



Annual Report 2019

Table of Contents

Foreword	3
This is ESA	4
The role of ESA	4
How ESA is organised	5
Human resources	5
Core values	6
Package meetings	6
Media relations	7
Visiting groups and seminars	7
Outreach activities	7
EEA 25th anniversary conference	9
Budget and financial performance	12
The Internal Market	13
Investigation of national legislation and practice	13
The three formal steps of an investigation	13
Complaints	14
Own initiative cases	14
Main activities in 2019	14
Transport	21
Norway amends its taxi licensing rules following ESA complaint case	21
Transport security inspections – aviation and maritime	22
Cooperation with EU transport agencies	23
Cooperation with and assistance to the EEA EFTA States	23
Food and feed safety, animal health and welfare	24
Audit activities in 2019	24
Aquaculture animal health controls and live bivalve molluscs	24
Organic production and labelling of organic products	25
African swine fever	25
Additional Salmonella guarantees granted to Iceland	25
Cooperation with the European Commission	26
State aid	27
Main activities in 2019	27
State aid decisions	28

Complaints	29
Complaints without formal investigations	31
GBER cases.....	32
Monitoring	32
Private enforcement study	33
Competition	34
Competition law	34
Main activities in 2019	34
Relationship with other competition law enforcers	36
Close cooperation with the European Commission.....	36
European Competition Network	36
Close cooperation with national competition authorities.....	37
Close cooperation with the courts in cases of EEA interest	38
Cooperation across the global competition community	39
Legal and Executive Affairs	41
Main activities in 2019	41
Procedure: How ESA works to uphold EEA law.....	42
Costs cases.....	44
The Court of Justice of the European Union and the General Court	44
The European Court of Human Rights.....	45
National courts and tribunals	45
Access to documents	45
Links to ESA's court cases in 2019	46
Cases pending before the courts in 2019	46
Glossary of terms	48

Foreword

The EEA's 25th anniversary year has seen unprecedented levels of activity for ESA. On the one hand, we are preparing for responsibilities in new areas including climate change, data protection and energy regulation. On the other hand, we have had the opportunity to look back on some of the fundamental achievements of the EEA for citizens and have seen that improvements are needed, for example in social security coordination, the recognition of diplomas, access to cross-border healthcare and gender equality.

In June 2019, we hosted a major conference with the EFTA Court, bringing together stakeholders from civil society, government, trade unions and business across the EEA EFTA States. We celebrated the benefits and protections the EEA has brought to people living in Iceland, Liechtenstein and Norway, and the additional opportunities opened up to travel, work, study and live throughout our European continent. We gave a platform to the “EEA generation” of young people who have lived their whole lives in this interconnected world. We also reflected on how to ensure that future generations will recognise and work to maintain the longstanding common values and European identity that enable us to call the whole of Europe our home.

After 25 years of operation and continued strengthening of cooperation across an ever greater number of areas, ESA needs to adapt the way it carries out its duties. The emphasis has moved from checking implementation of acts on paper to ensuring that their benefits translate from paper into practice. This requires specialised understanding of the factors influencing key sectors of social and economic life, and of how the aims of the EEA Agreement are to be achieved. It also means participating fully in a range of specialist bodies, from the EBA, ESMA and EIOPA in the financial field to the telecoms regulator BEREC, the European Competition Network (ECN) and the various transport agencies, as well as most recently ACER regarding energy. To meet these challenges, ESA will be looking to further strengthen both our expertise in strategically important fields and our capacity to respond quickly to new issues as they arise.

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, the EEA EFTA States, enabling the 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 EEA EFTA States with the 28 Member States¹ of the European Union (EU) in a common market, known as the European Internal Market.

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

Because of the EEA Agreement, EU law on the four freedoms, state aid and competition rules for undertakings is incorporated into the domestic law of the EEA EFTA States so that it applies throughout the entire EEA and ensures a common market with common rules. This removes barriers to trade and opens new opportunities for over 500 million Europeans, creating jobs and growth and adding to the international competitiveness of the EEA States.

As well as ensuring equal rights for all citizens and undertakings to participate in the Internal Market, and equal conditions of competition, the EEA Agreement 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 on uniform implementation and application of common rules. Therefore, it provides for a system where the European Commission works with the EU Member States, while ESA works with the EEA 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.

ESA operates independently of the EEA 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 to make sure that their rights are not violated by rules or practices of the EEA EFTA States or companies within those States.

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

Likewise, ESA ensures that companies operating in the EEA EFTA States abide by EEA rules relating to competition. ESA can investigate possible infringements of EEA provisions, either

¹ The United Kingdom left the European Union on 31 January 2020, but will remain part of the Internal Market during a transition period until 31 December 2020.

by 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 EEA EFTA State concerned decides to take appropriate action in response to ESA's request, ESA may initiate proceedings against that State before 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.

How ESA is organised



ESA is led by a College, consisting of three members. Although appointed by the EEA EFTA States, the College members undertake their functions independently and free of political direction. The current College took office on 1 January 2018 and is appointed until 31 December 2021. Bente Angell-Hansen (Norway) is appointed President. 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. 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 2019, ESA employed a total of 67 established staff members, representing 18 nationalities and including 31 EFTA nationals. Of these staff, 54% were female and 46% male. In management positions, 50% were male and 50% female.

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

The EEA EFTA States have established staff regulations that provide for staff to be employed by ESA on a temporary or fixed-term basis, for a maximum of six years. The average length of time that fixed-term staff members work at ESA is four-and-a-half years. This means that

employment opportunities arise frequently for highly qualified candidates within ESA's fields of activity.

Core values

ESA's core values – Integrity, Openness and Competence – are key elements of our ongoing operations. ESA continued to ensure that they were embedded in all of its internal and external activities in 2019.

Integrity

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 that 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 develop their competence, and continuously improve their skills and knowledge and aim for excellence. ESA is open to continuous improvement at organisational and individual level.



ESA's staff

Package meetings

ESA values close cooperation and dialogue with the EEA 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 2019, these "package meetings" took place in Liechtenstein's capital, Vaduz, from 25 to 27 April. In Norway, ESA conducted two package meetings in 2019: the Competition and State Aid Directorate visited Oslo on 26 and

27 September and the Internal Market Directorate met with ministry counterparts in Oslo on 24 and 25 October. The Internal Market Directorate visited the Icelandic capital of Reykjavík from 3 to 5 June, and the Competition and State Aid Directorate on 6 June.

Media relations

ESA issued a total of 44 press releases on its website in 2019. 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 EEA EFTA States and numerous reports.

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

Visiting groups and seminars

ESA staff members frequently give public presentations to interested parties visiting Brussels. This type of direct communication aims to provide more in-depth information about ESA and set a framework for further contact.



ESA received 25 visits in 2019, from school classes and student groups to trade unions, private companies, civil servants and politicians. ESA's College, its Directors and staff members deliver a range of seminars and meetings in both the EEA EFTA States and EU Member States.

*The Communications team
Head of Communications, Øystein Solvang, and
Communications Trainee, Elsa Lilja Gunnarsdóttir*

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 2019, ESA sought to strengthen this by attending outreach events and career fairs.

EEA Law Moot Court

ESA's 2019 EEA Law Moot Court competition was hosted by the Supreme Court of Iceland, with teams from Reykjavík University, the University of Iceland, the University of Bergen and the University of Oslo competing. This was the first time that students from both Iceland and Norway were able to compete in the EEA Law Moot Court. The winners of the competition are

invited to an exciting Winners' Week, with the programme including backstage visits to the EEA and EU institutions in Brussels and Luxembourg. This year's winners were from the University of Iceland.



*EEA Law Moot Court winners 2019 from the University of Iceland
From left: Eva Hauksdóttir, Olöf Embla Eyjólfssdóttir, Jón Sigurðsson and Maja Bednarowicz*

EEA Law Summer School

In August 2019, ESA hosted an EEA Law Summer School in Brussels. The summer school is for lawyers from the EEA EFTA States who have 3-6 years' experience in practice and who want to develop their knowledge of EEA law. This year, six lawyers – from a variety of different professional backgrounds – undertook a one-week study programme covering ESA's institutional structure and processes, research techniques, advocacy and litigation in the European Courts and EEA substantive law. We were also lucky enough to welcome Deputy Secretary-General of EFTA, Hege Hoff, who delivered a seminar on the work of the EFTA Secretariat. When not participating in taught sessions, the summer school participants conducted self-directed study on subjects of their choice or discussed EEA law topics in more detail with ESA staff members. The summer school was a great success and has increased ESA's visibility among members of the legal profession in the EEA EFTA States.



EEA Law Summer School 2019 participants with ESA and EFTA colleagues

From left: Heiðar Guðmundsson, Jon Loge Ramstad, Øyvind Arntzen, Ásthildur Valtýsdóttir, Carsten Zatschler (Director of Legal and Executive Affairs at ESA), Hege Hoff (Deputy Secretary-General of EFTA), Permlle Edh Hasselgård, Hana Temsamani and Catherine Howdle (Director of Legal and Executive Affairs at ESA)

EEA 25th anniversary conference

25 years of cooperation

For over 25 years the EEA Agreement has enabled the EEA EFTA States to be part of the European Internal Market. In 2019, this long and successful history of European cooperation was celebrated by the EEA institutions, including the EFTA Surveillance Authority.

ESA and the EFTA Court – the two bodies that make up the EFTA Surveillance and Court mechanism – have played a strong role in safeguarding the EEA Agreement and in developing the current body of EEA law. To mark the EEA's 25th anniversary, ESA worked with the EFTA Court in organising a high-level conference for key stakeholders.

The EEA25 Conference took place in the Concert Noble – a beautiful Renaissance-era building in the heart of the European district in Brussels. On 14 June 2019, the venue hosted over 300 guests from a diverse variety of backgrounds. Attendees included policy makers and EEA legal experts, ministry officials and representatives of civil society organisations.

The conference began with a series of video messages from the three Prime Ministers of the EEA EFTA States, following which the Presidents of ESA and the EFTA Court, Bente Angell-Hansen and Páll Hreinsson, took the floor to give a warm welcome to the assembled guests.



"We should value the benefits of the EEA, and cherish and nurture the Agreement itself, through our continued work and cooperation, positively and proactively meeting challenges as they arise."

Bente Angell-Hansen,
President of ESA



"I am an optimist when it comes to the future of EEA law. The reason is that I see a strong willingness on the part of the EFTA States to make it work."

Páll Hreinsson,
President of the EFTA Court

The EEA25 Conference consisted of three distinct panels, each covering a different aspect of the EEA Agreement. The panellists were selected in order to bring different perspectives to the discussion, to generate debate and discussion among the conference guests. **"The EEA Agreement – 25 years and still going strong"**



The speakers in the first panel were Judge Páll Hreinsson, President of the EFTA Court; Eleanor Sharpston QC, Advocate General at the Court of Justice of the European Union (CJEU); Professor Steve Peers, University of Essex; and Professor Halvard Fredriksen, University of Bergen.

Ambassador of the Principality of Liechtenstein to Belgium and Head of the Liechtenstein Mission to the EU, Sabine Monauni, moderated the panel, presiding

over a discussion evaluating the past and predicting the near future of the EEA.



The **“Competition and Consumers in the EEA”** panel discussed what EEA competition rules have delivered to consumers in practice, and how the EEA institutions will continue to work towards applying these rules in an effective and efficient manner.

The speakers on this panel were Páll Gunnar Pálsson, Director-General, Icelandic Competition Authority; Beret Sundet, Partner at BAHN; Eddy de Smijter, Head of Unit, International Relations, Directorate-General (DG) for Competition, European Commission; and Agustín Reyna, Head of Legal and Economic Affairs at the European Consumer Organisation BEUC.

Emily O'Reilly from ESA's Competition and State Aid Directorate moderated the panel, which began with a keynote address from Johannes Laitenberger, Director-General, DG Competition, European Commission.

The final panel discussion of the conference was titled **“People at work in the EEA”**. The speakers for this panel were General Court Judge Krystyna Kowalik-Bańczyk; Hans-Christian Gabrielsen, Chairman of the Norwegian Confederation of Trade Unions; Guðrún Hafsteinsdóttir, President of the Confederation of Icelandic Industries; and Hildur Hjörvar, a lawyer from the “EEA generation” working at the European Court of Human Rights.

Marthe Dystland from ESA's Internal Market Affairs Directorate served as moderator. The panel's keynote speaker was Iceland's former Minister of Justice and Education, Björn Bjarnason, who later in 2019 published an insightful report into the benefits of Icelandic membership of the EEA.

This panel discussion revolved around how EEA law has affected and continues to reflect the changing work environment. In particular, the speakers shared their thoughts on the challenges that the EEA States had faced over the last 25 years, how those challenges had been met, and what obstacles may lie ahead.



Hildur Hjörvar, Lawyer at the European Court Of Human Rights



The conference was a great success, and guests were left with new connections, fresh perspectives and the promise of continued professional discussion on the EEA Agreement in the years to come.

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 2019 was EUR 16 million, an increase of 6% compared with 2018. This increase was primarily due to inflation adjustments and an increase in the manning table. Nearly 77% of ESA's budget represents personnel costs, i.e. salaries, allowances and benefits.

<i>Amounts in EUR 000</i>	Actuals 2019*	Budget 2019	Actuals 2018	Budget 2018
<i>EEA EFTA States' contributions</i>				
- Current year	15,909	15,909	15,079	15,079
- Multi-year contributions for IT investments**	86	86	(14)	(14)
Total EEA EFTA States' contributions	15,995	15,995	15,065	15,065
Financial income	2	1	3	1
Other income	8	25	22	46
Total income	16,005	16,021	15,091	15,112
Salaries, benefits, allowances and turnover costs	12,217	12,306	11,106	11,609
Travel, training and representation expenses	849	993	785	932
Office accommodation expenses	1,249	1,253	1,204	1,234
Supplies and services expenditure	1,464	1,463	1,409	1,331
Other costs	9	-	-	-
Financial expenses	9	6	10	6
Total expenditure	15,797	16,021	14,514	15,112
Net surplus for the year	208	-	577	-

* Preliminary and unaudited data.

** Negative "multi-year" contributions for IT investments in 2018 represent an income deferral for contributions received in 2018 for a new IT project, for which income will be reported in future years.

ESA's annual financial statements, prepared in accordance with the International Public Sector Accounting Standards (IPSAS), are made available on our website once the relevant ESA/Court Committee (ECC) procedures for the year in question have been finalised. ESA's financial statement for the financial year 2018 was approved by the ECC on 20 December 2019, and ESA was discharged of its accounting responsibilities for that period by the EEA EFTA States.

The EFTA Board of Auditors (EBOA) is the auditing authority of ESA. It is a permanent committee consisting of auditors representing the supreme national audit bodies of the EFTA States. EBOA, in cooperation with external auditors, performs annual audits of the financial statements of EFTA institutions. When auditing the activities of either ESA or the EFTA Court, EBOA meets "at three", with audit representatives from Iceland, Liechtenstein and Norway, and reports to the ECC.

The Internal Market

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

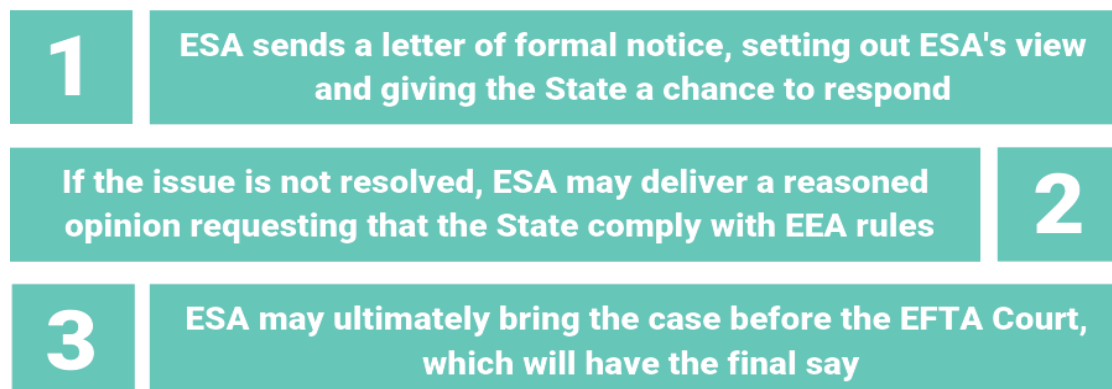
In order to ensure that every citizen and undertaking can reap the full benefits of the Internal Market, ESA continuously monitors the application of EEA law in the EEA EFTA States. ESA can pursue legal action against an EEA EFTA State to ensure the proper application and implementation of Internal Market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

For the Internal Market to function, the EEA EFTA States must ensure the effective and timely implementation of Internal Market rules into their national legal orders. One of ESA’s main priorities is to investigate cases where the EEA EFTA States have failed to implement legislation incorporated into the EEA Agreement in their national legal orders. In 2019, ESA opened 134 cases where an EEA 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 incorrect implementation of EEA law or where national rules and practices are incompatible with the EEA Agreement. Such an investigation can be initiated on the basis of ESA’s own monitoring of the EEA 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 Internal Market. In 2019, ESA dealt with some 120 ongoing complaint cases.

The majority of complaints received in 2019 concerned the 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

ESA can also proactively investigate breaches of EEA law. It does this by continuously monitoring events in the three EEA 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 stay informed about how the Internal Market is working in the three EEA EFTA States.



Miek Peeters investigates Internal Market cases

Main activities in 2019

Norwegian rules on hospital treatment in other EEA States

On 18 December 2019, [ESA decided to bring Norway before the EFTA Court](#) concerning rules that make it more difficult for its citizens to seek hospital treatment in other EEA States.

ESA had received several complaints concerning this issue, and found that a number of provisions in 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 healthcare system has failed to provide the 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 in Europe.

Climate change

ESA undertook several tasks in 2019 to prepare for the incorporation of EU acts related to climate change into the EEA Agreement.

Iceland, Norway and the EU agreed to deepen their cooperation on climate change. Accordingly, on 25 October 2019, the EEA Joint Committee incorporated key EU climate acts into the EEA Agreement through its Decision No 269/2019. This includes the Effort Sharing Regulation (Regulation (EU) 2018/842); the Land Use, Land Use Change and Forestry (LULUCF) Regulation (Regulation (EU) 2018/841), and rules on monitoring and reporting. These acts concern a range of sectors, including transport, buildings, waste management and agriculture, and LULUCF.

In 2019, ESA focused on the LULUCF Regulation, one of the first actions under which is for Iceland and Norway to present their national forestry accounting plans to ESA. An expert group has been established to assist ESA in its technical assessment of these plans, and ESA has also participated in the expert group established by the European Commission to review the plans of the EU Member States.

Cooperation with the European Financial Supervisory Authorities

ESA strengthened its close cooperation with the European Financial Supervisory Authorities (ESAs), taking a series of actions to improve information exchange and maintain close consultation. This is necessary for the fulfilment of its tasks under the EEA Agreement.

Most notably, ESA participated as a non-voting member in all meetings of the ESAs' Board of Supervisors, including confidential sessions and strategy meetings where the Board Members discussed common challenges and future priorities.

In addition, cooperation took place at a technical level on issues relating to financial entities operating or established in the EEA EFTA States. As a direct supervisor of Credit Rating Agencies (CRAs), for instance, ESA may not only register [new CRAs](#), but also investigate and ultimately impose supervisory measures and fines against firms conducting unauthorised credit rating activities in the EEA EFTA States. In this context, ESA worked closely with the European Securities and Markets Authority (ESMA), drawing on its longstanding experience of supervising EU CRAs.

Following the entry into force of major legislative packages in 2019 such as the Markets in Financial Instruments Directive II ([MiFID II](#)) and the Anti-Money Laundering Directive IV ([AMLD IV](#)), ESA and the ESAs assessed their legal implications and established the necessary operational arrangements to ensure consistent application of the new rules across the Internal Market. The Multilateral Memorandum of Understanding ([MMoU](#)) with the ESAs signed in 2018 was confirmed to be a reliable tool and a solid base for future cooperation to address the ever-increasing number of EEA acts and relevant tasks for ESA in the field of financial services.

Cooperation with the European Data Protection Board

Following the entry into force of EEA Joint Committee Decision No 154/2018 incorporating the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) into the EEA Agreement, ESA participates in the European Data Protection Board (EDPB).

The EDPB, which was established by the GDPR, is an independent European body that contributes to the consistent application of data protection rules and promotes cooperation among data protection authorities of the EU Member States. Based in Brussels, it is composed of representatives of the national data protection authorities and the European Data Protection Supervisor (EDPS).

The European Commission and ESA have the right to participate in the activities and meetings of the EDPB without voting rights.

Nationality and residency requirements in Norwegian and Icelandic company law

In December 2019, ESA [decided to bring Norway before the EFTA Court](#) and issued [a reasoned opinion to Iceland](#) concerning certain nationality and residency requirements for corporate board members and management of companies established in those states. ESA believes these requirements to be in violation of fundamental EEA principles regarding the freedom of establishment.

In particular, Norway requires managers and board members of companies established in Norway to be residents *and* citizens of an EEA country. In Iceland, which relaxed its rules in 2017, managers and board members of companies established in Iceland must *either* be residents *or* citizens of an EEA country.

In imposing these requirements, Norway and Iceland are restricting companies of other EEA States in their free choice of management, which may force them to alter the composition of their present management or board.

The requirements also restrict companies of other EEA States wishing to pursue activities in Norway or Iceland through agencies, branches or subsidiaries, as they may not choose their management freely and appoint the people they prefer.

Nationality and residence requirements are generally not a suitable proxy for the fitness and propriety of management and board members. This is why there are already stringent EEA rules and scrutiny in place for individuals in sensitive sectors such as financial services.

Liechtenstein rules on prior authorisation schemes for service providers

On 18 December 2019, ESA sent a [reasoned opinion](#) to Liechtenstein concerning rules in the Liechtenstein Trade Act on authorisation schemes and notification requirements. The rules require businesses wishing to provide their services in Liechtenstein to obtain prior authorisation from national authorities. Those who wish to provide cross-border services must also notify the authorities before taking up their activities in Liechtenstein.

The EFTA Court ruled already on 10 May 2016 that such requirements breach EEA law. The Court found the authorisation schemes to be in breach of the Services Directive, freedom of establishment for service providers and freedom to provide cross-border services in the EEA. Under the Services Directive, which aims to remove overly burdensome authorisation schemes, procedures and formalities, prior authorisation is only permissible in limited circumstances.

ESA acknowledged that a revision of the Liechtenstein Trade Act would require time. However, three-and-a-half years after the EFTA Court judgment, ESA found that Liechtenstein

had had sufficient time to take the necessary measures to adapt its legislation and bring it into conformity with EEA law. Therefore, ESA decided to deliver a reasoned opinion to Liechtenstein for non-compliance with the EFTA Court judgment.

Reporting obligation in Norway for service providers from other EEA States

Norway requires detailed information on any contract with a value exceeding NOK 20 000 to be reported by both the Norwegian recipient of the service and the provider from another EEA State, under the threat of fines. No such reporting obligation exists when Norwegian contractors are awarded a contract for work in Norway.

Several Norwegian and European companies complained to ESA about this practice.

In December 2018, ESA sent [a reasoned opinion to Norway](#). In ESA's view, the reporting obligation is in breach of Article 36 of the EEA Agreement on the free movement of services. The purpose of the reporting is to ensure effective fiscal supervision and tax collection, and to prevent tax fraud. Although ESA accepts that these are legitimate objectives, it concludes that Norway's stringent and deterrent approach is disproportionate to the aims pursued.

Norway does not agree with ESA's assessment, and argues that the reporting obligation does not go beyond what is necessary to ensure the above-mentioned aims. During the course of 2019, ESA and the Norwegian Government conducted a close dialogue in order to find solutions to the issue.

Restrictions in the financial undertakings field in Norway

In [April](#) and [December](#) 2019, ESA sent letters of formal notice urging Norway to remove several unjustified restrictions in the financial undertakings field.

Norway maintains an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20 to 25% of the total shares in financial undertakings.

This practice was also assessed by the EFTA Court in Case E-08/16 *Netfonds Holdings*. The Court concluded that it constituted a restriction on the freedom of establishment. The Court found it not to be a suitable way to achieve the identified legitimate objective or, if suitable, seemed to go beyond what was necessary in order to attain that objective.

Moreover, the Norwegian Financial Institutions Act contains a requirement whereby a Norwegian financial undertaking has to acquire authorisation from the Ministry of Finance if it wishes to set up a subsidiary in another EEA State.

ESA holds the view that this authorisation requirement breaches EEA legislation in the financial services field and the freedom of establishment.

Taxation of income received from EU agencies

In May and September 2019 respectively, ESA sent letters of formal notice to [Iceland](#) and [Norway](#) considering that those states are in breach of the Regulation establishing a European Union Aviation Safety Agency (EASA).

The EASA Regulation, as incorporated into the EEA Agreement, allows nationals of Iceland, Liechtenstein and Norway to be employed in this institution, and requires EEA EFTA States

to apply the Protocol on the privileges and immunities of the European Union to the staff of EASA. Among other things, the Protocol exempts staff from national taxes on income received from EU sources, on which EU tax has already been paid.

However, Iceland and Norway's tax rules require that resident taxpayers declare all income received from the European institutions and pay tax again on such income, including pensions.

ESA has also opened an own initiative case to assess the relevant Liechtenstein provisions.

Exportability of Norwegian cash benefits

It follows from Norway's National Insurance Act (*Folketrygdloven*) that in order to receive certain kinds of sickness benefits, the beneficiary must stay in Norway. Exceptions are limited and subject to prior authorisation of the Norwegian Labour and Welfare Administration (NAV). Following the so-called NAV case in Norway, the Norwegian Government considered that approximately 2 000 people had been wrongfully required to repay substantial amounts to the Norwegian authorities because they had stayed temporarily in another EEA State. Many people had been imprisoned for staying abroad and failing to notify the authorities of their stay, the longest known case of imprisonment being eight months. In November 2019, ESA decided to open an own initiative case regarding these Norwegian rules and practice.

In its preliminary assessment, ESA [takes the view that](#) the requirement to stay in Norway is not in line with EEA law, in that it contradicts the principle of exportability of cash benefits provided for by [Regulation \(EC\) No 883/2004](#) on the Coordination of Social Security Systems. Moreover, the Norwegian rules and practice amount to disproportionate restrictions on the freedom of movement provided for under Article 28 EEA and Article 7(1)(b) of [Directive 2004/38/EC](#) on the right of citizens of the EU and their family members to move and reside freely. In light of the Norwegian Government's forthcoming observations, ESA will decide whether to initiate infringement proceedings.

Hydropower authorisations in the EEA EFTA States

ESA looked into the regulation of hydropower authorisations in all three EEA EFTA States. ESA assessed these pursuant to rules on authorisation schemes laid down in the Services Directive.

By its own initiative, ESA looked into the Icelandic system for hydropower licences. Following a reasoned opinion from ESA, the system is now under revision.

In March 2019, the European Commission initiated similar infringement proceedings against eight EU Member States.

In light of the above, ESA decided to look into the regulation of hydropower authorisations in Liechtenstein and Norway. ESA sent requests for information to both states in April and received replies during the summer. Both cases are at a preliminary stage and ESA is assessing the information provided by Liechtenstein and Norway. No decision has been taken in either case.

Entry into force of the Third Energy Package in the EEA EFTA States

Following the entry into force of EEA Joint Committee Decision No 93/2017 incorporating the Third Energy Package, ESA began its cooperation with the Agency for the Cooperation of Energy Regulators (ACER), including participating in ACER's Board of Regulators, without voting rights.

ACER is an independent European agency, which fosters a fully integrated and well-functioning internal energy market and assists the EU's National Regulatory Authorities (NRAs) in exercising their tasks at EU level.

ACER's Board of Regulators is composed of representatives of the EU NRAs and the European Commission. The NRAs of the EEA EFTA States are also entitled to participate in the Board, without the right to vote.

Preparations for Phase IV of the EU Emission Trading System

Phase IV of the EU Emission Trading System (EU ETS) will run from 2021 to 2030. In 2019, the legislation for Phase IV had not been incorporated into the EEA Agreement. In September 2019, Iceland and Norway submitted their National Implementation Measures to ESA, pending entry into force. Following invitation from the EEA EFTA States, ESA started preparatory work to allow the technical assessments for Phase IV to start before the entry into force of the relevant legislation.

ESA ensures compliant practices in public procurement

EEA rules on public procurement require public entities in EEA countries to follow certain procedures when buying goods, services or works that exceed certain values. The procedures guarantee transparency and equal treatment of all potential suppliers in the EEA.

ESA considered a variety of issues in relation to public procurement in 2019.

Monitoring compliance of maritime transport contracts

ESA's ongoing monitoring of public service obligations in the area of maritime transport identified some possible issues in relation to compliance with public procurement rules in this area in Iceland. ESA opened two own initiative cases to investigate these further.

One case concerned a contract that had been awarded without applying all the procedural requirements of EEA law. As a result of ESA's case, the contracting authority reviewed its procedures and implemented a number of measures to ensure compliance.

The second case concerned cooperation between the Icelandic Road and Coastal Administration and the municipality of the Westman Islands. Under certain conditions, arrangements involving cooperation between public authorities fall outside EEA public procurement directives. This means that they are not required to be subject to competitive tendering. In this case, it was not clear to ESA that the relevant conditions had been satisfied. After the Icelandic Government provided more detailed information, the case was closed.

ESA continues to monitor developments in this area in both the EEA EFTA States and the EU, where a number of relevant cases are pending before the CJEU.

The position of non-profit providers

The introduction of new public procurement rules in the EEA in 2017 raised some questions about the continuing applicability of previous case law. It also raised questions regarding [ESA Decision No 154/17/COL](#) on reserving access to certain contracts for non-profit organisations. The position of non-profit providers has been subject to some debate, particularly in Norway. ESA has continued to review practices and developments in this area.

Exemption in the Norwegian bus services sector

ESA's role in relation to public procurement is not limited to investigating issues of possible non-compliance.

In 2019, ESA published [Decision No 042/19/COL](#) exempting providers of public bus services in Norway from the application of procurement rules relating to the utilities sector. The exemption applies when providers enter into contracts in order to carry out the operation of public bus transport services.

Exemptions can be granted if there is unrestricted access and an adequate level of competition in the market in the state concerned. ESA's decision concerns operators participating in competitive tender processes in order to be awarded contracts for the relevant services. These operators no longer have to follow the utilities procurement rules when they award further contracts themselves.

The exemption was made as the result of a request submitted pursuant to the relevant EEA rules by the company Vy Buss AS (the company previously known as Nettbuss AS).

Monitoring of the electronic communications market and incorporation of the telecom package

In December 2018, the EU adopted new telecom rules: the Electronic Communications Code (Directive (EU) 2018/1972) and the Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) (Regulation (EU) 2018/1971).

ESA is closely monitoring the process of incorporation of these rules into the EEA Agreement and actively following the European Commission's and EU Member States' work with regard to implementation of the new provisions.

The Electronic Communications Code is designed to reflect the reality of today's communications markets. Over the last 20 years, the markets have been transformed from a landscape of national monopolies to a more competitive marketplace with an increasing number of providers and variety of services. The EEA EFTA States are no exception to these market transformations. Once the new rules are incorporated into the EEA Agreement, ESA will have a vital role in ensuring their timely implementation and correct application in the EEA EFTA States.

In the meantime, ESA continues its work to ensure that the measures imposed by the National Regulatory Authorities (NRAs) of the EEA EFTA States on undertakings follow the rules that currently apply. It does this by engaging in continuous dialogue with the NRAs and stakeholders in order to identify solutions that will benefit businesses and consumers.

Transport

Safe, secure and sustainable transport of goods, services and persons is fundamental to a functional and competitive Internal Market.

The EEA Agreement covers all modes of transport. ESA monitors the implementation of EEA legislation on aviation, road, rail and maritime transport.

ESA works closely with the European Commission and the specialised EU transport agencies on aviation (European Union Aviation Safety Agency ([EASA](#))), maritime transport (European Maritime Safety Agency ([EMSA](#))) and railways (European Union Agency for Railways ([ERA](#))). These agencies provide ESA with expert advice and assist with visits and inspections in the EEA EFTA States concerning implementation of EEA legislation, either on a periodic basis in accordance with their work programme, or following a specific request by ESA.



Laurits Nielsen carries out transport inspections in the EEA EFTA States

Norway amends its taxi licensing rules following ESA complaint case

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

Norwegian legislation foresaw a limited number of taxi licences available in a licence district. The award of new licences was subject to a needs test.

ESA took the view that the Norwegian national legislation on access to the market for the provision of taxi services constituted an unjustified restriction on the freedom of establishment under Article 31(1) EEA.

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 thus serve a public interest.

However, the situation is different in densely populated areas. Limiting the number of licences on the basis of a needs test in densely populated areas will likely limit supply, as new operators will be precluded from entering the market.

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.

In June 2019, the Norwegian Parliament adopted new legislation, removing the general numerical limitation of licences. The new legislation made it possible to limit the number of licences only in rural areas predefined in secondary legislation. The new legislative framework will enter into force on 1 July 2020.

Transport security inspections – aviation and maritime

In the field of aviation and maritime security, one of ESA's most important tasks is to carry out on-site inspections.

The main objective of the [EU regulatory framework on aviation security](#), which also applies to the EEA EFTA States, 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.

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 Member States. For the EEA EFTA States, these inspections are carried out by ESA. The European Commission and ESA inspections are complementary to the national monitoring by the Member States of airports, operators and entities. ESA cooperates with the appropriate authorities in the EEA 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](#), which also applies to the EEA EFTA States, is to introduce and implement measures aimed at enhancing the security onboard ships used in international trade and, partly, domestic shipping, and associated port facilities and ports in the face of threats of intentional unlawful acts. As in the field of aviation security, ESA is tasked with inspecting the EEA EFTA States in the field of maritime security and is assisted by EMSA in its work.

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

Cooperation with EU transport agencies

As part of its cooperation with the EU transport agencies in the field of aviation, maritime transport and railways, ESA meets with the management of the agencies to discuss key priorities and common work items.

In 2019, ESA met with the new Executive Director of EMSA, Ms Maja Markovčić-Kostelac, and had a constructive discussion on forthcoming visits and inspections in maritime safety and security.

ESA also had a productive meeting with ERA to discuss the new legislative developments in the EU and how ERA's procedures and systems will be affected. ESA emphasised the need to remain conscious of the differences between the EU and the EEA EFTA States, and the role of ESA as regards implementation of railway legislation in the EEA EFTA States.

In addition, ESA met with EASA experts on standardisation inspections in aviation safety. The experts gave a presentation on the continuous monitoring approach applied by EASA, followed by discussions.

Cooperation with and assistance to the EEA EFTA States

ESA values an open and constructive dialogue with the national administrations in the EEA EFTA States, also in the field of transport. To this end, ESA undertook several formative actions in the EEA EFTA States in 2019:

1. **Presentation on public service obligations in transport in Iceland**
ESA gave a presentation to the national authorities and ministries in Iceland responsible for public service contracts in the field of transport. In the presentation, ESA went through the basic principles of the EEA Agreement on public service obligations, relevant EEA acts and case law of the European courts.
2. **Meetings to discuss implementation of aviation security legislation in Iceland**
ESA participated in dialogue meetings in Iceland to discuss the interpretation and implementation of aviation security legislation with national authorities, airports and other stakeholders.
3. **Presentation at the annual PFSO training conference in Norway**
ESA gave a presentation at the annual training conference for port facility security officers (PFSOs) in the region of central Norway, organised by the Norwegian Coastal Administration in Ålesund. The presentation focused on the maritime security inspections that ESA carries out and the methodology of inspections, as well as some general observations on the work of PFSOs stemming from inspections in Norway.
4. **Meeting with the Norwegian Railway Authority**
A meeting took place in Oslo between ESA and the Norwegian Railway Authority to discuss some legal discrepancies concerning railway safety and interoperability between the EU and the EEA EFTA States, in view of the fact that the Fourth Railway Package has not yet been incorporated into the EEA Agreement. The objective of the meeting was to find ways to minimise the impact of these discrepancies on the work of the national authorities, ERA and ESA.

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 continuously 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.

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

Audit activities in 2019

In 2019, three audits were carried out in both Iceland and Norway:

Aquaculture animal health controls and official controls of live bivalve molluscs		ICE
Meat and milk hygiene		ICE
Organic production and labelling of organic products		ICE
NOR	Aquaculture animal health controls	
NOR	African swine fever	
NOR	Meat and milk hygiene	

ESA issues a draft mission report after each audit with recommendations that aim to rectify shortcomings identified in the official control systems of the national authority. The EEA 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 the implementation of corrective actions.

Aquaculture animal health controls and live bivalve molluscs

ESA undertook a mission to Norway to evaluate health controls of diseases in aquaculture animals in May 2019. ESA found that there was no reliable system in place enabling the identification of farms that had been granted ISA (Infectious Salmon Anaemia)-free status and

that, in the majority of cases, such status had been granted without, or with very limited, involvement of the Norwegian Food Safety Authority (NFSA). There was also a lack of official verification of surveillance activity undertaken to prove disease freedom from ISA. After the audit, Norway planned to take a number of corrective measures to allow for the continuation of EEA trade of Norwegian farmed fish and shellfish.

On a similar audit in Iceland in March 2019, official controls regarding bivalve molluscs were found to be weak. Furthermore, monitoring and sampling to detect marine biotoxins, microbiological risks and presence of heavy metals were not performed as required by EEA legislation. Therefore, at the time of the mission it could not be guaranteed that products placed on the market were safe for human consumption. In response to this, at the request of ESA, Iceland implemented a remedial action plan addressing ESA's findings regarding bivalve molluscs and to improve the control systems of aquaculture animals.

Organic production and labelling of organic products

In December 2019, ESA conducted an audit in Iceland to verify that official controls related to organic production and the labelling of organic products were carried out in compliance with EEA legislation. This was the first ESA audit in Iceland dedicated to organic food production.

Iceland has designated a competent authority and put a system in place for the control of organic production. The competent authority has delegated control tasks to one accredited control body. Although the Icelandic control system can provide a good basis for further development of official controls in the organic sector, some adjustments are needed, such as ensuring sufficient supervision of the control body by the competent authority.

African swine fever

Norway is prepared to manage an outbreak of African swine fever (ASF) in domestic pigs, but needs to strengthen surveillance in domestic pigs and wild boar. These were ESA's conclusions following an audit in Norway in September 2019. In case of a suspicion of ASF, the emergency preparedness arrangements in Norway are likely to be effective for domestic pigs, but the preparation for an outbreak in wild boar is weaker. The contingency plan for domestic pigs is robust; staff are trained and could effectively manage an outbreak of ASF. However, for wild boar, the NFSA as the competent authority had no strategy for population management of wild boar, or for the gradual stepping up of biosecurity in hunting grounds when no infection is present.

Additional Salmonella guarantees granted to Iceland

In January 2019, ESA decided to authorise special guarantees for Iceland concerning meat and eggs from domestic fowl and meat from turkeys. The guarantees require that food products intended to be imported into Iceland from another EEA State are accompanied by documents with specific statements concerning checks on Salmonella.

Regulation (EC) No 853/2004 includes special guarantees concerning Salmonella for operators intending to place certain products on the Finnish, Swedish and Norwegian markets. When the prevalence of Salmonella in certain animal populations or food is very low and strict national control programmes apply, ESA can authorise special guarantees for an EEA EFTA State according to that regulation. With that decision, Icelandic authorities can apply these special guarantees in respect of meat and eggs from domestic fowl and meat from turkeys.

Cooperation with the European Commission

In July 2019, ESA and the European Commission's Directorate-General for Health and Food Safety (DG SANTE) signed an administrative arrangement concerning cooperation in the field of food and feed safety, animal health and welfare and animal by-products. The parties already participate regularly in each other's audits and exchange information on their respective work programmes. The arrangement formalises and further strengthens this cooperation and coordination in other areas, such as evaluation of residue monitoring plans and results.

State aid

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 exceptions to the prohibition are to apply.



*Members of ESA's Competition and State Aid Directorate
Hans-Petter Håvås Hanson, Militsa Kostova and Ketill Einarsson*

Main activities in 2019

In 2019, 43 state aid cases were opened and 33 cases were closed. At the end of the year, 38 state aid cases were pending. These statistics include pre-notification discussions, notifications, formal investigations, existing aid reviews, reviews of unlawful aid (mostly complaints), and recovery and evaluation cases. Monitoring cases and cases of aid under the General Block Exemption Regulation (GBER) are excluded.

ESA adopted 15 state aid decisions in 2019: 13 involving Norway and two concerning Iceland. All the decisions are available in the [state aid register on ESA's website](#). ESA has consistently

adopted fewer decisions per year following the state aid modernisation initiative launched in 2012. The modernisation has, to an extent, decentralised state aid control, leaving greater responsibility with the EEA States to ensure compliance by applying the GBER. ESA is now focusing more on monitoring implemented aid measures and outreach.

State aid decisions

Notifications

ESA decided on seven notification cases in 2019. Three of these were notified by the EEA EFTA States for legal certainty, and found not to involve state aid.

Digital health and education solutions in Norway

ESA assessed the financing of the Norwegian system for eHealth. This countrywide digital system for information and communication makes health services more accessible in Norway, whilst guaranteeing equal standards for all. It makes the daily lives of patients easier and ensures the safety of personal data. Norway has a health service that is publicly financed and founded on solidarity, and which, therefore, does not normally raise state aid issues. The eHealth system contributes to the good functioning of this health service and must therefore be assessed in conjunction with it. ESA thus considered that the eHealth services in question are not of an economic nature, and that the state aid rules do not apply. This decision has been challenged before the EFTA Court (see chapter on the Legal and Executive Affairs Directorate, under *Review of ESA's decisions*).

ESA also examined a platform for online digital learning materials set up by Norwegian municipalities. The digital initiative, called FriDA (Fri Digital Arena), aims to give children the opportunity to develop certain basic skills by using digital information and communication technology in learning. ESA concluded that FriDA's provision of free and openly available digital learning materials is not an economic activity, and that the financing of that activity is therefore not considered state aid.

Power price set by arbitration tribunal

In July 2019, Iceland notified an arbitration award to ESA for legal certainty. Two months later, ESA concluded that the power price set by the arbitration tribunal that Elkem Iceland pays to the State-owned power producer *Landsvirkjun* did not constitute state aid. ESA concluded that the award decided by the arbitration tribunal did not give Elkem an advantage.

Alternative pathway for electronic communications traffic

In September 2019, ESA approved state aid for the construction of a new subsea cable that will ensure reliable delivery of essential services to and from Norway. Norway is one of the most digitalised countries in Europe. Many of the essential functions of Norwegian society such as the police, hospitals and banks rely on internet access. Currently, almost all communications traffic in and out of Norway follows one geographic route, through Oslo, Sweden and Copenhagen. Norway has a need for an alternative pathway to maintain essential services and citizens' access to electronic communications in case of an outage on the existing route. Norway's financing of this new cable will strengthen national security by

ensuring safe and reliable communication. Norway will organise an open and non-discriminatory call for construction of the new subsea cable. This competition aims to find the best and most economical solution for an alternative pathway.

Complaints

During the course of 2019, ESA decided on eight complaint cases: seven against Norway and one against Iceland. On the basis of the complaints, ESA opened five formal investigations: four against Norway and one against Iceland. One of the investigations, Trondheim Spektrum, was closed by the end of the year.

ESA has to open a formal investigation when, after a preliminary examination, it has not been able, without doubt, to conclude that a potential state aid measure is in line with the EEA Agreement. When opening a formal investigation, ESA makes a decision where it sets out its preliminary views and doubts. During the formal investigation, ESA invites any interested party to comment on its preliminary view. The relevant state has the opportunity to respond to the comments from the interested parties.

ESA closed three complaint cases in 2019 without initiating formal investigations.

Trondheim Spektrum

In April 2019, ESA opened a formal investigation into alleged aid to Trondheim Spektrum. The investigation was concluded in December. ESA found that the alleged aid was compatible with EEA state aid rules. Trondheim Spektrum is a multipurpose facility used for sports events, concerts, trade fairs and congresses, and as a training venue for local sports clubs. ESA opened a formal investigation following two complaints in which it was claimed that Trondheim Spektrum received unlawful state aid from the municipality. The investigation also covered a measure notified by the Norwegian authorities. During the formal investigation, ESA looked into four measures: lease agreements allegedly not entered into on market terms, a capital increase, the financing of infrastructure costs and an alleged implicit guarantee for a loan. ESA found that the capital increase entails state aid, but that this aid is compatible with the EEA Agreement. ESA could also not exclude that the lease agreements contain elements of aid. However, such aid would also be compatible with the EEA Agreement. The other two measures investigated do not entail state aid. ESA considers that Trondheim Spektrum will ensure public access to facilities for sports, culture and recreation, and thereby satisfies a policy objective of common interest.

Waste handling in Tromsø

In December 2019, based on a complaint, ESA decided to investigate whether companies in the Remiks Group providing waste handling services in Tromsø, Norway, have received state aid. During the formal investigation, ESA will look into whether:

- Tromsø municipality overpaid Remiks Næring for collection of industrial waste
- Remiks Husholdning overpaid Remiks Produksjon for waste treatment services
- Certain transactions in 2010 and 2012, relating to the establishment of the Remiks Group, were concluded on market terms

Farsund Vekst

In July 2019, ESA opened an investigation to find out if illegal state aid has been granted to Glastad Farsund AS, a private company. The municipality of Farsund has entered into a series of complex arrangements, including option agreements, with the company. ESA has decided to look into whether municipality-owned shares and property were sold below market price. If so, and Glastad Farsund benefited from an artificially low price, it will have to refund the difference and pay it back to the municipality.

ESA's investigation is based on a complaint. In 2011, the municipality of Farsund and Glastad Farsund AS entered into a shareholders' agreement, establishing Farsund Vekst. On the same day, the municipality of Farsund granted Farsund Vekst option agreements with exclusive rights to develop the two seaside areas. In 2015, the municipality of Farsund sold its 50% share of Farsund Vekst to Glastad Farsund. The price was set at NOK 21 million, based on Farsund Vekst's total equity capital. Instead of transferring the funds, the parties agreed that the municipality could acquire development rights to the rooftop of a shopping centre, a right held by Farsund Vekst, for NOK 23.5 million. ESA will examine whether these transactions were made on market terms, or whether they provided an advantage to the private company.

Streetlights in Bergen

In April 2019, ESA opened a formal investigation into potential state aid granted in relation to the operation of streetlights in Bergen. Having received a complaint from the trade organisation Nelfo, ESA is looking into whether the municipality of Bergen overcompensated the largest power company in western Norway, BKK, for operating and maintaining the streetlights. BKK is currently the owner of the streetlight infrastructure, which the company acquired as part of taking over another company that was owned by the municipality. The municipality of Bergen is responsible for the streetlights along municipal roads, and finances these for the public good. ESA is looking into whether the municipality granted an undue advantage to BKK that goes beyond compensation in line with normal market conditions, and that may have benefited BKK's other economic activities. ESA is also investigating the municipal financing of various investments in the streetlights owned by BKK.

Gagnaveita Reykjavíkur

In December 2019, ESA opened a formal investigation into whether the telecom company Gagnaveita Reykjavíkur has received state aid. ESA has been looking into the matter since receiving a complaint from Síminn, a provider of wireless communications services in Iceland. The municipality-owned energy and utility company Orkuveita Reykjavíkur owns Gagnaveita Reykjavíkur and has financed and provided loans to the telecom company. The complainant claims that this has led to an unfair advantage and is in breach of state aid rules. ESA will investigate whether state resources were used to give Gagnaveita Reykjavíkur an advantage not available to other market participants. Gagnaveita Reykjavíkur is an independent entity, established to separate competitive and non-competitive operations of Orkuveita Reykjavíkur.

The Icelandic Post and Telecom Administration monitors that income from activities enjoying special or exclusive rights does not give advantages to operations in the competitive sector of telecommunications. Three decisions by the Post and Telecom Administration found that arrangements between Orkuveita Reykjavíkur and Gagnaveita Reykjavíkur violated this

requirement. The Post and Telecom Administration required Orkuveita Reykjavíkur to claw back the advantage in two of the cases. In none of the cases did the Post and Telecom Administration require that Gagnaveita Reykjavíkur pay interest on the advantage it received. ESA will investigate whether additional repayments need to be made, to ensure that Gagnaveita Reykjavíkur does not keep an undue advantage.

Complaints without formal investigations

Cash refund of the tax value of petroleum exploration costs

In March 2019, ESA closed a complaint case concerning the Norwegian Petroleum Tax Act. ESA found that the annual cash refund of the tax value of petroleum exploration costs does not entail state aid. Under the Norwegian Petroleum Tax Act, companies with taxable income can deduct exploration costs, an indispensable phase of petroleum extraction. Petroleum companies that do not have taxable income can carry forward their losses with interest, or ask for an annual cash refund of the tax value of these costs. The case was brought to ESA by Bellona, an environmental non-profit organisation, claiming that the cash refund of the tax value of petroleum exploration costs entails unlawful state aid from the Norwegian State by giving a selective advantage to certain companies. ESA concluded that the measure is not selective, as it is available to all companies on an equal footing. According to EEA state aid rules, a measure that is not selective does not constitute state aid.

TV 2

In December 2019, ESA concluded that the TV 2 agreement for public service broadcasting is in line with state aid rules. In September 2018, the Norwegian Ministry of Culture entered into an agreement with TV 2, giving the latter compensation for being a commercial public service broadcaster. In December 2018, ESA received a complaint from the media company Discovery that the agreement was in breach of EEA state aid rules. According to the agreement, TV 2 shall broadcast daily news on its main channel and Norwegian-language children's programmes at the weekend, and invest in Norwegian film and drama. The aim is to ensure media pluralism, production of news outside the Oslo area, and an alternative to the public broadcaster NRK. TV 2 receives up to NOK 135 million a year for these services. There is a specific block exemption for state aid for services of general economic interest. Compensation for such services is considered to be compatible with the EEA Agreement and exempt from notification to ESA if it meets certain criteria and does not exceed the net costs, including a reasonable profit, for performing the services. ESA concluded that the agreement between TV 2 and the Ministry of Culture meets these criteria. The agreement therefore falls under the block exemption and the complaint was rejected as unfounded.

Leangbukten Båtforenings Andelslag

Based on a complaint, ESA looked into whether Leangbukten Båtforenings Andelslag had received unlawful state aid from the Norwegian authorities. In the complaint, Asker Marina argued that Leangbukten Båtforenings Andelslag had received unlawful state aid from the municipality of Asker through two agreements. The first agreement concerns a 25-year lease contract to land and sea areas operated by Leangbukten Båtforenings Andelslag. Asker Marina alleged that Leangbukten Båtforenings Andelslag did not pay remuneration

corresponding to market terms. In the second agreement, Leangbukten Båtforenings Andelslag was granted the right to develop the sea area for no remuneration. In April 2019, ESA concluded that the measures have a purely local impact, and are thus not liable to affect trade between EEA States. Therefore, they do not constitute state aid within the meaning of Article 61(1) EEA. The decision is part of ESA's effort to focus state aid control on bigger cases that are more likely to impact competition in the Internal Market.

GBER cases

The General Block Exemption Regulation (GBER) allows the EEA EFTA States to adopt a wide range of state aid measures without prior notification to ESA. The GBER covers areas such as research and development and innovation, environmental protection, support to SMEs and aid for culture and heritage conservation.

For each GBER measure adopted, the EEA EFTA States send ESA an information sheet that sets out the main elements of the measure. These information sheets are published on ESA's [website](#). It is the responsibility of the EEA EFTA States to ensure that all conditions of the GBER are fulfilled for each adopted measure. However, ESA provides guidance to the EEA EFTA States on the interpretation of the GBER through a dedicated email address where the EEA EFTA States can send questions to ESA. The questions received, as well as ESA's answers, are published on ESA's website in the form of a "[GBER Questions and Answers](#)" document.

The questions concern issues such as:

- Definition of legal concepts such as "undertaking in difficulty"
- At what point in time is aid considered granted
- Definitions of sectors and terms used in the GBER
- The condition of incentive effect
- Issues concerning cumulation of state aid
- Publication of information in line with the GBER

Monitoring

Monitoring is an annual ex-post control aiming to correct irregularities in state aid measures. Monitoring helps to improve compliance with state aid rules directly and indirectly through its deterrent effect. Monitoring can also facilitate learning and outreach.

With the state aid modernisation initiative, ex-post monitoring has become even more important. With the increased scope of the GBER, the share of block exempted measures has risen significantly. As block exempted state aid measures are not subject to ESA's prior approval, their compliance with the GBER is checked by way of ex-post monitoring.

During the course of 2019, ESA selected three Norwegian state aid measures for monitoring: The Eco-Innovation scheme (approved aid scheme), exemptions/reductions of CO₂ tax on natural gas and LPG (GBER scheme), and the regionally differentiated social security contributions for the transport and energy sectors (GBER scheme). ESA also closed the

monitoring of the approved Norwegian scheme for the Compensation of Indirect Emission Costs because of full compliance, as well as the Icelandic GBER scheme to support innovation companies because of volunteer amendments at scheme level.

Private enforcement study

Following a call for interest, ESA commissioned a study on the private enforcement of state aid rules from three external partners: law firms Kluge and Advel for Norway and Iceland respectively, and the Liechtenstein Institute, a research institute based in Liechtenstein. The study was published in July 2019 and gives an overview on how state aid rules are implemented and enforced in Liechtenstein, Iceland and Norway. The study also looks into how the EEA EFTA States implement ESA's decisions requiring the recovery of incompatible aid. Very few cases relying on state aid rules have been brought before the national courts in the three EEA EFTA States during the 25 years of the EEA Agreement. Explanations for this could be ambiguity of state aid rules in national law, or lack of knowledge of state aid rules among legal practitioners and judges. The enforcement of state aid rules is essential for a "level playing field" in the EEA. The role of the national courts is to protect the rights of competitors and other third parties where aid is granted without ESA's authorisation.

Competition

Competition law

Competition law enables markets to work effectively for the benefit of consumers. Healthy competition pushes prices down and provides consumers with greater choice. It also incentivises companies to innovate and to deliver high-quality products and services.

The [EEA competition rules](#) prohibit anti-competitive coordination between companies, such as agreeing to fix prices or to refrain from competing head-on. They also prohibit dominant companies from abusing their market power, for example by obstructing their rivals' ability to compete.

ESA's role is to help ensure that companies operating in the EEA EFTA States abide by the EEA competition rules.

Main activities in 2019

ESA continued work on its active investigations in the mobile communications and air transport sectors. Investigative work was concluded in the e-payments sector, taking account of important market developments that followed the opening of ESA's proceedings in 2016.

In relation to the courts, 2019 was another busy year, with ESA actively assisting in the interpretation and development of the EEA competition rules in a number of cases at both national and European level.

ESA also stepped up its advocacy efforts, including at its EEA 25th anniversary event, with a view to conveying the benefits of competition policy in the everyday lives of consumers in the EEA EFTA States.

Mobile communications services

ESA took further steps in its investigation into whether Telenor may have abused a dominant position (contrary to Article 54 EEA) by squeezing margins available to rivals in standalone mobile broadband services offered to private users in Norway.

In June 2019, ESA sent a Supplementary Statement of Objections (SSO) to Telenor, putting additional arguments and evidence to the company. The sending of an SSO does not prejudice the outcome of the investigation, but was aimed at giving Telenor an opportunity to respond. These further elements reflect additional investigative work undertaken by ESA since a Statement of Objections (SO) was first issued in 2016.

ESA also decided, on prioritisation grounds, to discontinue the part of the investigation concerning breakage fees/clauses in Telenor's contracts with business users of mobile services. With investigative efforts focusing on the margins part of the case, the SSO supplements ESA's preliminary view that Telenor may have engaged in margin squeeze behaviour when supplying standalone mobile broadband services to residential customers in Norway.

Telenor replied to the SSO in the second half of 2019.

Regional air transport services

ESA continued its examination of whether the Norwegian airline operator, Widerøe, 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 certain airports with challenging approach and landing conditions, it was necessary to 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.

Throughout 2019, ESA continued its examination of Widerøe's reply to an SO sent to the airline operator in 2018 as part of the ongoing investigation. As stated above, the SO in this case likewise does not prejudice the outcome of an investigation, but is aimed at giving the party under investigation an opportunity to respond to ESA's preliminary concerns.

Online-payments services

In April 2019, ESA decided to discontinue its investigation into whether DNB, Nordea, BankID, Finance Norway and its related organisation, Bits, engaged in coordinated behaviour aimed at blocking Swedish payment initiation provider, Trustly, from the e-payments market in Norway. Payment initiation services enable customers to make online payments directly from their bank accounts.

Shortly after ESA opened its investigation in 2016, technical and contractual solutions were put in place, which enabled Trustly's access to the e-payments market. Trustly withdrew its complaint in November 2018 and confirmed that it was no longer experiencing obstructions in Norway. In light of this, and for reasons of prioritisation, ESA decided to discontinue its pending formal investigation, but indicated that it would continue to monitor the relevant markets closely in Norway.

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.²

In its role as a public enforcer, ESA may give differing degrees of priority to the complaints brought before it and focus its resources on those cases with the greatest level of interest under the EEA Agreement.

As reflected in the "Competition & Consumers" theme of ESA's EEA 25th anniversary event, ESA is mindful of prioritising cases with a clear consumer angle to ensure maximum impact in our enforcement work. In addition, ESA takes into account the significance of the alleged

² See, for example, ESA's Notice on the handling of complaints under Articles 53 and 54 EEA and ESA's Notice on best practices for the conduct of proceedings concerning Articles 53 and 54 EEA. Information on how to make a competition complaint may be found on: www.eftasurv.int/competition/complaints/.

infringement as regards the functioning of the EEA Agreement, the probability of establishing the existence of the infringement, and the overall scope of the investigation required.

Relationship with other competition law enforcers

ESA works side by side with the national competition authorities of the EEA EFTA States and EU Member States, as well as with its sister organisation 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. This is to ensure that businesses operating across national borders can have confidence in a consistent set of rules across the EEA. ESA continues to build on these close relationships through timely and targeted information-sharing to help ensure 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 in the “one-stop-shop” principle, so that either the European Commission or ESA, but not both, will be competent to handle any given case. However, there are robust mechanisms rooted within the framework to ensure that both authorities communicate regularly about their respective cases.

Through these mechanisms, ESA and the competition authorities in the EEA 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) concerning the territory of the EEA EFTA States. This is essential because cases handled by the European Commission can have a considerable impact on markets and market players in the EEA EFTA States.

Many of the European Commission’s largest antitrust cases involve EEA-wide markets or activities capable of affecting trade in an EEA 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 EEA EFTA States remain informed and involved by virtue of the EEA cooperation rules.

European Competition Network

The European Commission and the national competition authorities in the EU Member States cooperate on competition policy and practice through the European Competition Network (ECN). As the competition rules in the EEA Agreement are equivalent in substance to the competition rules in the EU, ESA and the national competition authorities of the EEA EFTA States also participate in ECN meetings and monitoring of ECN workflows.

The ECN framework ensures an open and continuous dialogue between all European enforcers on competition policy and experience. It is a key instrument in supporting effective and consistent application of competition law across the EEA.

Consistent Enforcement Across Europe

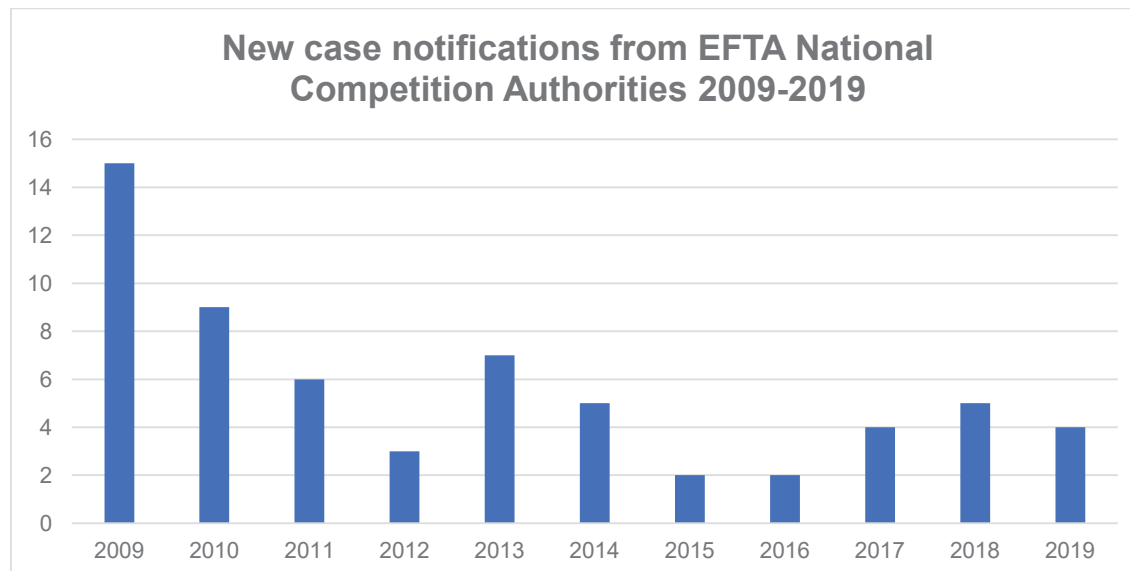
EEA Competition Rules	EU Competition Rules
Article 53 EEA	Article 101 TFEU
Prohibits anti-competitive coordination between market participants	
Article 54 EEA	Article 102 TFEU
Prohibits the abuse of a dominant position by large market participants	
Article 59 EEA	Article 106 TFEU
Prohibits the imposition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

Close cooperation with national competition authorities

National competition authorities and courts in the EEA 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 coherent and efficient application of these 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 Article 53 or 54 EEA, the national competition authorities in the EEA 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 reported a number of new investigations/enquiries concerning cases involving potential breaches of the EEA competition rules from 2009 to 2019.



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

Continuous informal communications also take place between ESA and the national competition authorities in the EEA EFTA States on both early stage and more advanced cases. This aims to support effective enforcement of the EEA competition rules by getting information and expertise where it is needed the most in the lifetime of a case.

Close cooperation with the courts in cases of EEA interest

In safeguarding coherent application of EEA law, ESA continues to assist the courts in cases involving the EEA competition rules and equivalent national provisions.

National courts and appeals tribunals in the EEA 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 observations in an *amicus curiae* (advisory) role to the courts and appeals tribunals of the EEA EFTA States where the coherent application of Article 53 or 54 EEA so requires. Similarly, ESA can provide observations to the courts in Luxembourg, namely the EFTA Court, the Court of Justice of the European Union (CJEU) and the General Court. ESA does so in practice on competition cases of EEA interest.

In May 2019, ESA submitted written *amicus curiae* observations before the Norwegian Competition Tribunal (*Konkurranseklagenemnda*) in an appeal (Case No 2019/34) brought by Telenor against a June 2018 decision by the Norwegian Competition Authority (NCA). The NCA's decision concluded that Telenor had abused its dominant position in the wholesale market for mobile communications in Norway in the period 2010 to 2014. Telenor implemented changes to the structure of Network Norway's fees for wholesale access to Telenor's mobile network, reducing Network Norway's incentives to roll out a third mobile network in Norway. This behaviour was considered to be in breach of Article 54 EEA and Section 11 of the Norwegian Competition Act. ESA submitted observations on the case law and tests for finding anti-competitive effects. In its ruling of 19 June 2019, the Competition Tribunal upheld the NCA's decision. The case is now under appeal before the Borgarting Court of Appeal.

In June 2019, ESA participated in the oral hearing in Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others* concerning a request by the Hungarian Supreme Court (*Kúria*) for a preliminary ruling from the CJEU. The case concerns an agreement on multilateral interchange fees (MIFs) paid by the bank of a credit card holder (acquiring bank) to the bank of the merchant (issuing bank) when a credit card transaction takes place. The questions included whether the same conduct can be a restriction of competition by both object and effect, and under what conditions an agreement such as the MIF agreement can be considered a restriction by object. ESA submitted *inter alia* that Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (equivalent to Article 53(1) EEA) must be interpreted as meaning that the same conduct can infringe this provision because the object of the conduct is anti-competitive, and also because its effect is anti-

competitive. Advocate General Bobek delivered his Opinion on the case on 5 September 2019.

In September 2019, ESA submitted written observations to the CJEU in Case C-308/19 *Consiliul Concurenței v Whiteland Import Export SRL* in a request for a preliminary ruling by the Romanian High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*). The request relates to the limitation period within which a national competition authority may impose fines for breach of the EU competition rules on undertakings. It asks – by reference to the limitation period imposed on the European Commission under Regulation (EC) No 1/2003 – whether a limitation period must be interpreted as being capable of being interrupted later than at the moment the national competition authority decides to open proceedings. ESA submitted its view that Article 4(3) of the Treaty on European Union (TEU) and Article 101 TFEU must be interpreted as requiring the courts of the Member States to interpret national rules on limitation, governing the ability of national competition authorities to impose administrative penalties for breach of Article 101 TFEU, in such a way as to ensure compliance with the principle of effectiveness. Where a national court concludes that the national limitation rules are not capable of being interpreted in such a way, it must give full effect to these provisions, if necessary by disapplying the national rules, subject to ensuring that the fundamental rights of the undertakings and individuals concerned are respected.

In October 2019, ESA submitted written amicus curiae observations to the Supreme Court of Iceland (*Hæstiréttur*) in an appeal of the Judgment of the Court of Appeals (*Landsréttur*) on 14 June 2019 in Case No 490/2018, *Byko ehf. and Norvik hf. v the Competition Authority and the Icelandic State and the Competition Authority v Byko ehf. and Norvik hf.* The case concerns a decision by the Icelandic Competition Authority of May 2015, in which it fined Norvik hf. for infringing (by way of its subsidiary Byko ehf.) both EEA and Icelandic competition rules. The Icelandic Competition Authority found that Byko had colluded extensively with its biggest competitor in the building materials market. ESA also submitted amicus curiae observations before the District Court of Reykjavik in 2016 (Case No E-550/2016) and *Landsréttur* (as referred to above) in this case. The most recent observations concern (as before) the circumstances in which EEA trade may be affected, as well as the importance of the appropriate level and deterrent effect of fines in competition cases.

Cooperation across the global competition community

ESA has long been a member of the International Competition Network (ICN), a forum that aims to maintain dialogue and address practical competition concerns that arise worldwide.

In May 2019, ESA also became one of the founding members of the international framework on Competition Agency Procedures (CAP). Established by the ICN Steering Group, the CAP is an “opt-in” framework, open to all competition agencies, aiming to advance basic principles of fairness across the global competition enforcement community. The CAP reflects a broad consensus among international competition agencies on basic principles of procedural fairness. It also facilitates transparency and dialogue to foster a better understanding of the different agencies’ investigative and enforcement procedures. ESA believes that promoting dialogue and taking steps towards global procedural convergence is very important in ensuring effective and meaningful enforcement on issues that affect consumers and markets across

the world. To this end, ESA has made details of its competition enforcement procedures available via the [CAP forum](#).

Legal and Executive Affairs

The Legal and Executive Affairs Department (LEA) is ESA's legal service. LEA provides legal advice, reviews all ESA decisions and represents ESA in court. LEA supports the College in communicating, formulating and coordinating ESA policy.

LEA is responsible for bringing cases against EEA EFTA States in the [EFTA Court](#), should they not fulfil their obligations under EEA law, as set out in ESA's formal infringement procedures. Upon request, the EFTA Court advises national courts in the EEA EFTA States on the interpretation of EEA law by delivering advisory opinions. The Court also hears applications brought by companies and individuals to review the lawfulness of decisions taken by ESA that affect them directly.

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

Where it may be of assistance, ESA can also participate in court proceedings as a third party before national courts of EEA EFTA States, as well as the European Court of Human Rights.



*Members of the Legal and Executive Affairs Department preparing to plead in the EFTA Court
Erlend Leonhardsen and Ewa Gromnicka*

Main activities in 2019

A large part of ESA's litigation work concerned human rights and the rule of law. Before the EFTA Court, ESA made submissions arguing for a derived right of residence in EEA States for family members of EEA nationals. Before the CJEU, ESA participated in five cases

concerning the application of the rule of law in the context of judicial reforms in Poland. ESA's pleadings focused on access to justice and the independence of the judiciary.

ESA intervened for the first time as a third party in a case before the European Court of Human Rights. The case concerned the right of access to justice in the EEA legal order, and the Court's ruling was in line with the outcome favoured by ESA in its submissions.

Procedure: How ESA works to uphold EEA law

Direct actions

A direct action is the final step of a 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 can then put forward its arguments or resolve the situation by complying with EEA law within the applicable deadline. Generally, matters are resolved before they reach the court, with the dialogue involved in the formal infringement procedure. Should this not be the case, however, ESA has the possibility to pursue the option of a direct action.

ESA can bring an action before the EFTA Court against an EEA EFTA State for non-implementation of a directive or non-incorporation of a regulation into its national legal order. This occurs when the EFTA State concerned has breached its EEA law obligations by overrunning the binding deadlines set out in this regard by at least one year.

ESA can also bring an action before the EFTA Court in substantive cases, for instance if it identifies a situation where national rules deprive businesses or citizens of their EEA rights. The EFTA Court can likewise resolve disagreements between ESA and the EEA EFTA States on the interpretation of EEA law.

ESA did not bring any direct action cases before the EFTA Court in 2019.

However, during 2019, the EFTA Court handed down four judgments in non-incorporation and non-implementation cases, concerning consumer protection and the environment. The EFTA Court ruled in favour of ESA in all four cases.



Ingibjörg Ólöf Vilhjálmsdóttir litigates cases before the EFTA Court

The EFTA Court also handed down one judgment in 2019 on a substantive non-conformity case, in which ESA had contended that Norway was in breach of its obligations under the Equal Treatment Directive as regards the national rules governing parental leave. In that case, the Court ruled in favour of Norway.

Referrals from national courts

When a national court has a case before it that depends on the interpretation or application of EEA law, it has the option to refer 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 EFTA Court received 12 requests for advisory opinions in 2019 on a wide range of questions referred by the national courts.

Two cases concerned family rights in an EEA law context. Case E-02/19 *D and E* concerned a derived right of residence and family reunification, and Case E-04/19 *Campbell* concerned the conditions for derived right of residence for third-country nationals who are family members of EEA nationals.

Two references concerned criminal proceedings before the national courts. In Case E-05/19 *F and G* the questions arose from criminal proceedings in Norway, which asked whether single “real transactions” could constitute market manipulation under EEA law. In Case E-06/19 *H and I*, criminal proceedings in Liechtenstein raised questions relating to transportation of money, rest periods for drivers and recording of work.

Three cases referred by the national courts concerned public procurement: Case E-07/19 *Tak – Malbik ehf.*, Case E-08/19 *Scanteam* and Case E-13/19 *Hraðbraut ehf.* All sought the EFTA Court’s interpretation of EEA public procurement law, as set out in Directive 2014/24/EU.

Two references concerned general data protection: Cases E-11/19 *Adpublisher I* and E-12/19 *Adpublisher II*.

Finally, three cases concerned financial and commercial matters. Case E-01/19 *Andreas Gyrre* concerned the sale of tickets to the London Olympics 2012 by a Norwegian seller. In Case E-03/19 *Gable Insurance* the Court addressed the insolvency of insurance companies and the precedence of “insurance claims” over “other claims”. Case E-10/19 *Bergbahn* concerned questions related to money laundering and the requirement to obtain adequate information on beneficial ownership.

The EFTA Court delivered four advisory opinions in 2019, including in Case E-01/19 *Andreas Gyrre* and Case E-02/19 *D and E*, both mentioned above. Case E-02/18 *Concordia* concerned payments for the reimbursement of medical expenses incurred by a Liechtenstein national living in Spain, and Case E-07/18 *Fosen-Linjen II* concerned remedies.

Review of ESA decisions

Parties concerned by a decision taken by ESA can seek 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.

One application was filed against a decision of ESA in the EFTA Court in 2019. In Case E-09/19 *Abelia and WTW*, the applicants sought the annulment of ESA’s Decision No 57/19/COL, in which ESA concluded that the public financing of eHealth and digital health infrastructure in the Norwegian healthcare system does not constitute state aid within the meaning of EEA law.

The EFTA Court did not hand down any judgments in 2019 resulting from applications for annulment of ESA decisions.

Costs cases

The EFTA Court is empowered to determine the level of costs to be awarded to a successful party in a case before it.

Two costs applications were brought before, and decided by, the EFTA Court in 2019: Cases E-01/17 COSTS and E-01/17 COSTS II. ESA did not participate in either costs case.

The Court of Justice of the European Union and the General Court

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

ESA can participate in CJEU cases in a number of ways. In a preliminary reference, where a national court of an EU Member State asks the CJEU to interpret EU law, ESA may make written or oral submissions if the subject matter of the proceedings falls under an area covered by the EEA Agreement. In other cases, ESA may ask 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.

ESA submitted observations in one new case before the CJEU in 2019: Case C-308/19 *Whiteland Import Export* concerning rules on the limitation period for fining.

Five cases brought before the CJEU in 2018 continued during the course of 2019, with ESA making submissions. Case C-228/18 *Budapest Bank* concerned anti-competitive conduct. Cases C-522/18 *Zakład Ubezpieczeń Społecznych* and C-537/18 *Krajowa Rada Sądownictwa*, and Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Others* concerned the application of the rule of law in the context of judicial reforms in Poland. One further case on the rule of law, Case C-668/18 *Uniparts*, was withdrawn after ESA made its submissions to the CJEU.

The CJEU handed down judgment in four cases in 2019 where ESA had been involved. In Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie* the CJEU ruled on the *ne bis in idem* principle in competition cases. Case C-697/17 *Telecom Italia* concerned procurement in the telecoms sector. And in Joined Cases C-585/18, C-624/18 and C-625/18 *Krajowa Rada Sądownictwa and Others*, the CJEU ruled on issues concerning the rule of law in the context of judicial reforms in Poland.

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 (ECtHR) has jurisdiction to decide on complaints alleging a violation of the European Convention on Human Rights (ECHR) by a contracting party. Whilst the EEA and the EEA EFTA institutions are not contracting parties to the ECHR, the EEA EFTA States are, and an applicant may bring them before the Court for alleged breaches of the Convention.

In 2018, an application to the ECtHR 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 intervened as a third party in the case and submitted written observations. The Court delivered its judgment in 2019 and declared the application inadmissible after concluding that there were no manifest deficiencies in the protection of the applicant's right to a fair trial.

National courts and tribunals

Even when ESA is not party to a particular case in the national courts, it may be able to offer insights into elements of EEA law that could have a bearing on the issues to be decided. Accordingly, certain national courts can permit ESA to submit amicus curiae briefs where this may be of assistance to them.

In 2019, ESA submitted an amicus brief in one such case in the Icelandic Supreme Court, Case 42/2019 *ICA v Byko & Norvik*, concerning competition law. ESA also submitted an amicus brief in the same case when it was heard by the Appeals Court of Iceland, Case 490/2018 *ICA v Byko & Norvik*.

ESA submitted an amicus brief in the Norwegian Competition Tribunal Case 2019/34 *Telenor v NCA*, focusing on specific issues in EEA competition law. The Tribunal handed down its judgment in 2019, ruling in favour of the NCA.

Access to documents

Anyone can request to view 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](#). ESA dealt with 125 access to documents requests in 2019.

Should you wish to request access to ESA's documents you can review [ESA's rules on access to documents](#) and send a request by email to registry@eftasurv.int.

Links to ESA's court cases in 2019

Cases pending before the courts in 2019

Substance cases:

[E-03/19 – Gable Insurance AG in Konkurs](#)

[E-04/19 – Campbell v The Norwegian Government](#)

[E-05/19 – F and G](#)

[E-06/19 – Criminal proceedings against H and I](#)

[E-07/19 – Tak – Malbik ehf. v the Icelandic Road and Coastal Administration and Þróttur ehf.](#)

[E-08/19 – Scanteam AS v The Norwegian Government](#)

[E-10/19 – Bergbahn Aktiengesellschaft Kitzbühel v Meleda Anstalt](#)

[E-11/19 – Adpublisher AG v J](#)

[E-12/19 – Adpublisher AG v K](#)

[E-13/19 – Hraðbraut ehf. v The Icelandic Ministry of Education, Science and Culture and others](#)

CJEU and GCEU cases:

[C-228/18 – Budapest Bank](#)

[C-522/18 – Zakład Ubezpieczeń Społecznych](#) (later ordered by the Court that no judgment was needed)

[T-612/17 – Google v Commission](#)

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

[C-537/18 – Krajowa Rada Sądownictwa](#) (later removed from the registry of the Court)

[C-558/18 and C-563/18 – Miasto Łowicz and Others](#)

[C-308/19 – Whiteland Import Export](#)

Review of ESA's decisions:

[E-09/19 – Abelia and WTW AS v EFTA Surveillance Authority](#)

National courts:

[42/2019 – ICA v Byko and Norvik](#)

Judgments delivered in 2019

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](#)

[E-01/19 – Andreas Gyrré v The Norwegian Government](#)

[E-02/19 – D and E](#)

Costs cases:

[E-01/17 COSTS – Nettbuss AS v Konkurrenten.no AS](#)

[E-01/17 COSTS II – County of Aust-Agder v Konkurrenten.no AS](#)

CJEU cases:

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

[C-697/17 – Telecom Italia](#)

[C-585/18, C-624/18 and C-625/18 – Krajowa Rada Sądownictwa and Others](#)

[C-668/18 – Uniparts](#) (later [removed](#) from the register of the Court)

European Court of Human Rights cases:

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

National courts and tribunals:

[490/2018 – ICA v Byko and Norvik](#)

[2019/34 – Telenor v NCA](#)

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 EEA 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 EEA EFTA States that are not considered to be in conformity with EEA rules.

European Economic Area (EEA) – An area of economic cooperation that consists of the 27 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 EEA EFTA States.

EEA Agreement – The Agreement creating the European Economic Area.

EEA EFTA States – The three EEA EFTA States that participate in the EEA: Iceland, Liechtenstein and Norway. Referred to as “the EEA EFTA States” in this report, except when Switzerland is included (not a member of the EEA).

EEA Joint Committee – A committee of representatives of the EU and the EEA 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 EEA EFTA States and ESA pursuant to the EEA Agreement. The main functions of the Court consist of issuing judgments in direct actions, in particular in infringement cases brought by ESA against the EEA EFTA States, and advisory opinions in cases referred to it by the national courts of the EEA EFTA States.

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

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

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

Own initiative cases – Cases 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.