The Free Movement of Electricity within the EEA

A comparative analysis of the threshold for restricting electricity exports to secure energy supply within the EU- and EFTA pillar.

Kandidatnummer: 250

Antall ord: 14 973

JUS399 Masteroppgave
Det juridiske fakultet

UNIVERSITETET I BERGEN

10.05.2023

ABBREVIATIONS

ACER	Agency for the Cooperation of Energy Regulators
CEP	Clean Energy Package
ECJ	European Court of Justice
ECLI	European Case Law Identifier
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
Member States	Member States of the European Union
RPR	Risk-Preparedness Regulation
SCA	Surveillance and Court Agreement
TEP	Third Energy Package
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union

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1 Introduction

1.1 Theme and actuality

The theme of this thesis is the security of energy supply as a ground for restricting electricity exports within the EEA. The analysis will discuss the legal situation after the EEA Agreement and the EU and seeks to identify if there is a different threshold for the EFTA States and the Member States' flexibility to limit cross-border flow. The topic is inspired by the current energy crisis in Europe and the debate on curtailing electricity export to safeguard electricity supply at a lower price.

The energy sector is characterised by fragmented legislation and rapid development. Because of the EEA's two-pillar system, the legal framework in the EEA is divided. The Clean Energy Package was implemented in the EU in 2019, which was the same year the Third Energy Package was fully enforced in the EFTA pillar.[1] The fast-changing legislation creates a legal gap between the EU- and EFTA pillars, challenging the homogeneity within the internal electricity market.

The shaping of energy law is significantly influenced by politics, which is an important reason for why the legal framework is continuously modified. The green shift – reallocating the focus from hydrocarbon sources to renewable energy sources creates a need for new innovative and technological solutions to deal with the challenges of securing a stable electricity supply.[2] The electricity interconnectors are crucial in this transition, given the gradually increasing use of variable energy sources, such as wind, solar and hydropower.

Although electricity exports present opportunities for economic growth, the electricity supply is not just of commercial importance. It is also indispensable for citizens and an imperative factor for state stability. Consequently, export restrictions can be an essential mechanism for protecting public security. Nonetheless, such measures must be proportionate to the overall aim of securing the electricity supply to prevent discrimination, distorted competition, and geopolitical unsteadiness.[3] Additionally, given the ongoing climate change crisis, the significance of this question is expected to continue to rise.

[1] EEA Joint Committee Decision No 93/2017 of 5 May 2017 amending Annex IV (Energy) to the EEA Agreement [2019].
[2] This is also recognised in Directive (EU) 2019/944, see recitals 3-6 of the preamble.
[3] I will explain this further in Chapter 3.

1.2 Research question and thesis structure

To conduct my analysis of the threshold for limiting the cross-border flow of electricity within the EU- and EFTA pillars, I have focused on the following research questions:

i) *How does electricity relate to the internal market?*

ii) *Do the EFTA States have the flexibility to restrict electricity exports to secure electricity supply, following the TEP? If so, how wide is this margin of appreciation?*

iii) *Do the Member States have the flexibility to restrict electricity exports to secure electricity supply, following the CEP? If so, how wide is this margin of appreciation?*

iv) *Is the threshold for implementing such measures different within the EU- and EFTA-pillar?*

Based on these research questions, the overall aim of my thesis is to analyse the EFTA States and the Member States' flexibility to restrict electricity exports to secure electricity supply at a national level – to identify if the threshold for implementing such measures is different within the EU and EFTA pillar and determine what the legal situation within the EEA is. To attain this goal, I have structured the thesis into three main chapters designed to provide a chronological overview of the legal situation based on the development of the legal framework governing the internal electricity market. This structure coincides with the order of the presented research questions and is meant to establish a coherent and logical overview of the theme.

In the following sections of this chapter, I will provide an overview of the delimitations and methodology used for concluding this analysis. While chapter 2 seeks to provide a theoretical overview and discussion of electricity in the context of the internal market and the free movement rules. The topics included in that chapter establish the foundation for understanding the legal discussions in the following chapters.

Chapter 3 discusses the EFTA States' flexibility to limit electricity exports after the EEA Agreement, following the TEP. This involves analysing the prohibition to adopt quantitative measures on electricity exports and if such limitations can be justified based on securing electricity supply at a national level. In contrast, Chapter 4 takes an EU perspective where I examine the Member States' flexibility to curtail interconnection capacity on electricity

following the provisions adopted in the CEP. Finally, chapter 5 ends this discussion by providing concluding thoughts on the thresholds for restricting electricity exports within the EEA.

1.3 Delimitations

During my research on this thesis, I have become aware of several aspects related to restrictions on electricity exports within the EEA that I have decided not to include. These delimitations are based on their relevance to the chosen research questions and in consideration of the framework of this assignment.

Firstly, I have excluded a discussion on whether the threshold for restricting electricity exports differed within the EEA before the CEP. This is because the relevant provisions in the TFEU and the EEA Agreement are identical in substance, meaning the answer would be similar, based on the homogeneity principle.

Secondly, I have delimited from discussing if electricity should be considered a service within the free movement rules. After the ruling in *Costa v ENEL*, the ECJ has consistently treated electricity as goods, and the characterization must be regarded as a settled topic.[4]

Thirdly, I have excluded aspects related to Switzerland. Switzerland is an EFTA State but is not part of the EEA Agreement.[5] Thus, when referring to the "EFTA States", it only covers Norway, Liechtenstein, and Iceland.

Additionally, it is imperative to note that there are limited legal sources and literature on the subject matter and that the evaluation of the EFTA States and the Member States' flexibility to restrict electricity exports is based on a case-by-case assessment. Consequently, covering all possible scenarios of limitations on electricity export is impossible, and thus, avoiding a certain level of abstraction in the analysis is difficult. This abstraction level, nonetheless, enriches the value of the thesis as it discusses a problem from a conceptual approach and not a case-by-case basis.

[4] Case 6/64 *Costa v ENEL* p. 597; Case 393/92 *Almelo* para. 28; Case 648/18 *Hidroelectrica* para. 28.
[5] For information about the relationship between Switzerland and the EEA, see Arnesen (2018), pp. 80-100.

1.4 Methodology

1.4.1 Methods

In my analysis of the threshold for restricting electricity exports within the EEA, I have utilised a legal dogmatic research method.[6] Both the aspects of electricity in the context of the single market and the concrete assessments of the EFTA States and Member States' flexibility to curtail electricity exports seek to establish the current legal situation within the EEA and, thus, aim to clarify the meaning of positive law. Additionally, to conduct an informed legal analysis, I employ a theoretical approach to the concept of security of supply and the electricity market to explain the factual sides of electricity exports and the functioning of the internal market. In carrying out the evaluation, analysis, and discussions on the current situation in EEA law, I have emphasised on a dynamic and teleological interpretation of the relevant EEA legal sources in accordance with the interpretive method applied by the ECJ and EFTA Court.[7] As stated in the *CILFIT* case, this means that "every provision of Community law must be placed in its context and interpreted in light of the provisions of Community law as a whole, regard being had to the objectives thereof and its state of evolution at the date on which the provision in question is to be applied".[8] Subsequently, the interpretive approach particularly aims at giving attention to the dynamic development and objectives and purposes on which the legislation is founded.

1.4.2 Legal sources and frameworks

This thesis follows the legal framework applicable to export restrictions on electricity under EEA energy law, as implemented in the EEA Agreement and the EU treaties, including the acts and court practice deriving therefrom. However, it is important to note that the EEA Agreement and EU law are distinct legal orders, although they are closely linked.[9] Consequently, it is more accurate to say that I have conducted this thesis based on two separate legal frameworks, providing a preliminary explanation for why there is currently not

[6] On the legal dogmatic research method, see inter alia: Smits (2015) pp. 207–228; Graver (2008) pp. 149-178.
[7] See for example, Case 55/87 *Moksel v BALM* para. 15; Haukeland Fredriksen (2010) p. 731.
[8] Case 283/81 *CILFIT* para. 20.
[9] Case E-9/97 *Sveinbjörnsdóttir* para. 59.

a homogeneous legislative framework within the EEA that regulates the EFTA States' and Member States' flexibility to limit the cross-border flow of electricity.[10]

The legal framework governing the analysis from an EU perspective follows the hierarchy of EU primary and secondary law. The primary law constitutes the EU treaties,[11] and it is especially Article 194 TFEU providing provisions on energy policy that is relevant for this analysis. As established by the ECJ, EU treaty law "must be interpreted as producing direct effects and creating individual rights which national courts must protect".[12] Additionally, the EU law has supremacy over national legislation in situations of conflict.[13] The treaty article does not explicitly regulate the Member States' flexibility to limit electricity exports. Still, it constitutes the legal basis for the CEP, which regulates the legal issue through secondary EU law.

The secondary sources of EU law include regulations, directives, decisions, recommendations, and opinions, as stated in Article 288 TFEU. It is only the two former legal acts deriving from the CEP, which both have binding effect on the Member States.[14] This also applies to decisions presupposed that it is not explicitly addressed to the parties – in which case, it is only binding for them. This thesis particularly emphasises on the Risk-Preparedness Regulation 2019/941 and the Electricity Regulation 2019/943, providing rules on cross-border electricity trade. These regulations also contain recitals that I have used to interpret the relevant articles. Although recitals do not have a binding effect, they can be seen as an expression of the preparatory work of the legal acts and, thus, provide interpretative guidelines on the objectives sought to be attained through the legislation.[15] Considering that there is no relevant case law establishing guidelines for how the relevant rules shall be interpreted, the recitals play an essential role in determining the Member States' flexibility to curtail electricity exports after the CEP.

In contrast, for assessing the EFTA States' flexibility to restrict electricity exports, it is the main part of the EEA Agreement that constitutes the primary source of law in this thesis. The EEA Agreement aims to integrate the EFTA States into the EU internal market to establish a

[10] On the decision-making processes within the EEA and the two-pillar structure, see Haukeland Fredriksen & Mathisen (2018), pp. 137-175; Bauer (2016), pp. 45-67.
[11] TEU and TFEU.
[12] Case 26/62 *Van Gend en Loos* p. 13.
[13] Case 6/64 *Costa v ENEL* pp. 593-594.
[14] TFEU Article 288.
[15] See Case 215/88 *Casa Fleischhandel v BALM* para. 31.

dynamic and homogeneous EEA.[16] In accordance with the homogeneity principle following the EEA Agreement, I have interpreted and applied the EEA law in conformity with EU law to attain these objectives.[17] This mainly refers to Articles 12 and 13 EEA, corresponding with Articles 35 and 36 TFEU, regulating the Contracting Parties' legitimacy to limit electricity exports and has primacy over national law.[18] Although the TEP is incorporated in Annex IV of the EEA Agreement, none of these legal acts regulates the Contracting Parties' flexibility to limit interconnection capacity on electricity.[19] Thus, I have namely analysed case law from the EFTA Court and the ECJ to establish the content of the EEA articles. Court practice is significant for determining the guidelines for establishing whether an electricity measure is discriminatory and proportionate within the meaning of EEA law.

[16] Ref, The EEA Agreement Article 1 (1), cf. recital 4 and 15 of the preamble.
[17] Ibid, Article 6 and Article 1 (1), cf. recital 4 and 15 of the preamble; Arnesen (2018) p. 215.
[18] These articles are identical in substance. Subsequently, rulings by the ECJ given prior to the signing of the EEA Agreement (May 2nd, 1992) have a binding effect on the EFTA States, cf Article 6 EEA. Additionally, even though the EFTA Court is only obligated to pay due account to principles laid down by the ECJ in later case law after SCA Article 3 (2), this formal distinction is insignificant in practice. See Joined Cases E-9/07 and E-10/07 *L'Oréal*, para. 28.
[19] The TEP refers to the Electricity Directive 2009/72, the Gas Directive 2009/73, the ACER Regulation 713/2009, the Electricity Regulation 714/2009 and the Gas Regulation 715/2009.

2 Electricity in the context of the internal market and the free movement of goods

2.1 The role and importance of the free movement of goods in the internal market

Understanding how electricity relates to the internal market is a precondition for conducting the analysis of the EFTA States and EU Member States' flexibility to restrict electricity exports to secure energy supply. As will be discussed in this chapter, electricity is a good that benefits from the freedom of movement and forms part of the EEA internal market. The legal scope and content of the free movement of goods in this context are regulated in Articles 35-36 TFEU and the EEA Agreement Articles 12 and 13. These provisions are "identical in substance", meaning the material content of the provisions is harmonised.[20] The main rule is that restrictions on trade between Member States are prohibited.[21] Considering the overall aim of creating a single market, the free movement of goods constitutes a crucial principle by removing trade barriers and providing equal opportunities and legal rights for all citizens and entities within the Member States.

Although the internal market is founded on a broad spectrum of principles, including economic, social, and political objectives, it is inevitable to take an economical approach when discussing why the free movement of goods is essential in establishing a single market. The internal market is *inter alia* based on the theory of comparative advantages, meaning – in simplified terms – that exports and imports are a precondition for economic welfare and stabilisation within each Member State and at a Union level.[22] This becomes even more important in electricity trade because public entities have a higher risk of providing preferential treatment to national consumers.[23] Protectionism of national consumers affects the idea behind the theory of comparative advantages, which the internal market, to some

[20] The EEA Agreement Article 6, cf. The SCA Agreement Article 3 (2); See also Arnesen (2018) pp. 300-301.
[21] Cf. The EEA Agreement Article 12 and TFEU Article 35.
[22] See Ricardo (2001); 'Heckscher-Ohlin theory' (Britannica) <https://www.britannica.com/topic/Heckscher-Ohlin-theory>.
[23] In Norway, 90 % of the electricity production capacity is owned by public authorities. See 'Ownership in the energy sector', (Energifakta Norge) <https://energifaktanorge.no/en/om-energisektoren/eierskap-i-kraftsektoren/>.

extent, seeks to attain through the free movement of goods. Unless justified, the prohibition of implementing restrictions on trade is therefore imperative in reaching the objectives of the internal market in general.

2.2 Electricity as "goods."

The factual side of electricity is intricate, which makes it difficult to characterise. Thus, the question sought to be answered in this section is *why* electricity is regarded as goods within the internal market.

The ECJ has defined goods as "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions".[24] There is no doubt that electricity constitutes a subject matter of trade, nor that it can be valued in money. However, "products" usually refer to portable objects such as books, oranges, etc. In contrast, electricity is a by-product obtained from primary energy sources, for instance, wind and gas. It is impossible to ship electricity abroad in containers or explicitly see it – electricity is transported and distributed through a network, making the trade inseparable from the physical cables and the boundaries of the grid.[25] Thus, from a critical or traditional perspective, it is difficult to accept without reflection that electricity falls within the scope of "goods", and it raises an issue as to whether such an approach should be acknowledged.[26]

That it is questionable to accept electricity as goods is *inter alia* substantiated by Advocate General Fennelly, who has recognised that it might appear "surprising that the Court has treated electricity, despite its intangible character, as goods" and consequently, that "electricity must be regarded as a specific case" in context of the free movement of goods.[27] From Advocate General Fennelly's point of view, this classification is "*perhaps* justifiable by virtue of its function as an energy source and, therefore, its competition with gas and oil" (my italics).[28] This suggestion namely covers the undisputed commercial aspects of electricity as provided for in the definition of goods. However, it also implies that the consideration of legal

[24] Case 7/68 *Commission v Italy* p. 428.
[25] Schoser & Sandberg (2016) p. 384.
[26] There has been some discussion about whether electricity should be considered goods or services within the Union, see for example, Case 393/92 *Almelo*, Opinion of AG Darmon, para. 59.
[27] Case 97/98 *Jägerskiöld*, Opinion of AG Fennelly, para. 20.
[28] Ibid.

uniformity and coherence in the energy sector is a possible explanation for why electricity falls inside the scope of goods, despite its intangible character.

The ECJ has clearly acknowledged that electricity is considered goods within the TFEU and the EEA Agreement.[29] Still, there are few cases where the ECJ has openly explained the choice of characterisation. In *Almelo*, the Court presented a three-dimensional justification:

i) the Member States have accepted electricity as a good in national laws,

ii) the Community's tariff nomenclature regards electricity as goods, and

iii) the Court in Costa v Enel accepted that electricity might be regarded as goods.[30]

In similarity with the proposed justification by Advocate General Fennelly, none of these arguments is directed at the mere factual sides of electricity. The underlining reasoning provided by the ECJ correspondingly seems to be founded in a coherent perspective, aiming at creating predictability and legal uniformity within the energy union. Consequently, the explanation appears to be founded on a purely discretionary assessment based on premises of value – hereby meant as a dynamic interpretation aimed at fulfilling the need for customising solutions in particular circumstances.

Given the factual sides of electricity, my perception is that electricity is more like a phenomenon than an object.[31] Still, in contrast to classical phenomena such as the moon, electricity is extraordinary because it also has commercial interest, it is subject to competition and possible to recreate. However, compared with other energy sources, electricity is distinct because it must be consumed at the exact moment it is produced. Although it can be stored in, for example, pumped hydro storages, making the concept more tangible, the intricate characteristics of electricity establish a need for adaption for it to fall within the scope of the free movement rules. Considering that electricity can be traded and the importance of electricity as a public interest generates a need for legal protection in line with gas and oil. The ECJ's dynamic approach towards electricity helps fill a legal gap in the EU treaties and the EEA Agreement, safeguarding the overall objectives of the internal market. Thus,

[29] Case 6/64 *Costa v ENEL* p. 597*;* Case 158/94 *Commission v Italy* para. 14-20; Case 648/18 *Hidroelectrica* para. 28.
[30] Case 393/92 *Almelo* para. 28
[31] See also 'Elektrisitet' (Store Norske Leksikon) <https://snl.no/elektrisitet>

providing a possible explanation for why electricity currently falls within the scope of "goods".

2.3 The internal electricity market

The internal market expands to electricity. The internal electricity market is extensive and complex. In this section, I will provide a brief overview of how the electricity market is regulated and designed.

In simplified terms, the internal electricity market is designed to ensure a balance between the consumption and production of electricity. The interconnection between the EFTA States and the Member States' transmission networks makes it possible to talk about one single electricity market. Still, the internal electricity market is a collective term embracing all electricity markets integrated into the grid – national, regional, and third-party electricity markets.[32] To ensure stability, the internal electricity market seeks to continuously exchange information establishing how much electricity the generators can produce and how much electricity the consumers request.[33]

The market rules provide provisions for participation in the market. Until the late 1990s, the national electricity markets were characterised as monopolies. Through implementing the first energy package in the late 1990s, the second in 2003, the third in 2009 and the CEP in 2019, the EU has sought to liberalise the energy markets.[34] The regulation has forced the unbundling of state-owned companies and, thus, opening the markets for competition by facilitating cross-border trade and securing the supply of electricity to a greater extent. [35] However, although energy has played a central part in European collaboration for many years, the energy sector did not become part of the EU primary law until the Treaty of Lisbon was enacted on the 1st of December 2009.[36] Article 194 TFEU now constitutes the legal basis for the European Parliament and Council's competence to adopt secondary law within the energy

[32] See Anchustegui (2018) pp. 1-35, which provides information about transmission networks in electricity competition, third-party access and unbundling in the EU.
[33] "Europe's Electricity Market Design: Where are we and where are we headed?" (Eurelectric) <https://www.eurelectric.org/in-detail/electricitymarketdesign/>; See also 'Intraday market' (Nordpool) <https://www.nordpoolgroup.com/en/the-power-market/Intraday-market/> on how electricity is traded.
[34] Anchustegui (2018) p. 25.
[35] Hunter & Anchustegui (2023) pkt. 2; Bjørnebye (2019) pp. 6-8; Bjørnebye (2020) pp. 14-16.
[36] TFEU, consolidated version [2012].

sector in the EU. The CEP was the first legislation on electricity founded on these provisions.[37] This package has not yet been implemented in the EEA Agreement.

2.4 Free movement of electricity in non-harmonised and harmonised areas

The importance of distinguishing between the applicability of the different energy packages within the EU- and EFTA pillars is that they, to some extent, provide different rules for governing the internal electricity market. From a general perspective, while the third energy package follows a traditional market-orientated view, the CEP is more influenced by policy priorities related to the green shift, taking a more climate-oriented approach.[38] As a result, with the implementation of the CEP, the EU legislator has sought to promote greater cooperation among the Member States, to enable and prepare the energy union to face the new challenges regarding the securement of energy supply within the union.

The Risk-preparedness Regulation 2019/941 provides rules for how the Member States shall cooperate to prevent, prepare for and handle electricity crises. As will be further discussed in Section 4, Article 16 of the RPR harmonises the Member States' flexibility to curtail electricity exports. Therefore, Articles 35 and 36 TFEU cannot constitute the legal basis for the assessment within the EU – in contrast to the EEA Agreement and the corresponding Articles 12 and 13 EEA, which I will look at in section 3.[39]

The treaty articles and the main part of the EEA Agreement outline the general starting point for understanding secondary law. However, they are only directly applicable if the legal issue falls inside a non-harmonised area within the EU law. By this, I mean a legal question not subject to complete regulation within the more specific rules in secondary law.[40] The direct application of the treaty articles and the EEA Agreement functions as a safety net for avoiding non-compliant national measures in circumstances where community law does not provide a direct legal basis. Consequently, the EFTA States and the Member States' flexibility to restrict electricity exports must be assessed based on different rules, hereby Articles 12 and 13

[37] The CEP refers to the Electricity Directive 2019/944, the Electricity Regulation 2019/943, The risk-preparedness Regulation 2019/941 and Regulation 2019/942.
[38] Anchustegui & Formosa (2020) pp. 90-91.
[39] See also Case 648/18 *Hidroelectrica* para. 27, where the ECJ explicitly states that the legal issue has not been harmonised in the TEP.
[40] Case 205/07 *Gysbrechts* paras. 33-34.

EEA and Article 16 RPR 2019/941. Thus, actualising the legal question as to whether the threshold for limiting cross-border trade of electricity differs between the EU- and EFTA pillars.

3 EU/EEA before the Clean Energy Package

3.1 Introduction

After clarifying that the Member State's flexibility to limit cross-border trade on electricity has not been harmonised at an EU level before the enforcement of the CEP, the legal situation within the EFTA pillar – following the third energy package – must be based on the general free movement rules laid down in the treaty articles and the main part of the EEA Agreement. From a historical perspective, the EFTA States' possibility to restrict electricity exports to secure the electricity supply has not been subject to discussions. The EFTA Court has never ruled on a case concerning Article 12 EEA on the prohibition for adopting export restrictions or the Contracting Parties' possibility to justify curtailments on electricity exports to secure energy supply.[41] Still, in line with the principle of homogeneity, Articles 12 and 13 EEA should be interpreted according to the legal situation within the EU before the implementation of the CEP. In this chapter, I aim to answer the research question of whether the EFTA States have the flexibility to restrict electricity exports to secure electricity supply and identify the threshold for implementing such measures.

In section 3.2. I will discuss the scope of the prohibition to restrict electricity exports. This will be followed by an analysis of whether non-compliant limitations on electricity exports can be justified after Article 13 EEA, based on securing energy supply in section 3.3. My objective is to identify the threshold imposed by primary law for limiting the amount of electricity being traded between cross-border lines.

[41] Arnesen (2018) p. 300.

3.2 The prohibition to restrict electricity exports

3.2.1 Prohibition to limit the amount of electricity exported

Regarding restricting the free movement of goods, the main rule is that measures inflicting trade barriers are prohibited because it undermines the functioning of the internal market. This explicitly follows from Article 12 EEA and Article 35 TFEU stating that "[q]uantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between the Contracting Parties". The reference to "measures" in this context must be interpreted broadly, covering the adoption of national legislation, regulations, decisions, administrative practice and all single actions taken by public authorities within the electricity market.[42] To discuss the scope of the prohibition, it is necessary to clarify what "quantitative restrictions" means in the context of electricity, as it constitutes the core of the provision.

The wording refers to limitations on measurable units, such as weight and the number of products exported. Accordingly, the ECJ has defined quantitative restrictions as "measures which amount to a total or partial restraint" of exports.[43] Electricity trade involves the transaction of exact numbers of megawatt-hours needed for distribution over a stated period. Consequently, Articles 12 EEA and 35 TFEU prohibit measures lowering the quantity of cross-border electricity traded compared to the available capacity on the domestic market. Let's take an example. The electricity systems within Norway and Denmark are linked through power interconnectors, which are cables moving electricity between the two countries.[44] Because of high or low electricity prices, or some other reason, Norway decides not to sell as much power to Denmark as they normally do. This measure will constitute a quantitative restriction, given that Norway has more electricity to offer.

Nevertheless, Articles 12 EEA and 35 TFEU must be seen in context with Article 16 (3) of the Electricity Regulation 714/2009, stating that "The maximum capacity of the interconnections […] affecting cross-border flows shall be made available to market participants, complying with safety standards of secure network operation". This implies that the Contracting Parties may reduce the amount of electricity exported to maintain a secure

[42] European Commission, 'Notice guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU)', pkt. 3.1.3.
[43] Case 2/73 *Riseria Luigi Geddo* para. 7.
[44] Directive 2009/72 Article 2 (13).

power system operation in line with the adequate transmission capacity without constituting a quantitative restriction. Consequently, restrictions taken to safeguard operational security in line with the adequacy of the grid fall outside the scope of the prohibition. Thus, measures taken to secure the operation of the transmission network will not be the focus in the following discussions. In subsection 3.2.2. and 3.2.3 I will examine which "measures [have] equivalent effect" to reduced interconnection capacity.

3.2.2 Measures having the same effect as curtailments on the quantity of electricity exported

Although the core of the prohibition covers measures lowering the quantity of electricity being traded through the interconnectors, the alternative condition, "all measures having equivalent effect" to such limitations, broadens the scope of the prohibition. As court practice illustrates, this is usually the decisive assessment providing the outer limits for the prohibition.[45] In this subsection, I will discuss the framework for this rule, followed by an analysis of how these guidelines apply to electricity in subsection 3.2.3.

The principle established by the ECJ is that the prohibition covers discriminatory measures.[46] As stated in the *Groenveld* judgement, a national measure is discriminatory if it effects cross-border trade and, because of this, provides a difference in treatment between the goods traded domestically and abroad.[47] The prohibition includes both direct and indirect discrimination.[48] This means the Contracting Parties are not permitted to explicitly exclude foreign consumers by, for example, adopting legislation that only allows exports to one EEA country. Nor establish conditions which implicitly exclude foreign consumers, such as introducing trade criteria that only some selected countries can meet.

The principle of non-discrimination requires that comparable situations should not be treated differently.[49] Thus, national measures explicitly or implicitly providing preferential treatment to the national market have the same effect as quantitative restrictions – preconditioned that

[45] See for example Case 648/18 *Hidroelectrica* para. 29 et seq; Case 72/83 *Campus Oil* para. 15.
[46] Case 15/79 *Groenveld* para. 9; Case 12/02 *Marco Grilli* para. 41 et seq.
[47] Case 15/79 *Groenveld* para 7.
[48] The Courts' statement in Case 15/79 *Groenveld* para. 7 illustrates the distinction between direct- and indirect discrimination by referring to national measures which have as "their object *or* effect the restriction of patterns of exports" (my italics).
[49] See for example Case 147/79 H*ochstrass* para. 7.

the national situation is comparable to the situation within the importing country. However, the problematic aspect of this rule is how and when it can be identified that a national measure favours the domestic market.

The threshold for concluding that a measure has a discriminatory effect on exports has undergone a broadening development in court practice.[50] As stated in the *Gysbrechts* judgement, the current threshold is that the action has "a greater effect on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State".[51] This is later supplemented by the court in the *VIPA* judgement, specifying that "any restriction on trade, even minor, is prohibited by Article 35 TFEU provided that it is not too uncertain or too indirect".[52] Considering the latter statement, I believe the threshold for stating that a measure has a discriminatory effect is extremely low. It seems sufficient that there is provided some evidence supporting that the measure has a greater effect on exporting goods. The guidelines do not require an absolute verification that this is the case, the measure simply cannot have a "too uncertain or too indirect" effect on foreign marketing.

3.2.3 The ECJ guidelines in context with electricity

To discuss how these guidelines apply to electricity, it is necessary to consider *why* the Contracting Parties would limit electricity exports to secure energy supply – besides operating the grid without overloading the power system.

The answer is that reducing the consumer demand from other EEA countries will result in a higher quantity of electricity being available for domestic consumption, consequently, preventing the risk of energy shortage at a national level. Seen from a competition perspective, this will also impact the electricity prices as determined by the market. Pricing mechanisms are an important tool for balancing the supply and demand of electricity by incentivising consumers to reduce or increase consumption to keep the system in balance.

[50] About the development and the reasoning for the widening scope of Articles 12 EEA and 35 TFEU, see European Commission, 'Notice guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU)' pkt. 6.2; Arnesen (2018) pp. 100-101; Case 205/07 *Gysbrechts,* Opinion of AG Trstenjak paras. 43-45.
[51] Case 205/07 *Gysbrechts* para. 43; On the development of the threshold, see European Commission 'Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU)' pp. 64-65.
[52] Case 222/18 *VIPA* para. 62.

Thus, limiting electricity exports to safeguard domestic consumption can reduce the prices on the national market, providing the national market with an unduly competitive advantage. Seen in context with the objectives of the internal market, this is undoubtedly a protectionist approach that the free movement rules seek to prevent through the prohibition of implementing trade barriers.

Considering that the measure only needs to have "a greater effect on [electricity] leaving the market of exporting Member State than on the marketing of [electricity] in the domestic market of that Member State", it is almost safe to say that any limitation by national entities to ensure the availability of electricity will surpass this requirement given the possible consequences, such as increased average prices in the neighbouring countries – at least if the EFTA State is considered a higher exporter of electricity than an importer.[53] This must be seen in the context of the close interconnection between the Contracting Parties and the establishment of a single European internal electricity market.[54]

Bearing in mind that the prohibition to restrict export specifies that "any restriction on trade, even minor" unless it is "too uncertain or too indirect", the prohibition does not leave much room for the Contracting Parties to adopt legal restrictions. As the Court indicates in *Hidroelectrica*, if the exporting country can trade a higher quantity of electricity, any form of measure hindering exports will be considered an illegal restriction.[55] The Court's statement did not imply that the magnitude of how much electricity could have been traded bilaterally was significant, other than that it could not have been too uncertain or indirect. A plausible assumption is, therefore, that if it can be identified a reduction in electricity being traded cross-border and the quantity does not meet the percentage available within the domestic market, it will constitute an illegal restriction unless objectively justified. Thus, based on the threshold and guidelines established by the ECJ, the Contracting Parties have little – if any– flexibility to implement restrictions on electricity exports after the prohibition established in Articles 12 EEA and 35 TFEU.

[53] See Case COMP/39.351*Swedish Interconnectors* para. 41.
[54] See section 2.3.
[55] Case 648/18 *Hidroelectrica* para. 32.

3.3 Justification of restrictions based on securing electricity supply

3.3.1 Derogation from the principle of free movement of goods

Following my concluding thoughts on the prohibition to restrict electricity exports, the Contracting Parties will, in most circumstances, be obligated to justify such measures for them to be lawful. As stated in section 2.1., the free movement of goods is a fundamental principle of the internal market. However, it is not an absolute right. The Contracting Parties are permitted to make exceptions from the prohibition to restrict exports after Articles 13 EEA and 36 TFEU, provided that the restrictions aim to protect the public interests as listed in these provisions. Consequently, this section aims to analyse the Contracting Parties' possibility to justify restrictions on electricity exports to secure energy supply within the domestic market.

The exception deriving from Articles 13 EEA and 36 TFEU are traditionally based on a proportionality assessment. The proportionality test is established through settled court practice and must be conducted based on the provisions recognised by the ECJ. The principle ensures that the Contracting Parties are provided with the opportunity to implement restrictive national measures if they are proportionate to the public interest they are intended to protect. However, for the measure to be proportionate, it is settled case law that three cumulative conditions must be fulfilled – the action must be appropriate and necessary for attaining the legitimate aim, in addition to being proportionate strictu sensu.[56]

In the following subsection, I will discuss the security of energy supply as a legitimate aim for the Contracting Parties to justify restrictions on electricity exports. I will also examine how the proportionality test has been assessed in case law and how these provisions relate to justifying restrictive electricity measures in subsection 3.3.3.

[56] See e.g., E-1/94 *Restamark* para. 58; Case 648/18 *Hidroelectrica* para. 37.

3.3.2 Security of energy supply as a legitimate aim

3.3.2.1 The concept of security of energy supply

Understanding what "security of energy supply" refers to is a precondition for discussing whether it can be a legitimate aim capable of justifying export curtailments on electricity after Article 13 EEA and 36 TFEU. Thus, in this subsection, I will provide a theoretical overview of the concept.

The security of energy supply is a general objective within all energy markets. In simplified terms, the concept refers to the ability of a power system to meet the consumers' demand at any given time without disruption, both in a short- and long-term perspective.[57] The security of supply depends on the well-functioning of all stages of the supply chain, including the production, transmission, distribution, and retail of electricity. It is a complex concept that can be characterised in many ways.

Consequently, what constitutes a "secure" supply is somewhat of a normative aspect. To operationalise the concept, I focus on three aspects covering and influencing the stability of the electricity supply. Firstly, the ability of the power system to meet the requested electricity demand relies on the availability of energy sources. If there is an energy shortage, it will reduce the quantity of electricity produced, generating a lower amount of electricity available for sale. This aspect is normally referred to as energy security within the power system.[58] The next aspect is adequate transmission capacity. If there is not enough capacity in the network to transmit the requested demand, it may cause disruptions in hours of high consumption.[59] The third aspect is the operational security of the power system. A secure supply of electricity necessitates a reliable grid – operational defaults in the power system may cause difficulties in supplying electricity to customers. Consequently, adopting measures to secure the electricity supply is the foundation of a well-functioning electricity market.

Before the implementation of the CEP, there was no legal definition of security of energy supply within the Union. Still, the EU has sought to Europeanise the concept of security of supply and, thus, create a global (or at least a European) concise definition of the term. As a result, the Commission has defined "security of supply" as: *"Ensuring […] the uninterrupted*

[57] 'Security of electricity supply'(Energi fakta Norge) <https://energifaktanorge.no/en/norsk-energiforsyning/forsyningssikkerhet/>
[58] Ibid.
[59] Ibid.

physical availability of energy products on the market at a price which is affordable for all consumers […], while respecting environmental concerns and looking towards sustainable development".[60]

The definition is suitable for illustrating the complexity of the concept. In addition to encompassing the ability of the power system to meet the consumers' demand, it includes aspects of sustainability, affordability, and environmental considerations. Every single one of these aspects opens for detailed specificities influencing the security of supply both within the national territory and at an EEA level. It raises difficult factual uncertainties in the context of securing energy supply – *e.g.,* how little energy must be available to constitute an energy shortage, and how is the operation of the power system best handled? The technically and scientifically complex circumstances in the electricity area make the concept of security of energy supply difficult to operationalise. To make the concept more tangible, I have narrowed the definition of security energy supply to "the uninterrupted physical availability of energy products on the market". This only covers the core aspect of the security of energy supply – the power system's ability to meet the consumers' demand.[61]

3.3.2.2 Securement of energy supply can be a legitimate aim

The general rule established by the ECJ is that securing the energy supply is capable of constituting a legitimate aim justifying restrictions on electricity exports.[62] Articles 13 EEA and 36 TFEU do not explicitly mention the securement of energy supply as a means for justification. It merely states that the provisions laid down in Articles 12 EEA and 35 TFEU "shall not preclude prohibitions or restrictions on [….] exports […] justified on grounds of […] public security…". Nonetheless, the listed alternatives are naturally understood as general considerations giving reasoning to the more concrete subject matter, establishing the legitimate aim that the restriction must pursue. In this context, the objective of securing the energy supply can fall within the scope of "public security".[63] This also means that restricting electricity exports to secure energy supply only can be done to protect public security.

[60] European Commission, 'Towards a European strategy for the security of energy supply' (Green Paper) p. 2.
[61] See also the Electricity Directive 2009/72, recital 51 of the preamble stating that consumer interest lay at the heart of the Directive. This aspect is covered by the definition.
[62] Case 72/83 *Campus Oil* para. 34; Case 648/18 *Hidroelectrica* para. 36.
[63] Ibid.

In section 3.3.3. I will discuss the scope of public security, followed by an analysis of which circumstances limitations on cross-border electricity flows can be justified based on securing energy supply. The analysis aims to determine when such curtailments can be proportionate to secure public security.

3.3.3 The proportionality assessment

3.3.3.1 The scope of public security in relation to electricity

Considering that restrictive export measures of electricity must be done to protect public security interests, it sets out a certain threshold for in which circumstances such actions can be proportionate to secure energy supply within the national territory. Therefore, it is necessary to establish the scope of public security to determine the proportionality of curtailments on cross-border electricity flows.

Neither the treaty articles nor the EEA Agreement provides a legal definition of "public security". However, the formulation naturally refers to a desired state in the community. Hence, it can be defined as the absence of threats against critical infrastructure or other indispensable public interests. The wording opens for a broad understanding of the derogation. Nonetheless, in accordance with settled case law and the principle of free movement of goods, Article 36 TFEU and Article 13 EEA shall be interpreted strictly.[64] Subsequently, not all uncertainties in relation to the supply of electricity fall within the scope of the provision. As explicitly stated in Article 36 TFEU and Article 13 EEA, the restrictions or prohibitions shall not constitute a means of "arbitrary discrimination or a disguised restriction on trade". This formulation can be interpreted as pinpointing the significance of upholding the general considerations that the internal market is founded on.

As stated by Advocate General Campos Sánches-Bordona, the derogation from the free movement rules is reserved to "prevent exports of electricity in emergencies caused by exceptional circumstances".[65] In line with the guideline provided by the ECJ, this statement shows that the scope of the provision is limited to crisis scenarios and establishes a high threshold for which objective circumstances are capable of justifying restrictions on electricity exports. Additionally, if the security of energy supply shall fall within the scope of public

[64] Case 95/81 *Commission v Italy* para. 27; Case E-5/96 *Ullensaker kommune* para. 33.
[65] Case 648/18 *Hidroelectrica*, Opinion of AG Campos Sánches-Bordona, para. 75.

security, the measure of restricting electricity exports must be justified based on objective considerations consistent with the protection of public security.[66]

Electricity is essential in modern European society. It is the primary power source for homes, businesses, and industries. Furthermore, it facilitates communication considering that technologies such as phones and the Internet cannot function without electricity. Additionally, electricity has also become important for transportation. However, electricity's most crucial role is enabling critical medical procedures. Medical technologies such as MRIs, x-rays, and life support systems depend on electricity, which can also make electricity vital for the survival of humans. Securing the supply of energy can therefore be important for securing public safety.

This also actualises the applicability of the precautionary principle, meaning that restrictions on electricity exports might be done as a preventive measure for risk management of the threat against human health.[67] However, the principle may only be invoked if the potentially harmful effects of a situation can be identified and scientific evaluation cannot determine the risk with sufficient certainty.[68] Thus, establishing a high threshold for the Contracting Parties to implement precautionary electricity restrictions on exports.

However, as mentioned in section 3.3.2.1., what constitutes a "secure" electricity supply is a relative aspect. It can depend on subjective and objective opinions, long-term or short-term perspectives and so on. Additionally, neither the treaty articles nor the provisions following the third energy package provide any guidelines on what constitutes an electricity crisis. Consequently, determining when an electricity crisis occurs can be a difficult task and thus, determining when restrictive measures are crucial for securing the energy supply for protecting the public interest.

It must also be noted that, as clearly stated by the ECJ and EFTA Court, measures having a purely economic purpose cannot be justified after the provision.[69] Consequently, electricity restrictions as a means of securing the energy supply at a lower price are not justifiable after the EEA Agreement and the TFEU. Summarised, the point of departure is that securing energy supply only can be a legitimate aim if the measure is proportionate to managing crisis

[66] Case 72/83 *Campus Oil* para. 34; Case 648/18 *Hidroelectrica* para. 36.
[67] European Commission '*on the precautionary principle'* p. 3.
[68] Ibid; see also the court's reasoning in Case 72/83 *Campus Oil* para. 34; Case 648/18 *Hidroelectrica* paras. 38 et seq.
[69] Case 648/18 *Hidroelectrica* para. 43.

scenarios. Furthermore, the restrictive measure must be based on objective reasoning, non-discriminatory and conducted transparently.

3.3.3.2 Restrictions on electricity exports are appropriate for securing energy supply within the domestic market

The first requirement in the proportionality test is that the national measure must be appropriate to secure the attainment of the aim pursued.[70] The functioning of the suitability criteria is as stated in Article 13 EEA to capture "arbitrary discrimination and disguised restriction on trade". By requiring a concrete connection between the restriction on electricity exports and the securement of supply as a public security measure, it ensures full transparency and, thus, avoidance of unnecessary distorted competition and preferential treatment of national consumers.

Reducing the capacity of electricity traded cross-border will decrease the demand and, consequently, make more electricity available for sale on the domestic wholesale market. Thus, in all circumstances, restricting electricity exports is suitable for securing the domestic market's uninterrupted availability of energy products – or at least to a greater extent.

3.3.3.3 Necessary for achieving a secure energy supply

The next step in the proportionality assessment is to ensure that the means "do not go beyond what is necessary to attain that objective".[71] The necessity criteria require the Contracting Parties to evaluate whether a less invasive measure could be implemented to attain the security of the energy supply. Thus, if it can be identified an alternative way for securing the electricity supply, preconditioned that it constitutes a less intrusive breach of EU- and EEA law, reducing the interconnection capacity cannot be justified.

Evidently, if any of the market-based measures in the Electricity Directive 2009/72 and the Electricity Regulation 714/2009 can secure the issue of an energy shortage, limited capacity on the interconnectors or operational defaults, restricting interconnection capacity is not necessary for securing the supply. Regarding the issue of an energy shortage, it is intuitively

[70] See for example, Case 110/05 *Commission v Italian Repbulic* para. 59; Case E-4/04 *Pedicel* para. 54.
[71] Case 648/18 *Hidroelectrica* para. 37; Case 110/05 *Commission v Italian Repbulic* para. 59; Case E-3/06 *Ladbrokes* para. 56.

only two ways to generate more electricity for the domestic market. Firstly, through innovation and development of new power plants. However, since restricting electricity exports to secure energy supply only constitutes a legitimate aim in crisis scenarios, such measures will only have a precautionary effect, preventing the risk of energy shortage from a long-time perspective. A second action is to increase electricity imports. However, this presupposes two elements – the economic welfare of the State and that there is enough electricity to be imported. If the national participants cannot compete in the electricity market due to economic insufficiencies, restricting exports will presumably be considered a necessary measure. In the event of a simultaneous electricity crisis across Europe due to energy shortage, the question becomes more complex. Still, it is difficult to see how other less invasive measures can secure the energy supply at a national level – the relevant acts do not provide for any market-based measures to secure the electricity supply in such an event.

In relation to the reliability of the power system to supply the consumers with the demanded electricity, the ECJ illustrated in the *Swedish Interconnectors* case that restrictions on electricity exports due to internal congestion cannot be considered necessary for achieving a secure energy supply.[72] The case concerned whether Svenska Kraftnät's decision to restrict cross-border transmission capacity due to internal bottlenecks were in violation of the competition rules set out in TFEU Article 102 and Article 54 of the EEA Agreement. The Commission stated that curtailments on electricity exports due to internal congestion, de facto, led to indirect discriminatory treatment between domestic and cross-border consumers in breach of competition rules.[73] The decision made by the Commission was to divide the Swedish electricity market into multiple bidding zones to solve the internal bottlenecks and, thus, avoid arbitrary restrictions on electricity exports. Although the decision is not binding for the ECJ or the EFTA State or concerns justification of restrictions after TFEU Article 36 and Article 13 EEA, it still illustrates that even though limitations on interconnection capacity must be done in accordance with the operational security and adequacy of the transmission system, there is a high threshold for concluding that a limitation is necessary if there is an underlining national issue that can be solved.

Consequently, restricting electricity exports shall establish a last-resort solution for the Contracting Parties to safeguard the energy supply at a national level. In light of this understanding, restricting electricity inter-community trade will only be considered necessary

[72] Case COMP/39.351 *Swedish Interconnectors* para. 45.
[73] Ibid, para. 42.

during the crisis period. Thus, the derogation is only justified as long as needed for securing the energy supply.[74] However, it is important to note the necessity assessment presupposes that the effect of the alternative measures identified to determine which measures are less invasive considering the free movement rules. This will also be an important element when evaluating the proportionality criteria.

3.3.3.4 Proportionate

The last step in the proportionality assessment is to evaluate whether restricting electricity exports are too invasive, even if it is considered necessary to achieve a secure energy supply.[75] The assessment involves balancing the Contracting Parties' interests in limiting interconnection capacity against the common interest of the internal electricity market, considering that all market-based measures have been exhausted. The interests in play in this context are the security of electricity supply within the national territory against the security of energy supply within the Union.[76] This is a difficult assessment given that the restriction's factual impact on the security of supply within the Union and the State must be based on scientific and technical evidence.

Nevertheless, it is settled case law that in non-harmonised areas, Member States are free to decide the level of supply they want to secure within their territory.[77] However, the state requesting derogation from the free movement rules still has the burden of proof concerning the proportionality of the restriction. Therefore, a more accurate question in this scenario, since the balancing must be conducted based on equal interests, can be: Does permit limitations on interconnector capacity have a greater impact on the security of supply in the Union than rejection will have on the level of secure supply determined by the exporting country?

One element that presumably will be important in this context is how dependent the Union is on the electricity supply from the exporting country. The more electricity the relevant state

[74] See also Case 72/83 *Campus Oil* para. 45. The Court does not explicitly state that the measure only can be justified on a temporary basis, but this still constitutes a part of the proportionality assessment and can be seen as a factor in why the restriction on import restrictions was justified.
[75] Case 126/15 *Commission v Portugal* paras. 64 and 81.
[76] The security of supply within the Union must be understood broadly in this context. Covering the security of supply within a single state, at a regional level or the Union as a whole.
[77] Case 150/11 *Commission v Belgium* para. 59.

usually exports, and the higher amount of electricity is limited, the greater the risk of influencing the uninterrupted availability of electricity in the Union. This alone may be a decisive factor if energy availability is only reduced at a national level. However, in more complex situations, it is evident that other factors must come into play. For instance, in the event of a simultaneous electricity crisis due to energy shortage across Europe, such an approach would easily create geopolitical unsteadiness and distort the whole functioning of the internal electricity market. Therefore, solidarity will be crucial in such events.

3.4 Concluding thoughts on the rules prior to the Clean Energy Package

In this chapter, I have discussed and analysed whether the EFTA States have the flexibility to restrict electricity exports to secure electricity supply for national consumption, to identify the threshold imposed by primary law for setting limitations on the amount of electricity being traded cross-border.

I have examined the scope of the prohibition to restrict electricity exports after the principle of the free movement of goods deriving from Articles 12 EEA and 35 TFEU, which has shown that all curtailments on electricity exports are prohibited unless they are non-discriminatory, or the effect of the restriction is too uncertain or too indirect. Regarding restrictions on the interconnection capacity of electricity to secure energy supply, I have identified that only restrictions taken to safeguard the operation of the power system and in line with the adequate transmission and distribution capacity fall outside the scope of the prohibition. Export curtailments taken to secure a higher quantity of electricity for national consumption will presumably always be considered discriminatory after the guideline established by the court in *Hidroelectrica* presupposed that the limited quantity can be traced.[78]

Consequently, the analysis has shown that the EFTA States, in most circumstances, will be obliged to justify why restricting electricity exports is proportionate to secure energy supply within the national territory. The discussion shows that restrictions are capable of being justified by means of securing energy supply for domestic consumption, and I have stated that limiting cross-border flows of electricity always will be an appropriate measure for

[78] Case 648/18 para. 32, cf. section 3.2.3.

safeguarding the energy supply. However, such restrictions will only be considered necessary if there are no other less invasive measures capable of securing the level of protection needed for a stable energy supply and can only be implemented as long as the electricity crisis requires it. Additionally, electricity restrictions cannot have a greater impact on the security of energy supply in the Union than the limitation will have on the energy supply for national consumption.

Nevertheless, considering the factual uncertainty on the effect limitations on electricity exports may have on the security of energy supply, especially in circumstances of an energy shortage, it is difficult to see how the Contracting Parties would be able to provide clear enough evidence to support their claim that such measures would be proportionate – at least on a general level. In my opinion, the factual complexity of the internal electricity market influences the threshold for the Contracting Parties to restrict electricity exports, as they need to document the effects of such restrictions to justify the derogation. Arguably, the threshold for justifying restrictions on interconnection capacity after Articles 12 and 13 EEA must be considered high and does not provide the Contracting Parties with much flexibility to restrict electricity exports to secure energy supply at a national level.

4 The Risk Preparedness Regulation Article 16

4.1 Cooperation in the spirit of solidarity in electricity crisis

After looking at the EFTA States' possibility to restrict electricity exports after the TEP, I will in this chapter evaluate the legal situation within the EU pillar following the rules laid down in the CEP. As mentioned in section 1.4.2. these rules are not implemented in the EEA Agreement.

The security of supply constitutes one of the three pillars of the European energy policy now implemented in TFEU Article 194 (1) (b). From an EU perspective, the security of energy supply provides legal obligations for the European Parliament and Council when adopting and amending legislation, in addition to setting out requirements for the interaction between the Member States and constituting a common area of responsibility across the Union. The security of electricity supply is defined as "the ability of an electricity system to guarantee the supply of electricity to customers with a clearly established level of performance, as determined by the Member States concerned".[79]

This chapter aims to identify the threshold for the Member States to restrict electricity exports based on securing the energy supply after the RPR Article 16. The RPR is a part of the CEP implemented in the EU and has no equivalent in the EEA structure. It provides rules for how the Member States shall cooperate to prevent, prepare for and handle electricity crisis in line with the objectives of the Energy Union.[80]

The establishment and development of a single electricity market have created an interdependence between the Member States and, thus, generated a greater need for solidarity and trust to uphold the stabilisation on the European market. As recognised by the European Parliament and the Council, the cooperation between the Member States is profound for the Energy Union to survive the transformation to renewable energy sources and the increased interconnection in the European market.[81] Thus, as founded in Article 194 (1) TFEU,

[79] The RPR 2019/941 Article 2 (1).
[80] Ibid Article 1, cf. recital 1 of the preamble.
[81] Ibid, recital 1 of the preamble.

measures taken to handle an electricity crisis must be done "in the context of the establishment and functioning of the internal market" and "in a spirit of solidarity between the Member States".

To conduct my analysis, I have structured the chapter as follows. Section 4.2. discusses restrictions on electricity exports under the scope of market-based measures. This is followed by an analysis of whether non-market-based curtailments on cross-border flows can be justified based on securing energy supply in section 4.3. The distinction between market-based and non-market-based measures distinguishes between compliant and non-compliant actions with the rules governing the internal electricity market.[82] This chapter aims to answer the research question; "*do the Member States have the flexibility to restrict electricity exports to secure electricity supply for national consumption, following the CEP?*" and to identify the threshold imposed by the RPR for implementing such measures.

4.2 Market-based restrictions on electricity exports

4.2.1 Main rule: Obligation to comply with market rules in electricity crisis

The RPR regulates the Member States' right to adopt measures influencing the import and export of electricity. Consequently, the RPR Article 16 is a drastic change compared to the EEA Agreement because it harmonises the legal issue in question by implementing specific rules for electricity trade within the Union that are binding upon the Member States. In this section, I will evaluate the scope of Article 16 (1) as the main rule for establishing whether the Member States are permitted to restrict electricity exports within the rules governing the electricity market.

The main rule following Article 16 (1) RPR is that the Member States are allowed to implement market-based measures in the event of an electricity crisis without having to justify

[82] Ibid, Article 2 (14).

it. This covers all national-, regional- and bilateral actions which the Member States may enforce in an electricity crisis, including curtailments on electricity exports. [83]

However, the scope of Article 16 (1) raises two main questions in this context. Firstly, if limitations on electricity exports based on securing energy supply can constitute a market-based measure and secondly, if measures curtailing electricity exports in other circumstances than an electricity crisis fall outside the scope of Article 16 (1). Thus, there are limits imposed in the RPR regarding the scope of electricity restrictions granted by it, and these will be the subject of discussion in the following subsections.

4.2.2 The rules governing the internal electricity market and system operation

4.2.2.1 Electricity Regulation 2019/943: Facing the challenge of export limitations due to internal congestion

Article 16 (1) RPR states that measures taken in an electricity crisis must comply with "[t]he rules governing the internal electricity market *and* system operation". [84] The reference gives a notion of a broad spectrum of provisions. As mentioned in point 2.3., the rules governing the internal electricity market within the EU follow from Article 194 TFEU and the CEP. This includes Directive (EU) 2019/944, Regulation (EU) 2019/943 and Regulation (EU) 2019/943, establishing rules for the electricity market.[85] In addition, Regulations 2017/1485 and 2017/2196 and Directives 2016/1148 and 2018/114 will be applicable as they provide rules for the system operation.[86] However, the important legal act in this context is the Electricity Regulation 2019/943, which establishes rules for the functioning of the internal electricity market.

Although the Electricity Regulation 2019/943 carries on many of the same rules as previously established in Electricity Regulation 714/2009 implemented in the TEP, it is especially one amendment that is significant to the Member States' flexibility to curtail electricity exports to safeguard energy supply for national consumption. The relevant modification follows from

[83] Ibid, Article 10 (2).
[84] My italics.
[85] See the RPR 2019/941 recital 1 of the preamble.
[86] Ibid, recital 5 of the preamble.

Article 16 in the Electricity Regulation 2019/943, providing rules for congestion management and capacity allocation.[87] As will be discussed in the following subsection, this provision provides the Member States with some flexibility to curtail electricity exports to safeguard electricity supply.

The importance of managing congestion to avoid unduly restrictions on electricity trade lies within the meaning of "congestion". The Electricity Regulation 2019/943 defines congestion as "a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows".[88] As the definition illustrates, congestion threatens the reliability of the power system and, thus, the security of supply.

Restrictions on electricity export have, after the previous energy packages, been especially challenging to handle due to insufficient transmission capacity on the interconnectors.[89] A reason for this is that the demand sometimes exceeds the quantity of electricity capable of being transmitted through the interconnectors, which results in network congestion. The traditional way to manage internal congestion has been by curtailing interconnector capacity,[90] which can be explained as "pushing congestion to the border" or as "undue discrimination between internal and cross-zonal exchanges".[91]

The Electricity Regulation 2019/943 has recognised this challenge. It has, in addition to the modification in Article 16, as will be discussed in the following subsection, established a positive obligation for national operators to ensure that the electricity markets are operated in line with the principle that barriers to cross-border electricity flows "shall be progressively removed".[92]

The formulation not only states that restrictions on cross-border trade are unlawful, but it also implies that the updated legal framework is meant to set out even stricter limits for the Member States' possibility to adopt such measures than previously followed by the TEP. This development is imperative for the EEA and EU comparison. It stresses, as also stated in

[87] The Electricity Regulation 2019/943 Article 2 (66) defines "capacity allocation" as "the attribution of cross-zonal capacity".
[88] The Electricity Regulation 2019/943 Article 2 (4).
[89] Rumpf (2020) p. 409; Hancher (2023) p. 18.
[90] See also Case COMP/39.351 *Swedish Interconnectors*; Case AT.40461 *DE/DK Interconnector*; Bergqvist & Anchustegui (2019) p. 11.
[91] Rumpf (2020) p. 411.
[92] The Electricity Regulation 2019/943 Article 3 (h).

the preamble, that it is crucial that the market removes existing barriers to cross-border trade.[93] Thus, its purpose is to limit the previously given flexibility for the Member States to curtail electricity cross-border trade.

4.2.2.2 70% of the available capacity on the interconnectors shall be utilised

Article 16 of Regulation 2019/943 provides general principles for capacity allocation and congestion management. Similar to the previous Electricity Regulation 714/2009, "[t]he maximum level of capacity of the interconnection and the transmission networks affected by cross-border capacity shall be made available to market participants complying with the safety standards of secure network operation".[94] In simplified terms, the main rule is that Member States shall trade the maximum amount of electricity capable of being transported without endangering operational security.

However, without a clear notion of the threshold value for the "maximum possible capacity" or minimum obligation, statistics offered by ACER have shown that only a limited capacity of the interconnectors has been exploited for electricity exports. In 2016, only around 26% of the interconnectors' capacity was utilised, thus restricting electricity exports to a greater extent than necessary for securing the operation of the power grid.[95]

Article 16 (8) in the Electricity Regulation 2019/943 states that transmission system operators are prohibited from limiting the volume of interconnection capacity as a remedy for solving internal congestion or managing flows resulting from transactions internal to bidding zones. In contrast to the previous rule, the provision also sets out a minimum capacity threshold, supplementing the principle of maximising the interconnectors' capacity for cross-border electricity flows. It states, "[t]he minimum capacity shall be 70% of the transmission capacity respecting the operational security limits".[96] Consequently, this leaves the Member States with the flexibility to use 30% of the available capacity for reliability margin, loop flows on each critical network element.[97] Therefore, limiting the available capacity on the

[93] Ibid, Recital 23 of the preamble.
[94] Ibid, Article 16 (4).
[95] ACER 'recommendation of the Agency for the Cooperation of Energy Regulators of 11 November 2016 on the Common Capacity Calculation and Redispatching and Countertrading Cost Sharing Methodologies' p. 5.
[96] The Electricity Regulation 2019/943 Article 16 (8) (a)(b).
[97] Ibid, Article 16 (8).

interconnectors up to 30% of the possible amount to secure the energy supply constitutes a market-based measure permitted after the internal electricity rules.

Seen in context with the statistics offered by ACER, the minimum 70% target has a tremendous factual impact on the Member states' possibility of solving internal congestion issues and, thus, limit cross-border trade in comparison with the previous rule established in the TEP. The threshold value enforces the principle of progressively removing discriminatory curtailments on cross-border electricity flows. Thus, the minimum 70% target restricts the Member States' possibility to limit cross-border trade to a greater extent than the previous rules in the TEP, considering that the Member States must solve the internal congestion issues within the 30 % flexibility limit. This forces the Member States to transact from restricting 74% of the electricity capable of being transferred cross-border to utilise the equivalent capacity.

Nevertheless, the Electricity Regulation 2019/943 allows three temporary market-based derogations from the 70% rule.[98] Pursuant to Article 16 (3), a lower capacity threshold can be established through coordinated capacity calculation by regional coordination centres. In contrast, Article 15 (2) allows Member States to reduce the capacity threshold in a national action plan. However, the relevant exemption in this context follows from Article 16 (9), stating that a derogation may be granted "where necessary for maintaining operational security", presupposing that it is not related to a curtailment of capacities which has already been allocated pursuant to Article 16 (2) of the Electricity Regulation 2019/943. I will discuss the meaning of this limited exception in section 4.3.1.1.

However, curtailments on cross-border electricity trade can only be considered necessary for maintaining operational security if all other market-based measures have been exhausted. As the Commission decisions in *Swedish Interconnectors* and *DE/DK Interconnectors* illustrate, allowing Member States to derogate from the 70 % rule if there are other market-based measures capable of securing the system operation would provide the exporting State with an unjustified advantage in breach of the non-discrimination principle due to preferential treatment of internal consumption.[99]

[98] Ibid.
[99] See also Case COMP/39.351 *Swedish Interconnectors*; Case AT.40461 *DE/DK Interconnector.*

Subsequently, limitations on electricity exports in line with the 70% target of electricity or where such measures are necessary for securing the operation of the power grid are considered market-based- measures within Article 16 (1) of the RPR. However, as explained, these rules only provide the Member States with a small margin of appreciation in exceptional circumstances and establish a higher threshold for the Member States to limit cross-border trade to safeguard the adequacy and operational security of the interconnectors in comparison with the TEP.

4.2.3 Restrictions on electricity exports are prohibited, even in electricity crisis

After clarifying in which circumstances restrictions on electricity exports can be market-based, the next subject is if Article 16 (1) only applies to electricity crisis. The fact that Article 16 (1) only regulates measures taken to "prevent or mitigate electricity crises" presents two interpretive alternatives for determining the scope of the provision. On the one hand, it might be understood as only regulating measures in the event of an electricity crisis and, thus, raising the legal issue as to whether the Member States' flexibility to limit cross-border flows of electricity only is partially harmonised through the implementation of the CEP. Alternatively, it can be comprehended as establishing that the Member States must comply with market rules *even* in crisis scenarios. As will be discussed, the latter interpretation is the only option in line with the objectives and purposes of the internal electricity market.

The RPR does not directly answer how the provision is meant to be interpreted. However, because the RPR is meant to implement the objectives in Article 194 TFEU, the scope of Article 16 (1) must be seen in the context of these provisions.[100] Seen as the internal energy market sets out an obligation for the Member States to act in a spirit of solidarity to ensure the functioning of the energy market and secure the supply of energy within the Union, this can only be attained through close cooperation in all situations.[101] As established in the *OPAL*-judgement, the principle of energy solidarity has a binding legal effect on the Member States and the EU institutions. In addition to constituting a fundamental principle of EU law.[102] Although the ECJ does not explicitly define the scope of the principle, it nonetheless sets out

[100] See the RPR 2019/941 Article 1 and recital 1 of the preamble, with reference to TFEU Article 194.
[101] See TFEU Article 194 (1), in addition to the RPR 2019/941 Article 1, cf. recital 1 and 6 of the preamble.
[102] Case 848/19 *OPAL* paras. 38 and 43.

mutual obligations and rights for the Member States to act in cooperation and trust within the energy sector to secure energy supply. Additionally, the functioning of the internal electricity market presupposes that the Member States ensures that consumers have access to competitive market prices from a wide range of suppliers, regardless of nationality. Trade barriers on electricity distort competition and, thus, the objectives governing the internal market. Although the RPR regulates how the Member States shall act in an electricity crisis, there can be no doubt that the provision must be understood as requiring, as the main rule, that measures derogating from the market rules are prohibited, even to prevent or mitigate electricity crisis.

Additionally, the RPR establishes a common approach to what constitutes an electricity crisis. As defined in Article 2 (6) RPR, an electricity crisis is "a present or imminent situation in which there is a significant electricity shortage, […] in which it is impossible to supply electricity to customers".[103]

The definition raises several legal questions, such as how "imminent" must the situation be to be characterised as a crisis? What constitutes a "significant" electricity shortage, and are there any criteria for the cause of "electricity shortage"? Can the energy shortage be a consequence of disrupted energy security, adequacy, and operational security, or is it limited to a particular source? What is the threshold for concluding that it is "impossible" to supply electricity to customers – is it sufficient that the supply does not meet the demand, regardless of the distinction in quantity not met, or does it introduce a *de minimis* rule? All these issues need to be addressed to identify an electricity crisis. However, the RPR implements methodologies for Member States to identify crisis scenarios.[104] For this assignment, it is sufficient to note that the definition of electricity crisis represents a high threshold for the Member States to limit electricity exports presupposed that such measures do not comply with the internal market rules, as will be further discussed in section 4.3.

Regarding restrictions on electricity exports, the RPR aims to *strengthen* the internal electricity market by avoiding undue curtailments on cross-border flows.[105] This implies that the Regulation sets out even stricter rules than previously followed by the general prohibition

[103] The RPR 2019/941 Article 2 (9). The definition provides two alternatives for ascertaining that there is a significant electricity shortage. However, because this assessment is meant to provide a general overview of the provision, the risk-preparedness plan of each Member State is not of interest.
[104] Ibid, Articles 5 to 9.
[105] Ibid, recital 6 of the preamble.

to restrict exports after Articles 35 and 36 TFEU – which only allowed exceptions in crisis scenarios.[106] Thus, the provision seems to establish an absolute prohibition to enforce non-market-based curtailments on electricity exports in all circumstances unless Article 16 (2) or (3) allows for derogations.[107]

4.3 Non-market-based restrictions on electricity exports

4.3.1 Can restrictions on electricity exports to secure energy supply be assessed after Article 16 (2), (3) or both?

As discussed in section 4.2, limiting electricity exports within the minimum 70% target and, where necessary for securing the grid operation constitutes market-based measures. Instead, this section will discuss the Member States' possibility to justify non-market-based restrictions on electricity exports to secure energy supply within the national territory. Thus, the following discussion emphasises on restrictions on the interconnection capacity that fall below the minimum rule and is unnecessary for maintaining operational security.

However, Article 16 RPR provides two possible provisions for assessing whether restrictions on electricity exports can be justified to secure energy supply. It is not intuitive how these provisions relate to each other or if both are applicable for assessing the Member States' flexibility to restrict electricity exports.

Article 16 (2) establishes guidelines for when "non-market-based measures" is permitted in an electricity crisis. This covers all curtailing measures on electricity exports that are not permitted after the rules laid down in the CEP.[108] Nonetheless, Article 16 (3) states that "transaction curtailments" only can be initiated in accordance with Article 16 (2) of the Electricity Regulation (EU) 2019/943 and the rules adopted to implement that provision. Consequently, the wording in Article 16 (3) implies that the general rule covering the

[106] See section 3.3.3.1.
[107] See also the RPR 2019/941 recital 6 of the preamble, where it is expressly stated that the Regulation aims at strengthening the internal electricity market by "in particular avoiding undue curtailment of cross-border flows and cross zonal transmission capacities".
[108] Ibid, Article 2 (14).

justification of non-market-based measures must be interpreted narrowly, not covering measures constituting barriers to electricity trade. If this is the case, Article 16 (2) is not applicable for assessing when restrictions on electricity exports can be justified based on energy security for national consumption.

Thus, to analyse the Member States' flexibility to restrict electricity exports to ensure electricity supply, it necessitates a clarification on the scope of Article 16 (3) and the applicability of this provision in relation to securing energy supply through export restrictions.

4.3.1.1 The scope of Article 16 (3) RPR and the Electricity Regulation 2019/943 in relation to restrictions on electricity exports

The question sought to be answered in this section is whether all restrictions on electricity exports fall within the scope of Article 16 (3) and, thus, can only be initiated following Article 16 (2) in the Electricity Regulation.

The CEP does not provide a legal definition of transaction curtailments. Nonetheless, Article 16 (3) specifies three types of curtailments that fall within its scope. Hereby, "curtailment of already allocated cross zonal capacity", "limitation of provision of cross zonal capacity for capacity allocation", and "limitation of provision of schedules". [109] Firstly, transaction curtailments cover limitations on already assigned energy transfers between different bidding zones in line with the capability of the interconnectors to accommodate the supply. Furthermore, it also covers restrictions on electricity supply which the transmission system is capable of transferring between bidding zones. And finally, it includes limitations of the provision of schedules. The common aspect of these restrictions is that they are related to electricity trading between different bidding zones, making this a defining aspect of the rule. Subsequently, the scope of Article 16 (3) seems to be directed at quantitative limitations on electricity trade.

Concerning export restrictions implemented to secure supply for national consumption, the alternatives suggest that if the Member States limit available electricity as a precautionary or

[109] Ibid, Article 2 (5) defines "cross zonal capacity" as "the capability of the interconnected system to accommodate energy transfer between bidding zones"; See also the definition of "capacity allocation" in Article 2 (21).

corrective measure, it will be considered a transaction curtailment. It must also be noted that Article 16 (3) only refers to these alternatives as examples of transaction curtailments. Article 16 (3) states that transaction curtailment, *including* the mentioned measures, must be activated only in accordance with the Electricity Regulation Article 16 (2). This implies that the list is not exhaustive and, thus, that all restrictions on trade fall within the scope of Article 16 (3) RPR. Thus, it is necessary to establish in which circumstances transaction curtailments can be initiated after Article (2) of the Electricity Regulation 2019/943.

Following Article 16 (2) of the Electricity Regulation 2019/943, transaction curtailment procedures shall be used "only in emergency situations, namely where the transmission system operator must act in an expeditious manner and redispatching or countertrading is not possible". [110] Additionally, such limitations must be applied in a "non-discriminatory manner". The provision establishes three criteria that need to be fulfilled to justify restrictions on electricity exports. Firstly, such measures can only be activated in emergency situations where transmission system operators must take prompt decisions. Secondly, they can only be activated as a last resort if other measures are not possible, and furthermore, transaction curtailments must be applied in a non-discriminatory manner.

The fact that transaction curtailments can only be activated in emergencies implies that the threshold for the Member States to secure energy supply by curtailing cross-border electricity trade is very limited. The reasoning is that such limitations can only be initiated in exceptional circumstances where there is a significant electricity shortage and measures to relieve physical congestion cannot accommodate secure energy transfer. Additionally, considering that transaction curtailments must be applied in a non-discriminatory manner, the limitations can presumably only be directed towards the area at risk of disruptions. Meaning that the Member States are not permitted to limit cross-border capacity in other areas than necessary for securing stability within the grid. Considering that capacity allocation is an important tool for the Member States to secure the adequacy and operational security of the power grid, Article 16 (2) seems not to allow restrictions aimed at decreasing foreign demand for stabilising supply within the national territory, but merely within the natural limits of the interconnectors.

[110] See the Electricity Regulation 2019/943 Article 2 (26) and (27) for the definitions of "redispacthing" and "countertrading". The important aspect of these elements in this context is that they constitute mechanisms for relieving physical congestion.

4.3.1.2 The scope of Article 16 (2) RPR: Non-market-based measures must be aimed at securing the electricity supply

Although it is my perception that Article 16 RPR only allows restrictions on electricity exports to be initiated in accordance with Article 16 (2) of the Electricity Regulation 2019/943, the uncertainty concerning the correlation between Article 16 (2) and (3) RPR makes it necessary to evaluate if the former provision *can* allow the Member States to decrease cross-border electricity flows for energy security reasons.

The main rule established in Article 16 (2) is that non-market-based measures can be justified if it is activated in an electricity crisis only as a last resort, provided that all market-based measures have been exhausted or where it is apparent that the rules governing the internal electricity market are not sufficient to stabilise the electricity supply.[111] Accordingly, the provision clarifies that securing energy supply is not only a legitimate reason capable of justifying deviations from the market rules but it is also delimited thereof.

However, although Article 16 (2) allows derogations from the rules governing the internal market in an electricity crisis, such measures cannot unduly distort competition and the effective functioning of the internal electricity market. The criteria established for ensuring that these objectives are attained is that the action taken by the Member States must be necessary, proportionate, non-discriminatory, and temporary. In addition, the Member States must ensure transparency by informing relevant stakeholders of the application of non-market-based measures.[112]

The criteria are essentially coincident with the conditions after the TEP and Article 36 TFEU. Nonetheless, in contrast with the previous assessment, which allowed for a derogation from the principle of non-discrimination, the justification of non-market-based measures following Article 16 (2) does not. The main rule after Articles 12 EEA and 35 TFEU is that discriminatory restrictions are prohibited and that such measures are capable of being justified if they are proportionate in relation to securing energy supply. Thus, allowing the Member States to derogate from the principle of non-discrimination. However, the RPR Article 16 does not allow the same exception. As previously mentioned, the non-discrimination principle requires that similar situations are treated in the same way and that dissimilar circumstances

[111] The RPR 2019/941 Article 16 (2).
[112] See also the RPR 2019/941 recital 19 of the preamble, stating that "[a]ll envisaged non-market-based measure should comply with the rules laid down in this regulation".

are handled differently. In relation to limitations on electricity exports to secure energy supply at a national level, this will to a large extent, build on the same considerations as after the Third Energy Package, as the non-discrimination principle is a general principle of law. Consequently, as stated in section 3.2.3, it is difficult to foresee that restrictions on electricity exports aimed at decreasing foreign demand, in any circumstance, will be considered a non-discriminatory measure. Thus, although the RPR Article 16 (2) presents an opportunity for the Member States to justify non-market-based restrictions on cross-border electricity trade to secure energy supply, the provision does not seem to allow such a derogation.

4.4 Concluding thoughts on the legal situation following the Clean Energy Package

I have in this chapter discussed whether the Member States have the flexibility to restrict electricity exports to secure electricity supply for national consumption after the CEP. The analysis has aimed to establish how wide a margin of appreciation the Member States are given to secure electricity supply within the national territory.

After having looked at the scope of Article 16 (1) of the RPR considering limitations on electricity exports, I have identified that the main rule is that Member States are allowed to curtail cross-border flows of electricity without having to justify it, presupposed such flexibility is provided for in the rules governing the internal electricity market. This rule applies in all circumstances, even in an electricity crisis.

In this context, the Electricity Regulation 2019/943 Article 16 (8) allows the Member States to limit cross-border flows up to 30 % within the capable transmission capacity respecting operational security limits. Thus, Member States can also limit electricity exports if the power grid's reliability requires it. Consequently, curtailments on electricity cross-zonal trade to safeguard operational security can constitute a market-based measure. However, this apparent flexibility is much narrower than at first thought. The analysis has shown that the internal electricity market rules do not seem to provide the Member States with much flexibility to implement such restrictive measures. The market rules do not allow Member States to restrict electricity exports to handle energy shortages by decreasing foreign demand – they are only aimed at safeguarding the reliability of the transmission network in line with the capable capacity of the interconnectors.

Thus, this has allowed me to establish that restrictions on electricity exports in most circumstances must be subject to strict justification standards. However, Article 16 (2) of the Electricity Regulation 2019/943 seems only to establish a narrow exception for the Member States to curtail electricity exports, namely where measures for relieving physical congestion cannot safeguard that the requested electricity demand is met. Presupposed that Article 16 (2) is applicable for justifying restrictions on electricity exports, this does not seem to change the strict approach. Subsequently, the threshold for the Member States to curtail electricity exports after the Article 16 RPR must be considered high and does not leave much flexibility to restrict electricity exports to secure the energy supply.

5 Conclusions

As mentioned in the introduction, this thesis has aimed to identify whether there is a different threshold for restricting electricity exports within the EU- and EFTA pillars to determine the current legal situation within the EEA.

The state of law in the EEA before the Clean Energy Package – also referring to the current legal situation within the EFTA pillar – is that the Contracting Parties are given the flexibility to limit the available amount of electricity for cross-border trade presupposed that this is a consequence of inadequate network capacity or if transferring the available electricity threatens the reliability of the power grid. The closer the power grids are to their critical operation points, the higher the potential risk of blackouts and other failures in the event of external influence, such as extreme weather conditions. Thus, as the main rule, the EFTA States are only permitted to limit cross-border electricity trade within the natural limits of the network design.

Regarding curtailments on cross-border flows of electricity to increase or stabilise the energy security within the domestic market will presumably, in most circumstances, constitute a discriminatory measure after the prohibition in Articles 12 EEA and 35 TFEU. Although such measures can be justified after Articles 13 EEA and 36 TFEU, the provision sets out a high threshold for establishing that safeguarding national consumption over the uninterrupted supply in the Union will be considered proportionate – even in an electricity crisis. Seemingly, this may be closely linked to the factual uncertainties regarding what constitutes an emergency prior to the CEP and the burden of proof for deciding the expected effect of the possible solutions.

The harmonisation of rules governing cross-border electricity trade within the CEP and the RPR, namely, codifies the principles established before the CEP. However, there are some novelties with the implementation of the CEP, illustrating that the purpose and objective behind the harmonisation have been to strengthen the internal market by avoiding undue curtailments on cross-border flows. In other words, with the entry into force of the CEP, the EU pillar has less room for restricting imports or exports of electricity than when compared to the situation in the EFTA pillar. I will discuss this in more detail below.

Similar to the guidelines applicable within the EFTA-pillar, the RPR Article 16 permits the Member States to curtail electricity exports within the physical limits of the power network to

secure system reliability and stability. Nevertheless, the obligation for the Member States to utilise a minimum of 70 % of the interconnection capacity requires the Member States to take greater responsibility for solving internal congestion issues. Consequently, establishing a higher threshold for in which circumstances it is deemed necessary to restrict the quantity of electricity traded cross-border to respect operational security limits. Thus, providing the Member States with less flexibility to restrict electricity exports than after the TEP.

Additionally, from my perception, it is difficult to see that the Member States are provided with any flexibility to limit electricity exports to secure the availability of electricity for domestic consumption. Considering that the RPR Article 2 (1) refers to the security of supply as "the *ability of an electricity system* to guarantee the supply of electricity to customers with a clearly established *level of performance*", the legal definition does not even seem to consider the availability of electricity as an aspect of secure supply within the CEP. This is also supported by my analysis of Articles 16 (2) and (3), which suggest that the provisions exclude the possibility of justifying such measures. However, seeing that the TEP did not establish a concise definition of the security of supply, it is difficult to establish if this is a possible novelty or if it might clarify the previous understanding of the security of supply as a legal concept.

Nonetheless, and to conclude answering the thesis research question, my analysis has shown that it is possible to identify a difference in the threshold for restricting electricity exports within the EU- and EFTA pillars. Although both pillars have a limited margin of appreciation, the threshold appears to be higher for the Member States than the EFTA states. Furthermore, because the CEP is not yet implemented in the EEA Agreement, the homogeneity principle does not apply. Consequently, the rules do not directly affect the application of law and the limits in the EEA Agreement.

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