2004 marked ten years of functioning of the EEA Agreement. The aim of the Agreement is to establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition. It extends the four fundamental freedoms of the Internal Market of the European Community, and a wide range of accompanying European Community rules and policies, to Iceland, Liechtenstein and Norway, the EFTA States that are signatories to the Agreement.¹

As a result of the EEA Agreement, citizens and undertakings in the EFTA States have access to the EU market in generally the same way as persons and undertakings in the EU. The latter have gained access to the markets in Iceland, Liechtenstein and Norway.

The basic provisions of the EEA Agreement are drafted in terms closely resembling the corresponding provisions of the EC Treaty governing the free movement of goods, persons, services and capital, and those on competition and other common rules, such as state aid and public procurement. The Agreement also contains provisions on a number of European Community policies relevant to the four freedoms.² It further provides for close co-operation between contracting parties to the Agreement³ in certain fields not related to the four freedoms.
A DYNAMIC AGREEMENT

Two separate legal systems are, thus, applied in parallel within the EEA. On one side the EEA Agreement applies to relations, both between the EFTA and European Community sides, and between the EFTA States themselves. On the other side, European Community law applies to relations between the EU Member States. For the EEA to pursue its aim of homogeneity the two legal systems must, therefore, develop in parallel and be applied and enforced in a uniform manner. The Agreement thus includes decision-making procedures for the integration into the EEA of new secondary European Community legislation.

The task of ensuring that relevant secondary European Community legislation is extended to the EEA in a timely manner rests, in the first instance, with the EEA Joint Committee, a committee composed of representatives of the Contracting Parties to the Agreement. The Agreement also provides a surveillance mechanism to ensure the fulfilment of obligations under the Agreement and uniform interpretation and application of its provisions.

While introduction of new secondary legislation into the EEA Agreement is entrusted to a single body, the EEA Joint Committee, the surveillance mechanism for which the Agreement provides is arranged in the form of a two-pillar structure, with two independent bodies. The implementation and application of the Agreement within the EFTA Pillar is monitored by the EFTA Surveillance Authority. The European Commission carries out the same task within the European Community Pillar. In order to ensure uniform surveillance throughout the EEA, the Agreement provides for co-operation, exchange of information and consultation between the two bodies on surveillance policy issues and individual cases.

JUDICIAL PROTECTION

The EEA Agreement also has a two-pillar structure for judicial control within the EEA. The EFTA Court exercises competences similar to those of the Court of Justice of the European Communities and the Court of First Instance in areas including the surveillance of observance by the EFTA States of the Agreement and appeals against decisions taken by the Authority.

Both the EFTA Court in the Icelandic passenger tax case (E-1/03) and the Court of Justice in Ospelt (C-452/01) have underlined that one of the main objectives of the EEA Agreement is to create a homogeneous European Economic Area. The two Courts moreover emphasised the need to ensure uniform interpretation of those rules of the EEA Agreement and the EC Treaty that are identical in substance. The Court of Justice in Ospelt highlighted one of the principal aims of the EEA Agreement, which is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. The EFTA Court has also confirmed in Asgeirsson (E-2/03) that the EEA Agreement is to be interpreted in the light of fundamental rights. The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.

During 2004, the EFTA Court recalled in the Fokus Bank case (E-1/04) that while, as a general rule, the tax system of an EFTA State was not covered by the EEA Agreement, exercise by the EFTA States of their taxation power must be consistent with EEA law. Furthermore, although EFTA States are at liberty, within the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves, this does not mean that in the exercise of the power of taxation so allocated, they may disregard EEA law.

The impact of third country legislation, particularly third country product approvals, on EFTA States’ EEA obligations will be the subject of a judgment of the Court of Justice in the coming year in a case argued in 2004 (Novartis, C-207/03 and C-252/03).

WHAT IS THE EFTA SURVEILLANCE AUTHORITY?

General surveillance

The origins of the Authority are found in Article 108 of the EEA Agreement. The detailed legislative provisions governing its role and obligations are found in the Agreement between the EFTA States commonly known as the “Surveillance and Court Agreement”.

A central role of the Authority is to ensure that the provisions of the EEA Agreement, including its Protocols and the acts referred to in the Annexes to the Agreement, are properly implemented into the national law of the EFTA States and correctly applied by their national authorities. This task is commonly referred to as general surveillance. General surveillance cases are either initiated by the Authority itself or as a result of a complaint.

If the Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement, it may, according to Article 31 of the Surveillance and Court Agreement, initiate formal infringement proceedings. However, before such proceedings are commenced, the Authority will use other means to try to ensure compliance by the EFTA State with the Agreement. In practise, the majority of problems identified by the Authority are solved as a result of informal exchanges of information and discussions between the Authority’s staff and representatives of the EFTA States.
Where appropriate, before concluding the informal phase – and although the Authority itself would not have taken a formal position on the matter – the Directorate concerned may make enquiries in the matter. These take the form of an informal letter to the EFTA State in question inviting it to provide the Authority with supplementary information on the matter under examination and, where necessary, to adopt the measures necessary to comply with EEA law. If formal infringement proceedings are initiated, the Authority will first send the EFTA State Government a letter of formal notice. This letter identifies the provision of EEA law that, in the Authority’s view, has been infringed. The Government is invited to submit its observations on the matter. If the Authority is not satisfied with the Government’s answer to the letter, or if no answer is received, the Authority may deliver a reasoned opinion. This document defines the final position of the Authority on the matter, states the reasons on which that position has been based, and requires that the Government take the measures necessary to bring the infringement to an end. Should the Government fail to comply with the reasoned opinion, the Authority may bring the matter before the EFTA Court, whose judgment is binding on the State concerned.

In 2004, the Authority brought one action before the EFTA Court. The case concerned a residence requirement for members of bank management boards in Liechtenstein (E-08/04).

**Competition**

The Single Market objectives of the EEA Agreement are also upheld through application of the EEA competition rules. The work of the Authority in the field of competition mainly concerns the application of the EEA Agreement directly to individual economic operators. The substantive competition rules of the EEA Agreement are virtually the same as those of the EC Treaty. The competition provisions prohibit, among other things, restrictive practices between businesses and abuses of dominant positions.

The Authority can initiate proceedings against market players. This may result in a decision imposing fines for anticompetitive behaviour. In practise, most cases are resolved informally, with competition concerns identified by the Authority often remedied without the need for formal proceedings, representing an efficient use of resources.

The EC merger control rules apply to the entire European Economic Area through the application of the EEA Agreement. The Authority provides comments and information on mergers handled by the European Commission in cases where EFTA markets are particularly affected.

The Authority may take action in cases of anticompetitive behaviour by public undertakings or undertakings with special or exclusive rights granted by the EFTA States. In such cases, action may be taken not only directly against the undertakings, but also against the State if it has taken measures leading to the anticompetitive behaviour.

### State aid

The EEA Agreement’s main state aid rule is that aid which distorts or threatens to distort competition and affects trade between the Contracting Parties is prohibited. There are, however, several possibilities for exemption.

New state aid measures must be notified to the Authority prior to implementation. They must not be put into effect before the Authority has decided upon the case. The Authority assesses whether a measure constitutes state aid and, if it does, examines whether it is eligible for exemption. The Authority can, after a preliminary examination, decide that a measure does not contain aid, decide not to raise objections to the measure, or to open a formal investigation procedure.

A final decision on a state aid measure can be positive (approving the aid), negative (prohibiting the aid), or conditional (approving the aid subject to conditions). If the Authority concludes that aid has been granted without the Authority’s approval, and that the aid is incompatible with the EEA Agreement, the Authority will, as a rule, order the EFTA State to reclaim the aid from the recipient.

Apart from deciding on all notified national plans to grant or alter aid, the Authority is also obliged to keep all systems of existing aid in the EFTA States under constant review. It can thus also open a case either, on its own initiative or, after having received a complaint.

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1. Switzerland is a member of EFTA, but not a party to the EEA Agreement. For Liechtenstein, the Agreement entered into force on 1 May 1995.
2. Referred to in this Annual Report as horizontal areas, such as labour law, health and safety at work, environment, consumer protection and company law.
3. The contracting parties to the EEA Agreement are Iceland, Liechtenstein, Norway, the 25 EU Member States and the European Economic Community.
4. [http://secretariat.efta.int/Web/LegalCorner](http://secretariat.efta.int/Web/LegalCorner)
5. In addition the EFTA States have entrusted the Authority with the power to monitor the application of the EEA Agreement by the other contracting parties to the Agreement. The Authority can, however, only take formal action against the three EFTA States.
6. Information explaining the procedures for non-compliance with EEA law may be found on the Authority's website: [www.eftasurv.int/procedures/infringemen](http://www.eftasurv.int/procedures/infringemen)
The Authority consists of three Members (the College). The Members are appointed by common accord of the Governments of the EFTA States for a renewable period of four years. A President is appointed from among the Members, also by common accord of the Governments, for a period of two years. The Members are completely independent in the performance of their duties. They must not seek or take instructions from any Government or other body, and must refrain from any action incompatible with their duties.

During 2004, the composition of the College was:

- Hannes Hafstein, President (right)
- Einar M. Bull (centre)
- Bernd Hammermann (left)

In 2004, the Authority had a staff of 52, representing 14 different nationalities. A majority (60%) of the staff members comes from the EFTA States. The Authority finds it valuable to also recruit from non-EFTA States as the diversity of cultures, skills and competencies has proven beneficial to the Authority’s work. In addition to its normal staff, the Authority also recruits a number of national experts for short time periods. These constitute a supplement to the regular staff. The Authority initiated a trainee programme in 2004, and employed nine national experts and four trainees during the year.

The general personnel situation of the Authority remains difficult in terms of number of positions. The primary workload remains high and new tasks are regularly added to the Authority’s field of responsibilities often without an adequate increase of staff. Consequently, the challenges faced by the organisation steadily increase.

Staff turnover in the organisation remains high due to the employment practice of the Authority of awarding employment contracts of three years, renewable once. In 2004, eight staff members left the Authority’s service and nine new staff members were recruited. With a high annual turnover rate of staff (15% in 2004) it remains a challenge to the Authority to retain and further develop core competencies. Historically, the average time of staff employment is less than four years. Despite this turnover rate, the Authority enjoys a high level of staff competence and efficiency.

In order to compensate for limited human resources the Authority endeavours to develop its staff, run an efficient organisation, and utilise modern information management systems. The Authority has, during 2004, continued to focus on maintaining and developing staff core competencies. Staff training remains a high priority and most staff has participated in external training within their respective fields of work.

The Authority successfully introduced its new information management system. The intention was to better utilise and exploit its information legacy and staff competencies, as well as improve its general case handling routines and procedures. New information management projects have also been initiated. The aim of these projects is to improve the Authority’s communication with external partners, in particular as regards notification procedures.

In October 2004, the Authority relocated its entire organisation to new functional office premises in Rue Belliard 35, 1040 Brussels.