

**Annual
Report
2018**

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Foreword

Twenty-five years ago, the people of Iceland and Norway joined their European neighbours to establish a European Economic Area (EEA) that now spans 31 countries and 500 million citizens. Liechtenstein joined the following year, in 1995.

The EEA has been a solid foundation for social and economic progress. Working together, the EEA States have been able to improve people's lives by generating favourable economic conditions for work, by raising standards for social protection, the environment and health, and by opening up new opportunities to travel, work, study, and live throughout the EEA.

Iceland, Liechtenstein and Norway, together with the EFTA Surveillance Authority (ESA) and the EFTA Court, have developed the EFTA pillar of the EEA over the past 25 years and have shaped this pillar through their ideas and values.

In that time, the EEA generation has grown up with a wealth of opportunity, and in an environment in which the benefits of the EEA can be seen and felt in everyday life. Meanwhile the cohesion and international cooperation generated by the EEA has become increasingly important as a foundation for our society in a time of rapid and global change. It is important that the EEA generation, and all Europeans, know about the impact the EEA agreement has on their lives.

At ESA we help enhance Iceland, Liechtenstein and Norway's continued successful participation in the Internal Market by monitoring their compliance with the EEA Agreement.

In this annual report, you can read how ESA continuously works to safeguard the Agreement. During 2018 ESA continued to pursue objectives such as equal treatment between men and women, environmental protection, animal welfare, food safety, transport security and fair competition, amongst other things. We work to make sure that every EEA citizen can reap the full benefits of the Agreement.

Bente Angell-Hansen
President

Frank J. Büchel
College Member

Högni S. Kristjánsson
College Member

This is ESA

The EFTA Surveillance Authority (ESA) monitors compliance with the rules of the European Economic Area (EEA) in Iceland, Liechtenstein and Norway, enabling these three States to participate in the European Internal Market.

The EEA was established by the Agreement on the European Economic Area in 1994 and joins the three states with the 28 Member States of the European Union (EU) in a common market.

The purpose of the EEA Agreement is to guarantee, in all EEA States, the free movement of goods, persons, services and capital – “the four freedoms”.

Because of the Agreement, EU law on the four freedoms, state aid, and competition rules for undertakings is incorporated into the domestic law of the participating EFTA States so that it applies throughout the EEA, ensuring a common market with common rules.

This removes barriers to trade and opens up new opportunities for over 500 million Europeans. The Internal Market of the EEA creates jobs and growth and adds to the international competitiveness of the EEA States.

The EEA Agreement ensures equal rights to participate in the Internal Market for all citizens and undertakings, and equal conditions of competition.

It also provides for cooperation across the EEA in important areas, such as research and development, education, social policy, the environment, consumer protection, tourism and culture.

The success of the EEA Agreement depends upon uniform implementation and application of the common rules. Therefore, the Agreement provides for a system where the European Commission works with the EU Member States, while ESA works with the EFTA States, to ensure compliance with EEA law.

The role of ESA

ESA ensures that Iceland, Liechtenstein and Norway respect their obligations under the EEA Agreement. At the heart of the Agreement is the principle of loyal cooperation.

ESA operates independently of the EFTA States and is based in Brussels. The role of ESA in ensuring compliance with EEA law is to protect the rights of individuals and market participants and make sure that their rights are not violated by rules or practices of the EFTA States or companies within those States.

ESA also enforces restrictions on state aid, assessing its compatibility with the functioning of the Internal Market. ESA has the power to order repayment of unlawful state aid.

ESA likewise ensures that companies operating in the EFTA States abide by the rules relating to competition. ESA can investigate possible infringements of EEA provisions, either on its own initiative, or on the basis of complaints. It can impose fines on individual undertakings and assess mergers between undertakings where certain thresholds are met.

ESA can request a change in national rules or practices that are in breach of EEA law. Unless the State concerned decides to take appropriate action in response to ESA's request, ESA may initiate proceedings against the relevant EFTA State at the EFTA Court.

In monitoring and enforcing the EEA Agreement, ESA has powers that correspond to those of the European Commission and there is close contact and cooperation between the Commission and ESA. The two institutions oversee the application of the same laws in different parts of the EEA.

ESA's organisation



ESA is led by a College, which consists of three members. Although appointed by the EFTA States, the College members undertake their functions independently and free of political direction.

On 1 January 2018 a new College took office. The three College members are appointed until 31 December 2021. Ms. Bente Angell-Hansen (Norway) is appointed

President until 31 December 2019. Frank J. Büchel (Liechtenstein, pictured left) and Högni S. Kristjánsson (Iceland, pictured right) are College members.

Under the leadership of the College, ESA employs experts in law, economics, veterinary science and other fields from all over Europe. To carry out its role ESA is divided into the following departments:

- Administration Department, led by Director Anders Ihr
- Internal Market Directorate, led by Director Gunnar Thor Pétursson
- Competition and State Aid Directorate, led by Director Gjermund Mathisen
- Legal and Executive Affairs Department, led by Director Carsten Zatschler

Human resources

At the end of 2018, ESA had a total of 64 established staff members on fixed-term and temporary contracts, representing 18 nationalities and including 27 EFTA nationals. Of these staff, 55% were female and 45% were male, and 45% of those in management positions were female.

Each year, ESA engages several trainees from the EFTA States on an 11-month programme to work in the fields of Internal Market, Competition and State Aid, Legal and Executive Affairs and Communications.

In accordance with ESA's staff regulations established by the EFTA States, all fixed-term staff are employed for a three-year period, normally renewable only once. As a

consequence, the turnover of staff is high, and the average length of time that fixed-term staff members work at ESA is just under five years. This results in [employment opportunities](#) for highly qualified candidates within ESA's fields of activity arising frequently.

Core values

Integrity	<p>ESA's core values – <i>Integrity, Openness and Competence</i> – are key elements of our ongoing operations. In 2018, ESA continued to ensure that they are embedded in all of its internal and external activities.</p>
Openness	
Competence	

Integrity: ESA operates in a fair, objective and independent manner. ESA's staff take ownership of their tasks and carry out these tasks in an environment of open discussion and high ethical standards.

Openness: ESA's communication and outreach activities are aimed at increasing knowledge about our work and tasks as well as strengthening compliance with the EEA Agreement. ESA and its staff carry out their functions in a manner which is visible, approachable and transparent, while still showing due concern for information that needs to be protected.

Competence: ESA employs highly qualified staff, who have the skills and knowledge required for ESA to fulfil its role and to deal with tasks in an effective and efficient manner. ESA's staff develops its competence and continuously improves its skills and knowledge and aims for excellence. ESA is open to continuous improvement at an organisational and individual level.



ESA's staff in September 2018

Media relations

In 2018, ESA issued a total of 33 press releases on its website. The site is a key channel for communication with stakeholders and the general public. In addition to press releases, it provides general information about the EEA Agreement, together with extensive

information about ESA's fields of work and decisions taken by the College. It also houses ESA's Public Document Database, information on the status of implementation of directives in the EFTA States, and numerous reports.

ESA has also continued to increase its presence on social media. ESA is currently engaging on Twitter, Facebook, LinkedIn and Instagram.

Visitor groups and seminars



Øystein Solvang, ESA's Head of Communications

ESA staff members frequently give public presentations to interested parties visiting Brussels. Such direct communication is well suited to giving more in-depth information about ESA and to set a framework for further contact.

ESA received several visits in 2018, from school classes and student groups to trade unions, public servants and politicians. ESA's College, its Directors and its staff members deliver a range of seminars and meetings in both the EFTA States and EU

Member States.

Outreach activities

ESA considers it important to maintain competitive employment conditions, and to ensure a high level of public awareness of ESA as an attractive workplace. In 2018 ESA sought to strengthen this by attending outreach events and career fairs for law students.



The Moot Court participants and judges in Oslo

ESA's 2018 EEA Law Moot Court competition was hosted by the University of Oslo, with teams from the Universities of Oslo and Bergen competing. The winners of the competition were invited on an exciting Winners' Week, with the programme including backstage visits to the EEA and EU institutions in Brussels and Luxembourg.

Package meetings

ESA values close cooperation and dialogue with the EFTA States. Every year, members of ESA's management and staff meet with representatives from relevant ministries in Iceland, Liechtenstein and Norway to discuss ongoing cases. In 2018, these "package meetings" took place in Liechtenstein's capital, Vaduz, on 17 and 18 April and the Icelandic capital of Reykjavík on 5 and 6 June. In Norway, ESA conducted two package meetings in 2018: the Competition and State Aid Directorate visited Oslo on 27 and 28 September and the Internal Market Directorate met with ministry counterparts on 25 and 26 October.

Budget and financial performance

ESA's activities and operating budget are financed by contributions from Norway (89%), Iceland (9%) and Liechtenstein (2%). ESA's total budget for 2018 was EUR 15.1 million, an increase of 4% compared with 2017. This increase was primarily due to inflation adjustments. Nearly 77% of ESA's budget represents personnel costs, i.e. costs for salaries, allowances and benefits.

On 22 June 2018, ESA submitted its Financial Statement to the EFTA States for the financial year 2017 and the accompanying Audit Report by the EFTA Board of Auditors (EBOA). The Financial Statement was approved on 11 December 2018 and ESA was discharged of its accounting responsibilities for that period by the EFTA States.

Financial performance (amounts in EUR rounded to 000s)	Outcome 2018*	Budget 2018	Outcome 2017	Budget 2017
Financial income	3	0.5	3	0.5
Contributions and Other income	15,088	15,125	14,746	14,538
<i>Other income</i>	9	46	254	46
<i>Contributions from the EEA/EFTA States</i>	15,079	15,079	14,492	13,974
Total income	15,091	15,126	14,749	14,539
Salaries, Benefits, Allowances	11,106	11,609	10,654	11,328
Travel, Training, Representation	785	932	632	897
Office Accommodation	1,204	1,234	1,206	1,210
Supplies and Services	1,407	1,345	1,035	1,098
Financial Costs	10	6	9	6
Other Costs	0	0	0	0
Total expenditure	14,512	15,126	13,536	14,539
Financial performance	579	0	1,213	0

* Preliminary and unaudited

The Internal Market

Main activities in 2018

The European Internal Market refers to a common area where persons, goods, services and capital can move freely – “the four freedoms”. These provisions are supplemented by other horizontal provisions, concerning areas such as health and safety at work, labour law, equal treatment of men and women, consumer protection, environmental and company law. Such provisions are essential for prosperity, growth, competition and trade. They improve efficiency, raise quality and help cut prices.

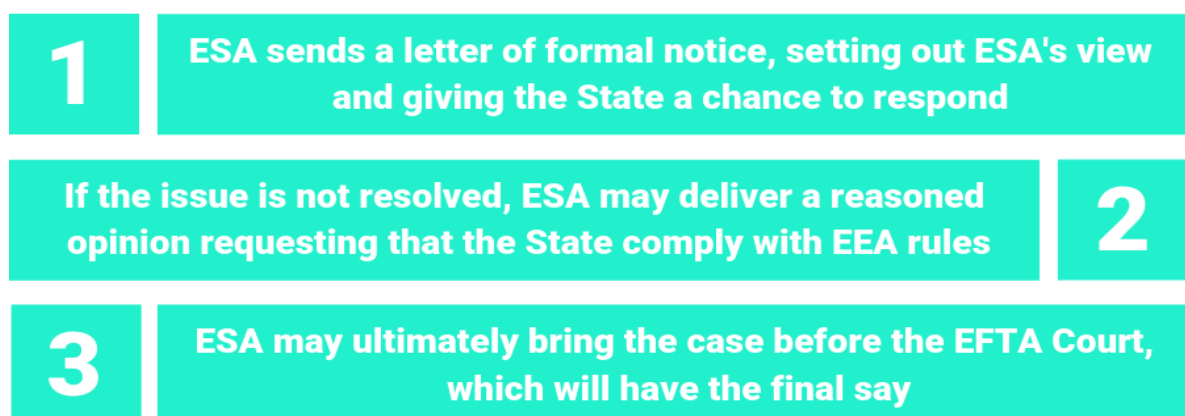
In order to ensure that every citizen and undertaking can reap the full benefits of the Internal Market, ESA continually monitors the application of EEA law in the EFTA States. ESA can pursue legal action against states to ensure the proper application and implementation of the Internal Market rules.

For the Internal Market to function, the EFTA States must ensure the effective and timely implementation of the Internal Market rules into their national legal orders. One of ESA’s main priorities is to investigate cases where the EFTA States have failed to implement legislation incorporated into the EEA Agreement in their national legal orders. In 2018, ESA opened 173 cases when an EFTA State had failed to adopt national measures by the relevant compliance date.

Investigation of national legislation and practice

Where ESA has information about any domestic legislation or practices that may not comply with EEA law, it can decide to initiate an investigation. This may be based on an incorrect implementation of EEA law or where national rules and practices are incompatible with the EEA Agreement. Such investigations can be initiated on the basis of ESA’s own monitoring of the EFTA States, or on the basis of a complaint, which anyone may submit to ESA.

The three formal steps of an investigation



Complaints

ESA receives an average of 50 complaints each year connected to the Internal Market rules, many raising important issues related to the functioning of the market. In 2017, ESA dealt with some 150 ongoing complaint cases.

The largest number of complaints were received regarding the sector of free movement of persons, mostly in connection with an alleged breach of the Residence Directive by Norway. ESA also received a large number of complaints in the services sector in both Norway and Iceland, and in relation to goods and the food and feed sector.

Own initiative cases



Védís Eva Guðmundsdóttir investigates Internal Market cases

ESA also has powers to pro-actively investigate breaches of EEA law. It does this by continuously monitoring events in the three EFTA States, tracking legislative developments and national court rulings, as well as incidents reported in the national press.

ESA engages in a continuous dialogue with business organisations, trade unions, NGOs and other stakeholders at the national level in order to be

informed about how the Internal Market is working in the three EFTA States.

Norwegian rules on hospital treatment in other EEA States

On 20 September 2017, ESA sent a [reasoned opinion](#) to Norway concerning rules that make it more difficult for its citizens to seek hospital treatment in other EEA States.

ESA has received several complaints concerning the issue and has found that a number of provisions in the Norwegian legislation are not in line with EEA law. Overall, the Norwegian system lacks the clarity, precision and transparency required by the EEA rules on patients' rights. This makes it very difficult for patients to navigate the system and fully understand their rights.

Further, Norwegian rules prohibit patients from directly accessing medical service providers in other EEA States, in cases where the Norwegian health care system has failed to provide necessary medical treatment within the prescribed deadlines. Other Norwegian rules fail to ensure, as required under EEA law, that an assessment is made as to whether patients can actually receive equally efficient treatment in Norway in due time. In addition, Norway does not ensure an adequate, case-by-case assessment of individual patients.

Finally, the Norwegian rules do not explicitly ensure that what is recognised by international medical science is fully taken into account when evaluating the expected benefit of medical treatment available elsewhere Europe.

Norway replied to the reasoned opinion on 19 January 2018, after having been granted an extension. Further, on 18 June 2018, Norway informed ESA that it aimed to change the

rules in question, and enclosed a consultation paper proposing several suggested changes to the national rules.

Recognition of psychology degrees in Norway



In June 2018, ESA sent a [letter of formal notice](#) to Norway for its practice of refusing to recognise the qualifications of students who had studied psychology in Hungary. According to ESA, Norway's handling of the applications for recognition does not comply with the Professional Qualifications Directive (2005/36/EC).

Until 2016, it was a consistent practice of the Norwegian authorities to grant licences to individuals with degrees in psychology from Hungary. The licences gave the graduates the right to pursue the profession of psychologist under supervision for one year. After successful completion, they became fully authorised psychologists in Norway.

With no prior warning, Norway changed that practice in 2016. According to Norway, the change was due to new information about the Hungarian qualifications. Having assessed that information, Norway considers the profession of psychologist in Hungary and Norway as not the same profession and therefore considers Directive 2005/36 not to apply. The applicants were deprived of the rights they would have enjoyed under the Directive.

Norway's new practice primarily affects graduates of the Hungarian ELTE-University. Fifty graduates had their licence applications rejected in 2016. Those who had already been granted a licence in 2016 were informed that they should not expect to be granted an authorisation after completing their licence period.

Around 200 Norwegian students had already been accepted to, or were studying at, the ELTE-University at the moment Norway decided to change its practice in 2016.

Norwegian rules on paid parental leave

A father's entitlement to paid parental leave in Norway is dependent on the economic status of the child's mother. Norway limits paid parental leave to situations where the mother is studying or working full time or otherwise fulfilling activity requirements set out in national legislation. In effect, where a mother decides not to return to work following the birth of her child, the father will not be able to take paid parental leave, other than the so-called ten week "father's share". The result is that mothers are explicitly granted more comprehensive rights to paid leave.

Following an investigation, in July 2018, [ESA sent an application to the EFTA Court](#) seeking a declaration that the Norwegian rules constitute direct discrimination on grounds of sex, contrary to the Sex Discrimination Directive (2006/54/EC). Norway maintained that its rules on parental leave are in line with EEA law, and the matter is to be decided by the EFTA Court in 2019.

Basketball players from other EEA States in Iceland

The Icelandic “4+1 rule” introduced by the Icelandic basketball association meant that clubs were prevented from having more than one foreign player on court during a match.

Following an examination of a complaint in November 2017, ESA sent a [reasoned opinion](#) to Iceland, concluding that this was a violation of the EEA Agreement.

The principle of free movement allows workers to move to another EEA state and have access to employment without discrimination. When a sport constitutes an economic activity and takes on the form of gainful employment, it falls within the scope of the free movement of workers and is subject to EEA law. Foreign basketball players should therefore have the same rights to employment as Icelandic players. The non-discrimination principle in EEA law also extends to amateur basketball players from other EEA States residing in Iceland.

In 2018, the Icelandic basketball association amended the rule which now provides that the so-called “Bosman-A players” are treated equally with Icelandic nationals. The list of countries whose nationals are considered as “Bosman-A players” comprises all the EU Member States and the EFTA States. ESA is looking into and discussing the details of these amendments.

Iceland in breach of Protocol 35 to the EEA Agreement

On 13 December 2017, ESA sent a [letter of formal notice](#) in an own initiative case in which it took the view that Iceland had failed to adequately implement Protocol 35 to the EEA Agreement. Protocol 35 requires the EFTA States to ensure that implemented EEA rules take precedence over other domestic legislation.

Article 3 of the Icelandic EEA Act No 2/1993 was intended to implement Protocol 35 EEA in Iceland. Article 3 of the Act No 2/1993 is, however, simply a rule of interpretation, which provides that domestic law is to be interpreted in conformity with EEA law.

The Icelandic Supreme Court has handed down several judgments which confirm the view that an interpretation on the basis of Article 3 of the EEA Act cannot ensure the priority of implemented EEA legislation in cases of conflict with other domestic legislation.

One of the effects of this is that the main provisions of the EEA Agreement on the freedom of movement are deprived of their core purpose, which is to prevent unjustified restrictions on free movement.

ESA therefore found that Article 3 of the Act No 2/1993, as interpreted and applied by the Icelandic Supreme Court, does not adequately implement Protocol 35 EEA.

The Icelandic government replied to the letter of formal notice on 18 December 2018, stating that it remained committed to proposing amendments to its legislation in order to ensure that it fully reflects the obligations undertaken by Iceland under the EEA Agreement.

Sale of alcoholic beverages at Keflavík Airport, Iceland

In August 2016, ESA received a complaint from an importer of alcoholic beverages to Iceland, claiming that Iceland did not comply with Article 16 EEA in relation to the conditions upon which Fríhöfnin ehf., which operates duty free stores at Leifur Eiríksson Air Terminal at Keflavík Airport, procures and markets alcoholic beverages.

Article 16 EEA requires that State monopolies are adjusted so as to eliminate any discrimination regarding the conditions under which goods are procured and marketed will exist. According to the case law of the Court of Justice of the European Union and the EFTA Court, this entails that there must be a transparent and non-discriminatory product selection system, which provides for an obligation to give reasons and an independent monitoring procedure. Furthermore, a State monopoly's marketing and advertising measures must be impartial and independent of the origin of the products.

Following a detailed examination ESA issued a [letter of formal notice](#) in November 2018 concluding that Fríhöfnin's operation of the retail sale of alcoholic beverages at Leifur Eiríksson Air Terminal constituted a State monopoly within the meaning of Article 16 EEA. Consequently, as Fríhöfnin's system of product selection and marketing did not fulfil the abovementioned requirements of EEA law, ESA took the view that Iceland was in breach of Article 16 EEA.

Equal treatment of men and women in Liechtenstein

In April 2017, ESA sent a [reasoned opinion](#) to Liechtenstein in an own initiative case concluding that Liechtenstein's provisions permitting insurers to use gender as a risk factor infringe the principle of equal treatment and non-discrimination between men and women.

Liechtenstein has national provisions allowing insurers and related financial service providers to use gender when they calculate premiums and benefits, which leads to different rates for men and women. ESA considers this to be a breach of the principle of equal treatment and non-discrimination between men and women.

As of December 2012, the Court of Justice of the European Union, in the *Test-Achats* case, ruled against any provision allowing the use of gender in calculating premiums and benefits. The EFTA States have to take due account of the principles laid down by the Court, but Liechtenstein nevertheless adopted its provisions after the *Test-Achats* judgment.

The Liechtenstein Government has informed ESA that it intends to take steps to ensure that the *Test-Achats* judgment is incorporated into the EEA Agreement, with transitional periods for Liechtenstein, as well as making necessary amendments to national legislation.

Posting of workers – Norway

In December 2018, ESA closed two complaint cases on rules concerning compensation for travel, board and lodging for posted workers.

ESA received a complaint from the Confederation of Norwegian Enterprise (*NHO*) in December 2013 and another complaint from a Polish service provider in February 2015.

In October 2016, ESA sent a [letter of formal notice](#) to Norway concluding that rules requiring employers to provide for travel, board and lodging expenses for posted EEA workers in certain sectors were in breach of the Posting of Workers Directive ([96/71/EC](#)).

In October 2018, the Norwegian Tariff Board amended the rules concerning compensation for travel, board and lodging so that they only apply to travel within Norway.

In the [closure decision](#), ESA took the view that the new rules solve the issues raised in the letter of formal notice. ESA also found that the new rules entail equivalent rights for posted workers and Norwegian workers when required to travel in Norway, and appear to be in line with the revised Posting of Workers Directive ([2018/957/EU](#)). The cases were therefore closed.

DAB radio – Norway



In October 2018, ESA [closed](#) a complaint case, concluding that Norway's migration to digital audio broadcasting (DAB) does not breach EEA rules.

ESA received a complaint in December 2015, alleging that switching the analogue FM radio network off and introducing DAB technology for radio broadcasting in Norway was incompatible with EEA law.

In 2017, Norway brought the distribution on the FM network of national commercial radio channels and commercial local radio channels in the four largest cities – Oslo, Bergen, Stavanger and Trondheim – to an end. Local radio broadcasting on the FM network outside these cities remained unaffected.

ESA concluded that it falls within the discretion of the EFTA States to decide on the approach towards radio and television broadcasting and the timeline for the national migration from analogue to digital broadcasting. ESA found the Norwegian Government's reasoning for migration from FM to DAB radio technology to pursue general interest objectives.

ESA therefore concluded that Norway's migration to DAB did not infringe EEA rules and closed the case.

Free movement of persons in Liechtenstein

Following a complaint against Liechtenstein, ESA requested information concerning the implementation and application of Directive 2004/38/EC by the Migration and Passport Office. Under Liechtenstein law on the right of EEA citizens to move and reside freely, the derived right of a third country national family member of EEA nationals to reside in Liechtenstein was revoked where the spouses have initiated divorce proceedings or separated, as the conditions for residence permits were no longer fulfilled under national law.

Following a [letter of formal notice](#) in 2017, Liechtenstein provided the [explanation](#) that where the spouses have initiated divorce proceedings, the procedure of checking a third

country national spouse's right of residence does not automatically lead to the revocation of their residence permit, but it could be the result.

ESA sent a [reasoned opinion](#) in March 2018 stating that even if formal divorce proceedings had been initiated, a third-country national family member of an EEA national who is enjoying the right of residence in Liechtenstein should retain a derived right of residence until the date of final divorce.

In June 2018, Liechtenstein informed ESA that the authorities had adapted its practice so that they now await the decree absolute on the divorce before checking a third country national spouse's right of residence. This change is now reflected in a handbook on the application and interpretation of the relevant national law. ESA is currently assessing the change in administrative practice.

Reorganisation and winding-up of credit institutions

In July 2018, ESA [closed](#) an own initiative case against Iceland concerning an incorrect implementation of Directive 2001/24/EC on the reorganisation and winding-up of credit institutions into Icelandic law, as Iceland had introduced legislative amendments, which ESA found to comply with the requirements laid down in the Directive.

By letter in March 2015, ESA informed Iceland that it had opened a case regarding the implementation of the Directive following a judgment of the EFTA Court in Case E-28/13 *LBI hf. v. Merrill Lynch International Ltd* and in light of the interpretation of the Supreme Court of Iceland in two judgments.

In February 2018, ESA delivered a [reasoned opinion](#), where it stated that Chapter XII of the Act on Financial Undertakings No. 161/2002 incorrectly implemented the provisions of the Directive regarding the governing law during reorganisation and winding-up proceedings of credit institutions. The incorrect implementation was reflected by the wording of Icelandic law, which entailed conditions that were either contingent upon criteria of Icelandic law, or were not directed at the same substantive agreements as provided for in the text of the Directive. ESA considered that this was further demonstrated by jurisprudence of the Supreme Court, which had disregarded the relevant implementing provisions, as being contrary to Icelandic insolvency rules.

ESA registered a credit rating agency

In July 2018, ESA [approved](#) the registration of the Norwegian company Nordic Credit Rating AS as a credit rating agency. The entity is the first credit rating agency to be registered with ESA since it was entrusted with new responsibilities related to the supervision of the financial sector in 2016.

EEA rules seek to ensure that credit ratings issued in the EEA respect standards of quality, transparency and independence by providing that only registered entities may lawfully issue ratings. Once registered, credit rating agencies are subject to on-going supervision and monitoring, to make sure that they continue to meet the conditions for registration. If a credit rating agency fails to meet its obligations, ESA may issue fines and/or withdraw the registration. While agencies established in Iceland, Liechtenstein and Norway must be registered with ESA, credit rating agencies established in the EU must be registered with the European Securities and Markets Authority (ESMA). Legally binding decisions addressed to credit rating agencies established in the EFTA States are adopted by ESA

on the basis of drafts by ESMA. The supervision of EFTA-based credit rating agencies is therefore subject to close cooperation between the two authorities.

Cooperation with the European Financial Supervisory Authorities

In April 2018, ESA concluded a [Multilateral Memorandum of Understanding \(MMoU\)](#) on cooperation, information exchange and consultation with the European Financial Supervisory Authorities (ESMA, EBA and EIOPA).

The MMoU is a non-binding agreement which sets out practical cooperation arrangements. The MMoU was relied on when ESA registered a credit rating agency in July 2018, in close cooperation with ESMA. In October 2016, ESA was entrusted with new decision-making powers corresponding to the powers of the European Financial Supervisory Authorities with regard to the EFTA States.

Transport

Efficient, safe, secure and environmentally friendly transport of goods, services and persons is fundamental to a more efficient and competitive Internal Market.

The EEA Agreement covers all modes of transport. However, due to geographical location or lack of infrastructure, certain legislation applies to a limited degree in some of the EFTA States. ESA monitors all EEA legislation on transport, be it on land, in the air or at sea. Moreover, and in order to ensure compliance with aviation and maritime security rules, one of ESA's most important tasks within the field of transport is to carry out on-site inspections.

In the field of aviation, maritime and rail, ESA cooperates with the EU transport agencies. The agencies provide ESA with expert advice and assist with visits and inspections in the EFTA States, either in accordance with their own work programme or at ESA's request.

Access to the taxi services market in Norway

In 2014, ESA received a complaint against Norway concerning the rules limiting access to the taxi services market. The complainant argues that Norwegian rules regarding access of new entrants to the taxi services market are in conflict with EEA law, and constitute a restriction on the freedom of establishment.

Norwegian legislation foresees a limited number of taxi licences available in a licence district. The award of new licences is subject to a needs test. This means that the competent authority in a licence district limits the number of licences in accordance with demand in the district.

ESA takes the view that the applicable Norwegian national legislation on access to the market for the provision of taxi services, as described above, constitutes an unjustified restriction on the freedom of establishment under Article 31(1) EEA. ESA does not take issue with the licensing requirement itself, but is concerned about the restriction that follows from the numerical limitation of taxi licences.

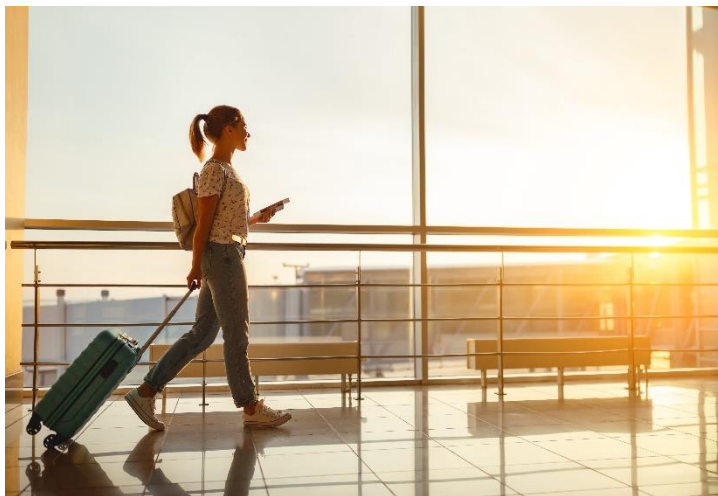
ESA acknowledges that a limitation of licences can be necessary to guarantee a satisfactory, round-the-clock supply of taxi services in rural areas where taxis are often an indispensable means of transport and thereby serve a public interest.

However, the situation is different in densely populated areas, such as Oslo, where it is likely that limiting the number of licences on the basis of a needs-based test will have the result of limiting supply, as new operators will be precluded from entering the market. High barriers to enter the taxi market could lead to an inefficient exploitation of resources and limit labour productivity, thereby increasing prices.

ESA issued a letter of formal notice to Norway in May 2016 and a reasoned opinion in February 2017. Norway replied to the reasoned opinion in December 2017, announcing amendments to the existing legislation. The new legislative framework is said to entail a removal of the numerical limitation of licences and new rules with regards to their allocation.

Currently the Ministry of Transport is working on a proposal to amend the Professional Transport Act and the Professional Transport Regulation. The Norwegian Government reports to ESA regularly on the progress in the legislative process. The public hearing process for an amendment of the Norwegian Taxi Regulation has been initiated in October 2018. To this end, a public hearing document has been put forward. In the document it is proposed, among other things, to remove the needs test for taxi licences. During the hearing process, relevant government agencies, organisations, institutions and associations are given the opportunity to state their opinions. ESA will continue to monitor the legislative process in close cooperation with the Norwegian Government.

Transport security inspections – aviation and maritime



The main objective of the EU's regulatory framework on aviation security is to establish and implement appropriate measures in order to safeguard passengers, crew, ground personnel and the general public against acts of unlawful interference perpetrated on board aircraft or within the confines of an airport.

Regulation (EC) No 300/2008 of the Council of 11 March 2008 on common rules in the field of aviation security forms the basis for the regulatory framework. Multiple regulations supplementing and implementing the common rules have since been adopted in the field of aviation security. By the incorporation of this regulatory framework into the EEA Agreement, the legislation is also applicable in the EFTA States.

One of the key components of the framework on aviation security is the organisation of inspections by the European Commission to verify implementation by the EU Member States. For the EFTA States, these inspections are carried out by ESA. The European Commission and ESA inspections are complementary to the national monitoring by the EU Member States of airports, operators and entities. ESA cooperates with the appropriate authorities in the EFTA States and the European Commission to work towards the common goal of increasing aviation security within the EEA.

When it comes to maritime security, the main objective of the EU maritime security legislation is to introduce and implement measures aimed at enhancing the security of ships used in international trade and domestic shipping and associated port facilities and ports in the face of threats of intentional unlawful acts. By the incorporation of this maritime legislation into the EEA Agreement, the legislation is also applicable in the EFTA States. As in the field of aviation security, ESA is tasked with inspecting the EFTA States in the field of maritime security and is assisted by the European Maritime Safety Agency (EMSA) in its work.

The cooperation between ESA and the European Commission in this field is further strengthened by means of participation in both common workshops and inspections. This cooperation is one of the most important means of ensuring the harmonised application of the applicable legislation in all EFTA States.

Food and feed safety, animal health and welfare

ESA is responsible for monitoring the implementation of EEA legislation on food and feed safety, animal health and welfare in Iceland and Norway.

In this field a substantial number of updated legislative texts are continually being adopted. These must apply without delay both in the EU Member States and in Iceland and Norway to ensure the functioning of the harmonised market for food, feed and animals within the EEA area.

In addition to monitoring the compliance with relevant legislation and dealing with complaints and infringement cases, ESA's tasks include conducting audits to control that Iceland and Norway apply the relevant legislation appropriately.

Audit and inspection activities in 2018

In 2018, three audits were carried out in both Iceland and Norway. In addition, one inspection related to the listing of border inspection posts was carried out in Norway.

	Animal welfare during transport	NOR	<p>ESA issues a draft mission report after each audit with recommendations aimed to rectify shortcomings identified in the official control system of the national authority. The EFTA State is then invited to comment on the draft report and to propose corrective actions addressing the recommendations, which will be included in the final report published on ESA's website. ESA continuously follows up on progress made regarding implementation of corrective actions.</p>
	Antimicrobial resistance	NOR	
	Border inspection posts	NOR	
	Organic production	NOR	
ICE	Antimicrobial resistance		
ICE	National audit system		
ICE	Animal by-products		

Monitoring and reporting of antimicrobial resistance

Reporting of reliable and comparable data is essential for the evaluation of the trends and sources of antimicrobial resistance (AMR) across the EEA. This goes for the risk assessment process, as well as for the evaluation of any measures put in place to mitigate the development of AMR.

In 2018, ESA carried out audits in Norway and Iceland with the objective to evaluate the implementation of EEA requirements on harmonised monitoring and reporting of AMR in bacteria obtained from certain food and food-producing animal populations including the specific monitoring and reporting of ESBL, AmpC and carbapenemase-producing bacteria.

ESA found that Norwegian and Icelandic authorities have developed a framework for monitoring of AMR, supported by documented procedures, which generally follows EEA requirements. Further improvements are needed to ensure the effective implementation of the AMR monitoring programme, in particular in relation to specific monitoring of ESBL-producing E. coli, and representativeness of samples.

Organic production and labelling of organic products

Organic production puts restrictions on the use of genetically modified organisms, chemical pesticides, synthetic fertilisers, antibiotics and other substances.

In 2018, ESA conducted an audit in Norway, to verify that official controls related to organic production and labelling of organic products were carried out in compliance with the EEA legislation. Regulation (EC) No 834/2007 was incorporated into the EEA Agreement by

EEA [Joint Committee Decision No 49/2017](#) and it took effect in the EFTA States in March 2017. This was the first ESA audit in Norway dedicated to organic food production.

Norway has designated a competent authority and put in place a system for the control of organic production, which provide a good basis for official controls in the organic sector and are generally in line with the EEA organic legislation. The competent authority has delegated the control tasks to one control body, which is accredited and subject to supervision of the competent authority. The Norwegian system is mostly adequate although some adjustments are needed, such as in the planning of official controls and risk-based sampling.

Norwegian border inspection posts

ESA and Directorate F of the European Commission's Directorate General for Health and Food Safety (DG SANTE) carried out a joint inspection in Norway in 2018 for the approval of new facilities and additional categories for existing Norwegian border inspection posts. The inspection was carried out, at the request of the Norwegian competent authority, in two border inspection posts, to assess the suitability and readiness of the facilities and equipment.

Import of stray dogs to Norway

During 2018, ESA received complaints concerning two new administrative practices introduced by the Norwegian Food Safety Authority from July 2018. The first concerns persons bringing dogs into Norway who must provide evidence that the dog has been in their ownership and control for at least six months before entering the country. The second concerns the fact that stray dogs will no longer be considered as animals that may be traded under the EEA rules on the commercial import of dogs.

Compliance of these practices with EEA law was discussed with the Norwegian authorities at the annual package meeting in October 2018 and ESA is now considering whether to take the matter further.

Production of fish oil in Iceland

In 2018, ESA sent a further request for information to Iceland concerning official controls of production of fish oil for human consumption at "dual approved" establishments producing both fish oil for human consumption and fish oil or fish meal not intended for human consumption. EEA law establishes strict hygiene requirements concerning raw materials used and the production process for production of fish oil for human consumption.

Restrictions on imports of raw meat, egg and dairy products in Iceland

In October 2014, ESA delivered a reasoned opinion to Iceland concerning restrictions on imports of raw meat products from other EEA states. In 2015, ESA opened a case concerning similar restrictions imposed on imports of egg and dairy products.

Following a reference from the Reykjavík District Court, the EFTA Court delivered in February 2016 an advisory opinion concerning the Icelandic import system for raw meat products. The court concluded that it was not in line with Directive 89/662 on veterinary checks in intra-Community trade for an EFTA State to require a special permit before raw

meat products are imported and a certificate confirming that the meat has been stored frozen for a certain period.

Following that judgment, ESA issued a letter of formal notice and then a [reasoned opinion](#) to Iceland, in which it took the view that the authorisation system for the import of egg and dairy products was not in line with Directive 89/662.

ESA decided in December 2016 to bring both cases before the EFTA Court. In a judgment delivered in November 2017, the EFTA Court upheld ESA's main conclusions, ruling that the import authorisation systems and related requirements for raw meat products, raw egg products and unpasteurised dairy products were not in line with Directive 89/662.

In July 2018, as Iceland had not yet adopted measures to comply with the EFTA Court judgment, ESA decided to issue a letter of formal notice in which it concluded that Iceland had failed to comply with that judgment. In its reply to the letter of formal notice, the Icelandic Government indicated the steps and timeframe foreseen to amend its legislation.

Disposal of animal by-products in Iceland

In October 2018, ESA sent a letter of formal notice to Iceland concluding that Iceland is in breach of EEA animal by-product (ABP) legislation (Regulations (EC) No 1069/2009 and (EC) No 142/2011). Iceland failed to maintain a system of official controls and to ensure that an adequate system is in place to ensure that fallen stock, home slaughter waste and slaughterhouse waste are disposed of in accordance with legislative requirements.

The letter followed an ESA mission in June 2018, which found that insufficient action had been taken by Iceland to address ABP disposal issues identified in an earlier 2013 mission. ESA is currently considering Iceland's observations to the letter of formal notice.

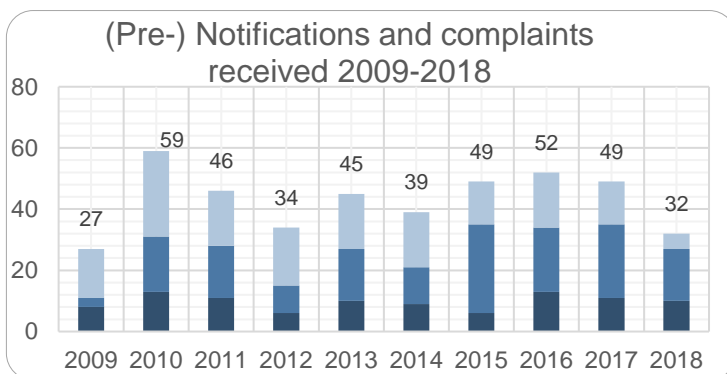
State aid

Main activities in 2018

State aid is public support to commercial activities. It can take many forms, for example cash grants, tax breaks or favourable loans. As a rule, the EEA Agreement prohibits state aid to prevent negative effects on trade, but exemptions are made for purposes such as environmental protection, regional support and research, innovation and development. The state aid rules in the EEA Agreement are broadly equivalent to the state aid rules that apply across the European Union.

The general prohibition on state aid that applies in Iceland, Liechtenstein and Norway is enforced by ESA. It is also ESA's role to decide how the exceptions to the prohibition are to apply.

In 2018, 36 new state aid cases were lodged, and 41 cases were closed. At the end of the year, 34 state aid cases were pending. These statistics include pre-notification discussions, notifications, formal investigations, existing aid reviews, reviews of unlawful aid (mostly complaints), recovery and evaluation cases. Cases of aid under the General Block Exemption Regulation (GBER) are excluded.



This shows that the number of cases has started to come down following the state aid modernisation reform that was initiated by the European Commission in 2012. The modernisation has to a great extent decentralised state aid control, leaving a greater responsibility with the EEA

States to ensure compliance by applying GBER. In keeping with these trends, ESA is now focussing more on the monitoring of implemented aid measures and to outreach.

State aid scoreboard

In February 2018, ESA published its [2017 state aid scoreboard](#) for the EFTA States. The scoreboard examines trends in state aid expenditure by the EFTA States as well as across the EEA more generally.

The scoreboard comprises aid expenditure made by the EFTA States before 1 January 2017. The data is based on annual reports submitted to ESA by the EFTA States.

The 2017 scoreboard showed that state aid expenditure increased in all three EFTA States both in absolute amounts and relative to GDP.

There were three main conclusions across the three EFTA States:

- The EFTA States increased their aid expenditure.
- The expenditure reflects national policy objectives such as green development and innovation, which are common objectives in the EEA.
- The use of the GBER is on the rise. In 2016, 95% of all measures for which expenditure had been reported for the first time were GBER measures.

Overall, the three EFTA States spent nearly EUR 2.9 billion on state aid in 2016, a nominal increase of some 6% or EUR 153 million compared to 2015. Relative to GDP, Norway is the only EFTA State whose aid expenditure is above the average EU level, whereas spending in Iceland and Liechtenstein are both well below the average.

In 2016, Norway spent EUR 2.8 billion on state aid and increased its overall spending by 9%. This growth was mainly due to an increase in aid for environmental and energy saving purposes.

Iceland spent EUR 77 million on state aid in 2016 and increased its overall spending by 18%. The rise in aid expenditure was primarily due to an increase in aid for research, development and innovation.

Although Liechtenstein increased its overall state aid spending in 2016 by 1.4% to EUR 1.82 million, the country's aid expenditure relative to GDP remained the lowest of all of the EEA States.

State aid decisions

In 2018, ESA adopted seven state aid decisions, six involving state aid granted by Norway and one decision concerning state aid granted by Iceland. The decisions are available in [the state aid register](#) on ESA's website.

Norwegian coastal route contracts



In August, [ESA greenlighted](#) the new Coastal Route Agreements in Norway. As the contracts were awarded based on a competitive tender for the operation of regular sailings between Bergen and Kirkenes, ESA concluded that there is no state aid involved in the agreements.

The agreements apply as from 1 January 2021, have a duration of 10 years and entail total government payments of around NOK 8 billion (approximately EUR 807 million).

In March 2017, [ESA approved](#) state aid inherent in the current Coastal Route Agreement, but encouraged Norway to facilitate more competition. The Norwegian authorities split the new tender competition into three smaller packages and awarded contracts to two transport companies. In addition to Hurtigruten sailing the coastal route as of 2021, the Norwegian company

Havila enters the route.

According to the new agreements, the Norwegian Government will compensate Hurtigruten for sailing seven ships and Havila for sailing four. The entities will be compensated to perform daily sailings from Bergen to Kirkenes throughout the year with calls at 34 ports.

Icelandic state guarantees for Landsvirkjun

In September 2018, [ESA concluded](#) that state guarantees for Landsvirkjun's hedging derivatives did not involve state aid.

Landsvirkjun is an Icelandic state-owned energy company and one of the largest producers of renewable electricity in Europe. As such, the company competes with other large-scale electricity producers on the continent to attract energy intensive industry. Landsvirkjun is exposed to foreign currency exchange risk as well as interest rate risk on its debt portfolio and uses various derivative contracts to hedge these risks. The Icelandic state has granted guarantees for some of Landsvirkjun's hedging derivatives.

In 2017, ESA [started an investigation](#) to look into whether the state guarantees were in line with EEA rules. After an inquiry, ESA found that Landsvirkjun did not gain an economic advantage through these state guarantees.

Pension scheme for Norwegian non-profit organisations



Hans-Petter Håvås Hanson, Militsa Kostova and Ketill Einarsson, investigate state aid and competition cases at ESA.

In February 2018, [ESA greenlighted](#) a Norwegian pension scheme for about 100 non-profit organisations (NPOs) that have provided specialised health and child welfare services on behalf of the Norwegian State in the years 1974 to 2010. The budget of the scheme is NOK 1.1 billion (approximately EUR 115 million).

Norway notified the measure to ESA in December 2017 for legal certainty. ESA concluded that the NPOs do not carry out economic activities, and that

the scheme therefore does not involve state aid within the meaning of the EEA Agreement.

Norwegian NOx tax exemption scheme

In February 2018, [ESA approved](#) a prolongation of the NOx tax exemption scheme in Norway worth some NOK 14 billion (approximately EUR 1.4 billion).

Norwegian authorities have entered into a new environmental agreement with 15 business organisations for the period 2018–2025; giving the undertakings represented there an exemption from Norway's NOx tax under certain conditions.

Norway introduced the NOx tax in 2007 to reduce national emissions in line with the country's international commitments. The environmental agreement allows undertakings to obtain a full exemption from NOx taxes, provided they commit to collectively reduce the total NOx emissions substantially.

Norway notified the scheme to ESA in December 2017 for the period 2018–2025. ESA has approved similar exemption schemes twice before for the periods [2008–2010](#) and [2011–2017](#).

Competition

Main activities in 2018

In 2018, ESA continued its active investigations in the e-commerce, mobile communications and transport sectors.

ESA's focus in 2018 was on progressing the investigative activity initiated in previous years. The fact that investigative proceedings are open and dialogue is ongoing with the parties does not prejudice in any way the existence of an infringement. It indicates, however, that ESA is considering relevant evidence and facts as a matter of priority.

Online-payments services

ESA continued to look into whether DNB, Nordea, Finance Norway, Bits, and BankID Norway were involved in collusion (contrary to Article 53 EEA) to prevent a new market entrant from providing its e-payments service in Norway. The case concerns a payment initiation service offered by the Swedish payments provider Trustly, in the EEA which enables customers to make online payments directly from their bank accounts.

Regional air transport services

In May 2018, ESA sent a Statement of Objections to the Norwegian airline operator,



Widerøe, setting out its preliminary view that Widerøe may have abused a dominant position (contrary to Article 54 EEA) by refusing to supply a component of a satellite-based approach and landing system installed at several regional airports in Norway.

The Norwegian State purchases scheduled air transport services to and from many regional airports in

Norway. To be awarded the public service obligation (PSO) contract for operating scheduled air transport routes to and from those airports, the Norwegian State has required that, due to challenging approach and landing conditions, the airline operator must have a particular satellite-based approach and landing system installed on board the aircraft.

ESA is investigating whether Widerøe refused to supply a component of this system – the on-board receivers – to other airline operators. ESA received Widerøe's reply to the Statement of Objections in the second half of the year and the investigation is ongoing.

Mobile communications services

In 2018, ESA continued its investigation into whether Telenor may have abused a dominant position (contrary to Article 54 EEA) by obstructing competitors in the provision of mobile communications services to Norwegian users.

ESA examined further evidence relating to its assessment of whether Telenor squeezed competitors by applying an insufficient spread between the wholesale prices charged to its wholesale customers and the retail prices Telenor offered to its own residential mobile broadband customers. ESA also continued to assess whether certain clauses in Telenor's retail contracts may have made it too costly for competitors to capture business customers from Telenor.

Ongoing handling of market information and complaints

ESA continued to assess incoming information concerning other suspected infringements of the EEA competition rules. These submissions were assessed in line with ESA's publicly available guidance on handling complaints in competition cases.¹

ESA is entitled to give differing degrees of priority to the complaints brought before it and to have regard to the interest under the EEA Agreement in order to determine the degree of priority to apply to a given matter. The assessment of interest under the EEA Agreement depends on the circumstances of each individual case.

Relationship with other competition law enforcers

ESA works side-by-side with the national competition authorities of the EFTA States and with the European Commission to ensure that the EEA competition rules are applied in a consistent manner. Effective communication and close cooperation with our European colleagues remain key priorities for ESA to ensure legal certainty for businesses operating across national borders in the EEA. ESA continues to build on our close relationships with our European colleagues through timely and targeted information sharing to help ensure a coherent and consistent interpretation and application of the law.

Close cooperation with the European Commission

ESA shares jurisdiction with the European Commission for applying the EEA competition rules and has forged a solid partnership through years of shared policy and case experience.

The competition rules in the EEA Agreement are anchored on the "one-stop-shop" principle, so that either the European Commission or ESA, but not both, will be competent to handle a given case. However, there are robust mechanisms rooted within the framework to ensure that both authorities communicate regularly in their respective cases.

Through these mechanisms, ESA and the competition authorities in the EFTA States are kept closely informed of important developments and have the opportunity to make their voices heard in European Commission cases (both mergers and antitrust) that concern the territory of the EFTA States.

¹ See, for example, ESA's Notice on the handling of complaints under Articles 53 and 54 of the EEA Agreement and ESA's Notice on best practices for the conduct of proceedings concerning Articles 53 and 54 of the EEA Agreement. Information on how to make a competition complaint may be found on: www.eftasurv.int/competition/complaints/.

This is essential because cases handled by the European Commission can have a considerable impact on markets and market players in the EFTA States.

Many of the European Commission’s largest antitrust cases involve EEA-wide markets or activities capable of affecting trade in an EFTA State. Mergers are also examined at European level if the annual turnover of the companies concerned exceeds specified thresholds in terms of global and European sales. The rules on jurisdiction are such that, generally, the European Commission is the competent authority to assess mergers under the EEA Agreement. However, ESA and the EFTA States remain informed and involved by virtue of the EEA cooperation rules.

European Competition Network

The competition rules in the EEA Agreement are equivalent in substance to the competition rules in the EU. Much is gained, therefore, from sharing experiences and insights with other competition enforcers across Europe. ESA meets regularly to discuss competition policy and experiences with its European colleagues as part of the European Competition Network (ECN).

Consistent Enforcement Across Europe

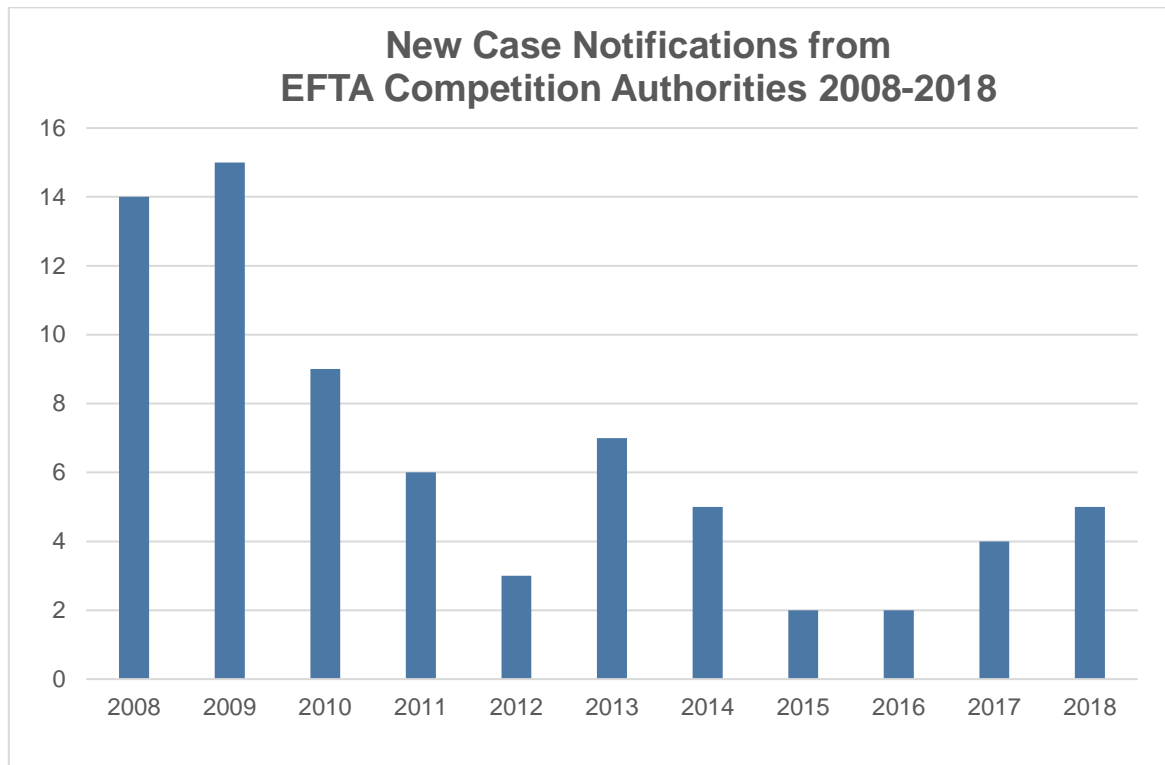
EEA Competition Rules	EU Competition Rules
Article 53 EEA	Article 101 TFEU
Prohibits anti-competitive coordination between market participants	
Article 54 EEA	Article 102 TFEU
Prohibits the abuse of a dominant position by large market participants	
Article 59 EEA	Article 106 TFEU
Prohibits the imposition of state measures which are contrary to the competition rules	

Close cooperation with the EFTA competition authorities

National competition authorities and courts in the EFTA States apply Articles 53 and 54 EEA in parallel to the equivalent national competition rules (in cases where there is a possible effect on EEA trade). To ensure a coherent and efficient application of those provisions, ESA’s activities in the field of competition are coordinated with those of the national competition authorities. This is done via the EFTA network of competition authorities.

When acting under Articles 53 or 54 EEA, the national competition authorities in the EFTA States inform ESA of new investigations. Sharing background information early on helps to identify the most appropriate authority to deal with a given case.

As can be seen from the chart below, the national authorities have reported a number of new investigations/enquiries concerning cases involving potential breaches of the EEA competition rules during 2008–2018.



Before adopting decisions requiring an infringement to be brought to an end under Articles 53 or 54 EEA, the competition authorities in the EFTA States must also submit a draft decision to ESA. With a view to ensuring that the competition rules are applied in a consistent manner throughout the EEA, a final decision may only be adopted once ESA has been given the opportunity to comment.

Close cooperation with the courts in cases of EEA interest

In safeguarding a coherent application of EEA law, ESA continues its practice of assisting the courts in cases involving the EEA competition rules and equivalent national provisions.

National courts in the EFTA States may request guidance from ESA on the interpretation and application of the EEA competition rules. ESA, acting on its own initiative, may also submit *amicus curiae* observations to the courts of the EFTA States where the coherent application of Articles 53 or 54 EEA so requires. Similarly, ESA can provide observations to the EFTA Court and to the Court of Justice of the European Union/General Court on competition cases of EEA interest.

Further to a request for an advisory opinion from the EFTA Court (submitted by the Reykjavík District Court) in Case E-6/17 *Fjarskipti v Síminn*, ESA participated in an oral hearing which took place at the EFTA Court on 31 January 2018. ESA had submitted written observations to the EFTA Court in October 2017 on, among other things, the importance of market participants being able to effectively pursue actions for damages before national courts for breaches of the EEA competition rules. ESA noted that the full

effect of the EEA competition rules would be at risk if there was no possibility to claim damages before a domestic court for a loss caused by a breach of those rules.

In its judgment in May 2018, the EFTA Court held, among other things, that a natural or legal person must be able to rely on Article 54 EEA to claim compensation before a national court for a violation of that provision. In the absence of EEA law governing the procedure and remedies for violations of competition law, it falls under the procedural autonomy of each EEA State to lay down detailed rules on the degree of significance to attach to a final ruling by a competition authority in such a follow-on action, subject to the principles of equivalence and effectiveness.

In February 2018, ESA submitted written observations to the EFTA Court concerning a request for an advisory opinion from the Borgarting Court of Appeal in Norway (Borgarting lagmannsrett) in Case E-10/17 *Nye Kystlink AS v Color Group AS and Color Line AS*. The case is a follow-on damages action based on ESA's 2011 decision against Color Line for long-term exclusivity arrangements at a harbour on an important duty-free ferry route between Norway and Sweden. The issues concerned a statute of limitations and the principles of equivalence and effectiveness. ESA participated in the oral hearing that took place at the EFTA Court in April 2018. ESA emphasised the need for compliance of national rules on limitation periods with the principle of effectiveness in the EEA Agreement. The EFTA Court issued its judgment in September 2018 confirming that, in line with the principle of effectiveness, the application of limitation periods should not make it impossible or excessively difficult to bring actions for damages for infringement of the EEA competition rules. ESA also assisted the Borgarting Court of Appeal by providing access to documents in ESA's case file.

In September 2018, ESA submitted written (*amicus curiae*) observations to the Icelandic Appeals Court (Landsréttur) in Case No 490/2018 *Byko ehf. and Norvík hf. v The Competition Authority and the Icelandic State and The Competition Authority v Byko ehf. and Norvík hf.* The case concerned a decision taken by the Icelandic Competition Authority in May 2015, in which it fined Norvík hf. for infringing (by way of its subsidiary Byko ehf.) both EEA and Icelandic competition rules. ESA previously intervened before the District Court of Reykjavik in 2016 (Case No E-550/2016). The case was later appealed to Landsréttur and ESA therefore submitted its observations again. The observations concerned the circumstances in which the EEA competition rules apply (i.e. when EEA trade may be affected) and the importance of the appropriate level and deterrent effect of fines in competition cases.

ESA's Legal Affairs

Main activities in 2018

The Legal and Executive Affairs Department (LEA) is ESA's legal service.

In that capacity, LEA provides legal advice, reviews all ESA decisions and represents ESA in court. LEA is also responsible for supporting the College in communicating, formulating and coordinating ESA policy.

LEA is also responsible for bringing cases against EFTA States in the [EFTA Court](#) for failure to live up to their obligations under EEA law following ESA's [formal infringement procedure](#).

Upon request, the EFTA Court also advises national courts in the EFTA States on the interpretation of EEA law by delivering advisory opinions. Finally, the Court hears applications brought by companies and persons to review the lawfulness of decisions taken by ESA which affect them directly.

ESA participates in all cases before the EFTA Court. ESA also participates in cases before the EU courts which are likely to have a particular impact on EEA law.



Two new College members joined ESA in 2018, Bente Angell-Hansen, president of ESA and Högni S. Kristjánsson.

ESA ensures the proper implementation and application of EEA law in Iceland, Liechtenstein and Norway, just as the European Commission does for the EU Member States.

A direct action is the final step of the formal infringement procedure against an EFTA State. Before taking the EFTA State to court, ESA [informs](#) the State of its views in a series of informal and formal steps.

The State is then able to put forward its arguments, or resolve the situation by complying with EEA law within the applicable deadline or shortly thereafter.

In 2018 ESA brought five direct actions before the EFTA Court in which it sought a declaration from the Court that an EFTA State had infringed EEA law.

Direct actions for non-incorporation and non-implementation

Four direct action cases were brought before the EFTA Court in 2018 because the EFTA State concerned had breached its EEA law obligations by overrunning by at least one year the binding deadlines by which it should have incorporated or implemented into national law new or modified EEA provisions. These four cases concerned consumer protection and the environment.

During 2018, the EFTA Court handed down eight judgments in non-incorporation and non-implementation cases, ranging from a series of cases on legislation laying down rules on managers of alternative investment funds, to a case concerning legislation which obliged

states to make simple pressure vessels available on the market and a case concerning facilitating workers' rights. The EFTA Court found in favour of ESA in all eight cases.

Substantive (non-conformity) direct actions

ESA can bring an action before the EFTA Court in substantive cases, such as if it identifies



Ingibjörg-Ólög Vilhjálmsdóttir litigates cases before the EFTA Court

a situation where national rules deprive businesses and consumers of their EEA rights.

ESA and the EFTA States may disagree on whether the national rules are in line with EEA law, with the EFTA Court having the final say. However, these matters are often resolved before that stage.

In 2018, ESA brought one such substantive case before the Court: an action in which ESA contended

that Norway was in breach of its obligations under the Equal Treatment Directive as regards the national rules governing parental leave.

The EFTA Court handed down one judgment in 2018 on a substantive non-conformity case, finding in favour of ESA's application against Norway for a breach of EEA rules on public procurement as concerned the construction of a car park in Kristiansand.

Referrals from national courts

When a national court has a case before them that depends on the interpretation or application of EEA law, they have the option of referring a question to the EFTA Court. The EFTA Court then delivers an advisory opinion. ESA participates in the proceedings in such cases by submitting written and oral arguments to the Court.

The Court received two requests for advisory opinions in 2018. Case E-02/18 *Concordia* concerns payments for the reimbursement of medical expenses incurred by a Liechtenstein national living in Spain. The second request, in Case E-07/18 *Fosen-Linjen II*, concerns remedies.

In 2018, the EFTA Court delivered four advisory opinions on a wide range of questions referred from national courts. In Case E-06/17 *Fjaraskipti*, the Court ruled on a margin squeeze in the Icelandic telecommunications sector. Case E-08/17 *Kristoffersen* concerned sponsorship of a member of the Norwegian ski team and led the Court to set down guidelines for the national courts on whether there had been a breach of freedom of establishment or the freedom to provide services. In Case E-09/17 *Falkenhahn* the EFTA Court was asked to consider the compatibility of a proposed electronic money scheme with European capital requirements legislation, and finally in Case E-10/17 *Nye Kystlink* the Court delivered a judgment on limitation periods for damages claims where a fine has been awarded for an infringement of the EEA rules governing competition.

Review of ESA decisions

Parties concerned by a decision taken by ESA can seek an annulment of the decision before the EFTA Court. ESA and the applicant then submit written observations, and the Court rules on the validity of the decision.

There were no actions against decisions of ESA in the EFTA Court in 2018. Nor did the EFTA Court hand down any judgments on such cases.

Costs cases

The EFTA Court is empowered to determine the level of costs to be awarded for cases in which it has delivered judgment and awarded costs.

No new costs applications were brought before, or decided by, the Court in 2018.

The Court of Justice of the European Union and General Court

The Court of Justice of the European Union (CJEU) has jurisdiction in the field of EU law to interpret EU legislation. As many EU law instruments are incorporated into EEA law, ESA therefore participates in cases before the EU courts which are likely to have a particular impact on EEA law and its future development.

ESA can participate in CJEU cases in the following ways. In a preliminary reference where a national court of an EU Member State's court asks the CJEU to interpret EU law, ESA may make written or oral submissions if the subject matter of the proceedings is in an area covered by the EEA Agreement. In other cases, ESA may seek leave to intervene in support of one of the parties under the conditions laid down in Article 40 (3) of the Statute of the Court of Justice.

During 2018, ESA submitted observations in five cases before the CJEU. Case C-228/18 *Budapest Bank* concerned anti-competitive conduct, and Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie* saw the CJEU being asked to examine the *ne bis in idem* principle in competition cases. Case C-697/17 *Telecom Italia* concerned procurement in the telecoms sector. Finally, Cases C-522/18 *Zakład Ubezpieczeń Społecznych* and C-668/18 *Uniparts* concerned the application of the rule of law in the context of judicial reforms in Poland. The CJEU handed down judgment in 2018 in two cases in which ESA had been involved: in Case C-15/16 *Baumeister* the CJEU ruled on professional secrecy in the context of national financial supervisory authorities, and in Case C-320/16 *Uber France* the CJEU delivered a judgment concerning the scope of application of the Services Directive.

ESA was also involved in two cases pending before the General Court of the European Union: Case T-612/17 *Google v Commission*, which concerned a Commission finding of anti-competitive behaviour, and Case T-892/16 *Apple v Commission*, which concerned a Commission State aid decision.

The European Court of Human Rights

The European Court of Human Rights has jurisdiction as regards the European Convention on Human Rights (ECHR). The EEA as such, and the EEA EFTA institutions, are not

contracting parties to the ECHR. However, the EFTA States are contracting parties and an applicant may bring them before the Court for alleged breaches of the Convention.

In 2018, an application to the European Court of Human Rights was made against Norway by the Norwegian company Konkurrenten.no, arguing that there had been a breach of its rights to a fair trial following a decision of the EFTA Court in Case E-19/13. ESA sought leave to intervene as a third party in the case.

National courts

ESA is entitled to submit *amicus curiae* briefs where this may be of assistance to the national courts. In 2017, ESA submitted a brief in one such case in the Icelandic Court of Appeals, concerning competition law.

[490/2018 - ICA v Byko & Norvik](#)

Access to documents

Anyone can ask to see documents from ESA. Documents are normally made publicly available upon simple request, though ESA may refuse disclosure in certain circumstances. Once a document has been disclosed, it is uploaded to ESA's website on the [public document database](#). In 2018 ESA dealt with 98 access to documents requests. Should you want access to ESA's documents you can review [ESA's rules on access to documents](#) and send the request by an email to registry@eftasurv.int.

Links to ESA's court cases in 2018

Cases brought before the courts in 2018

Non-implementation and non-incorporation cases:

[E-03/18 - EFTA Surveillance Authority v Iceland \(Regulation on ODR\)](#)

[E-04/18 - EFTA Surveillance Authority v Iceland \(Regulation on ODR for consumer disputes\)](#)

[E-05/18 - EFTA Surveillance Authority v Iceland \(Directive on ADR for consumer disputes\)](#)

[E-06/18 - EFTA Surveillance Authority v Iceland \(Environmental Assessment Directive\)](#)

Substance cases

[E-01/18 - EFTA Surveillance Authority v Norway \(parental benefits\)](#)

[E-02/18 - C v Concordia Schweizerische Kranken- und Unfallversicherung AG, Landesvertretung Liechtenstein](#)

[E-07/18 - Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon \(NHO\) v AtB AS](#)

CJEU and GCEU cases

[C-228/18 - Budapest Bank](#)

[C-617/17 - Powszechny Zakład Ubezpieczeń na Życie](#)

[C-697/17 - Telecom Italia](#)

[C-522/18 - Zakład Ubezpieczeń Społecznych](#)

[C-668/18 - Uniparts](#)

[T-612/17 - Google v Commission](#)

[T-892/16 - Apple Sales International and Apple Operations Europe v Commission](#)

ECtHR cases

[Application No 47341/15 - Konkurrenten.no v Norway](#)

National courts

[490/2018 - ICA v Byko & Norvik](#)

Judgments delivered in 2018

Non-implementation and non-incorporation cases:

[E-07/17 - EFTA Surveillance Authority v Iceland \(Pressure vessels\)](#)

[E-11/17 - EFTA Surveillance Authority v Iceland \(Managers of Alternative Investment Funds Directive\)](#)

[E-12/17 - EFTA Surveillance Authority v Iceland \(Managers of Alternative Investment Funds Regulation\)](#)

[E-13/17 - EFTA Surveillance Authority v Iceland \(Managers of Alternative Investment Funds Regulation\)](#)

[E-14/17 - EFTA Surveillance Authority v Iceland \(Managers of Alternative Investment Funds Regulation\)](#)

[E-15/17 - EFTA Surveillance Authority v Iceland \(Managers of Alternative Investment Funds Regulation\)](#)

[E-16/17 - EFTA Surveillance Authority v Iceland \(Managers of Alternative Investment Funds Regulation\)](#)

[E-17/17 - EFTA Surveillance Authority v Iceland \(Facilitating Workers' Rights\)](#)

Substance cases:

[E-4/17 - EFTA Surveillance Authority v Norway \(public procurement\)](#)

[E-06/17 - Fjarskipti hf. v Síminn hf.](#)

[E-08/17 - Henrik Kristoffersen v the Norwegian Ski Federation](#)

[E-09/17 - Edmund Falkenhahn AG v the Liechtenstein Financial Market Authority](#)

[E-10/17 - Nye Kystlink AS v Color Group AS and Color Line AS](#)

CJEU cases:

[C-15/16 - Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister](#)

[C-320/16 - Uber France](#)

Glossary of terms

Case – An assessment of the implementation, or application, of EEA law, or tasks executed for the purpose of fulfilling ESA’s obligations under EEA law, registered before and during the year. Such cases do not necessarily lead to the initiation of infringement proceedings against one or more EFTA States or undertakings, or the opening of formal investigations.

Complaints – Cases where ESA examines information received from economic operators or individuals regarding measures or practices in the EFTA States which are not considered to be in conformity with EEA rules.

EEA – European Economic Area. An area of economic cooperation that consists of the 28 EU Member States and three of the four EFTA States: Iceland, Liechtenstein and Norway. Switzerland is not part of the EEA. Inside the EEA, the rights and obligations established by the Internal Market of the European Union are expanded to include the participating EFTA States.

EEA Agreement – The Agreement which creates the European Economic Area.

EEA EFTA States – The three EFTA States that participate in the EEA: Iceland, Liechtenstein and Norway. Referred to as “the EFTA States” for the purposes of this report.

EEA Joint Committee – A committee of representatives of the EU and the EFTA States competent to incorporate legislation into the EEA Agreement.

EFTA – European Free Trade Association. An inter-governmental organisation set up for the promotion of free trade and economic integration to the benefit of its four members: Iceland, Liechtenstein, Norway and Switzerland.

EFTA Court – The judicial body with jurisdiction regarding the obligations of the EFTA States and ESA pursuant to the EEA Agreement. The main functions of the Court consist of judgments in direct actions, in particular infringement cases brought by ESA against the EFTA States, and advisory opinions in cases referred to it by the national courts of the EFTA States.

EFTA Surveillance Authority – The organisation which ensures that the three EFTA States fulfil their legal obligations as stated in the EEA Agreement. Referred to as “ESA” for the purposes of this report.

Management tasks – Cases which are opened on the basis of an obligation on ESA deriving from the EEA Agreement directly, or from secondary legislation, such as eCOM notifications and draft technical regulations.

Notifications – State aid measures, draft technical regulations, and telecommunications market notifications that are submitted to ESA by the EFTA States for examination or approval.

Own initiative cases – Those opened by ESA at its own instigation. Such cases include the non-implementation of directives, the non-incorporation of regulations for Iceland and Norway, and the examination of the implementation and application of EEA law. This also covers food safety and transport inspections.

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