows organisations or foundations to bring actions that do not concern their own rights and duties. A condition in section 1-4 is that "the conditions in section 1-3 are otherwise satisfied".

(127) It is not decisive whether the organisation's or the foundation's members could have brought the case in its own name. The provision is therefore particularly significant where an individual member does not meet the requirements for bringing an action. The Dispute Act Committee also emphasises that the development of the law has been guided by "a need to have a claim decided that the courts have come to recognise".

(128) Here, the Dispute Act Committee mentions, among other arguments, the Supreme Court ruling in Rt-1980-569 (the Alta case). This case arose from the Storting having consented to the development of the Alta river system. This was followed by the Government – "in accordance herewith" – granting the state power plants authority permission to develop and regulate the water system. In other words, the Storting's consent was vital. An action brought by Friends of the Earth Norway against the State challenging the validity of a consent to state regulation of the Alta river system, was allowed. The Supreme Court referred to the principle that "[t]he need for constitutional review" is paramount. It was clear that the outcome did not affect directly either the organisation or its members, see page 575.

(129) The need to be able to bring such a representative action is thus acknowledged, irrespective of whether a judgment determines the rights or duties of the claimant in the case.

(130) In the Proposition to the Odelsting No. 51 (2004–2005) page 142, the Ministry emphasised that the presentation of the subject matter in dispute should not be subject to overly strict requirements. In the Ministry's view, it was a question of "creating substantive opportunities for interest groups, among others, to protect their interests". Like the Dispute Act Committee, the Ministry stressed the need to allow "representative actions" to protect "idealist or general public" interests where it may be difficult for private individuals to assert independent legal claims, see the Proposition page 156. In the special motives on page 366, it is set out that the new section 1-4 is to "make way for representative actions to safeguard general public interests to a greater extent". The Ministry also mentioned that the provision stems from the development in case law, "particularly over the last 25 years". I add that I have not found any traces indicating that the Ministry believed that the possibility of representative actions should be different, or more limited, in connection with constitutional review of Storting decisions.

(131) The preparatory works also state that "the key criterion" for organisations' right to bring an action must be the organisation's objective. On page 367, it is set out that "[t]he decisive factor must be the effects of the disputed issue when it comes to the organisation's objective".

(132) For actions brought by organisations, it is not a condition that the result determines the claimant's rights or duties. Such actions are merely to safeguard the idealist and general public interests within the organisation's objective. But also organisations are precluded from bringing an action challenging the validity of a statutory provision or a Storting decision in general, as also emphasised by the Storting in 2015 and 2020 when expressly continuing applicable law on constitutional review.

(133) I note that No to the EU with its approximately 20 000 members has sufficient connection to the legal claim made. According to its objective, No to the EU is to work "to prevent that Norwegian statutory provisions and rules – through our EEA membership and otherwise – are adjusted to the EU's internal market in violation of the majority's basic views in connection with the referendums in 1972 and 1994". Values such as national self-government and respect for the Constitution are emphasised as key. As I have accounted for, the action from No to the EU is brought as an attempt to prevent the adjustment of Norwegian law to the EU's internal market for energy supply, where the Constitution's provisions on transfer of sovereignty are essential. No to the EU is clearly a natural representative for an action of this kind.

The possibility under section 1-3 of the Dispute Act to allow actions of a more general scope

(134) The State contends that the scope of the action brought by No to the EU is too broad. I will therefore take a deeper look into the extent to which the requirements for bringing an action allow for proceedings of a more general scope.

(135) By proceedings or actions of a "more general scope", I do not mean actions that are "abstract" in the sense I have previously discussed – i.e. brought to have a statutory provision ruled invalid with effect on everyone – but actions whose characteristics are more general than what is typical for actions concerning the citizens' individual rights and obligations. As I have already mentioned, the action brought by No to the EU is in such an in-between category.

(136) *The wording* in section 1-3 of the Dispute Act does not give a firm answer to which extent actions of a more general scope may be allowed. The criteria provided are wide and call for discretion, and – which I will come to soon – primarily with regard to the need for clarification of legal rules.

(137) Section 1-1 subsection 1 of the Dispute Act – *its purpose provision* – reads:

> "The Act shall provide a basis for hearing civil disputes in a fair, sound, swift, efficient and trustworthy manner through public proceedings before independent and impartial courts. The Act shall safeguard the needs of individuals to enforce their rights and resolve their disputes, and the needs of society for respect and clarification of legal rules."

(138) Thus, it is stressed already in the purpose provision that the Act is not only to safeguard the needs of individuals to resolve their disputes, but also "the needs of society for respect and clarification of legal rules". In Norwegian Official Report 2001: 32 B page 649, the Dispute Act Committee points out the purpose provision's significance for the interpretation of discretionary statutory provisions:

> "The statutory provision contains a number of rules that require discretion. For these rules, the purpose provision will identify the most important considerations in the

exercise of discretion."

(139) The Dispute Act section 1-3 is in fact such a provision that requires discretion. In Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 1.1, Juridika, revised on 1 December 2019, the following is stated:

> "The purpose provision in section 1-1 may impact the further development of the requirements for bringing an action within the scope of section 1-3. The requirements have so far developed primarily from the parties' need to have their disputes resolved. However, section 1-1 also emphasises 'the needs of society for respect and clarification of legal rules'. The need of an Act on civil proceedings to serve also a societal purpose is of course not new. But with the purpose provision, this societal, fundamental consideration is brought to light and clarified. It is not unlikely that this will increase the emphasis on the societal aspect, and that it to some extent may alter the requirements for bringing an action, for instance where the question is whether an action is too abstract to constitute a legal claim …"

(140) In my view, the purpose of the Dispute Act gives – under the circumstances – a basis for placing considerable emphasis on overall societal aspects and needs when assessing whether an action of a more general scope is admissible. Here, I refer to what I have said on the right of organisations to bring an action related to idealist and general public interests.

(141) The question where to set the threshold for bringing an action is thoroughly discussed in *the preparatory works to* section 1-3 of the Dispute Act. I mention in particular the Dispute Act Committee's assessment in Norwegian Official Report 2001: 32 A page 191 et seq. When discussing whether the threshold for bringing an action should be lowered, the Committee took as a starting point that "in recent years, there [had] been an emphasis on the need for clarification of the law". The Committee argued that "the subject matter in dispute must involve a legal relationship". The following is stated on page 191:

> "When it comes to the possibility to obtain a judgment on abstract legal issues, the Committee believes that one should keep the rule that currently forms the starting point, namely that one cannot have a judgment on abstract legal issues. The courts' task must be to resolve individual, actual disputes. Here, the Committee notes that as long as there is a relevant need for clarification, actions may be brought although the case still has the characteristics of a future case, see for instance Rt. 1998 page 300. Admittedly, there is a context between the relevance requirement and the need for clarification of the law. The Committee points out that there has been a significant development in this area."

(142) After having mentioned some older, restrictive rulings, the Committee continued:

> "The current state of the law, however, emphasises the need as crucial for whether or not the action should proceed, see Rt. 1998 page 300. In the light of this, the Committee does not see the need for changes to what is currently applicable law."

(143) When the Committee, at that stage, concluded that changes were not necessary, case law had already recognised that the need for clarification is crucial for the action's admissibility, and therefore already provided a certain opening for actions of a more general scope.

(144) The impression that admissibility is determined by the need for, and the possibility of, clarification, is amplified on the next page, where the Committee states that "legal issues of a more abstract nature" according to applicable law may be reviewed "to a certain extent". The

following is stated on page 192:

> "Also legal issues of a more abstract nature may according to applicable law be reviewed to a certain extent, but the more steps are taken to remove the court from concrete review of individualised facts, the more nuances and illustrative materials will be lost. Such abstract review may therefore under applicable law only be carried out where the dispute cannot be concretised in any expedient manner."

(145) Two issues are key here: Will a broader form of constitutional review have the result that the court loses "nuances and illustrative materials", and is it possible to concretise the dispute?

(146) Next – immediately after the sentence on the possibility to "concretise the dispute" – the Committee mentions the Danish Maastricht case. This passage has been central in the parties' closing statements, and it reads:

> "The Dispute Act Committee refers to the Danish Supreme Court's judgment 12 August 1996, allowing an action from a group of citizens requesting that the Act from 1993 making way for Denmark's joining of the EU be declared unconstitutional. The Supreme Court pointed out that the accession to the EU Treaty entailed a transfer of legislative power in a number of areas that could have a radical impact on the Danish population in general, and that the claimants therefore had a genuine interest in having the claim decided. Considering this, the previous requirements of concrete and relevant connection to the claim, could not apply. The Committee trusts that the same type of reasoning would apply to a corresponding issue in Norway."

(147) When reading the last sentence in the quote, – "the same type of arguments would apply to a corresponding issue in Norway" – in context with what I have already discussed, it is to me clear that the Committee, with this statement, found that a corresponding case might have proceeded in Norway under former applicable law. The Committee was silent as to under exactly which circumstances such a case might have been heard.

(148) When the Committee did not propose changes to applicable law, it was – as I read this – because in this context also, it had already been established that the need for clarification of the law is decisive.

(149) The factual circumstances were different in the case in the Danish Supreme Court, presented as an example by the Dispute Act Committee. However, it concerned a decision by the Danish *Folketing* similar to that in the case at hand. The legal issue is virtually coinciding with the issue that may occur in relation to Article 115 of the Constitution. The Danish constitution, also, contains provisions on the Folketing's right to transfer powers to international organisations, establishing that this must be approved by a qualified majority. The claimants in the Maastricht case contended that the Folketing had acted contrary to the procedure in the Danish constitution. This was the legal claim that the Danish Supreme Court ruled admissible. The action did not succeed on its merits.

(150) I finally mention that the Committee on one point proposed a change compared to applicable law: The possibility to bring an action against the State challenging the validity of regulations, see more on page 192 and the reference to the so-called battery hens rulings, where the Supreme Court's Appeals Selection Committee had previously assumed that this was not possible under the previous Dispute Act. Although it does not affect the case at hand in any decisive manner, this, too, shows that admissibility depends on the need for clarification, not

on whether the issue may be characterised as "abstract". Illustrative here is the following statement from the Dispute Act Committee:

> "When assessing the admissibility of an action – whether there is sufficient legal interest – the need for clarification of the law is key. If there is a sufficient need for clarification, the burden of being sued must then naturally be carried by the creator of the disputed rule, i.e. the State. In such a situation, it is difficult to see any real reason why egg producers should also be made defendants next to the State."

(151) The Ministry followed up the Committee's assessment in Proposition to the Odelsting No. 51 (2004–2005). When it comes to the requirements for bringing an action, the Ministry provides a brief overview of applicable law on page 137, but refers to the Committee's assessment "for a more details". On page 142, the Ministry takes this starting point:

> "As the Ministry sees it, the threshold for legal action under applicable law should generally be continued, nonetheless such that it leaves room for lowering the threshold, particularly with regard to issues of principle. Considering the wording of section 1-3 of the draft amendment, the Ministry assumes that the rule absorbs and continues the central dimensions of the requirement of legal interest and the subject matter in dispute. The rule expresses a legal standard that may – as section 54 of the applicable Dispute Act section 54 – be developed and nuanced further through case law."

(152) When the Ministry finds that applicable law should generally be "continued", this must be balanced against the reference to the Dispute Act Committee's discussion of applicable law. As I have demonstrated, the Committee assumed that actions of a more general scope were allowed to some extent under already applicable law if there was a need for clarification. The addition of "room for lowering the threshold, particularly with regard to issues of principle" proves that the Ministry was prepared at least to match the Committee when it came to allowing such actions.

(153) In the Proposition, the Ministry does not clearly distinguish between the proposal to allow actions against the State challenging the validity of regulations and the Dispute Act Committee's general remarks that actions of a more abstract nature were already admissible under previously applicable law. The Proposition does not mention the Dispute Act Committee's reference to the Maastricht case. Nevertheless, as I read it, the Ministry, in discussing the Supreme Court's use of the plenary, assumed that an action similar to that in the Maastricht case was admissible, see Proposition to the Odelsting No. 51 (2004–2005) page 504.

(154) The Ministry endorsed the Committee's proposal to allow actions against the State challenging the validity of regulations. However, the balancing of interests made by the Ministry in this context, reaches beyond this individual proposal. As part of what I perceive to be a discussion of a broader scope, the Ministry stressed the following on page 142:

> "… [T]he clear starting point is that the courts are to resolve concrete disputes based on evidence presented and applicable law. This is also the main argument for the doctrine developed in relation to so-called 'abstract legal issues'. As the Ministry sees it, it is neither necessary nor desirable to abandon this starting point in its general form."

(155) The Ministry then presents aspects that the Dispute Act Committee had emphasised on a broader level in support of allowing a more general review in some cases. Among other things, the Ministry mentions that one should avoid forcing the legality assessment into "less

expedient forms" and that "the need for clarification of the law" must be decisive. The Ministry also points out that "a classification of the action as 'abstract' [should not] be decisive".

(156) Finally, the Ministry mentions "another example" on page 143, which also suggests that actions of a more general scope may be allowed to proceed. In the Ministry's opinion, the right to bring an action cannot depend on the existence of a challengeable administrative decision. In this regard, it is stated that "[i]t should be possible to bring an action … also where the general norm is expected to be specified through a decision by an administrative body", i.e. that an administrative decision has not yet been made. The further implication of this is clarified by the Ministry's position that the opinion of the state of the law as expressed by the Supreme Court in Rt-2003-1630 should not be continued in the new Dispute Act. Here, the Supreme Court had ruled the action by Friends of the Earth Norway inadmissible. The Supreme Court's main argument was that no administrative decision had been made that the organisation could challenge in the case.

(157) In summary, it appears both from the comments related to actions challenging the validity of regulations and from this example, that the Ministry found that the Supreme Court had gone too far in limiting the right to bring such actions of a more general scope. Albeit not decisive in the case at hand, it suggests a direction: The right to bring an action should not be too restricted.

(158) This is summed up as follows on page 363 of the Proposition:

> "Overall, the rule in section 1-3 sets a legal standard. Although the criterion 'legal interest' is not included in the wording, it does not involve a substantive change from applicable law. Whether the action is admissible under section 1-3 must be based on an overall assessment. The requirements laid down in the provision may partially overlap. The starting point is an individual assessment of the relevant facts of the individual case. The provision is worded – and intended to be applied – such that its interpretation may change over time. The further limitations under section 1-3 will require some discretion, and in borderline cases, it will be essential whether it is natural and reasonable that the dispute is allowed in court …"

(159) Also in this passage, it is emphasised that the conditions overlap, that the interpretation may change over time, that the decision requires discretion, and that the need for a court ruling may be decisive.

(160) The Standing Committee on Legal Affairs, too, made some general comments to the threshold for bringing an action. The following is set out in Recommendation O. (1)10 (2004–2005) on page 31:

> "The *Committee* finds that the threshold for legal action under applicable law should mainly be continued. But the *Committee* deems it important that a lower threshold nonetheless may be applied in certain cases, particularly those dealing with issues of principle, including actions brought against the State challenging the validity of regulations, and when general norms in legislation are applied to individual facts."

(161) Hence, the Committee supported the Ministry's statement that "a lower threshold […] may be applied in certain cases, particularly those dealing with issues of principle". It is worth noting that the Committee did not limit this to actions challenging the validity of regulations and the

application of general norms in legislation to individual facts, but rather presents them as examples.

(162) In summary, I find that *the preparatory works as a whole* provide sufficient legal basis for allowing actions of a more general scope to some extent. Crucial factors are the need for clarification of the law and the consideration of expedient procedure. This is clearly expressed by the right of organisations to bring an action involving issues of a more abstract and general nature within their objective.

(163) The preparatory works give no final answer as to whether a broader declaratory action may be brought challenging the validity of Storting decisions under Articles 26 and 115 of the Constitution. However, the highlighted factors are entirely general. I mention in particular the repeated emphasis on the need for clarification – whether there is "substantial interest in having the claim decided". Also the Dispute Act Committee's and the Ministry's statements related to the Maastricht case support the conclusion that an action of a more general scope challenging the constitutionality of a Storting decision like the one at hand, must be admissible if there is a need to have the issue reviewed.

(164) *Legal literature* sheds *some* light on the question of, and in which manner, actions of a more general scope should be admissible. It also discusses the question of whether a "Maastricht case" could have been heard in a Norwegian court.

(165) First, I refer to Schei and others, *Tvisteloven*: *Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 2.5, Juridika, revised on 1 December 2019. After having outlined the general starting points and established that "a more abstract legality review of regulations may be possible", it is stated that a "corresponding abstract review" also is conceivable "for example where it is a question whether statutory provisions or decisions are contrary to the Constitution". Next, the Danish Maastricht judgment and the later Lisbon judgment are presented as examples of this. Then:

> "Similar issues might be come up before Norwegian courts. Much suggests that one should follow the main characteristics of case law from the Danish Supreme Court."

(166) After a further discussion, the general starting point is formulated as follows in the commentary:

> "It must be possible to review the constitutionality of decisions and statutory provisions in connection with an abstractly formulated claim of unconstitutionality, if there is a genuine need to have such a claim decided – and if it would be impossible, or clearly inexpedient, to examine the issue in a different manner."

(167) In line with general theory, Skoghøy states in *Tvisteløsning* [dispute resolution] 3rd edition, 2017 on page 396 that "[t]he subject matter must be an *individual and substantive dispute*". After the discussion of the Maastricht judgment and the Dispute Act Committee's statement that "the same must apply under Norwegian law", the following is set out on page 407:

> "However, the possibility to bring a declaratory action, claiming breach of other constitutional provisions than those concerning human rights, should in my opinion be kept within a narrow framework. It must be a condition for allowing such declaratory actions that they involve an issue of principle and of great public interest, and that the most expedient procedure would be to have the issue reviewed through a declaratory

action claiming constitutional breach."

(168) Aasland states in the article *Rettslig interesse – et område for domstolsskapt rett* [Legal interest – an area of law created through case law], published in 2015, that it – based on the Dispute Act Committee's statement – must "remain open" whether exceptions could be made from the main rule that the courts cannot review abstract legal issues. Also Backer in *Norsk sivilprosess* [Norwegian civil procedure], 2nd edition 2020 leaves it an open question. Andenæs and Fliflet, *Statsforfatningen i Norge* [The constitutional law of Norway], 11th edition, 2017 discuss the Danish cases, stating that "[a] similar case concerning a corresponding issue" must be admissible under certain conditions also in Norwegian courts.

(169) In other words, legal literature is either firmly in favour of the possibility, in principle, to bring a declaratory action on unconstitutionality in a situation such as in the Maastricht case, or it keeps it an open question. There seems to be consensus, however, that any possibility of review must be subject to a narrow framework.

(170) I have already mentioned *Danish law*. The background is the reference to the Maastricht judgment in Norwegian preparatory works as an example of a more general action of unconstitutionality that may also be brought under Norwegian law, and which is later discussed in central Norwegian literature on procedural law. It is not necessary to consider Danish case law beyond this. As demonstrated, it is not a question of establishing an exception modelled on Danish law. Constitutional review in Norway has long been different from that in Denmark. The case at hand must be resolved based on the general criteria in section 1-3, cf. section 1-4, of the Dispute Act, interpreted in the light of Norwegian sources of law.

(171) In addition, a myriad of other examples of *comparative law* exist that may provide useful background and inspiration, but I will leave it at that.

Conclusion: The Dispute Act section 1-3 allows for declaratory actions of a more general scope

(172) Based on section 1-3 of the Dispute Act and the sources of law I have mentioned related to this provision, I believe there is some room for allowing an action of a more general scope. There are no indications that this does not include actions challenging the Storting's compliance with the Constitution when it comes to a transfer of sovereignty to an international organisation under Article 26 subsection 2 and Article 115 of the Constitution.

(173) For the courts to allow such a more general action, there must be a particular need for clarification of the law. Furthermore, the legal issue must be suited for assessment on a general level.

(174) With the overall assessment that must be carried out, a number of factors may be relevant under the circumstances: Does the action raise unclear issues of principle? Is it difficult or clearly inexpedient to have the constitutional issue examined more concretely? Will the issue be sufficiently clarified by allowing the action at this point and in its present form, or will the courts have a better decision-making basis if the case is brought in a less general form? How general is the asserted claim – does it relate to concrete and limited facts?

(175) The factors that I have mentioned overlap, and they are not by any means intended to be

exhaustive.

Individual assessment of whether No to the EU's action is admissible

(176) When deciding whether the requirements for bringing an action are met, the claimant's contentions on the merits of the main action must be accepted without further review. The same applies to contentions on the interpretation of the legal rules that the claimant believes are decisive. In our case, it must therefore be decided in the main case, if the action is allowed, whether the transfer of sovereignty to which the Storting consented was of such a nature that the consent should have been given in accordance with the rules in Article 115 of the Constitution, and not Article 26 subsection 2. However, the courts must fully examine the facts and legislation that determine whether the requirements for bringing an action are met. I will now turn to this issue, based on what I have said regarding the factors I consider relevant.

(177) In practice, No to the EU is seeking a judgment declaring that the Storting violated the Constitution when giving consent with a simple majority on 22 March 2018 pursuant to Article 26 subsection 2. A further analysis of No to the EU's action shows that it involves a limited legal issue. The organisation has not requested a judgment on the general interpretation of the constitutional provision. It has requested a declaration that the Storting applied a constitutional provision incorrectly in this particular case. It has not requested the court to rule the Storting decision invalid. Apart from that, the action has clear similarities with actions challenging the validity of an individual decision, without requesting a judgment with concrete legal consequences. No to the EU is not seeking a judgment with formal legal effects for others than the litigant parties.

(178) The claim stems from a specific and limited fact: The allegedly unconstitutional decision has been acted upon by the Government with the result that Norway has committed itself to the EU and to other EFTA states within the EEA cooperation. Another effect is that certain legal rules have been incorporated into Norwegian law. Under these rules, powers are transferred to entities such as ESA and the newly established RME, which, No to the EU claims, entails a transfer of sovereignty that properly falls under Article 115 of the Constitution. ESA and the RME can make decisions that directly affect the rights of Statnett – a state enterprise with individual rights and duties, see section 3 of the State Enterprise Act. It is not clear whether other legal persons may be affected. To this point, no such decisions having direct relevance for Statnett's or others' rights or duties have been made. As such, we are dealing with a dispute that, at least for the time being, has not affected any individual party directly.

(179) On the other hand, the purpose of the action is not to safeguard the interests of individual parties in a traditional sense, but general public interests within No to the EU's purpose and normal scope, as section 1-4 of the Dispute Act allows for.

(180) I have arrived at the conclusion that there is a particular need for clarification of the issue of principle in the case in the form it is raised. Transfer of sovereignty to international organisations, mostly in connection with the EEA cooperation, is a topical and recurring issue of controversy. This is amplified by a constant development, where – according to the No to the EU – sovereignty is transferred "bit by bit" and becomes increasingly difficult to reverse.

(181) I also mention that, even though the issue in the main action is controversial also in a legal perspective, it has not previously been examined in court. A judgment that contributes to

clarifying the distinction between Article 26 subsection 2 and Article 115 of the Constitution will be of guidance to future cases where this issue is raised. The Storting makes consent decisions of this nature on a regular basis, and the judgment will therefore have an impact irrespective of whether the court finds that the relevant decision has the necessary legal basis or that the limits of the Constitution have been passed.

(182) Moreover, it was established during the hearing that it is uncertain whether concrete decisions will ever be made whose constitutionality could be examined within the areas that, according to both parties, involve elements of transfer of sovereignty. In particular, possible information requests from ESA and subsequent impositions of fines may not be reviewed directly in Norwegian courts, but will in principle be under the EFTA Court's jurisdiction. Thus, it also involves a transfer of judicial power to an international body.

(183) As I see it, the legal issue is suited for clarification in more general terms on the legal and factual basis we presently have. When assessing the merits of the case, the key issue is the interpretation of Article 26 subsection 2 and Article 115 of the Constitution. All sources of law that may shed light on this are available, which they also were when the Storting made its decision. Other key issues when ruling on the merits are the nature and the scope of the transfer of sovereignty. Also here, the same material is available as that available to the Storting.

(184) As I see it, it is unlikely that anything significant would add to the main ruling if one should wait for an individual administrative decision aimed at a concrete legal person. On the contrary, it might be that the decision under review will concern a very limited and perhaps peripheral issue when viewed against the background of the actual question of the case – the Storting's consent decision related to the overall transfer of sovereignty.

(185) I will not go further into the many issues that may arise here. Nor do I see any reason to go into any detail on the legal effects if No to the EU should succeed with its claim. It is sufficient to point out that, if so, it will be established that the Storting should have handled the case differently. Here, as usual, it will be up to the body having committed a procedural error to assess whether, and how, the error may be corrected. It may be argued that possible uncertainty as to the legal effects suggests that the action should not proceed. But even if the action is brought after an individual decision has been made, uncertainty may persist. The real basis for – and purpose of – the action will still be to obtain a ruling that the Storting acted contrary to the Constitution.

(186) Above all, it would be clearly unfortunate – and inexpedient – if the controversial and unclear issue of principle raised in the case at hand could not be reviewed because no individual administrative decision has been made that may directly affect a party's legal status. The possible practical effect of that is that it would be impossible to have a legal issue of great public interest decided.

(187) Against this background, I find that No to the EU's action should be allowed to proceed.

(188) From what I have already said, it is clear that the requirement of relevance is met, as well as the requirement of connection, see my earlier discussion section 1-4 of the Dispute Act.

Conclusion and costs

(189) The requirements for bringing an action in section 1-3 of the Dispute Act are met. Article 89 of the Constitution does not preclude legal action.

(190) Against this background, No to the EU's actions should be allowed to proceed.

(191) No to the EU has won the case and is entitled to compensation for its costs. The question whether the case should proceed has been subject to a separate appeal, and according to section 20-8 subsection 2 second sentence of the Dispute Act, costs in such cases shall be determined for all instances, see among others the Supreme Court ruling HR-2018-492-U paragraph 36.

(192) Costs of NOK 355 942 are claimed in the District Court, and NOK 203 406 in the Court of Appeal. In the Supreme Court, the claim is NOK 1 417 225 including VAT. The claim is accepted.

(193) In addition, No to the EU has claimed compensation for court fees in all instances. The claim is accepted as concerns the court fee in the Court of Appeal and the Supreme Court, in the respective amounts of NOK 6 900 and NOK 7 032. However, No to the EU has only been charged the input fee of 5 R in the District Court, see section 8 subsection 1 first sentence of the Court Fee Act. The duty to pay input fee in the District Court is triggered by the organisation's writ in the main action, see section 4 of the Court Fee Act, and not by the separate hearing of the admissibility question. The input fee in the District Court is therefore not a cost "relating to rulings on issues other than the claim that is the subject matter of the action", see section 20-8 subsection 2 first sentence of the Dispute Act. Thus, pursuant to section 20-8 subsection 2 second sentence, the Supreme Court is not to include the input fee in the District Court as part of its costs ruling. The question of the court fee in the District Court must be decided in the main action.

(194) I vote for this

O R D E R:

1. The case may proceed.

2. The State represented by the Ministry of Foreign Affairs will compensate No to the EU's costs of NOK 1 990 505 incurred in the District Court, in the Court of Appeal and in the Supreme Court within two weeks of the service of this order.

(195) Justice Matheson:

Dissent

Briefly on my main view

(196) I have arrived at the conclusion that No to the EU's action is inadmissible.

(197) Article 89 of the Constitution interpreted in the light of history, case law and preparatory

works implies, in my view, that questions relating to the constitutionality of a Storting decision may only be reviewed if raised in a concrete dispute based on concrete facts. Such a review is referred to as a concrete review of the Storting's decision. In other words, the provision limits the courts' power to review this type of decisions.

(198) As opposed to Justice Kallerud, I find that No to the EU's action falls outside the limitations set by Article 89 of the Constitution for constitutional review. Constitutional review may in my view only take place in connection with a dispute arising from concrete facts. In the case at hand, no decision has been made in accordance with the alleged transfer of sovereignty. Nor is any such decision expected, and it is uncertain whether it will ever be made. Thus, this is not a dispute dealing with a concrete legal issue. This is the basis for my dissent and why I have concluded that the action is inadmissible.

(199) Since I have a different view than Justice Kallerud on the contents of Article 89 of the Constitution, I am compelled to look thoroughly into the state of the law before Article 89 was adopted in 2015, the premises from which Article 89 derived, and its subsequent amendment in 2020.

Constitutional review under former customary constitutional law

(200) The courts' power and duty to review the constitutionality of statutory provisions have developed over time through interaction between case law, political authorities and legal literature.

(201) As of today, a large number of Supreme Court rulings have been issued dealing with constitutional review. Older case law dealing with the same has been assessed, among others, by Eckhoff, in the article *Høyesterett som Grunnlovens voktere* [the Supreme Court as the guardians of the Constitution], in *Jussens Venner*, 1976 pages 1–34. For all rulings presented, the review has related to disputes on the *application of a* statutory provision to a specific legal issue. The same has been the situation in later cases involving a review of the constitutionality of a statutory provision or a Storting decision.

(202) I confine myself to a few such rulings. One of the landmark rulings in this area is Rt-1976-1 (the Kløfta case), which concerned setting of compensation for expropriation. Other examples are Rt-2013-1345 (the structure quotas case), which concerned a fishing company's loss of structure quotas, and Rt-2010-143 (the shipping tax case), which concerned tax assessment for a number of shipping companies after the revision of a former shipping tax system. I also mention the ruling in Rt-2010-535 (the Norwegian Church Endowment case), which concerned an order of redemption and regulation of ground rent for leased land owned by the Norwegian Church Endowment among others. I have a different view than Justice Kallerud as to what may be derived from the ruling, to which I will return.

(203) It has been a requirement for bringing an action that it concerns a concrete dispute. Previously, a dispute was characterised by being based on concrete facts and concerning specific issues in the relationship between physical or legal persons. This still applies, see Skoghøy, *Tvisteløsning* [dispute resolution], 3rd edition, 2017 page 396.

(204) In my view, the Supreme Court ruling in Rt-1976-1 (the Kløfta case) confirms that the power of review was limited to concrete assessments. Justice Blom states on page 5 that it is clear

that if "the application of a statutory provision has a result that is contrary to the Constitution", the courts must base their ruling on the rule laid down in the Constitution, and not on the statutory provision. He also states that one is dealing with generally accepted customary constitutional law. As I read the judgment, the wording "the application of a statutory provision" that may give an unconstitutional result in fact refers to concrete review in the sense I have described.

(205) Andenæs and Fliflet, *Statsforfatningen i Norge* [the constitutional law of Norway], 11th edition, 2017 state in chapter 46, "Constitutional review of statutory provisions and other Storting decisions", that the power of review in our system is "part of the general application of the law", and that it concerns "the application of the law in the specific case".

(206) In my view, Justice Kallerud's quote from Smith, *Jussens Venner*, 2020 page 334, expresses the same. According to Smith, the form of constitutional review that has developed in Norway over a long time, "relates to the manner in which legislation is or will be applied in the specific case". He then states that this "also" implies that the review normally takes place later and only has formal legal effects on the parties.

(207) The Storting's Commission on Human Rights – the Lønning Commission – stated the following on constitutional review when presenting in 2011 a draft limited revision of the Constitution, see Document 16 (2011–2012) page 78:

> "The courts' duty to examine the constitutionality of statutory provisions is limited to so-called *concrete* review, i.e. that the courts may only examine the constitutional issue if it is presented to the courts in a concrete dispute. Thus, Norwegian courts have no powers to examine on a general basis whether a statutory provision is contrary the Constitution."

(208) In my opinion, this coincides with my interpretation of the other sources on this point.

(209) Based on my above assessment, I start from the premise that constitutional review at the time of the adoption of Article 89 of the Constitution, involved review in concrete disputes based on concrete facts. This was what constitutional review entailed under customary constitutional law at that time.

(210) Justice Kallerud has expressed the view that the plenary judgment Rt-2010-535 (the Norwegian Church Endowment case) is an example of constitutional review being exercised in a broader sense when there has been a need for it. I do not agree that this judgment demonstrates that the Supreme Court, before the constitutional amendment, allowed actions of a more general scope concerning the constitutionality of statutory provisions and Storting decisions. It is sufficient to point out that the case involved an administrative decision – an instruction – from the Government that had specific effects in the legal relationship between the Norwegian Church Endowment as the lessor and the lessees of the fund's properties. The claimant was an ecclesiastical employer and interest group. The action involved church interests to such an extent that the organisation was considered to meet the requirements for bringing an action section 1-4 of the Dispute Act, see the judgment's paragraph 34. Constitutional review was related to the instruction's legal impact on the fund, see paragraph 121–122. The Supreme Court found that the instruction ordered the fund to safeguard certain interests "in a manner and a scope that is contrary to" the former Article 106 of the Constitution.

Constitutional review under Article 89 of the Constitution

The meaning of the constitutional amendment in 2015

(211) When the Lønning Commission's draft constitutional provision on the constitutional review was heard by the Storting's Standing Committee on Scrutiny and Constitutional Affairs, the majority stated initially that the purpose of amending the Constitution was to bring to light "the courts' current power" to review the constitutionality of statutory provisions and other decisions in the exercise of public authority, see Recommendation 263 S (2014–2015) page 9.

(212) Another majority states on page 10 that there has been broad consensus that the courts had jurisdiction "in specific cases to examine statutory provisions and other decisions in the exercicse of public authority in the light of the Constitution". The Committee thus emphasises that constitutional review under customary constitutional law applied in *concrete* cases. Then, it states:

> "*This majority* emphasises that the present constitutional proposal is exclusively about incorporating constitutional review into the Constitution with its current content and scope, see Document 16 (2011–2012) page 80 and Document 12:30 (2011–2012) page 181. The purpose of this codification is to bring to light constitutional review as an important part of our constitutional system and our rule of law."

(213) The reform as a *codification* of customary constitutional law is further emphasised by the Committee's majority on page 11 in the Recommendation. There, it is stated that all the alternative drafts were worded to cover "the current content" of constitutional review as it had developed through case law and been recognised by the other state powers.

(214) Justice Kallerud has quoted the majority's explanation of the wording of the constitutional proposal. On page 11 of the Recommendation, four elements are emphasised related to the wording that was later adopted:

(215) First, it is stated that the wording indicates that constitutional review lies with the courts of general jurisdiction; this as opposed to the system in many other countries with special constitutional courts or other bodies outside of the regular courts.

(216) Next, the Committee's majority points out that constitutional review is an ex-post review.

(217) The majority further emphasises that constitutional review in Norway is "concrete and concerns the application of the law in concrete disputes, and whose legal effect is formally limited to the litigant parties (*inter partes*)". They also emphasise that the effect of unconstitutionality is "that the unconstitutional statutory provision is not applicable in the specific case".

(218) Finally, it is emphasised that in the event of unconstitutionality, it is formally up to the Storting to assess whether and how the statutory provision should be amended in accordance with the Constitution. It is stated that this is "in contrast to systems where the courts on an abstract basis examine whether the statutory provision itself is unconstitutional, and where unconstitutional statutory provisions are ruled invalid with legal effect on everyone (*erga omnes*), both private and other State bodies."

(219) In my view, the majority's comments to the provision that was later adopted, show that the

Storting would clarify two fundamental issues. One was that incorporating constitutional review into the Constitution would not at any level allow for a general validity review – i.e. with a prior or subsequent effect on everyone – as in constitutional courts in other countries. The intention was that the unconstitutional provision should only be inapplicable "in the specific case".

(220) The second issue that the Committee's majority wished to clarify, was that the review itself in Norway is concrete in the sense that it must relate to concrete facts. Constitutional review may only be carried out in connection with a concrete dispute based on concrete facts.

(221) In Norwegian law, a dispute is characterised, as already pointed out, by being concerned with legal issues in the relationship between individual persons. Nonetheless, as emphasised by Justice Kallerud, there is no absolute procedural requirement for bringing an action that its outcome will have a direct legal effects for the claimant. This follows from section 1-4 of the Dispute Act on the right of organisations to bring an action. Of course, the provision also applies in cases involving constitutional review. In my view, it nevertheless follows from the Committee's statement that a case involving constitutional review must relate to a dispute on a specific legal issue. This applies even if the procedural rules do not always require that the claimant is directly a part of the legal relationship.

(222) To me, it is clear that the Storting's terminology when adopting Article 89 of the Constitution only reflects the framework for all constitutional cases heard by the Supreme Court up to that point. Many of these were of a more recent date, such as the Kløfta case, the structure quota case, the shipping tax case and the case regarding the Norwegian Church Endowment.

(223) The Storting's Standing Committee on Scrutiny and Constitutional Affairs mentioned these rulings expressly in Recommendation 263 S (2014–2015) page 11, during its discussion of the intensity of constitutional review. I have previously described what they involved. The Committee also mentioned Rt-1996-1415 (the Borthen case), which concerned an amendment that resulted in the loss of spouse supplement for old-age pensioners, and Rt-2007-1281 (the Øvre Ullern case), which concerned the application of the Ground Lease Act to old ground leases.

(224) These references can only imply that the Committee members were aware of the content of the subjects of review in the mentioned cases. Considering the long-standing traditions of constitutional review and the topics of the more recent rulings, it is clear that this formed the framework for the enshrining of the courts' power to review Storting decisions in the Constitution. In my view, this confirms what the Storting, during the Committee discussions and Storting debate, meant by concrete review.

(225) This is confirmed on page 12 of the Recommendation as it is stressed that the constitutional proposal would not give the courts a basis for developing "a new and more extensive constitutional review" of statutory provisions and other decisions in the exercise of public authority. The same applies to the Committee's comment that changing the "current form and function" of constitutional review would require a separate constitutional amendment.

The content under the constitutional decision in 2020

(226) In 2020, Article 89 of the Constitution was amended to read:

> "In cases brought before the Courts, the Courts have the power and the duty to review whether applying a statutory provision is contrary to the Constitution, and whether applying other decisions under the exercise of public authority is contrary to the Constitution or the law of the land."

(227) According to the wording, constitutional review concerns the application of "a statutory provision … or … other decisions". I agree with Justice Kallerud that this must also include the use of a *consent* decision by the Storting, such as in the case at hand. I also agree with him that the courts also before the adoption of Article 89 could review whether a consent decision is covered by Article 26 subsection 2 of the Constitution. It is essential that this – as usual – take place as part of the hearing of a concrete dispute, as I believe the Storting intended when incorporating constitutional review into the Constitution in 2015.

(228) On the background to the amendment in 2020, the proposers wrote in Proposed Constitutional Amendment 19, Document 12:19 (2015–2016) page 1:

> "The wish for more conformity between the wording and the substantive content is in itself sufficient to justify the proposed constitutional amendment. But on one individual point, ('abstract' review of statutory provisions, see below) the proposal may also be justified by the wish to avoid that the wordings chosen in June 2015 serve as basis for developing constitutional review in a direction that is alien to both Norwegian judicial tradition and to the relationship between courts and current politics."

(229) The purpose of the amendment was thus to clarify that it is not the statutory provision in itself that is subject to the courts' review, which is typical for constitutional review in many states both in and outside of Europe. This was expressed by specifying that it was the "application" of a statutory provision that might be reviewed. This is commented as follows on page 2 of the proposed constitutional amendment:

> "Norwegian constitutional review has always been aimed at the application of the law in the specific case ('concrete review'), and this is undoubtedly what the Storting meant to constitutionalise when adopting the current Article 89. This is also in accordance with the corresponding provision in Sweden, see Chapter 11 Article 14 of the Instrument of Government."

(230) In the subsequent recommendation from the Standing Committee on Scrutiny and Constitutional Affairs, the Committee's majority used the same starting point, see Recommendation 258 S (2019–2020) page 3.

(231) In other words, the purpose of the 2020 revision was to clarify that constitutional review should not develop into the possibility of setting aside statutory provisions and other decisions *in general*. The system should be maintained as it had been. The wording was to express as clearly as possible the legislature's intent in 2015, namely that constitutional review of the Storting's decisions should take place as part of deciding a concrete dispute.

(232) When discussing whether Article 89 of the Constitution limits constitutional review to apply only in concrete disputes, Justice Kallerud states that this was not a topic as late as in HR-2020-2472-P (the climate case). He comments that a judgment in favour of the claimants – the environmental organisations – would not have had a formal legal effect either on them or on their members.

(233) As Justice Kallerud has pointed out, the action in the climate case arose from individual administrative decisions – the granting of production licences – and thus in a legal relationship between individual persons; namely the Government and the petroleum companies. I can therefore not see that the Supreme Court's hearing of that case makes a difference as to what constitutional review of the Storting's decisions should entail, apart from what I have already expressed. The question of *who* may bring such an action will be part of my discussion of the significance of section 1-4 of the Dispute Act.

Summary

(234) I my view, the sources that I have discussed thus far show that the 2015 amendment was a codification of customary constitutional law. Article 89 of the Constitution absorbed this, without subtracting – or adding – anything. This signifies that not only constitutional review as such was included in the Constitution, but also the applicable limitations thereon. Consequently, the condition for constitutional review was that statutory provisions and other decisions could only be reviewed as part of the hearing of a dispute between individual persons. The revision in 2020 was only intended to clarify this. The background for the amendment was that the Storting did not want constitutional review to extend beyond what had been applicable law up to that point.

The application of Article 89 of the Constitution versus sections 1-3 and 1-4 of the Dispute Act

The application of section 1-3 of the Dispute Act

(235) Of course, there is a link between which issues are admissible in court under procedural law, and which issues may be subject to constitutional review. In my view, as pointed out several times, the right to bring an action has been limited to concrete review. The scope of constitutional review is thus limited by this.

(236) This means that an interpretation or development of the requirements to bring an action in the Dispute Act may not provide a basis for allowing actions involving constitutional review beyond the framework formed by Article 89 of the Constitution. Although at the time of the adoption of Article 89, there had been a certain development in civil procedure in the direction of allowing actions of a more abstract nature, there are no indications in the preparatory works that such a development in the right to bring an action under the Dispute Act could change constitutional review in such a direction.

(237) A different solution would entail that constitutional review, without the Storting's contribution, becomes subject to dynamic development, despite the legislature's intent to limit such review to concrete disputes, as was the tradition. I reiterate the statement in the Committee's Recommendation in 2015, that the amendment not would give the courts a basis for developing a "more extensive constitutional review", and that any amendment of the "current form and function" of such review would require a constitutional amendment, see Recommendation 263 S (2014–2015) page 12.

(238) As previously mentioned, I read the Committee's remarks and terminology in the light of what had been the framework for the major constitutional cases up to that point, which were all cases involving review in concrete disputes. Based on that, I cannot see that the Storting

had an incentive to discuss whether a possible further development of ordinary procedural rules could also entail an extension of constitutional review. Therefore, the Storting cannot have intended, wished, or accepted anything other than constitutional review being limited by what one historically and until some years before the adoption had perceived to be the framework for constitutional review of statutory provisions and other decisions.

(239) Against this background, the limitation of constitutional review to concrete disputes must be implicit in the norm expressed in Article 89 of the Constitution. In the intersection we are dealing with between constitutional law and civil procedural rules, the right to bring an action that otherwise has basis in procedural rules must therefore "yield" to the rule in the Constitution. In other words, the Constitution prevails.

(240) An exception from the constitutional norm is, in my opinion, only possible if something else would violate general rule of law principles and give a solution that would be alien to our democratic society. I note that such views have previously been expressed in other contexts, see HR-2020-2472-P paragraph 123 (the climate case). If so, it is a question of making use of a safety valve. As set out in the judgment's paragraph 142, the threshold for making use of such a safety valve in constitutional issues must be high.

(241) However, constitutional review of the Storting's decisions will still be possible where this is part of the hearing of a concrete dispute. As I see it, it is difficult to consider such an organisation of the power of review a violation of general rule of law principles.

(242) In legal literature, the general view is that abstractly formulated claims of unconstitutionality should be allowed to proceed "in special circumstances", see Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 2.5, Juridika, revised on 1 December 2019. A similar view is expressed by Skoghøy, who comments that a declaratory action claiming constitutional breach should be kept "within a narrow framework", see Skoghøy, *Tvisteløsning*, [dispute resolution] 3rd edition, 2017 page 407. The constitutional issues are not discussed in the mentioned works. However, my perception is that legal literature advocates a narrow exception rule. My comment with regard to a possible safety valve in the interpretation of the Constitution conforms well to such a rule. Views expressed in legal literature are in any case not decisive.

The application of section 1-4 of the Dispute Act

(243) Section 1-4 of the Dispute Act reads:

> "If the conditions in Section 1-3 are otherwise satisfied, an organisation or foundation may bring an action in its own name in relation to matters that fall within its purpose and normal scope."

(244) Section 1-4 allows an organisation to act as claimant without itself being part of the dispute or the legal relationship concerned. But the provision states that the requirements in section 1-3 – the requirement of a legal claim, the relevance of the claim, and the defendant's connection to claim – are met as usual, see Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-4 note 1, Juridika, revised on 1 December 2019.

(245) The express condition that the requirements in section 1-3 must be met in representative

actions thus entails that also actions under section 1-4 must arise from a dispute. An action brought by an organisation must consequently involve a concrete dispute based on individual facts and concern a limited legal issue in the relationship between individual persons. Section 1-4 of the Dispute Act does not change this. The significance of the provision is that it allows others than the legal persons involved in the dispute itself to bring an action, provided it lies within the organisation's objective and function to protect interests that are directly affected by the outcome of the concrete dispute.

(246) For the record, according to Proposition to the Odelsting No. 51 (2004–2005) page 142, extended review of validity applies to *regulations*, which means that it is not a requirement that the dispute is between individual persons. However, this is without relevance to the issues at hand.

(247) A representative action thus involves a concrete dispute between other legal persons, whose outcome is of interest to the organisation or its members. This is well illustrated by the Supreme Court's ruling in Rt-1980-569 (the Alta order), which was crucial to the implementation of section 1-4 of the Dispute Act section 1-4. Justice Endresen stated on page 575 that "[i]t must involve a legal claim, to which the claimant has such connection that exactly he has cause to bring an action". The underlying case dealt with the validity of a royal decree that gave the former Norwegian Water Resources and Energy Directorate permission to develop the Alta river system. This undoubtedly concerned a concrete legal relationship.

(248) Against this background, a requirement of concrete review under Article 89 of the Constitution is fully compatible with the requirement under the Dispute Act section 1-4, cf. section 1-3, of an individual underlying dispute or legal issue.

(249) In his discussion of whether section 1-3 allows actions of a more general scope, Justice Kallerud mentioned Proposition to the Odelsting No. 51 (2004–2005) page 143. In his perception, the Ministry's comments suggest that "actions of a more general scope" should be allowed to proceed. In my view, the Ministry's comments reflect a narrower approach.

(250) The Proposition sets out that "an example of an admissible action is one that challenges the application of general norms to individual facts". In the same paragraph, the Ministry states:

> "An action should be allowed to proceed as long as the relevance of the claim and the parties' connection thereto so suggest, also where the general norm is normally expected to be concretised through an administrative decision. This should apply on a general basis, and not only, for instance, in the environmental area, where a case concerning the application of the general principle of due care in section 16 of the Forestry Act was ruled inadmissible (Rt. 2003 page 1630), despite the special legal basis for bringing such an action in the Århus Convention of 25 June 1998 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters."

(251) Justice Kallerud has expressed that the Ministry found that "the right to bring an action cannot depend on the existence of a challengeable administrative decision". He also refers to "the Ministry's position that the interpretation of the law expressed by the Supreme Court in Rt-2003-1630 should not be continued in the new Dispute Act".

(252) To me, it is important to point out that the Ministry, in the quoted paragraph, believes that an action should be allowed "as long as the relevance of the claim and the parties' connection thereto so suggest" *and* "the general norm is normally expected to be concretised through an

administrative decision". In legal literature, this is referred to as actions "by and against private persons on these persons' obligation to comply with legislation" and as "actions challenging competence under public law", see Schei and others, *Tvisteloven: Kommentarutgave* [the Dispute Act: Commentary], section 1-3 note 2.5, Juridika, revised on 1 December 2019. The Supreme Court ruling in Rt-1998-300 (the brewery logo case) is mentioned here, where two breweries were considered to have a legal interest in bringing an action on the entitlement to use their logos for advertising purposes in the future. I cannot see that this is the same as allowing "actions of a more general scope" in the sense expressed by Justice Kallerud.

Should No to the EU's action proceed?

Introduction

(253) In my view, a criterion for allowing No to the EU's action to proceed is that it is based on an individual decision affecting the relationship between legal persons, so that the conditions for review under Article 89 of the Constitution balanced against the rules in sections 1-3 and 1-4 of the Dispute Act are met.

(254) As I see it, No to the EU's claim raises a number of procedural issues. However, in the light of my result, I will leave it at that.

(255) Like Justice Kallerud, I also find that No to the EU in practice is requesting a clarification of whether the Storting violated the Constitution when giving consent to the EU's third energy market package by a simple majority pursuant to Article 26 subsection 2 of the Constitution. However, I cannot see how that is sufficient to allow No to the EU's action to proceed.

The subject of concrete constitutional review

(256) Justice Kallerud has accounted for the two factors in the EU's third energy market package that may create doubt as to whether it was sufficient that the Storting gave its consent under Article 26 subsection 2 of the Constitution. One concerns ESA's power to make individual decisions, while the other concerns ESA's power to request information from Norwegian energy undertakings. I refer to Justice Kallerud's views in this regard.

(257) The parties agree that the only relevant recipients of the mentioned administrative decisions will ultimately be participants in the Norwegian energy supply market – primarily Statnett. Statnett builds, owns and manages the central power network in Norway. The Supreme Court has been informed that to this date, no such decisions have been issued to Norwegian undertakings.

(258) As I understand No to the EU, the organisation finds that *the Storting's consent to* Norwegian accession to the EU's third energy market package is *in itself* an individual decision subject to constitutional review. I disagree. Although the organisation does not believe the Storting is competent to decide on accession to the EU's third energy market package under Article 26 subsection 2 of the Constitution, the disagreement with the Ministry regarding the constitutionality of the Storting's decision is not a concrete dispute that may be reviewed under the rules in the Dispute Act balanced against Article 89 of the Constitution.

(259) In the case at hand, no decisions have yet been made under the exercise of power transferred under the EU's third energy market package, and according to information provided, no such decisions have been signalled. If the action proceeds, the courts will thus have to carry out an abstract advance review of the constitutionality of a future decision of unknown content issued to Norwegian undertakings. As I perceive the constitutional norm, this is not feasible under Norwegian constitutional law. What might possibly be challenged in a later action is the validity of *a decision issued to Statnett or a different market participant.* Such an action would allow a review of whether the basis for the decision arises from a set of rules established in accordance with the Constitution, including Article 26 subsection 2 and Article 115.

(260) There is no reason for me to address whether No to the EU, based on section 1-4 of the Dispute Act, in the future may challenge the constitutionality of a later decision by the RME. However, it is clear that this is possible for an undertaking with a legal interest in a review of a decision made based on the EU's third energy market package, or for an organisation representing interested parties. It is unnecessary for me to consider to which extent also others – such as consumers and businesses – may bring an action to have such a decision reviewed because it – for instance – may lead to new prices affecting their legal status.

(261) Justice Kallerud, as I understand him, emphasises the importance in the case at hand to obtain clarification of the issue of principle in the form it is raised. The Court of Appeal had an entirely different view:

> "Decisive for the Court of Appeal's view that the issue of which No to the EU is seeking clarification is not vital for people in general in relation to constitutional review, is first of all that a transfer of sovereignty such as that involved in [the EU's third energy market package], concerns executive and not legislative power, and is also of a limited character. Furthermore, any decisions made by ESA or RME will only affect a limited number of participants in the energy sector, primarily Statnett. The decisions will not be aimed at individual citizens."

(262) My view is the same as that of the Court of Appeal: The need for clarification of the law will be sufficiently fulfilled by allowing participants in this area to bring an action based on decisions affecting their legal status. The fact that the case is legally and politically controversial cannot determine the right to review.

(263) To me, Justice Kallerud seems to base his result on the Dispute Act Committee's discussion of the Danish Maastricht action, and that the Ministry seems to have presupposed that a similar action must be allowed to proceed. The Maastricht action challenged the constitutionality of Denmark's accession to the Treaty on the European Union. The issue was thus of a completely different and more far-reaching scope than that in the case at hand.

(264) On the other hand, a corresponding action challenging Denmark's accession to the Schengen Convention was ruled inadmissible by the Danish Supreme Court, see UfR 2001 page 2065. In the court's remarks on page 2076, it is stated that

> "… the rules of the Schengen Convention do not involve a transfer of sovereignty in a number of general and essential areas of life and do not in themselves have a radical impact on the Danish population in general. As a result, the appellants do not have a significant interest in having reviewed their claim that the Accession Act is contrary to

the Constitution".

(265) I agree with Justice Kallerud that the Danish criteria for bringing an action cannot dictate the content of Norwegian law. At the same time, it is worth noting that the criteria assumed by Justice Kallerud regarding the courts' power under Norwegian law to review the constitutionality of Storting decisions set the threshold lower than the criteria assumed by the Danish Supreme Court in the Schengen case.

Conclusion

(266) No to the EU's action challenging the constitutionality of the Storting's consent to incorporation of the EU's third energy market package in EEA Agreement is, based on my discussion of Article 89 of the Constitution, inadmissible. I consequently find that the appeal should be dismissed.

(267) Justice **Normann:** I agree with Justice Matheson in all material respects and with his conclusion.

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

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

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

(271) Justice **Skoghøy:** I agree with Justice Kallerud in all material respects and with his conclusion.

(272) Justice **Indreberg:** Likewise.

(273) Justice **Webster:** Likewise.

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

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

(276) Justice **Bergsjø:** Likewise.

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

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

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

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

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

Following the voting, the Supreme Court issued this

O R D E R :

1. The case may proceed.

2. The State represented by the Ministry of Foreign Affairs will compensate No to the EU's costs of NOK 1 990 505 incurred in the District Court, in the Court of Appeal and in the Supreme Court within two weeks of the service of this order.