Annual Report 2016

EFTA SURVEILLANCE AUTHORITY

Foreword

Europe is changing. Globalisation is being questioned. Free trade and free movement are met with scepticism. For the first time, a country wants to leave the European Union. The aim of the European project was a Europe united without borders. Now some see such openness as a threat. Some fear loss of sovereignty. Others ask whether our economies and societies are fair.

We need to take these changes in the currents seriously. After more than 20 years of access for the EEA EFTA States to a well-functioning Internal Market of 500 million inhabitants, it might be tempting to take for granted the rights and freedoms it has provided. We should not.

The EEA Agreement has contributed greatly to the constant improvement of the living and working conditions of those living within the EEA. Now is the time to protect our achievements. In this time of uncertainty, we are fortunate to be a part of the world's largest trading block, endowed with well-functioning and trusted institutions. These structures provide a measure of security; they allow us to channel the forces of globalisation — to harness their potential, while protecting the welfare gains and prosperity achieved.

The work environment and our societies are changing fast. New opportunities and new challenges arise from globalisation, the digital revolution, changing work patterns and demographic developments. We share a responsibility in working towards a more prosperous Europe, where economic and social developments reinforce each other, and where environmental concerns are being met.

The EFTA Surveillance Authority's oversight responsibilities cover Internal Market affairs, competition and State Aid, and we highlight a few of the many cases handled by ESA in 2016 in this report. With a committed and competent staff numbering over 70 people of 16 different nationalities ESA works hard to address the new challenges. This way we hope to ensure that the EEA Agreement can reach its full potential also in changing times. In particular, we seek to ensure that competitive forces work for the good of all.

An important part of ESA's policy concerns our outreach activities. We need to increase awareness of EEA law in the EEA EFTA States and our own knowledge of developments in Iceland, Liechtenstein and Norway. We favour a close dialogue to this effect.

We welcome any questions you might have. You can find us on Facebook, Twitter and LinkedIn via **@EFTASURV** and on our website www.eftasurv.int.

Sven Erik Svedman	Helga Jónsdóttir	Frank J. Büchel
President	College Member	College Member

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Glossary of terms

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

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

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

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

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

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

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

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 2015. Such cases do not necessarily lead to the initiation of infringement proceedings against one or more EFTA States or undertakings, or the opening of formal investigations.

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

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

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

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

Introduction

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

The European Economic Area

The European Economic Area (EEA) consists of the 28 Member States of the European Union (EU) and three of the four European Free Trade Association (EFTA) States: Iceland, Liechtenstein and Norway (Switzerland is not part of the EEA). It was established by the EEA Agreement in 1994, an international agreement which enables the three EFTA States to participate fully in the European Internal (or Single) Market.

The purpose of the EEA Agreement is to guarantee, in all 31 EEA States, the free movement of goods, people, services and capital – "the four freedoms". Because of the Agreement, EU law on the four freedoms, state aid, and competition rules for undertakings, is incorporated into the domestic law of the participating EFTA States. All new relevant EU legislation is also introduced through the EEA Agreement so that it applies throughout the EEA, ensuring a uniform application of laws relating to the Internal Market.

The Agreement ensures equal rights to participate in the Internal Market for citizens and economic operators in the EEA, and equal conditions of competition. It also provides for cooperation across the EEA in important areas, such as research and development, education, social policy, the environment, consumer protection, tourism and culture. By removing barriers to trade and by opening new opportunities for some 500 million Europeans, the Internal Market of the EEA creates jobs and growth and adds to the international competitiveness of the EEA States.

The success of the EEA Agreement depends upon uniform implementation and application of the common rules in each of the 31 EEA States. The Agreement provides for a system of supervision where EU Member States are supervised by the European Commission, while the participating EFTA States are supervised by the EFTA Surveillance Authority. The two institutions cooperate closely on policy as well as individual cases.

The role of ESA

ESA ensures that the participating EFTA States (Iceland, Liechtenstein and Norway) respect their obligations under the EEA Agreement. ESA operates independently of the EFTA States and is based in Brussels.

ESA protects the rights of individuals and market participants who find their rights violated by rules or practices of the EFTA States or companies within those States. Such rules or practices may, for example, be discriminatory, impose unnecessary burdens on commercial activity, or constitute unlawful state aid. ESA may initiate proceedings against the relevant EFTA State at the EFTA Court,

seeking a change in the relevant rules or practices unless the State concerned decides to take appropriate action in response to ESA's request.

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

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

In monitoring and enforcing the EEA Agreement, ESA has powers that correspond to those of the 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.

Key figures 2016

Total number of cases opened in 2016:	555
Total number of cases closed in 2016:	524
Pending complaints at the end of 2016:	158

ESA College

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

In 2016 the College consisted of the following members:

- Sven Erik Svedman (Norway), President
- Frank J. Büchel (Liechtenstein)
- Helga Jónsdóttir (Iceland)

Sven Erik Svedman has been President of ESA since 1 September 2015. The three College members are appointed until 31 December 2017.

The College is assisted by ESA's staff, who work within the:

- Internal Market Directorate
- Competition and State Aid Directorate
- Legal and Executive Affairs Department
- Administration Department

Budget and financial performance

ESA's activities and operating budget are financed by contributions from Iceland (9%), Liechtenstein (2%) and Norway (89%). ESA's total budget for 2016 was EUR 14 million, a nominal increase of 6.1% compared with 2015.

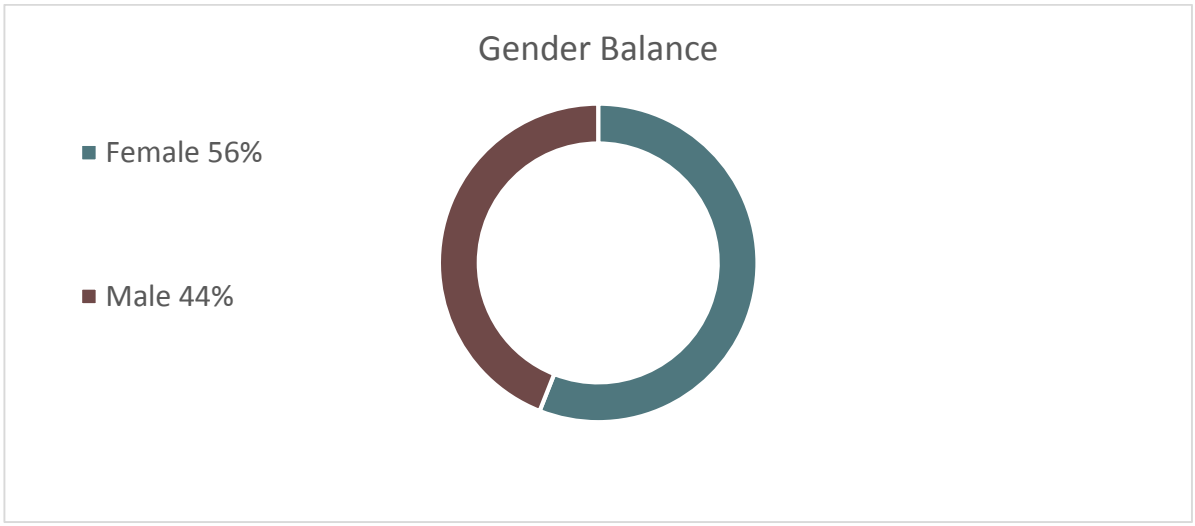
Financial performance (amounts in EUR rounded to 000s)	Outcome 2016*	Budget 2016
Financial income	1	2
Contributions from the EEA/EFTA States	13,974	13,974
Other income	30	40
Total income	**14,005**	**14,016**
Salaries, benefits, allowances	10,400	10,943
Travel, training, representation	820	882
Office accommodation	1,206	1,184
Supplies and services	1,100	1,001
Financial costs	4	6
Other costs	0	0
Total expenditure	**13,530**	**14,016**
Financial performance	**475**	**0**

* preliminary and unaudited

On 29 June 2016, ESA submitted to the EFTA States its Financial Statement for the financial year 2015 and the accompanying Audit Report by the EFTA Board of Auditors (EBOA). The Financial Statement was approved on 5 December 2016 and ESA was discharged of its accounting responsibilities for that period by the EFTA States.

Human resources

At the end of 2016, ESA had a total of 73 staff, including the three College members, staff employed on fixed-term and temporary contracts, and trainees. Sixteen nationalities were represented and over half (38) of the staff members were nationals of EEA EFTA States. In 2016, 56% of staff were female, 44% of staff were male, and 38% of management (College Members, Directors and Deputy Directors) were female.



In accordance with ESA's staff regulations established by the EFTA States, all staff are employed on temporary or fixed-term contracts. As a consequence, the turnover of staff is high and employment opportunities for highly qualified candidates within ESA's fields of activity arise frequently.

Openness and transparency

It is vital that ESA continues to attract and recruit talented and competent staff in order to carry out its role effectively. Hence, in addition to maintaining competitive employment conditions, it is important to ensure a high level of public awareness of ESA as an attractive and rewarding place to work. To reach this goal, various initiatives were carried out during 2016, leading to stronger employer branding. ESA was present at careers fairs for law students, with good results. The second EEA Moot Court Competition was delivered with great success in collaboration with universities in Iceland, and ESA plans to collaborate with universities in Norway for the next competition in the 2017/18 academic year. ESA has also continued to increase its presence on social media.

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

ESA Core Values

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 and its staff carry out their functions in a manner which is visible, approachable and transparent. ESA is open to continuous improvement at an organisational and individual level.

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. We develop our competence and continuously improve our skills and knowledge and aim for excellence.

ESA's communication and outreach activities are aimed at increasing knowledge about our tasks and strengthening compliance with the EEA Agreement.

ESA and its staff carry out their functions in an approachable and transparent manner, while showing due concern for information that needs to be protected.

Media relations

In 2016, ESA issued a total of 70 press releases on its website (www.eftasurv.int). The site is a key channel for communication with stakeholders and the general public. In addition to press releases, it provides general information about ESA, extensive information about ESA's fields of work and decisions taken by the College. It also houses ESA's public document database (see below),

information on the status of implementation of directives in the EFTA States, and numerous reports and speech texts. In 2016, the website had around 107,000 visits.

Visitor groups and seminars

Staff members frequently give public presentations to interested parties visiting Brussels. Such direct communication is well suited to giving more in-depth information about ESA and to setting a framework for further contact. Around 30 groups visited ESA in 2016, ranging from upper secondary school classes and student groups to public servants and politicians.
ESA's College, its directors and its staff members also participate in and deliver a range of seminars and meetings in EFTA and EU Member States.

Public access to documents

Documents handled by ESA are, as a general rule, publicly available upon simple request. ESA can, however, refuse disclosure of certain documents.

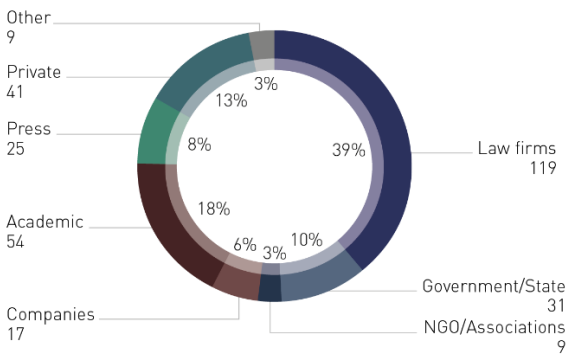
Once a document has been disclosed, it is uploaded to ESA's searchable online Public Document Database, available to anyone. ESA received a total of 115 access requests in 2016.

Requests for public access:

Access requests received in 2016	115
Access requests received in 2015	145
Access requests received in 2014	155

Total number of documents assessed:	305
Full access granted:	226
Partial access granted:	11
Access denied:	68

Who asks for public access?



Internal Market

ESA is responsible for monitoring the EFTA States in order to ensure the effective and timely implementation of the Internal Market rules into their national legal orders. ESA is also responsible for ensuring that EEA law is applied correctly in the EFTA States. In this context, ESA performs broadly the same tasks as the European Commission. The two institutions work closely together.

Main activities in 2016

The Internal Market is based on the rules concerning "the four freedoms" – the free movement of goods, persons, services and capital, which have been at the core of European integration. These provisions are supplemented by a number of horizontal provisions, covering areas such as health and safety at work, labour law, equal treatment of men and women, consumer protection, environment and company law.

ESA may take action if an EFTA State fails to incorporate these rules into its national law in a timely manner or is suspected of breaching EEA law.

Ensuring timely implementation of new legislation

An important part of ESA's monitoring work involves ensuring the timely implementation of EEA law through its infringement proceedings process. The common rules found in the EEA are intended, among other things, to ensure that companies and individuals have access to the Internal Market without discrimination and free from the restrictions imposed by arbitrary barriers to trade. For this to work, legislation incorporated into the EEA Agreement has to be implemented swiftly and applied equally in the EFTA States.

In 2016, ESA opened some 266 cases where the EFTA States had failed to implement legislation containing Internal Market rules. The biggest sector concerned goods. Other important sectors included food and feed safety, animal health and welfare and transport. Overall, more cases were opened against Iceland than any other EFTA State.

Internal Market Scoreboard

Twice a year, ESA produces the Internal Market Scoreboard, indicating how the EFTA States perform with regard to the timely implementation of new EEA directives and regulations. Once a year, this publication also provides a comparison with the performance of the EU Member States. The Scoreboard presents the average transposition deficit for each of the EFTA States. The transposition

deficit indicates how many directives and regulations containing Internal Market rules the EFTA States have failed to transpose and communicate on time.

In January 2017, ESA published its 39th Internal Market Scoreboard, based on numbers from November 2016. This Scoreboard only reflects the status of the EFTA States and is not connected to the performance of the EU Member States.

The Scoreboard revealed that Norway continues to perform well, with only three directives awaiting full implementation, translating into a transposition deficit for directives of 0.4%. Liechtenstein's performance continued to improve, with seven directives not fully transposed, making a transposition deficit of 0.9%. However, Iceland's performance deteriorated once again, with 18 directives overdue. This means its transposition deficit for directives had risen to 2.2%.

Norway had five regulations overdue for incorporation into the national legal order, resulting in a transposition deficit for regulations of 0.2%. Iceland had 65 overdue regulations, meaning its transposition deficit for regulations had risen to a disappointing 2.6%.

The purpose of monitoring the EFTA States' timely compliance with their transposition obligations is to ensure the full benefits of the EEA Agreement for all stakeholders. The Internal Market is a key driver of growth and jobs. However, it does not deliver benefits automatically. Fragmentation and different sets of rules in the various EEA countries prevent citizens and businesses from reaping the full benefits of the Internal Market. For this reason, ESA closely monitors the EFTA States' timely implementation and transposition of EEA legislation.

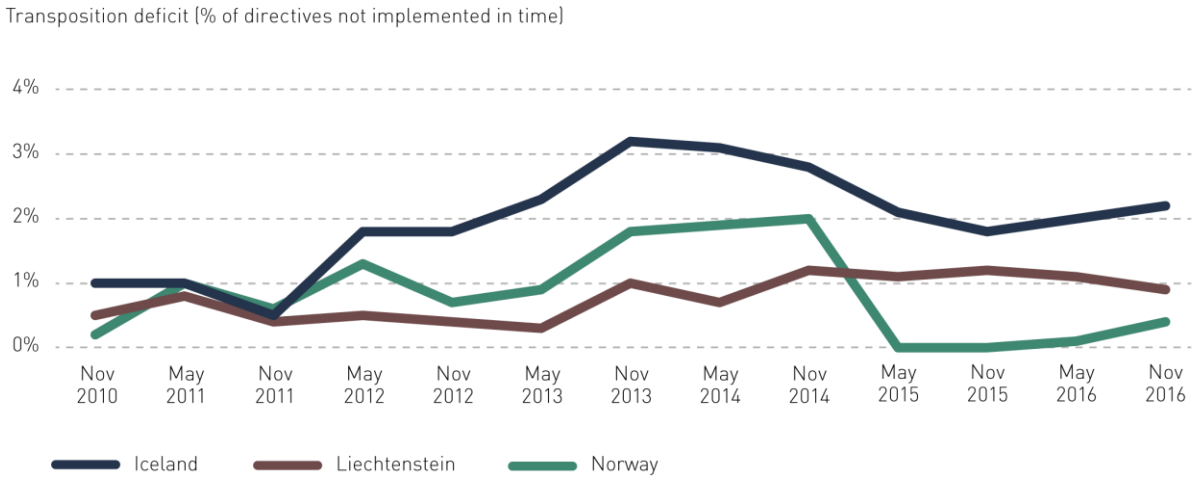


Figure 1: EFTA States' transposition deficit over the past five years.

Transposition deficit as at 30 November 2016 for directives which should have been transposed on or before 30 November 2016.

Investigations of national legislation and practices

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 rules or where other domestic laws or practices are incompatible with the rules. Such investigations can be initiated on the basis of ESA's own monitoring of the EFTA States, or on the basis of a complaint.

How ESA investigates

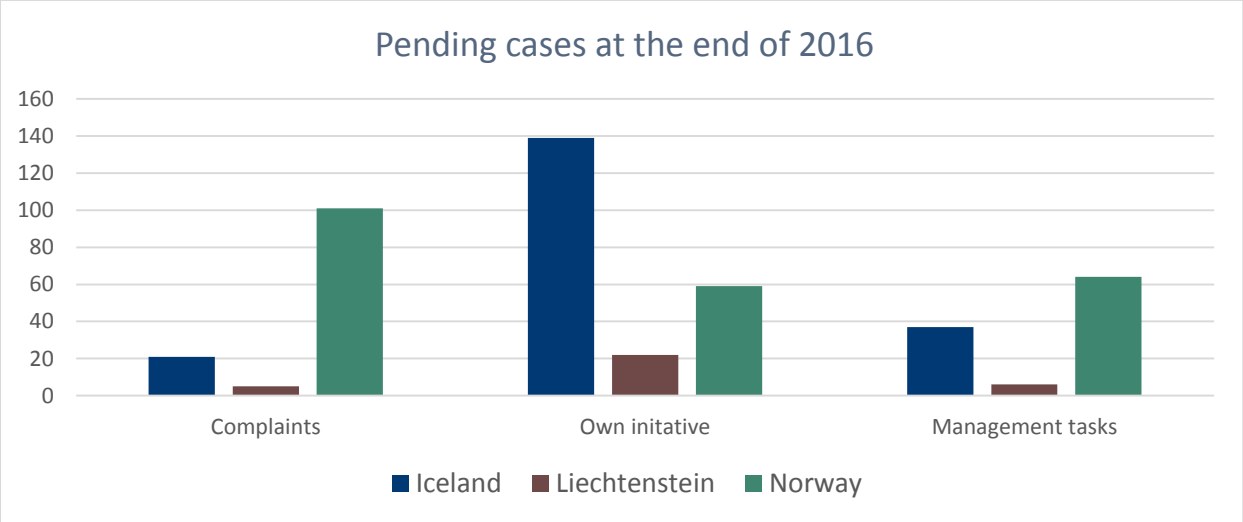
Anyone may submit a complaint to ESA. Additionally, when ESA becomes aware of potential problems in an EFTA State through its own monitoring activities, an investigation of national legislation or practices can be initiated. ESA's investigation may lead to formal infringement proceedings being launched.

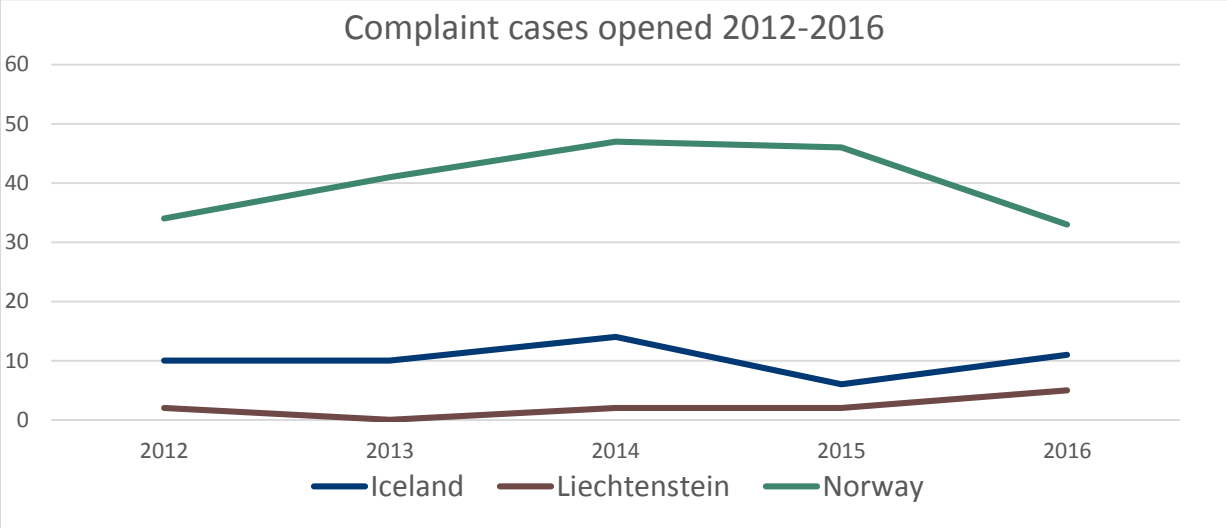
These proceedings consist of three steps:

1. ESA sends a letter of formal notice, setting out ESA's view and giving the State a chance to respond
2. If the issue is not resolved, ESA may deliver a reasoned opinion requesting that the State comply with EEA rules
3. Finally, ESA may bring the case to the EFTA Court, which will have the final say

With regard to substance cases, ESA opened 99 cases in 2016 to investigate whether legislation is being correctly applied and implemented in the EFTA States. These cases spanned a wide range of sectors, reflecting the broad range of areas covered by Internal Market rules.

ESA received 49 complaints concerning the Internal Market in 2016. As was the case in 2015, the largest number of complaints was received in connection with the sector of free movement of persons, mostly in connection with an alleged breach of the Residence Directive by Norway. ESA also received a number of complaints relating to the freedom to provide services.





Norwegian rules on paid parental leave breach equal treatment rules

Fathers in Norway are only allowed to take full advantage of their right to paid parental leave if the mother is working or studying full time or otherwise fulfilling activity requirements enumerated in the Norwegian National Insurance Act. As a result, fathers cannot take parental leave if the mother does not return to work. The only exception from this rule is the "*father's share*" of ten weeks, which fathers can take during the mother's paid parental leave.

Furthermore, if the mother is not entitled to paid parental leave and is staying at home, no paid parental leave whatsoever is granted to the father.

The rules limiting the grant of paid parental leave are only applicable to fathers. Mothers in the same situation are therefore explicitly granted more comprehensive rights to paid parental leave.

Following an examination in an own initiative case in July 2016, ESA sent a letter of formal notice to Norway on the basis that the Norwegian rules constitute direct discrimination on grounds of sex, contrary to the Sex Discrimination Directive (2006/54/EC). ESA has also received complaints from fathers, claiming that they were not granted parental leave because their wives were not working or studying full time.

Liechtenstein is in breach of equal treatment rules for men and women

In July 2016, ESA sent a letter of formal notice to Liechtenstein. In ESA's view, Liechtenstein's provisions permitting insurers to use gender as a risk factor infringe the principle of non-discrimination between men and women, both as implemented in the Sex Discrimination in Access to Goods and Services Directive (2004/113/EC) and as a general principle of EEA law.

Moreover, ESA considers that by maintaining such national provisions Liechtenstein has failed to respect a duty of loyalty and a duty of sincere cooperation for EEA States under Article 3 of the EEA Agreement.

In March 2011, the European Court of Justice (CJEU) ruled in the *Test Achats* judgment (C-236/09) that the use of gender as a risk factor by insurers may not result in individual differences in premiums and benefits for men and women. Therefore, it ruled that Article 5(2) of Directive 2004/113/EC (which provided a derogation from this rule) is invalid with effect from December 2012.

Liechtenstein claims, however, that it is allowed to maintain the derogation, unless the EEA Joint Committee adopts amendments to the annex to the EEA Agreement incorporating Directive

2004/113/EC.

It also claims that a distinction should be made between CJEU rulings on invalidity and rulings on interpretation, in context of the preliminary ruling procedure set out in Article 267 of the Treaty on the Functioning of the European Union (TFEU).

ESA launches formal procedure against Norway's posting of workers rules

Norway requires employers to provide for lodging, travel and boarding expenses for posted EEA workers in the maritime construction industry, on construction sites and in cleaning enterprises. Norway has opted for compensation for travel, board and lodging expenses, but not for an allowance paid in the form of a flat rate, without any direct link to the specific expenditure incurred.

In light of the established jurisprudence of the European Courts on this issue, ESA considers that Norway's system runs contrary to the Posting of Workers Directive (96/71/EC). This Directive lays down the list of areas of regulatory competence of the EEA State where the workers are posted; otherwise, the law of the home EEA State applies.

Contrary to the arguments of the Norwegian Government, ESA finds that compensation for travel, board and lodging expenses cannot be considered to be part of the minimum rates of pay under the Directive. Moreover, such compensation cannot be justified on public policy grounds.

ESA reached this conclusion following examination of a complaint from the Confederation of Norwegian Enterprise (NHO) submitted in December 2013. In February 2015, a European service provider also lodged a complaint, claiming difficulties entering the Norwegian market.

In light of this, in October 2016, ESA issued a letter of formal notice to Norway. At the end of December 2016, Norway responded and stated that the social partners are working towards a settlement. ESA hopes that this will allow for a solution to be found within the limits of EEA law.

ESA entrusted with new responsibilities in financial supervision

In October 2016, ESA was entrusted with new responsibilities related to the supervision of the financial sector.

By incorporation into the Annexes to the EEA Agreement of the Regulations establishing the European Supervisory Authorities (EBA, EIOPA and ESMA), ESA is entrusted with the power to take certain binding decisions addressed to national supervisory authorities or market operators in the EFTA States.

Following the financial crisis, the European Supervisory Authorities were created in the EU in the areas of banking, insurance and securities markets to ensure consistent supervision. In certain instances, they can also issue binding decisions to national authorities and market participants, including binding mediation in cases of conflict between national supervisors and in case of breach of EU financial services legislation. Furthermore, the European Securities and Markets Authority (ESMA) is the designated supervisory authority for credit rating agencies and trade repositories.

In accordance with the two-pillar structure of the EEA Agreement, ESA now has decision-making powers corresponding to the powers of the three authorities with regard to the EFTA States. ESA will also take all legally binding decisions related to direct supervision of any credit rating agencies and trade repositories established in the EFTA States. In order to ensure that the European Supervisory Authorities' expertise is integrated fully into ESA's work, any binding decision taken by ESA will be adopted on the basis of a draft prepared by the relevant authority. Close cooperation and coordination with the European Supervisory Authorities is therefore important.

The European Supervisory Authorities will still be competent to perform actions of a non-binding nature vis-à-vis competent authorities and market operators in the EFTA States.

Norwegian rules on interest deductibility are discriminatory

In October 2016, ESA delivered a reasoned opinion to Norway concluding that certain interest cap rules contained in the Norwegian Tax Act breach the EEA Agreement.

ESA considers that the interest cap rules are indirectly discriminatory because – although they apply to domestic groups and cross-border groups equally – they are unlikely to be applied to loans within a Norwegian company group in practice. As a consequence, cross-border company groups find themselves at a disadvantage. ESA is of the view that this amounts to an infringement of the freedom of establishment protected by the EEA Agreement.

ESA does not dispute that the Norwegian legislation pursues legitimate objectives aimed at maintaining the balanced allocation of taxing powers between EEA States and the prevention of tax avoidance and abuse. However, the Norwegian rules go beyond what is necessary to achieve this goal, since they are not limited to preventing only artificial arrangements created to avoid tax.

Restrictions on offshore króna assets are not in breach of the EEA Agreement

ESA recently closed two complaint cases concerning Icelandic laws on the treatment of offshore króna assets. The laws are part of measures for removing capital controls in Iceland. The EEA Agreement permits States to take protective measures when they are in difficulties with regard to their balance of payments. In such situations, States are allowed to implement a national economic and monetary policy aimed at overcoming economic difficulties, as long as the criteria for these protective measures are met.

ESA found that Iceland's treatment of offshore króna assets is a protective measure within the meaning of the EEA Agreement. The overall objective of the Icelandic law is to create a foundation for unrestricted cross-border trade with Icelandic króna, which will eventually allow Iceland to again participate fully in the free movement of capital.

In its closure decision, ESA took the view that although the Icelandic economy is now stronger, there is still a possibility that the lifting of capital controls would destabilise capital flows, causing renewed difficulties with the balance of payments.

Iceland excludes State liability for damages caused by its courts

ESA has found that Icelandic law precludes individuals from seeking damages when courts of last instance breach EEA law. ESA reached this conclusion following an examination of a complaint by an individual alleging that they had sustained damages as a result of an incorrect interpretation of EEA law by the Supreme Court of Iceland. As a consequence, in January 2016, ESA issued a reasoned opinion requiring Iceland to comply with the general principle of State liability for breaches of EEA law, which extends to liability for judicial breaches.

ESA considers that the possibility that a State may be rendered liable for judicial decisions contrary to EEA law does not pose any risk to the independence of the courts.

Nor is the finality of the decisions of the courts called into question: the principle of State liability requires compensation for loss, but not a revision of the final judgment.

Environmental Impact Assessment in Iceland

In May 2016, ESA sent a reasoned opinion to Iceland over its failure to apply the Environmental Impact Assessment (EIA) Directive correctly. This is the latest development in a wide ranging investigation by ESA and follows a number of complaints from the general public and environmental NGOs.

The EIA Directive is a way to assess whether the various elements that arise in a specific project will produce significant environmental effects. One of the key features of the EIA Directive is public involvement in the decision-making process. Public participation can be a valuable source of input and is intended to ensure that the procedure is open and transparent. The legislation makes it clear that those who are directly affected by a project must have the opportunity to express their views on its environmental impact.

Those people that are directly affected by a project must also be able to challenge the substantive or procedural legality of certain decisions, acts or omissions related to the Directive. In the course of its investigation, ESA became aware that, in Iceland, it is not currently possible to challenge omissions. In practice, this means that where public authorities fail to take a decision that is legally required, the public concerned have no remedy available under Icelandic law.

ESA is working closely with Iceland to resolve this issue as soon as possible.

Norway referred to the EFTA Court over PFOA

In February 2016, ESA took the decision to refer Norway to the EFTA Court over its unilateral ban on the synthetic chemical perfluorooctanoic acid (PFOA). PFOA has a diverse range of applications and is often used in textiles to make them dirt and water resistant. It is also known to be harmful to both human health and the environment.

The REACH Regulation (1907/2006) on dangerous substances establishes a clear procedure to be followed where chemicals pose risks to human health. Before a ban can be introduced, a State must produce rigorous scientific evidence to justify the restriction. After a thorough review, a substance

can be restricted or made subject to an outright prohibition. However, this must be decided at the EEA-wide level, to ensure all users and consumers across Europe are protected.

Norway introduced a national ban on PFOA in 2014, citing the need to protect human health. In so doing, it challenged ESA's interpretation of the REACH Regulation. Norway maintains that it can introduce a national ban until harmonised rules are in place across the EEA. ESA, however, is clear that the only way to ensure a level playing field for all manufacturers and importers of products containing PFOA is to respect the procedure laid down in the REACH Regulation.

ESA had previously sent a reasoned opinion to Norway. However, as Norway failed to comply with its obligations under the EEA Agreement, it is now for the EFTA Court to rule on the legality of Norway's ban on PFOA.

ESA's competence to carry out surveillance on trade in fish

In May 2016, ESA received a complaint against Norway concerning the Norwegian Seafood Council´s marketing and promotional activities aimed at increasing Norwegian consumers' demand for fish products of Norwegian origin.

The activities are financed through mandatory levies imposed on fish exporters and exported fish products. The complainant considers this is a measure having equivalent effect to quantitative restrictions contrary to Protocol 9 to the EEA Agreement.

In June 2016, the Norwegian Government submitted its initial observations on the complaint. The key message from the Norwegian Government was that ESA does not have the competence to consider the complaint. The Norwegian Government considers that Protocol 9 to the EEA Agreement is a unique construction that must be interpreted in light of the fact that the EEA Agreement does not foresee the free movement of fish, but instead leaves it to the contracting parties to regulate the marketing of fish.

In October 2016, ESA sent the Norwegian Government a pre-Article 31 letter in which it stated its preliminary assessment that ESA is competent to carry out surveillance of Protocol 9 to the EEA Agreement. In addition, ESA noted that on the basis of the available information it would seem that the Norwegian Seafood Council´s marketing and promotional activities constitute a measure having equivalent effect to quantitative restrictions on import contrary to Article 1(2) of Protocol 9 to the EEA Agreement.

Iceland has not sufficiently respected its obligations to notify technical regulations

During the past few years ESA has consistently checked whether legislation adopted by the EFTA States has been duly notified under the procedure in Directive 98/34.

Directive 98/34 is an important tool in ensuring free movement of goods within the Internal Market, as national regulations can make it difficult for enterprises to sell their products within the EEA area. The directive is set up to prevent any unnecessary barriers to trade by obliging EFTA States to inform ESA of technical regulations *at a draft stage*. Following a notification, a three-month standstill period starts running, during which the EFTA State in question is required *not* to adopt the relevant technical regulation. This procedure enables ESA, the Commission and other EEA countries to examine the proposed text and submit any comments if they consider that the legislative measures might be problematic for the free movement of goods or information services, such as e-commerce.

In July 2016, ESA sent a letter of formal notice to Iceland for non-notified technical regulations adopted in 2013-2014, as well as a reasoned opinion for non-notified technical regulations adopted in 2012. The reasoned opinion also addresses the fact that the Icelandic legislation implementing Directive 98/34 does not contain an explicit rule of non-enforceability for technical regulations that

have not been notified and which individuals or legal persons can rely on directly before national courts. The lack of such a rule entails that national courts are not obliged by national law to disapply measures that have not been duly notified under Directive 98/34, vis-à-vis affected individuals and/or economic operators. This makes it more difficult for Icelandic persons and economic operators to rely on the rights enshrined in Directive 98/34.

Construction of underground parking in Kristiansand, Norway

In July 2016, ESA delivered a reasoned opinion to Norway for breach of EEA rules on public procurement. ESA maintained that the Norwegian Municipality of Kristiansand had awarded a contract regarding the construction and operation of an underground car park without following the applicable rules for the award of works concessions.

More concretely, ESA took the view that the contracting authority, the Municipality of Kristiansand, had failed to publish the contract notice EEA-wide in the Official Journal of the European Union and the TED (Tenders Electronic Daily) database in accordance with the requirements laid down in EEA legislation. Furthermore, ESA considered that the contracting authority had not respected the minimum time limit for the submission of applications in the award procedure. ESA also noted that the contracting authority had incorrectly described the subject matter of the public contract by failing to use a complete and sufficiently precise set of CPV (Common Procurement Vocabulary) codes.

ESA and Norway disagree on the precise legal classification of the contract in question. Whilst ESA considers that the subject matter of the contract fulfils the legal definition of a "works concession", Norway maintains that it constitutes a "service concession", for which a more lenient set of rules on concession awards apply.

Food safety

The EEA legislation on food safety is based on the principle of whole-chain-compliance; "*from farm to fork*" and *"ocean to table"*. This means that food safety is to be ensured at all stages throughout the food production and distribution chain, all the way to the final consumer. Its provisions include elements *inter alia* influencing on feed and food safety, animal health and welfare.

ESA's tasks include monitoring to ensure timely transposition and correct application of EEA law, case handling related to food safety and veterinary legislation, and on-the-spot inspections to verify that Iceland and Norway apply legislation correctly.

When ESA identifies shortcomings in the control systems set up by the national authorities it will issue recommendations aimed at rectifying the situation. The EFTA States are invited to comment on the draft reports, as well as provide corrective actions in line with the recommendations set forward before the reports are published on ESA's website.

On-the-spot inspections

The food and feed safety, animal health and welfare sectors cover a wide range of issues. Missions by veterinary inspectors are important tools to assess the performance of the EFTA States in these fields. In 2016, ESA carried out eight missions in various sectors across the veterinary, food and feed fields. The core focus of ESA is to carry out audit missions to the EFTA States. However, other kind of missions, as fact-finding missions, may also take place to assess whether legislation in force ensures food safety.

Inspections in 2016

4 in Iceland:

- Veterinary medicinal products and residues
- Fact finding mission: Campylobacter
- Post slaughter traceability
- General review of outstanding recommendations

4 in Norway:

- Feed safety
- Fact finding mission: Campylobacter
- Post slaughter traceability
- General review of outstanding recommendations

Room for improvement of official control of feed safety in Norway

A mission to Norway carried out by ESA showed that the control system of animal feed has been adequately implemented and covers most of the feed production chain. A risk-based system for official controls is in place.

Even though the outcome of the inspection was positive, some shortcomings were identified. The controls did not always ensure that the relevant requirements concerning cross-contamination and homogeneity of feed were fully complied with. The task of taking official feed samples had been delegated to a private inspection company, which was not accredited in accordance with the EEA legislation. Finally, the follow-up of instances of non-compliance by the feed business operators was, in some cases, lacking or not carried out in a timely manner.

It was, however, positive that the Norwegian Food Safety Authority had carried out an internal audit of the feed sector in 2015. This internal audit had uncovered many of the findings observed by the ESA mission team, but these findings had not yet been rectified before the audit by ESA in 2016.

Traceability, labelling and use of food additives in products containing meat

Traceability is the ability to track any food, feed, food-producing animal or substance intended for consumption through the food production chain. Traceability allows food business operators and authorities to respond to risks that can arise in food and feed, in order to ensure that all food products are safe for consumers.

Norway's current control system on traceability and labelling of products with meat and the use of additives is not sufficiently developed and implemented. This was the main conclusion of the report published by ESA following an inspection carried out in Norway in October 2016.

ESA visited ten establishments and found that food business operators in those establishments generally had traceability systems in place. However, during the inspection it was confirmed that the controls carried out by the Norwegian Food Safety Authority only covered part of the requirements for the traceability and labelling of meat and meat products. Some deficiencies remained undetected by the Norwegian authorities.

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

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

Following a request by the Reykjavík District Court, the EFTA Court delivered in February 2016 an advisory opinion concerning the Icelandic import system for raw meat products. The EFTA Court concluded that it was not in line with Directive 89/662 on veterinary checks in intra-Community trade for an EFTA State to require a special permit before raw meat products are imported and a certificate confirming that the meat has been stored frozen for a certain period.

Following that judgment, ESA issued a letter of formal notice to Iceland in April 2016, and then a reasoned opinion in September 2016, in which it concluded that the authorisation system for the import of egg and dairy products was a not in line with Directive 89/662.

ESA decided in December 2016 to bring both cases before the EFTA Court.

Transport

Efficient, safe and sustainable transport of goods, services and persons complements the development of the Internal Market and is fundamental to a more efficient and competitive EEA economy.

All modes of transport are covered by the EEA Agreement. Due to geographical location or lack of infrastructure, certain legislation applies to a limited degree in some of the EFTA States. ESA monitors all EEA legislation on transport, be it on land, in the air or at sea. To ensure compliance with aviation and maritime security rules, ESA also carries out on-site inspections.

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

Complaint on access to the taxi services market in Norway

In 2014, ESA received a complaint against Norway concerning the rules limiting access to the taxi services market. The complainant argues that Norwegian rules regarding access of new entrants to

the taxi services market are in conflict with EEA law, and constitute a restriction on the freedom of establishment. Norwegian legislation foresees a limited number of taxi licences available in a licence district. The award of new licences is subject to a needs test, which means that the competent authority in a licence district limits the number of licences in accordance with the assumed demand in the district.

ESA takes the view that the applicable Norwegian national legislation on access to the market for the provision of taxi services, as described above, constitutes an unjustified restriction on the freedom of establishment under Article 31(1) EEA.

ESA does not take issue with the licensing requirement in itself. Rather, what ESA is concerned with is the restriction that follows from the numerical limitation of taxi licences. In ESA's view, the conditions for granting a new licence do not satisfy the requirements under EEA law for prior authorisation schemes. The conditions must constitute objective, non-discriminatory criteria, known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion.

Norway argues that the restriction is justified by legitimate objectives in the public interest. The main purpose of the rules, according to the Norwegian Government, is to ensure a satisfactory supply of taxi services at all times. Norway submits that without a limitation and a needs-based test, the obligation for taxi service providers to be available 24 hours a day could not be sustained, and that in consequence the taxi services in sparsely populated areas would become unsatisfactory and would most likely disappear at certain times of the day. ESA does not concur with this view.

ESA acknowledges that a limitation of licences can be necessary to guarantee a satisfactory, round-the-clock supply of taxi services in rural areas where taxis are often an indispensable means of transport and thereby serve a public interest. However, the situation is different in densely populated areas, such as Oslo, where it is rather likely that limiting the number of licences on the basis of a needs-based test will have the result of limiting supply, as new operators will be precluded from entering the market. Creating such high barriers to enter the taxi market will lead to an inefficient exploitation of resources and limit labour productivity, thereby increasing prices.

As a result of the above, ESA issued a letter of formal notice to Norway in May 2016.

The Norwegian Government has contested ESA's view and maintains its reasoning that the restrictions are justified on grounds of public interest and are proportionate.

Aviation and maritime security inspections

The main objective of the EU's regulatory framework on aviation security is to safeguard civil aviation against acts of unlawful interference. The framework as incorporated into the EEA Agreement applies to airports serving civil aviation within the EEA, operators providing services at such airports and entities providing goods and or services to or through such airports.

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

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

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

Norway fails to ensure the freedom to provide maritime transport services

In February 2016, ESA delivered a letter of formal notice to Norway for a failure to ensure the freedom to provide maritime transport services due to the existing trade area limitations of the Norwegian International Ship Register ("NIS").

Under Norwegian law, vessels on the NIS Register are not allowed to transport passengers on scheduled transport services between Norway and foreign ports. Moreover, the Regulation on trade areas for passenger services registered in the NIS establishes that vessels cannot transport passengers on scheduled services between the Nordic countries.

ESA takes the view that Regulation (EC) No 4055/86 lays down the freedom to provide intra-community and third country maritime transport services for the subjects falling within the scope of the Regulation (that is, nationals established in the EEA and EEA-nationals established outside the EEA whenever their vessels are registered in an EFTA State in accordance with its legislation). Thus, the imposition of any restrictions on the freedom to provide services falling within the scope of Regulation 4055/86 is in principle contrary to EEA law. In the view of ESA, the trade area limitation for NIS vessels constitutes a restriction under EEA law.

Norway, in its reply to ESA's letter of formal notice, took the view that the trade limitation does not constitute a restriction, and in any event could be justified on grounds of public policy and the protection of workers.

The case is still ongoing, and ESA and Norway have met on several occasions to discuss this significant case for the Norwegian maritime industry and the Norwegian flag.

ESA stresses the importance of compliance with the EEA *acquis* in the field of freedom to provide maritime transport services, and strongly believes that such compliance can be achieved in a way in which the interests of all stakeholders and beneficiaries of the freedom to provide services are safeguarded.

State aid

State aid is public support provided to commercial activities. Examples are cash grants, tax breaks, favourable loans, guarantees or investments not based on market terms. The EEA Agreement prohibits state aid in order to prevent distortions of competition and negative effects on trade in the EEA. The prohibition on state aid seeks to ensure equal opportunities for companies across Europe, and to prevent government assistance from being used as a form of protectionism in the absence of trade barriers.

The prohibition is, however, subject to numerous exemptions, recognising that government intervention can be necessary to correct market failure and for other purposes. To benefit from these exemptions the EFTA States must, as a rule, notify aid measures to ESA for prior approval. Aid measures may be implemented without prior approval when they comply with the General Block Exemption Regulation (GBER) or other more specific rules.

Main activities in 2016

In 2016, ESA opened 58 new state aid cases and 54 cases were closed. At the end of the year, 36 state aid cases were pending. These statistics include pre-notification discussions, notifications, formal investigations, existing aid review, unlawful aid (mostly complaints) and recovery cases. Cases of aid under the GBER are excluded. The statistics also exclude cases of other state aid matters such as review of guidelines on state aid.

Using the GBER – opportunities and responsibilities

The GBER exempts wide categories of aid measures from the notification obligation, provided that the conditions set out in the GBER are fulfilled. The idea is that only the larger, more distortive and complex cases will remain subject to prior notification and detailed scrutiny by ESA before aid can be granted.

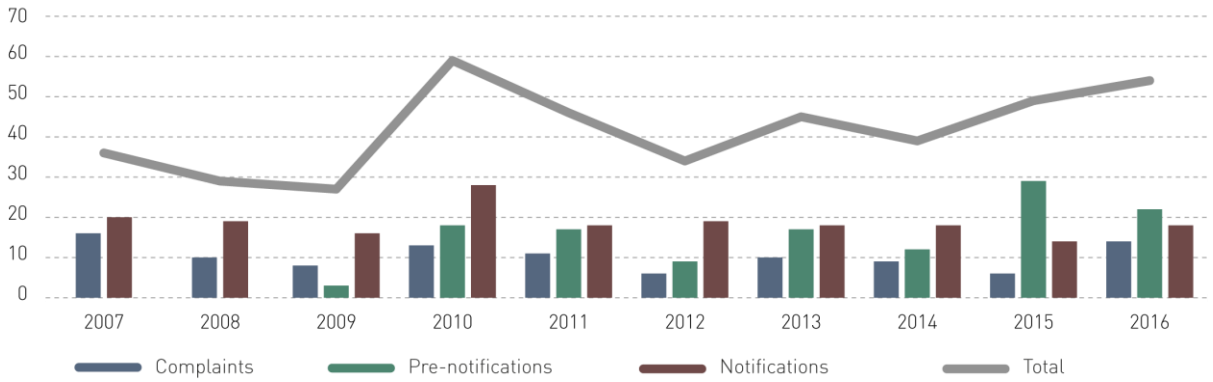
The GBER thus shifts more responsibility to national authorities – in exchange for higher standards on transparency and accountability. In particular, larger aid awards are published on a publicly available website, certain schemes require an evaluation plan and ESA conducts monitoring exercises to ensure that aid measures fulfil the requirements under the GBER.

In 2016, Norway made active use of the GBER with 34 block-exempted aid measures, whilst Iceland block-exempted two aid schemes. Liechtenstein has so far not made use of the GBER. An overview of GBER information sheets received by ESA is available on its website.

In 2016, ESA adopted 24 state aid decisions, 17 involving state aid in Norway and seven in Iceland. A full overview of ESA's state aid decisions is available from the state aid register on the ESA website.

Despite active use of the GBER by the EFTA States (see box), ESA has not yet experienced a drop in notifications. At the same time, the number of complaints submitted to ESA increased significantly in 2016. Notifications and complaints are important indicators of activity, as ESA enjoys very limited discretion in whether or not to handle these cases. As is illustrated by the graph below, ESA has recently experienced a level of activity in the field of state aid last seen in the direct aftermath of the financial crisis.

(Pre-)Notifications and complaints received 2007-2016



State Aid Scoreboard

In March 2016, ESA published its annual State Aid Scoreboard for the EFTA states. The scoreboard, published annually, is a benchmarking tool for measuring trends in state aid expenditure by the EFTA States as well as across the EEA more generally. The scoreboard comprises aid expenditure made by the EFTA States before 1 January 2015. The data is based on annual reports submitted to ESA by the EFTA States

The state aid expenditure increased in Iceland and Liechtenstein, while Norway slightly reduced its spending. On the whole, aid spending continued to decrease. Aid for regional development covered the largest proportion of total state aid, followed by aid for environment and energy-saving purposes. Less than one percent of the aid was granted for sector-specific objectives.

Electricity producers must pay market price for public natural resources

In April 2016, ESA concluded that Iceland must introduce legislation to ensure that electricity producers using public natural resources always pay market price for those rights.

Iceland has on numerous occasions granted electricity producers, which have obtained licences to construct power plants, rights to use public natural resources to generate hydroelectric or geothermal energy. However, there is no legal act establishing the required content of such agreements. Neither is there a clear legal requirement for the payment of a market-based remuneration nor are there published and precise criteria for determining the level of such remuneration.

ESA proposed that Iceland introduce a legal obligation establishing that any transfer of rights to use public natural resources for electricity generation must take place on market terms. This obligation would be binding on all public entities. Moreover, Iceland would establish a clear methodology to

determine the remuneration paid for the use of the natural resources to ensure that all operators receive equal treatment. ESA has also asked Iceland to review any existing contracts to ensure that all companies pay a correct market remuneration for the remainder of those contracts.

Iceland has formally accepted ESA's proposals. Iceland has also established a working group which has the role of implementing the necessary regulatory amendments, determining the market price for the use of the natural resources and reviewing the existing contracts with the electricity producers to ensure that they pay market price.

Enova – supporting energy efficiency and environmental measures

In December 2016, ESA approved a series of Norwegian environmental aid schemes managed by Enova, a state-owned entity. The aid schemes are financed from the Energy Fund, which has a budget for 2017 of NOK 2,546 million.

In this regard, ESA has taken decisions on the following measures:

The objective of the **Demo scheme** is to incentivise the user demonstration of new technologies, products or processes, within the fields of renewable energy production, energy efficiency and reduced greenhouse gas emissions. The long-term goal of the scheme is to increase the number of new energy and climate technologies available for adoption in the market. The scheme supports demonstration, under realistic operating conditions, of technologies and solutions that have not been adopted by the relevant market players. Under this scheme, Enova will mainly use convertible loans to address the technological risk of the projects.

The **Eco-Inn scheme** promotes innovative projects that aim at significantly improving environmental protection beyond the framework of EU/EEA standards, or improve environmental protection in the absence of standards. Enova will use convertible loans and grants to incentivise projects under this scheme.

The **alternative fuels infrastructure programme** comprises five different aid schemes for the deployment of recharging infrastructure for electric vehicles, shore-side electricity supply, refuelling infrastructure for hydrogen and biofuels, as well as liquefied natural gas (LNG) supply to ships. The schemes have been authorised from 1 January 2017 until the end of 2022. They represent a continuation of schemes that have previously been approved by ESA. The predecessors of the first two have been operated by Enova under the umbrella of the Norwegian Energy Fund scheme approved in 2011. The alternative fuels infrastructures programme was approved in 2015.

Enova has also made use of the GBER to exempt from notification the remaining aid-granting activities of Enova. Accordingly, ESA does not need to take decisions on these aid schemes. Besides approving the new Enova aid schemes, ESA also authorised three individual aid measures granted by Enova under the predecessor of the Demo scheme. These concern demonstration projects for environmentally friendly and innovative technologies for producing aluminium, copper and black wood pellets (a bio-based coal substitute).

ESA clears Norwegian exemption for consumers importing low-value goods

In July 2016, ESA decided that the Norwegian import duty exemption for low-value goods imported by consumers does not constitute state aid.

In October 2015, ESA received a complaint concerning the exemption in the Norwegian Customs Act, which provides that no import duties are payable for goods costing less than 350 NOK including transport and insurance. According to the complaint, the exemption amounted to unlawful state aid.

ESA examined the case and concluded that the exemption does not favour certain undertakings or the production of certain goods, as required by Article 61(1) of the EEA Agreement. ESA found that the exemption has the effect of expediting and simplifying the customs clearance process and was to the benefit of Norwegian consumers. The exemption was considered necessary for the functioning and effectiveness of the Norwegian custom system. Consequently, ESA found the exemption justified by the nature and general scheme of the customs system.

ESA closes its outstanding Icelandic financial crisis cases

In 2016, ESA closed its two remaining state aid cases relating to the financial crisis in Iceland. This marked the end of more than seven years of assessing various measures adopted in the wake of the fall of the Icelandic banks.

In January, ESA decided not to raise objections to the Icelandic authorities' efforts to restructure Norðurland Savings Bank and its predecessors, the savings banks of Bolungarvík, Svarfdælir and Þórshöfn.

Given that Landsbankinn hf. eventually took over the savings bank, it was no longer relevant for ESA to assess the measures aimed at ensuring return to long-term viability. ESA still assessed whether the measures were in line with other relevant provisions in its financial crisis Restructuring Guidelines.

In November, ESA closed its formal investigation into loan agreements concluded between the Central Bank of Iceland (CBI) and Íslandsbanki hf. and Arion banki hf. ESA found that the agreements were on market terms and thus did not constitute state aid.

ESA began looking into this matter upon receiving a complaint. Following the opening of the formal investigation, ESA received substantial information concerning average interest rates for comparable debt instruments. This information demonstrated that the terms agreed by the CBI were in line with commercial conditions at the time. Therefore, ESA concluded that the CBI acted in line with the conduct of a private creditor and had not provided preferential treatment to the two banks.

Delays in recovery of incompatible state aid

The EFTA States are obliged to take all necessary measures to recover state aid that ESA has declared incompatible from the beneficiary/beneficiaries. ESA's Recovery Guidelines set out the recovery procedure and highlight the importance of EFTA States effectively recovering incompatible aid without delay. If the EFTA States fail to respect their recovery obligation, ESA may bring the matter before the EFTA Court. Failure to recover state aid raises major concerns, as the distortions created by incompatible state aid continue in the meantime.

ESA currently has two ongoing recovery procedures:

In October 2014, ESA ordered Iceland to recover the incompatible state aid from the beneficiaries of the Icelandic investment incentives scheme. In September 2015, ESA brought an action to the EFTA Court against Iceland for failing to comply with ESA's decision. The EFTA Court upheld ESA's position in a judgment delivered in July 2016, declaring that Iceland had failed to fulfil its obligations. At the end of 2016, Iceland had not yet completed full recovery from all beneficiaries.

The second recovery case concerns aid to public bus transport in the county of Aust-Agder, Norway. In May 2015, ESA concluded that the beneficiary, Nettbuss Sør AS, had received incompatible state aid and ordered the Norwegian authorities to recover it without delay. After lengthy procedures at the national level and extensive discussions with ESA, the Norwegian authorities informed ESA in December 2016 that they have effected full recovery, and provided documentation for ESA to assess.

Aid to the media sector – news and current affairs

ESA approved two aid measures in favour of companies in the media sector in 2016.

In January, ESA approved the introduction of a zero VAT rate for electronic news services in Norway, which brought the VAT treatment of electronic news services in line with that applicable to printed newspapers. This measure allows news media, including the large number of local and regional newspapers in Norway, to publish and sell their content electronically without being disadvantaged by the VAT system. The approval of the measure is valid until 1 March 2022.

In June, ESA took a decision approving amendments to the production grant scheme for news and current media in Norway. The amendments introduce national weekly news and current affairs media as a new group of beneficiaries under the scheme, which is administered by the Norwegian Media Authority. National weekly news and current affairs media had previously benefitted from production grants disbursed by the Arts Council of Norway. The production grant scheme itself was authorised by ESA in March 2014.

Competition

Competition law enables markets to work effectively for the benefit of consumers. Competition not only pushes prices downward, but can also provide consumers with greater choice. Competition encourages companies to be innovative and to deliver high quality products and services.

Key reflections from 2016

Investigations in digital markets
In the field of communications, ESA sent a Statement of Objections to Telenor in early 2016 expressing concerns that Telenor may have abused a dominant market position in the provision of mobile services in Norway.

In the evolving area of e-commerce, ESA opened an investigation in October 2016 into whether members of the Norwegian banking sector colluded to prevent a new market entrant from providing its e-payments service in Norway.

Investigations in transport markets
ESA also progressed two investigations in the transport sector.
The Color Line / Sandefjord municipality case concerns Color Line's long-term access to Sandefjord harbour on a popular ferry route for tax-free sales between Norway and Sweden. Following changes in the allocation of sailing times at that harbour to a new competitor, Fjord Line, and the re-allocation of Color Line's sailing times, ESA decided to close the investigation in December 2016.

In June 2016, ESA opened an investigation into whether the Norwegian airline company Widerøe abused a dominant position by refusing to supply an essential part of a navigation system required for landing at several regional airports in Norway.

Assisting the Icelandic courts
ESA was also active in competition enforcement in Iceland. In April 2016 ESA submitted written observations ("amicus curiae") to the Reykjavík District Court in a case involving cooperation on prices in the hardware sector in Iceland. ESA's observations concerned the application of the EEA competition rules and the importance of the deterrent effect of fines in competition cases.

Main activities in 2016

2016 saw a significant level of investigative activity with ESA pursuing alleged breaches of the EEA competition rules in a number of different areas, notably in the communications, e-commerce and transport sectors. During the course of the year two new formal competition investigations were opened, an existing competition investigation was closed, and a Statement of Objections was issued in another ongoing investigation.

The decision to open proceedings does not signify that ESA has made a finding of an infringement, or prejudge in any way the outcome of ESA's investigation. It simply indicates that ESA intends to dig deeper into the facts of the case as a matter of priority.

Formal competition investigation opened into regional air transport services in Norway

In June 2016, ESA opened an investigation into whether the Norwegian airline company Widerøe abused a dominant position (contrary to Article 54 EEA) by refusing to supply an essential part of a navigation system required for landing at several regional airports in Norway. Due to challenging conditions, public service contracts for operating routes into these airports have been linked to having access to a particular satellite-based approach system, called SCAT-1. ESA is assessing whether or not Widerøe impeded other airlines in accessing a key component of this system.

Formal competition investigation launched in e-payments sector in Norway

In October 2016, ESA opened a formal investigation into whether DNB, Nordea, Finance Norway and BankID Norway colluded (contrary to Article 53 EEA) to prevent a new market entrant from providing its e-payments service in Norway. Bits, a related organisation to Finance Norway, is also under investigation.

This followed a complaint from a Swedish payments provider, Trustly, regarding the alleged blocking in Norway of its new e-payments service, referred to as a payment initiation service. ESA is now looking in more depth into why Norwegian consumers are unable to benefit from a new type of service that is available in most other EEA countries. ESA is also looking into related industry rules.

Color Line / Sandefjord municipality investigation closed

In the Color Line / Sandefjord municipality case, ESA opened an investigation in March 2015 concerning a popular ferry route for tax-free sales between Norway and Sweden, namely the Sandefjord–Strömstad route.

ESA has been looking into Color Line's long-term access to Sandefjord harbour. An agreement was reached between Sandefjord municipality, Color Line and Fjord Line in autumn 2015 whereby a new sailing schedule with more commercially viable sailing times for Fjord Line was implemented. Sandefjord municipality also undertook to re-allocate sailing times from 2020 based on criteria that seek to safeguard competition and ensure equal treatment and non-discrimination.

Having assessed the implications of these changes for competition on this busy crossing, ESA decided to close the investigation relating to Fjord Line's complaint in December 2016. In the summer of 2016 a third party submitted a new complaint against Color Line regarding the same market. ESA is currently assessing that complaint.

Statement of Objections issued in Telenor case

In February 2016, ESA sent a Statement of Objections to Telenor expressing concerns that it may have abused a dominant position (contrary to Article 54 EEA) by obstructing competitors in two markets involving the provision of mobile communications services to Norwegian users.

In the first part of this case, ESA is looking at whether Telenor squeezed its competitors through charging them higher wholesale prices than the retail prices Telenor offered to its own mobile broadband customers. In the second part of the case, ESA is assessing whether certain clauses in Telenor's retail contracts may have made it too costly for competitors to capture business customers from Telenor.

ESA received Telenor's reply to the Statement of Objections in April 2016. An oral hearing was conducted in October 2016 at Telenor's request and the investigation is ongoing.

Advancing ESA's general investigative activity

During 2016 ESA also continued to receive market information and complaints concerning other suspected infringements of the EEA competition rules. These submissions are assessed in line with ESA's publicly available guidance on handling complaints in competition cases.[1]

Cooperation with the European Commission

ESA's close relationship with the Directorate-General (DG) for Competition in the European Commission has been a cornerstone of the EEA competition law framework. ESA shares jurisdiction with the Commission when applying the EEA competition rules and has forged a strong partnership through years of shared policy and case experience.

While the rules are founded on the "one-stop-shop" principle, so that either the Commission or ESA, but not both, will be competent to handle a given case, there are robust mechanisms deeply rooted within the framework to ensure that both authorities speak with each other in their respective cases.

[1] See, for example, ESA's Notice on the handling of complaints under Articles 53 and 54 of the EEA Agreement and ESA's Notice on best practices for the conduct of proceedings concerning Articles 53 and 54 of the EEA Agreement.

ESA and the EFTA States are therefore kept closely informed and have the opportunity to make their voices heard in Commission cases (for both mergers and antitrust) that concern the territory of the EFTA States. This is important as cases handled by the Commission can have a considerable impact on markets and market players in the EFTA States. For example, mergers are 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, in practice, the Commission is the competent authority to assess mergers under the EEA Agreement. However, ESA and the EFTA States remain involved in such merger cases by virtue of the EEA cooperation rules.

ESA and the competition authorities of the EFTA States are also involved in discussions on European competition policy within the European Competition Network (ECN). As part of the ECN community, ESA meets and shares experiences with its European colleagues. The competition rules in the EEA Agreement are equivalent in substance to the competition rules in the EU, as set out in the Treaty on the Functioning of the European Union (TFEU), and so there is much to be gained from sharing experiences and insights within this network.

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	

Information exchange with the EFTA competition authorities

National competition authorities and courts in the EFTA States apply Articles 53 and 54 EEA in parallel to the equivalent national competition rules. To ensure a coherent and efficient application of those provisions, ESA's activities in the field of competition are coordinated with those of the national competition authorities. This is done via the EFTA network of competition authorities.

When acting under Articles 53 or 54 EEA, the national competition authorities in the EFTA States inform ESA about new investigations. Sharing background information early on helps to identify the most appropriate authority to deal with a given case. The national authorities reported a number of new investigations and enquiries concerning cases involving potential breaches of the EEA competition rules both formally and informally in 2016.

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

Supporting the courts in competition cases

ESA seeks to safeguard a coherent application of the EEA competition rules in a number of ways and in 2016 it continued its practice of assisting the courts in cases involving the EEA competition rules and equivalent national provisions.

In March 2016, ESA submitted written observations to the EFTA Court in relation to a request for an advisory opinion from the Icelandic Supreme Court in Case E-29/15 *Sorpa bs. v The Competition Authority* concerning a rebate policy of a municipal cooperative agency providing waste management services.

While the case concerned the application of national competition rules, the Icelandic Supreme Court sought advice, amongst other things, on the circumstances under which a municipality or a municipal cooperative agency may be considered an "*undertaking*" when carrying out activities in the waste management sector, as well as on the circumstances under which a rebate policy may be considered discriminatory within the meaning of the provisions prohibiting abuse of a dominant position. The EFTA Court issued its judgment in September 2016, stating amongst other things that, in assessing whether a service is an economic activity, account must be taken of the existence of competition with private entities and the level of compensation received.

In April 2016, ESA submitted observations (as *amicus curiae)* in a case involving cooperation on prices in the hardware sector in Iceland which was on appeal before the Reykjavík District Court (the *Byko* case). ESA provided guidance on the circumstances in which the EEA competition rules apply (namely when trade may be affected). ESA also underlined the importance of a deterrent effect when setting fines in competition cases. Fines in competition cases must be set high enough to effectively deter undertakings from infringing the competition rules.

Further to a request for an advisory opinion from the Norwegian Supreme Court concerning Case E-3/16 *Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet*, ESA submitted written observations to the EFTA Court concerning the distinction between restrictions by object and by effect in the area of joint bidding. ESA submitted in brief that the fact that cooperation takes place openly is not a determining element when assessing whether a form of conduct constitutes an infringement by object. The legal criteria that must be emphasised when considering cooperation in the form of two competing companies submitting a joint tender through a joint venture is whether it

reveals a sufficient degree of harm to competition, having regard to the content of its provisions, its objectives and the economic and legal context of which it forms part.

In order to categorise an agreement as an infringement "by object", an agreement must in itself reveal a sufficient degree of harm to competition, and be capable of restricting competition. The EFTA Court issued its judgment in December 2016 and concluded amongst other things that, since the submission of joint bids involves price fixing, the analysis of the legal and economic context may be limited to what is strictly necessary.

Outlook for 2017

Tackling barriers to entry and expansion in EEA markets

A common thread through all of ESA's ongoing competition cases is the focus on assessing whether companies imposed artificial barriers to entry and expansion in EEA markets. ESA takes possible obstructions to competition in the Internal Market very seriously.

ESA aims to progress its open investigations in the digital and transport sectors with the appropriate urgency and attention to detail during the course of 2017. Through engaging in a constructive dialogue with the parties in question, ESA seeks, and will continue to seek, to establish all relevant facts and context. This is important for ensuring that any intervention is targeted to clearly identified problems. ESA is mindful of ensuring that consumers can reap the benefits of open EEA markets characterised by strong and durable competitive forces.

Any further complaints or market information which ESA may receive in 2017 regarding potential competition law infringements in the EFTA States will also be scrutinised to check the compatibility of such business practices with the EEA competition rules.

Making a complaint regarding a potential breach of EEA competition law

Competition law protects businesses and consumers from anti-competitive business practices which are illegal. ESA enjoys wide powers of investigation and may impose fines of up to 10% of global turnover on undertakings that breach the competition rules. Businesses which are subjected to restrictive practices or abuses by other market operators, or consumers which may be harmed by such behaviour, can submit *market information* or lodge a *formal complaint* to ESA. The Form C on ESA's website provides guidance on the relevant content and format required for submitting formal complaints on suspected infringements of the EEA competition rules. Further information on ESA's complaints procedure is available on ESA's website.

Continuing to build on strong relationships with other competition law enforcers

ESA works side-by-side with the competition authorities of the EFTA States and with the Commission to ensure that the EEA competition rules are applied in a consistent manner.

Effective communication and close cooperation with our European colleagues will continue to be a key priority for ESA in 2017 to ensure legal certainty for businesses operating across national borders

in the EEA. We will also continue to build on our close relationships with our European colleagues through timely and targeted information sharing within the ECN.

We are conscious of the need to play our role in bringing important or novel issues of EEA interest to the network's attention so that we can work together towards a coherent and consistent interpretation of the law.

Promoting a greater understanding of the EEA competition rules

To maximise the impact of its work, ESA plans to continue to raise awareness of the EEA competition rules and to communicate pro-actively with the wider business and legal community.

To this end, ESA will continue to make active use of social media in seeking to reach a wider audience. ESA will also continue to avail itself of the option to submit observations in court proceedings in cases of particular EEA interest. This is an effective instrument in communicating important messages regarding the interpretation of key aspects of the EEA competition rules.

Providing guidance on matters of legal interpretation is an important tool in contributing to a cohesive EEA in which the business community can have confidence in a common set of rules.

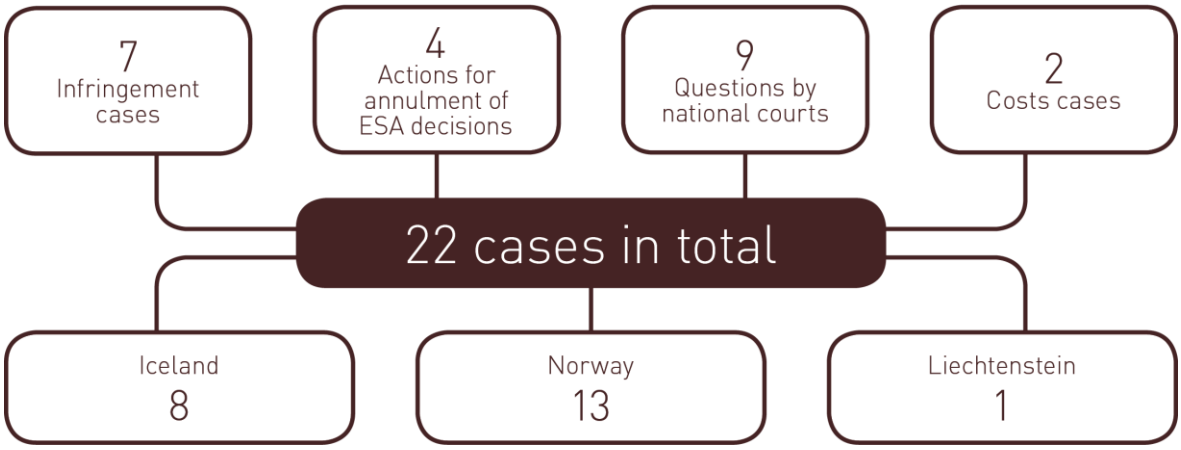
Legal and Executive Affairs

As ESA's legal service, the Legal and Executive Affairs department provides legal advice, reviews all ESA decisions and represents ESA in court. LEA also provides the College with support on formulating, coordinating and communicating ESA policy.

The EFTA Court

Bringing a case against an EFTA State for failure to live up to its obligations under EEA law is the final step in ESA's formal surveillance procedure. Upon request, the EFTA Court also advises national courts in the EFTA States on the interpretation of EEA law by delivering advisory opinions. Finally, the Court hears appeals brought by companies and persons to review the lawfulness of decisions taken by ESA which affect them directly. ESA participates in all cases in the EFTA Court.

Cases lodged before the EFTA Court in 2016



Main activities in 2016

Direct actions – ESA v EFTA States

The EEA Agreement covers the European Union as well as Iceland, Liechtenstein and Norway. It essentially guarantees consumers and companies equal access to do business, invest, study or work in all 31 EEA countries. To that end, all participating States have committed to align their national laws to the common EEA rules. This entails a dynamic process which generally runs smoothly even though it requires frequent changes to national laws in all countries. ESA follows up on these obligations for Iceland, Liechtenstein and Norway just as the European Commission does for the EU Member States. Most shortcomings can be solved out of court, either before or after ESA raises matters in a formalised dialogue with the States (known as the infringement procedure). However, in 2016 ESA brought seven infringement cases before the EFTA Court.

Non-incorporation actions

Three of the infringement cases were brought because Iceland had breached its EEA law obligations by overrunning for at least one year the binding deadlines by which it should have incorporated into its national law new or modified EEA provisions. These cases ranged from legislation on the marketing and use of explosives precursors to legislation on pesticides:

E-10/16 - EFTA Surveillance Authority v Iceland (Pressure equipment)
E-17/16 - EFTA Surveillance Authority v Iceland (Pesticides)
E-18/16 - EFTA Surveillance Authority v Iceland (Marketing/use of explosives precursors)

Explosives precursors in Iceland

Regulation 98/2013 lays down rules for the marketing of explosives precursors, to prevent the illegal manufacturing of explosives. Explosives precursors are substances that can be used for the purposes of making explosives. The Regulation seeks to reduce the accessibility of high-risk chemical explosives precursors to private individuals and introduces the obligation for economic operators to report any suspicious transactions involving explosives precursors as well as other substances that are also considered dangerous.

The rules foreseen in Regulation 98/2013 aim to ensure a better level of security regarding explosives, bomb-making equipment and technologies that could be used for the purpose of terrorist acts. The EFTA States were required to incorporate this regulation by 1 August 2015.

Lodging a case at the EFTA Court is the last step in a formal infringement procedure against an EFTA State. Prior to this, ESA will inform the EFTA State of its view and the State will be able to put forward its arguments, or to resolve the situation by complying within the applicable deadline or as soon as possible thereafter.

As Iceland did not meet this deadline for incorporation of the regulation into its national legal order, and did not take adequate steps to do so in the following year, ESA brought the matter before the EFTA Court in September 2016.

Unlike in the EU, the EFTA Court cannot impose penalty payments for such breaches. It is limited to reminding the EFTA States that timely implementation is crucial for the proper functioning of the EEA Agreement also in Iceland, Liechtenstein and Norway. However, as in the EU, consumers or companies that suffer harm from being denied their EEA rights are entitled to compensation (through state liability), which is an EEA right that they can enforce in their national courts.

During 2016 the EFTA Court handed down nine judgments in favour of ESA in non-incorporation cases, covering cases dealing with legislation on (*inter alia*) driving licences, medicines and greenhouse gases.

E-20/15 - EFTA Surveillance Authority v Iceland (Aerosol dispensers)
E-21/15 - EFTA Surveillance Authority v Iceland (Engines)
E-22/15 - EFTA Surveillance Authority v The Principality of Liechtenstein (Medicinal products)
E-23/15 - EFTA Surveillance Authority v The Principality of Liechtenstein (Human organs for transplantation)
E-30/15 - EFTA Surveillance Authority v Iceland (Medicines)
E-31/15 - EFTA Surveillance Authority v Iceland (Copyright)
E-32/15 - EFTA Surveillance Authority v the Principality of Liechtenstein (Driving licences)
E-33/15 - EFTA Surveillance Authority v Iceland (Pharmacovigilance)
E-34/15 - EFTA Surveillance Authority v Iceland (Greenhouse gases)

Driving licences in Liechtenstein

ESA brought Liechtenstein to the EFTA Court for failure to implement the Driving Licences Directive (2006/126/EC), as well as two amending Directives (2012/36/EU and 2011/94/EU).

In a ruling delivered in July 2016, the EFTA Court found that Liechtenstein had failed to fulfil its obligations by failing to adopt the measures necessary to implement the Acts within the times prescribed.

The Driving Licences Directive aims at improving road safety in the EEA, in particular by setting minimum standards for medical checks on professional drivers and for qualifications and continuous training for driving examiners. The Directive also further enhances harmonisation of the European driving licence system by (inter alia) introducing a harmonised period of driving licence validity and a new standardised “"credit card”" licence model which reduces the risk of fraud or forgery.

Substantive [Non-conformity] actions

New European laws often require new national rules, but existing national laws may also deprive businesses and consumers of their EEA rights if these are not in line with EEA law. The EFTA Court has the final say where ESA and the EFTA States disagree on what this means in any given situation, and ESA can also bring an action before the Court when the EFTA States are too slow to rectify the problems identified. In 2016 ESA brought three such cases before the EFTA Court:

E-09/16 - EFTA Surveillance Authority v Norway (Chemicals)
E-13/16 - EFTA Surveillance Authority v Iceland (Roadside inspections of commercial vehicles)
E-14/16 - EFTA Surveillance Authority v Iceland (Roadside checks on dangerous goods)

Roadside checks in Iceland

In April 2016, ESA decided to bring two cases against Iceland before the EFTA Court. ESA took the view that the Icelandic legislation and practice were not in line with EEA law on checks on the transport of dangerous goods, and on technical roadside inspections of commercial vehicles to check whether they are in a good enough condition to be allowed on the road.

ESA considered that Iceland had failed to correctly implement Directive 95/50/EC, governing the checks to be made by national transport authorities to ensure that vehicles used to transport dangerous goods (such as flammable, explosive and toxic substances) carry such goods safely by road.

The same goes for Directive 2000/30/EC, which requires the EEA States to conduct technical roadside inspections of commercial vehicles (heavy goods vehicles) in order to improve road safety and protect the environment. Iceland does not carry out regular technical inspections on the road as required by the Directive, and the obligation to provide drivers with an inspection report based on a standardised form is not met.

Since ESA had raised both of these issues with the Icelandic authorities on several occasions and Iceland had not taken satisfactory measures to comply fully with the provisions of the respective Directives, both matters were referred to the EFTA Court in 2016.

In 2016, ESA also introduced a case seeking a declaration of Norway's non-compliance with a previous judgment of the EFTA Court:

E-04/16 - EFTA Surveillance Authority v Norway (Money laundering)

Money laundering and terrorist financing in Norway

Two years after the EFTA Court handed down a judgment against Norway for failure to fully implement rules to fight money laundering and terrorist financing, ESA in February 2016 had to bring Norway to the EFTA Court for a second time.

Directive 2005/60/EC requires that providers of certain services to trusts or companies and other natural or legal persons trading in goods that involve large payments in cash are subject to effective supervision. Norway failed to ensure that a public authority was entrusted with the task of effectively supervising those persons, and thereby respecting the relevant anti-money laundering and terrorist financing rules.

Following the EFTA Court's judgment in Case E-13/13 in 2013, Norway was required to immediately take action to bring its legislation on anti-money laundering and terrorist financing into compliance with EEA law. More than two years later, Norway had still not proposed or adopted any such legislation. This failure to comply with the EFTA Court's judgment in a timely manner constituted itself a breach of EEA law and ESA had to take Norway to court again.

In November 2016, the EFTA Court found in Case E-4/16 that Norway has failed to fulfil its obligations under Article 33 SCA by failing, within the time prescribed, to take the measures necessary to comply with the judgment from 2013.

During 2016, the EFTA Court handed down three judgments on the following non-conformity cases:

E-35/15 - EFTA Surveillance Authority v Norway (Port reception facilities)
E-19/15 - EFTA Surveillance Authority v the Principality of Liechtenstein (Prior authorisation schemes for establishment and cross-border services)
E-25/15 - EFTA Surveillance Authority v Iceland (Failure to recover aid)
In each of these three judgments, the EFTA Court ruled in ESA's favour. ESA is following up on the judgments with the EFTA States.

Referrals from national courts

Another way of enforcing EEA law is that national courts from Iceland, Liechtenstein and Norway refer a question to the EFTA Court when a case before them depends on the interpretation or application

on EEA law. ESA systematically participates in the proceedings before the EFTA Court by the submission of written and oral arguments.

In 2016, the EFTA Court received nine new requests for advisory opinions in cases of this type, as follows:

E-01/16 - Synnøve Finden AS v Staten v/Landbruks- og matdepartmentet
E-03/16 - Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet
E-05/16 - Norwegian Board of Appeal for Industrial Property Rights
E-06/16 - Fjarskipti hf. v Póst- og fjarskiptastofnun
E-19/16 - Thue v the Norwegian Government represented by the Ministry of Finance
E-08/16 - Netfonds Holding ASA m.fl. v Staten v/Finansdepartementet
E-11/16 - Mobil Betriebskrankenkasse v Tryg Forsikring
E-15/16 - Yara International ASA and the Norwegian Government, represented by the Ministry of Finance
E-16/16 - Fosen-Linjen AS v AtB AS

Synnøve Finden

The case between Synnøve Finden AS and the Norwegian Government, represented by the Ministry of Agriculture and Food, concerned the compatibility of the Norwegian regulation on a price equalisation system for milk ("the PE Regulation") with EEA rules on freedom of establishment and state aid.

The PE Regulation provides for a special distribution subsidy to the dairy producer Q-Meieriene AS for the distribution of liquid milk products. Synnøve Finden intended to start making products such as Norwegian yogurt and milk for consumption. However, the Ministry informed it that it would not extend the special distribution subsidy to that firm. ESA supported the view that the special distribution subsidy constitutes state aid, which is subject to the relevant rules of the EEA Agreement, including notification to ESA.

The EFTA Court assessed the special distribution subsidy against the four conditions for finding a state aid measure (intervention by the State or through State resources, selectivity, advantage and effect on trade and competition). It concluded that those criteria seem to be fulfilled in this case. The final determination rests, however, with the national court. The EFTA Court further noted that the subsidy in question benefits the distribution of both products falling outside the scope of the EEA Agreement (e.g. liquid milk products) as well as products falling within (e.g. flavoured yogurt), which are nevertheless distributed together. Moreover, the subsidy is inseparably linked to trade in those products. In those circumstances, the proper functioning of EEA State aid law requires that the national measure in question must, as a whole, be notified to ESA.

As regards freedom of establishment, the EFTA Court found that there were no grounds for challenging the measure under Article 31 EEA but for the effects on cross-border trade.

In 2016 the EFTA Court delivered 12 advisory opinions on matters referred from national courts:

E-13/15 Abuelo Insua Juan Bautista v Liechtensteinische Invalidenversicherung
E-14/15 - Holship Norge AS v Norsk Transportarbeiderforbund
E-17/15 - Ferskar kjötvörur ehf. v the Icelandic State
Joined Cases E-15/15 and E-16/15 - Franz-Josef Hagedorn v Vienna-Life Lebensversicherung AG AND Rainer Armbruster v Swiss Life (Liechtenstein) AG
E-24/15 - Walter Waller v Liechtensteinische Invalidenversicherung
E-28/15 - Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board
E-26/15 Criminal Proceedings against B; and E-27/15 - B v Finanzmarktaufsicht (FMA)
E-29/15 - Sorpa bs. v The Competition Authority
E-01/16 - Synnøve Finden AS v Staten v/Landbruks- og matdepartmentet
E-03/16 - Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet
E-06/16 Fjarskipti hf. V Póst- og fjarskiptastofnun

Review of ESA decisions

In 2016, there were four appeals lodged in the EFTA Court against decisions of ESA:

E-02/16 - Gerhard Spitzer v EFTA Surveillance Authority
E-07/16 - Míla ehf. v EFTA Surveillance Authority
E-12/16 - Marine Harvest ASA v EFTA Surveillance Authority
E-20/16 - Autonomy Capital (Jersey) LP and Eaton Vance Management v EFTA Surveillance Authority

Marine Harvest v ESA

In September 2016, the company Marine Harvest ASA lodged with the EFTA Court an application for the annulment of an ESA decision in which ESA had declared that it has no competence to perform state aid surveillance in the fisheries sector.

ESA's decision of July 2016 rejected a complaint lodged by Marine Harvest in May 2016. In that complaint, Marine Harvest alleged that "incompatible state aid" was granted to the Norwegian fisheries sector, which was financed by levies imposed on fish exporters in Norway and exported fish products from Norway. In July 2016, ESA informed Marine Harvest that it did not have the competence

to perform state aid surveillance in the fisheries sector and consequently closed the case. It is this decision which Marine Harvest is challenging before the EFTA Court.

ESA's submissions to the EFTA Court state that neither the EEA Agreement nor the Surveillance and Court Agreement provide any legal basis for ESA to perform state aid surveillance in the fisheries sector. The case will continue in 2017.

During 2016, the EFTA Court dismissed as inadmissible the following cases:

E-04/15 - Icelandic Financial Services Association v EFTA Surveillance Authority
E-02/16 - Gerhard Spitzer v EFTA Surveillance Authority
E-07/16 - Míla ehf. v EFTA Surveillance Authority

Costs Cases

The EFTA Court is empowered to determine the level of costs to be awarded for cases in which it has delivered judgment and awarded costs. In 2016, two applications for taxation of costs were brought before the Court:

Case E-07/12 COSTS - DB Schenker v EFTA Surveillance Authority
Case E-14/11 COSTS - DB Schenker v EFTA Surveillance Authority

The Court of Justice of the European Union

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

ESA can participate in CJEU cases in the following ways:

In a preliminary reference where an EU Member State's court asks the Court of Justice to interpret EU law, ESA may make written or oral submissions if the subject matter of the proceedings is in an area covered by the EEA Agreement.

In other cases, ESA may seek leave to intervene in support of one of the parties under the conditions laid down in Article 40 (3) of the Statute of the Court of Justice.

During 2016, ESA submitted written and/or oral observations in six cases before the CJEU:

Case C-201/15 AGET Iraklis
Case C-434/15 Asociación Profesional Elite Taxi ("Uber Spain")
Case C-646/15 Panay
Case C-656/15 Commission v TV2/Danmark
Case C-672/15 Noria Distribution
Case C-15/16 Baumeister

Amicus curiae

To ensure the coherent application of the EEA competition rules, ESA may of its own initiative give written advice to the courts of the EFTA States. This assistance is part of ESA's duty to defend the public interest. Therefore, ESA in its observations does not formally support one or other side and fully respects the independence of the national courts.

ESA intervened once as *amicus curiae* in 2016, in a case before the Reykjavík District Court. Please see page 34 in the Competition chapter of this report for further details.