

EEA EFTA States

Internal Market Scoreboard

February 2012

EFTA SURVEILLANCE
AUTHORITY

29th INTERNAL MARKET SCOREBOARD of the EEA EFTA STATES

MAIN FINDINGS

- The average transposition deficit of the EEA EFTA States decreased to 0.5%. All three States were well below the deficit target of 1%.
- The EU Member States' average transposition deficit remained at 1.2%.
- With the decrease of overdue directives from 11 to 9, Norway's deficit decreased from 1% to 0.6%. However, the transposition delay in Norway increased by 4.1 months.
- The transposition deficit for Liechtenstein decreased from 0.8% to 0.4%. However, the transposition delay in Liechtenstein increased by 2.6 months.
- Iceland's transposition deficit decreased by 0.5%, from 1% to 0.5%. However, its transposition delay increased slightly by 0.2 months.
- Iceland still had one directive overdue by more than two years, Liechtenstein and Norway had none.
- The *total* number of infringement cases pursued by the Authority increased by 11 cases (from 63 to 74) since the previous Scoreboard.
- The overall number of infringement cases due to *incorrect transposition or incorrect application* of Internal Market rules increased to 34, which is 6 cases more than in the previous Scoreboard.
- The number of infringement cases concerning the *late transposition of directives* by the EEA EFTA States decreased from 21 to 18 since the previous Scoreboard.
- Iceland's number of overdue *regulations* decreased since the previous Scoreboard, from 16 to 11. For Norway, the number decreased by six regulations, to a total of 8.

OUTLOOK AND RECOMMENDATION

- Recent developments in the implementation deficit give reasons to be optimistic for the future
- It is recommended that the EEA EFTA States focus on long overdue directives to reduce the transposition delays

1. INTRODUCTION

The Internal Market of the European Union ensures that businesses and citizens of the European Union have the right to trade their goods and services, to work, to invest and to establish themselves wherever they want within the Union. The purpose of the EEA Agreement¹ is to extend the Internal Market to the three EEA EFTA States, namely Iceland, Liechtenstein and Norway,² thus ensuring, by and large, that the businesses and individuals in those countries have the same rights as those in the EU Member States.

The benefits of the Internal Market include:

- free trade on equal terms within the EEA, which promotes innovation, competition and lower prices for consumers;
- the right to seek work and establish a business in the 27 EU Member States and the three EEA EFTA States;
- competition, e.g. between service providers, which leads to more innovation, better services and lower prices for consumers; and
- more cross-border investment within the EEA.

The Internal Market does not deliver benefits automatically. A prerequisite for the functioning of the Internal Market is that equal conditions exist for competition, based on common, homogeneous rules, across the States that are parties to the EEA Agreement. These rules have to be adopted, transposed into national law and properly enforced.

The legal instruments regulating the Internal Market

The common body of law (“*acquis communautaire*”) that regulates the Internal Market consists first and foremost of directives and regulations adopted by the European Union. *Directives* must be transposed into national legislation in the EEA States, but it is left to each EEA State to choose the form and the method of implementation. Each directive provides a time limit by which transposition has to take place. EU directives are incorporated into the EEA Agreement through decisions taken by the EEA Joint Committee. The obligation to transpose a directive into the national law of the EEA EFTA States is triggered by the EEA Joint Committee decisions.

The EFTA Surveillance Authority (“the Authority”) is required to ensure the fulfilment by the EEA EFTA States of their obligations under the EEA Agreement, including the transposition of the directives in a timely and correct manner. The European Commission is entrusted with the parallel task in relation to the EU Member States. In carrying out its tasks, the Authority co-operates closely with the Commission. This co-operation ensures a uniform implementation and application of the Internal Market rules and principles throughout the whole EEA.

Regulations, according to the EEA Agreement, shall “as such” be made part of the internal legal orders of the EEA EFTA States. According to the legal order of Liechtenstein, a regulation is directly applicable once the EEA Joint Committee decision

¹ Agreement on the European Economic Area.

² Switzerland is also a member of EFTA, but not a party to the EEA Agreement. Hence, in this Scoreboard, the term “EEA EFTA States” refers to Iceland, Liechtenstein and Norway.

incorporating it into the EEA Agreement enters into force. In Iceland and Norway, however, regulations are not directly applicable. Rather, the Icelandic and Norwegian constitutions require that regulations be made part of their internal legal orders by way of national implementing measures.

What is the purpose of the Internal Market Scoreboard?

Since 1997, the European Commission and the EFTA Surveillance Authority have published the Internal Market Scoreboard to monitor how well the EU States and the EEA EFTA States comply with their obligations to ensure timely transposition of Internal Market directives.

The purpose of the EEA EFTA Internal Market Scoreboard is to monitor:

- to what extent the EEA EFTA States notify the transposition of new EEA directives on time;
- the number of directives still to be transposed; and
- the average time it takes for the EEA EFTA States to transpose directives.

The findings in this Scoreboard take into account the 1472 directives that had been incorporated into the EEA Agreement by 31 October 2011.³ The Scoreboard records the transposition status for these directives on *10 November 2011*.

In addition to the information concerning the transposition of Internal Market directives into national law, the Scoreboard provides information on the number of infringement proceedings initiated against the EEA EFTA States for lack of conformity with or failure to apply EEA legislation correctly.

Finally, chapter 5 of the Scoreboard provides information on the number of infringement proceedings concerning failure to transpose Internal Market directives and regulations on time.

³ The corresponding figure for the EU is 1388 Internal Market directives. Traditionally, the higher number of directives in the EU is caused by the fact that some directives become applicable in the EU before they are incorporated into the EEA Agreement. However, some directives are repealed in the EU before they are repealed in the EEA EFTA States. The present difference is caused by the fact that approximately 150 directives concerning plant health checks have been repealed by 2 directives in the EU. However, these have not yet been incorporated into the EEA Agreement.

2. TRANSPOSITION OF INTERNAL MARKET DIRECTIVES INTO NATIONAL LAW

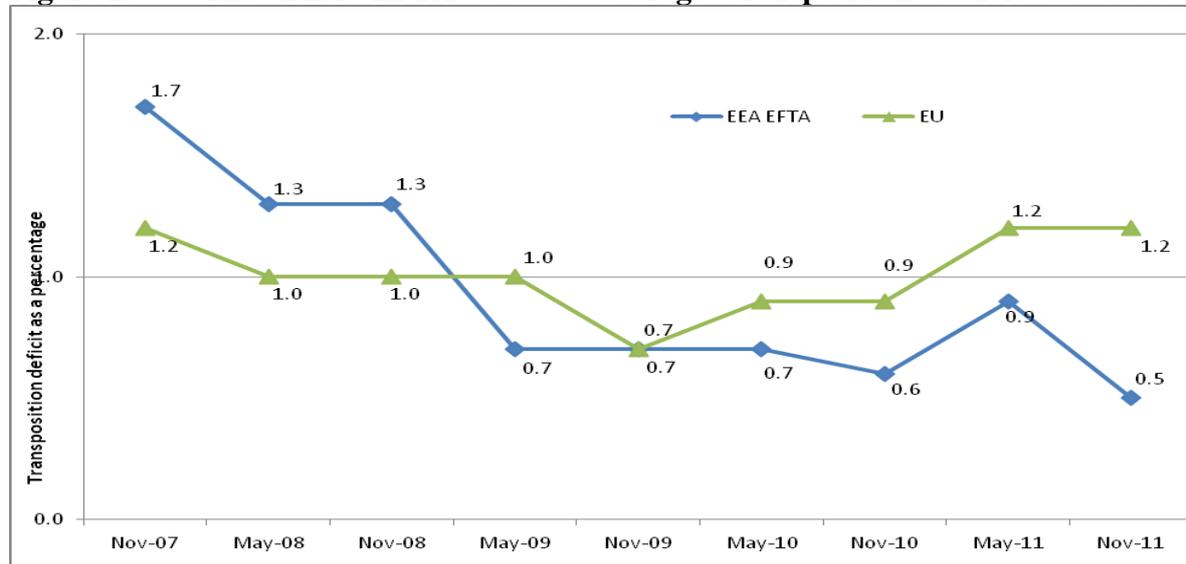
The Internal Market is a key driver of growth and jobs and one of the main engines for economic recovery. In these challenging times, a well-functioning Internal Market is more important than ever as it provides opportunities for businesses and citizens. Yet the Internal Market does not deliver benefits automatically. The EEA States need to transpose Internal Market legislation into their national law within the agreed deadlines. Timely transposition is a necessary condition for achieving the policy objectives set out in the relevant legislation. Moreover, it is important for the credibility of the Internal Market in the eyes of the public. This is why the EEA States are repeatedly called upon to improve their transposition records.

The transposition deficit indicates how many directives containing Internal Market rules the EEA States have failed to communicate as having been transposed on time.⁴ As from January 2009, the relevant deficit target to measure transposition performance has been 1% according to the European Council conclusions of March 2007.⁵ This interim target set by the European Council is used as a benchmark by the Authority as well.

2.1 Average transposition deficit in November 2011

In November 2011, the average transposition deficit for the EEA EFTA States was at 0.5%, well below the 1% transposition deficit target (**Figure 1**). In absolute terms, the 0.5% deficit indicates that the EEA EFTA States were late with 23 notifications of national transposing measures, which is a decrease of 16 since the last Scoreboard.

Figure 1: The EEA EFTA States’ average transposition deficit at 0.5%



Transposition deficit on 10 November 2011 for the EEA EFTA States and the EU 27 for directives which should have been transposed on or before 31 October 2011. Source for EU figures: The European Commission’s Internal Market Scoreboard N° 24.

⁴ The EEA EFTA States’ transposition deficit shows the proportion of Internal Market directives not notified to the EFTA Surveillance Authority as fully transposed by the deadline, in relation to the total number of Internal Market directives.

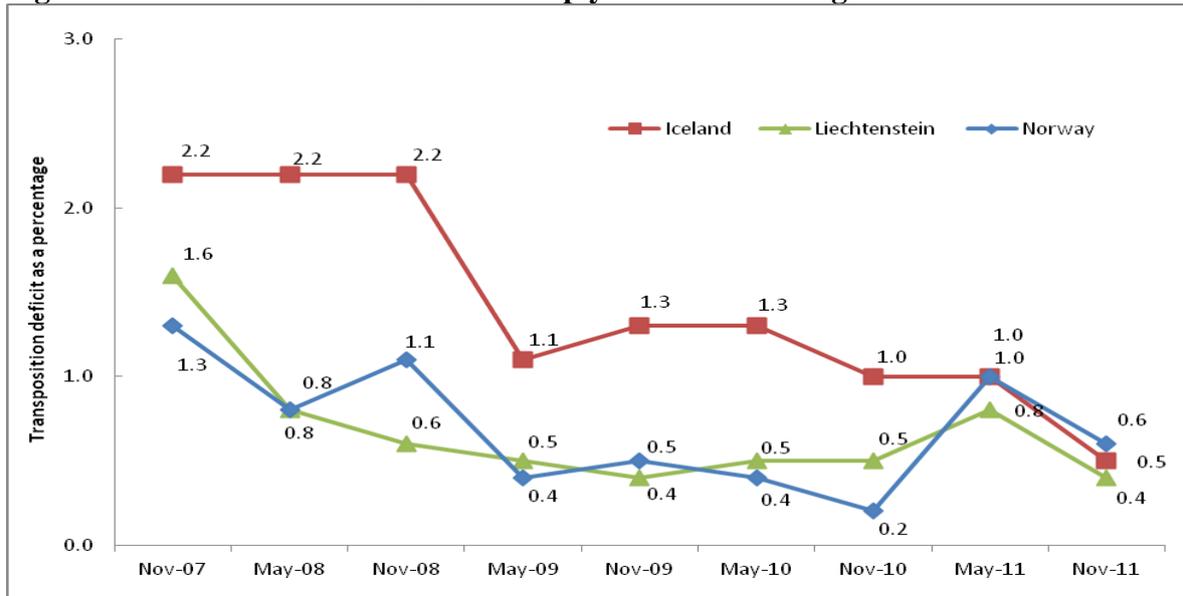
⁵ Conclusion of the European Council summit in Brussels (8-9 March 2007).

The EU average transposition deficit, at 1.2%, was above the interim target of 1%.

2.2 Performance measured against the 1.0% interim target

All three EEA EFTA States showed a very positive trend during the past six months. An improvement of the implementation deficit was reached both in average deficits as well as absolute terms. Iceland decreased its deficit by 0.5%, from 1% to 0.5%. The deficit corresponds to 8 directives not fully transposed on time, which is 6 less than at the time of the previous Scoreboard.

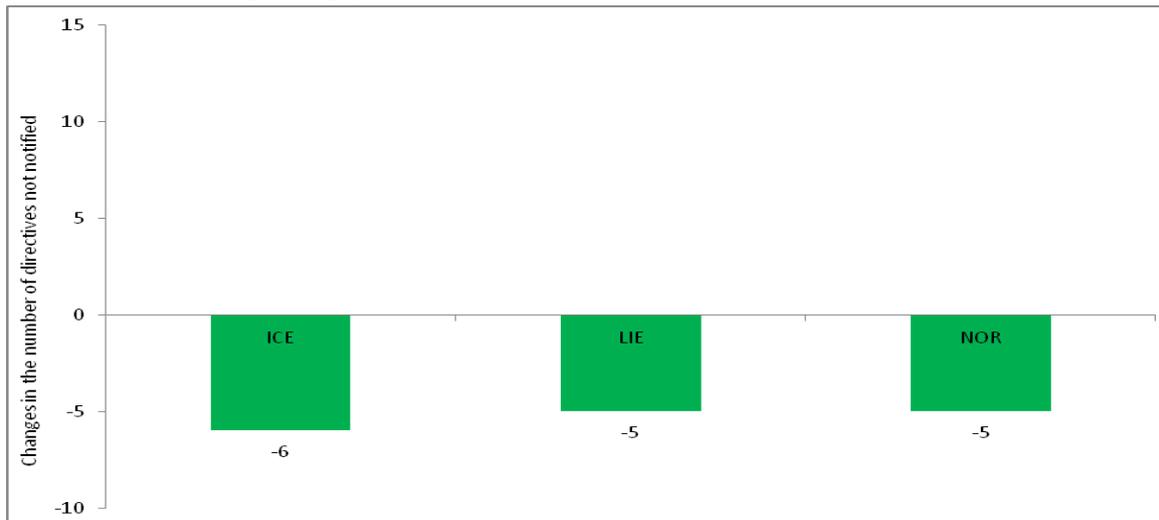
Figure 2: All EEA EFTA States comply with the 1% target



Transposition deficit on 10 November 2011 for directives which should have been transposed on or before 31 October 2011.

Norway decreased its deficit by 0.4%, from 1% to 0.6%. This deficit corresponds to 9 directives not having been fully transposed. Liechtenstein decreased its deficit by 0.4%, from 0.8% to 0.4%. This corresponds to 6 directives not having been fully transposed. This means for both States a decrease of 5 directives since the previous Scoreboard (Figures 2 and 3).

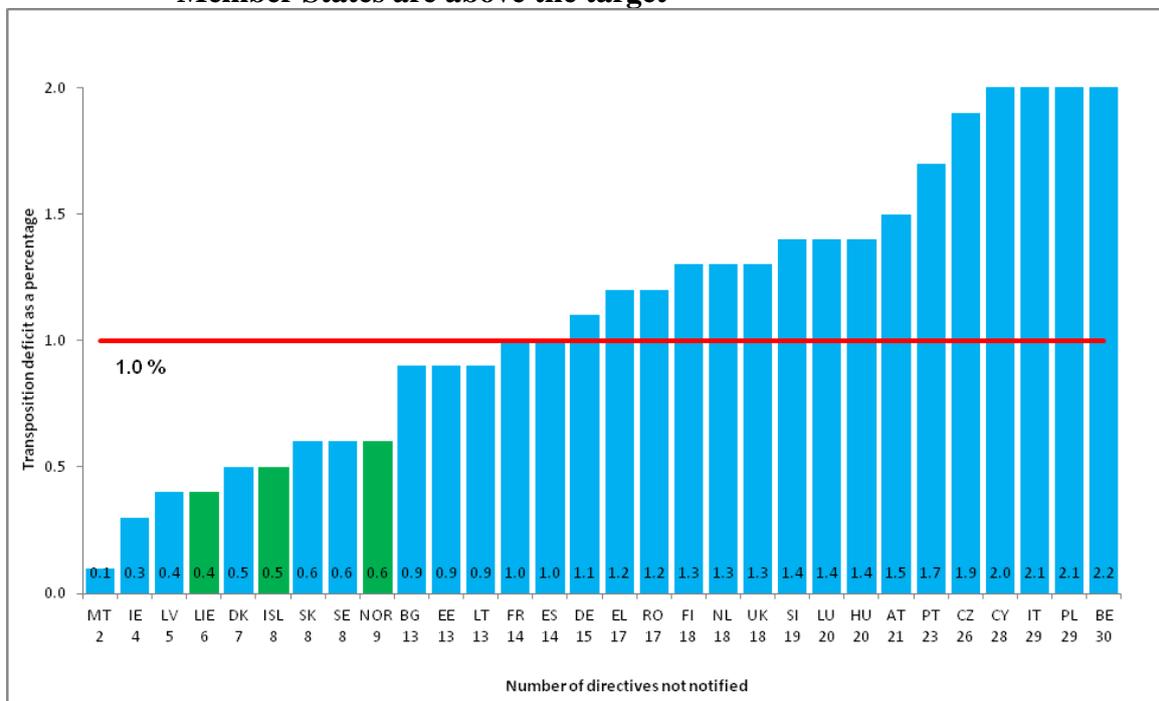
Figure 3: Change in the number of outstanding directives since the previous Scoreboard



The change in the number of outstanding directives by each EEA EFTA State since the previous Scoreboard.

Out of all 30 EEA States (27 EU and 3 EEA EFTA States), only 14 succeeded in bringing their transposition deficits in line with the 1% interim target, whereas 16 EEA States were above the target. The number of EU Member States in line with the 1% transposition deficit target (11) remained the same as in the previous Scoreboard (Figure 4).

Figure 4: The three EEA EFTA States comply with the 1% interim target, 16 EU Member States are above the target



Comparison of transposition deficits within the EEA.

Source for EU figures: The European Commission’s Internal Market Scoreboard N° 24.

2.3 How late are the EEA EFTA States in transposing directives?

Ensuring timely and correct transposition of directives is a continuous challenge. It requires a constant effort by the EEA EFTA States' national administrations in order to keep pace with the incorporation of new directives into the EEA Agreement. Failure to do so may undermine the functioning of the Internal Market.

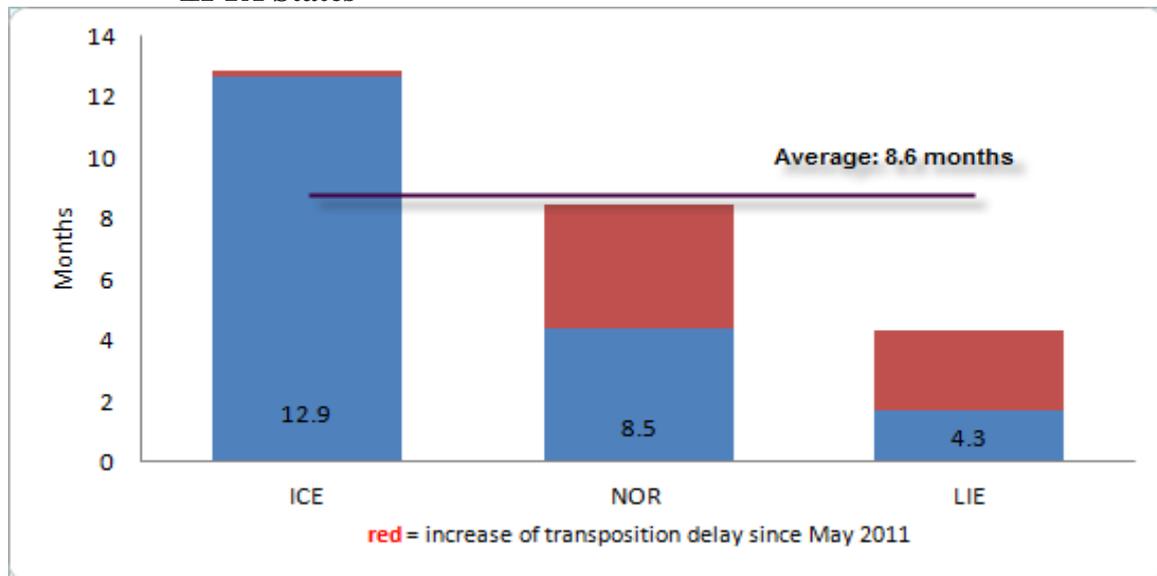
Delays in transposition are at times due to time-consuming legislative processes in the EEA EFTA States. However, directives are usually transposed relatively soon after the expiry of the time limits.

In March 2002, the European Council announced a “zero tolerance” for directives for which the transposition is overdue by two years or more.⁶ Similarly, such delays in the transposition of directives are of particular concern to the Authority.

2.3.1. Length of transposition delays

It is important that the EEA States ensure that implementation takes place in a timely manner. The EEA EFTA States increased their average time taken to transpose directives by 2.3 months since the previous Scoreboard, from 6.3 to 8.6 months. This increase in average delay reflects the EEA EFTA States' efforts to reduce the number of directives outstanding for less than six months, while hardly any reduction occurred with regard to directives delayed by more than six months, in particular long overdue directives.

Figure 5: Liechtenstein has the lowest transposition delay among the three EEA EFTA States



Average transposition delay of overdue Internal Market directives with a transposition deadline of 31 October 2011 for which no notification was received by 10 November 2011, broken down by the length of delay.

⁶ Conclusion of the European Council summit in Barcelona (15-16 March 2002).

Whilst Iceland’s transposition deficit decreased by 0.5% , its transposition delay increased slightly by 0.2 months. This means that, on average, an extra 12.9 months is still taken by Iceland to transpose directives after the transposition deadlines expire.

Norway’s transposition delay increased from 4.4 months to 8.5 months. Liechtenstein’s transposition delay increased by 2.6 months, bringing the delay to 4.3 months. Liechtenstein thus has the lowest transposition delay among the three EEA EFTA States (**Figure 5**).

The EU States’ average transposition delay, at 7.9 months, is slightly shorter than the EEA EFTA States’ delay. What is needed now is for the EEA EFTA States to pay particular attention to the directives that are more than six months overdue in order to reduce the transposition delay.

2.3.2. “Zero tolerance” for delays in the transposition of directives of more than two years

If EEA States do not transpose Internal Market directives on time, they deprive citizens and businesses of their rights and of the full benefits of a properly functioning Internal Market. The longer the delay, the more serious the consequences. Therefore, a “zero tolerance” target has been set for directives whose transposition is two or more years overdue.⁷

17 of the directives which have not yet been transposed by the EEA EFTA States are overdue by less than 6 months, and three directives are overdue by 6 to 12 months. 2 directives are overdue by 12 to 24 months. Iceland continues to have one directive overdue by more than two years, namely Directive 2003/55/EC on common rules for the internal market in natural gas (Second Directive).

It should be noted that long delays in transposing directives cannot be justified by administrative burdens or the complexity of the directives; the long delays simply should not exist. Accordingly, the Authority has commenced infringement proceedings regarding the long overdue directives.

2.4 Conformity of legislation: Directives incorrectly transposed

For the good functioning of the Internal Market, timely transposition of EEA legislation is only the first step. It is also important that legislation is transposed correctly.

The transposition deficit figures do not indicate the quality of the national legislation. It is important to bear in mind that the transposition deficit figures presented above only indicate the failure by the EEA EFTA States to notify the implementation of directives at a given point in time. The quality of the national implementing legislation is only assessed at a later stage. Such conformity assessments may prompt the Authority to take further action if it finds that the notified measures do not ensure full and correct implementation of the relevant legislation.

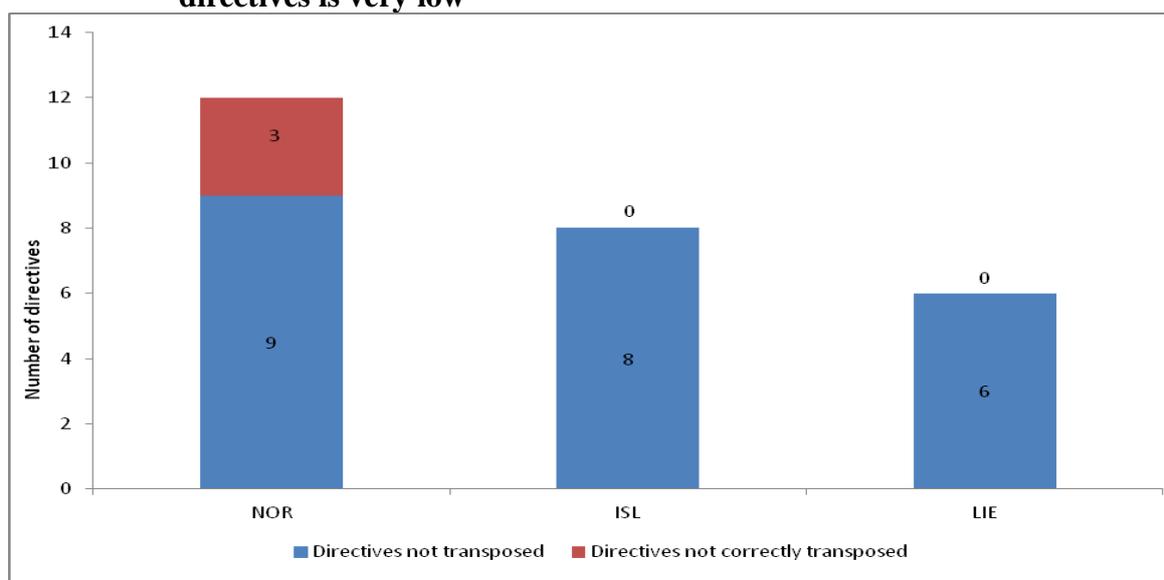
⁷ Conclusions of the European Council summit in Barcelona (15-16 March 2002).

Furthermore, failure to comply with the basic principles of the EEA Agreement itself, such as the free movement of goods, persons, services and capital, impairs the functioning of the Internal Market and might, therefore, also prompt action by the Authority.

The overall number of directives *not communicated* to the Authority as having been fully transposed by 10 November 2011 was 23. This number had decreased by 16 since the time of the previous Scoreboard. The number of infringement proceedings against the EEA EFTA States concerning *incorrect transposition* of directives, at three, was significantly lower than the number of outstanding directives.⁸ The majority of such conformity assessments are, however, concluded without the need to resort to formal infringement proceedings.

Adding the number of directives not correctly transposed to the number of directives yet to be transposed, the EEA EFTA States with the lowest number of cases ranked as follows: Liechtenstein (6), followed by Iceland (8) and then Norway (9) (**Figure 6**).

Figure 6: Number of infringement cases concerning incorrectly transposed directives is very low



The number of Internal Market directives not yet communicated as having been fully transposed (transposition deficit) added to the number of transposed directives for which infringement proceedings for non-conformity have been initiated by the Authority (November 2011).

⁸ This figure only includes problems with the correct transposition of directives as established on the basis of systematic *conformity assessments*.

3. INFRINGEMENT PROCEEDINGS

If the Authority considers that an EEA EFTA State has failed to fulfil an obligation under the EEA Agreement, it may initiate formal infringement proceedings pursuant to Article 31 of the Surveillance and Court Agreement.⁹ Such infringement proceedings correspond to those initiated by the European Commission under Article 258 TFEU (Treaty On The Functioning Of The European Union).

The Authority endeavours, in so far as possible, to solve all matters by informal means, through contacts with the national administrations concerned. Formal infringement proceedings are opened, however, where an informal exchange of views fails to solve the problem at hand.

The opening of infringement proceedings provides an opportunity for a more formal dialogue between the Authority and the EEA EFTA State concerned. The Authority opens infringement proceedings when, in its view, an EEA EFTA State is failing to fulfil its obligations under the EEA Agreement. It should be noted that only the EFTA Court can declare that a breach of EEA law has occurred. Until the Court renders such a judgment, the fact that infringement proceedings have been opened only shows that it is the Authority's opinion that the State concerned has failed to fulfil its obligations under the EEA Agreement. This should be kept in mind when interpreting the statistics on infringement procedures below.

Infringement cases can be divided into two categories. The first category relates to cases concerning *lack of conformity with or incorrect application* of EEA provisions, opened either on the basis of complaints or on the Authority's own initiative. These cases concern, for example, situations in which the Authority, after having acknowledged transposition of a directive by an EEA EFTA State, concludes at a later stage that the national legislation is not in full conformity with the requirements of the relevant directive or that the EEA EFTA State is not complying with the Internal Market rules, i.e. the free movement principles, in some other way. When EEA legislation/rules are not correctly implemented or applied in practice, citizens and businesses are often deprived of their rights.

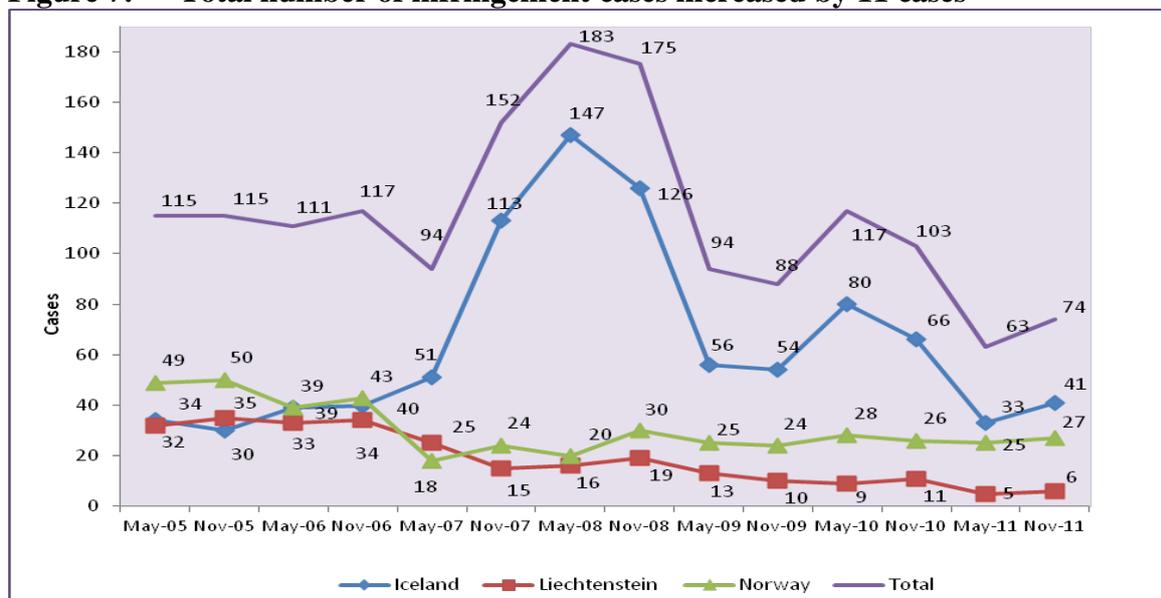
The second category of cases relates to *late transposition*, in other words directives and regulations only partially transposed or not transposed at all into the national legislation of the EEA EFTA States within the set time limits. Infringement cases in this category (non-transposition cases) are generally clear-cut and, therefore, seldom the subject of legally complicated disputes between the Authority and the EEA EFTA State concerned. Information on the infringement cases concerning late transposition of directives and regulations is included in chapter five.

⁹ Agreement on the Establishment of a Surveillance Authority and a Court of Justice.

3.1. Increase in the *total* number of infringement proceedings

On 1 November 2011, a total of 74 infringement cases were being pursued by the Authority (**Figure 7**).¹⁰ This represents 11 cases more than at the time of the previous Scoreboard. The increase in the number of infringement cases is mainly due to the increase in the infringement cases concerning timely incorporation of regulations (up to 22 from 14).

Figure 7: Total number of infringement cases increased by 11 cases



Total number of all open infringement proceedings against the three EEA EFTA States on 1 November 2011.

Of the 74 infringement cases pending on 1 November 2011, 34 cases concerned incorrect implementation or application of Internal Market rules (see point 3.2) whereas 18 cases concerned the late transposition of directives (see point 4.1). The remaining 22 cases concerned the late transposition of regulations (see point 4.2).

3.2. Infringement proceedings due to lack of conformity with or incorrect application of Internal Market rules

3.2.1. Increase in the number of infringement proceedings concerning the lack of conformity with or incorrect application of rules

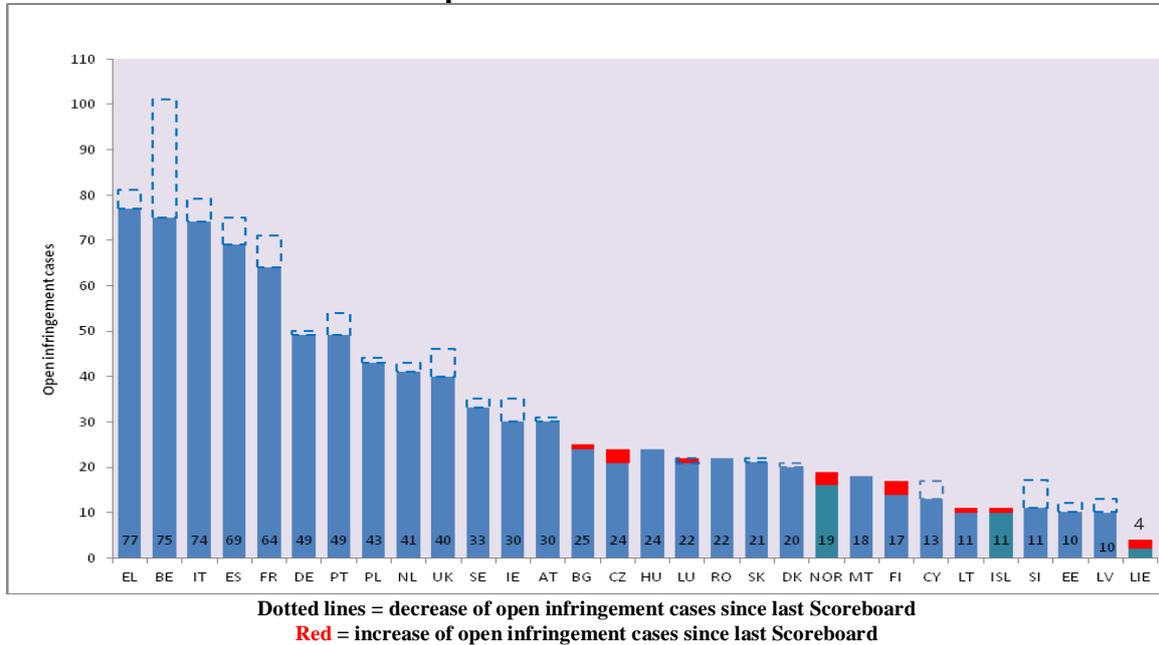
The overall number of infringement cases due to lack of conformity with or incorrect application of Internal Market rules (34 cases) increased by six cases since the time of the previous Scoreboard.

All three EEA EFTA States saw their number of infringement cases increased since the previous Scoreboard. Norway by three, Liechtenstein by two and Iceland by one. In comparison with the EU27, the number of infringement proceedings against the EEA

¹⁰ A pending infringement case is defined as a case where at least a letter of formal notice has been sent to the State, but the case has not yet been referred to the EFTA Court.

EFTA States remained low (**Figure 8**). Liechtenstein, with four cases, had the lowest number of infringement proceedings out of the 30 EEA States.

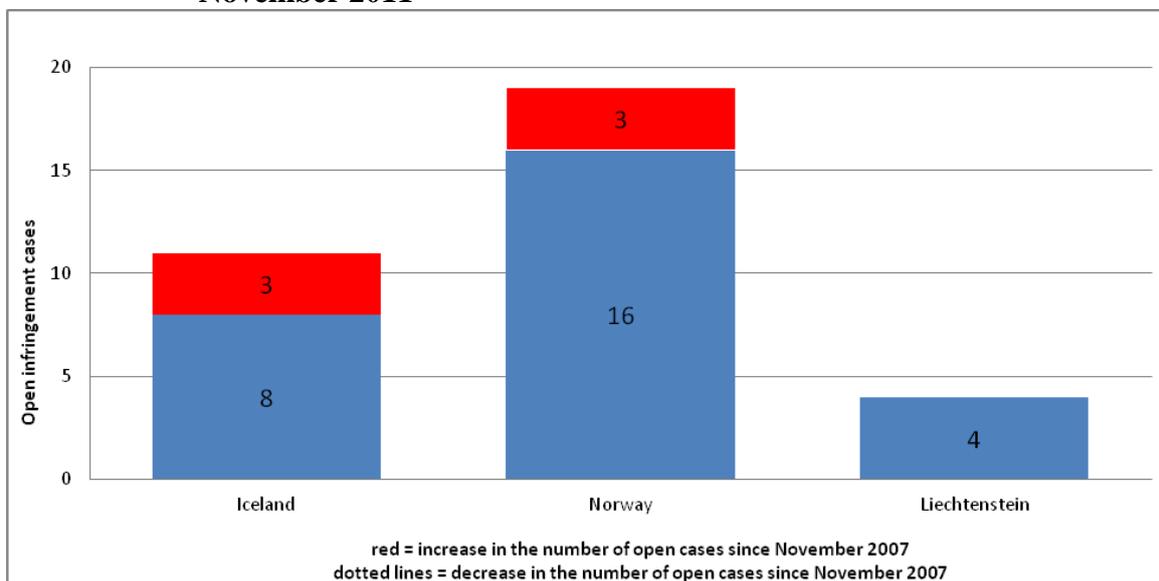
Figure 8: The number of EEA EFTA States’ infringement cases concerning lack of conformity with or incorrect application of Internal Market rules remains low in comparison to the other EEA States



Pending infringement cases due to lack of conformity with or incorrect application of Internal Market rules on 1 November 2011 compared to the situation in May 2011. Source for EU figures: The European Commission’s Internal Market Scoreboard N° 24.

A comparison between the number of infringement proceedings pursued against the EEA EFTA States in November 2007 and in November 2011 shows that Liechtenstein has managed to reduce its infringement proceedings by two cases, from six to four. Over that period, infringement proceedings against Iceland and Norway rose by three cases. (**Figure 9**).

Figure 9: Comparison of open infringement cases between November 2007 and November 2011



Open infringement cases as of 1 November 2011 compared to corresponding figures as at 1 November 2007.

Undertakings and citizens may lodge a complaint with the Authority if they believe that they have not been able to exercise their rights under the EEA Agreement because of the failure by an EEA EFTA State to apply the EEA Agreement correctly.

The number of pending infringement proceedings initiated as a result of a complaint increased by five since the time of the previous Scoreboard (from 6 to 11). The 11 pending infringement proceedings initiated on the basis of complaints represent 32% of all pending infringement proceedings concerning lack of conformity with or incorrect application of Internal Market rules. Seven of these cases related to Norway, one to Liechtenstein, and one to Iceland.

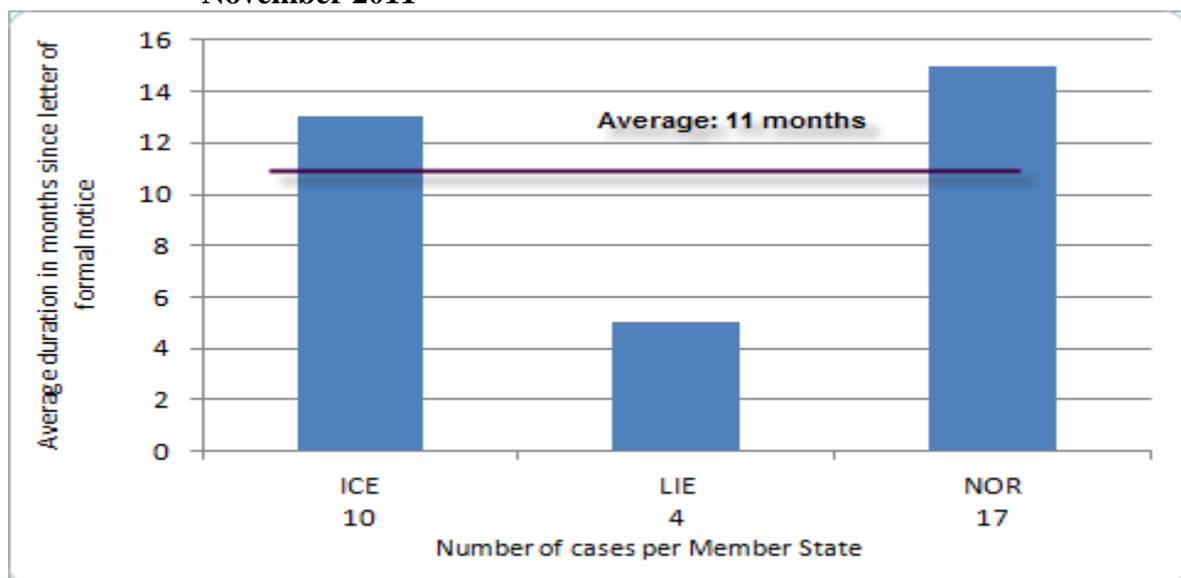
3.2.2. Duration of infringement proceedings

When problems with the application of Internal Market rules do arise, they need to be solved quickly to ensure that citizens and businesses are able to exercise their rights. Therefore, special focus should be placed on the time required for infringement proceedings and/or the time taken by the EEA EFTA States to comply with Court judgments.

3.2.2.1. Time required for infringement proceedings

The average time for pending infringement cases not yet sent to the Court for the EEA EFTA states is 11 months as at the cut-off date of 1 November 2011 (**Figure 10**). The average duration of the EU Member States' infringement proceedings exceeds the two years mark (25.5 months).

Figure 10: Pending infringement cases not yet sent to the EFTA Court as of 1 November 2011



Pending infringement cases not yet sent to the EFTA Court as of 1 November 2011 (31 cases): average time in months from the date the letter of formal notice was issued.

4. INFRINGEMENT PROCEEDINGS CONCERNING FAILURE TO TRANSPOSE DIRECTIVES AND REGULATIONS INTO NATIONAL LAW

4.1.1 Infringement proceedings concerning non-transposition of directives

The number of infringement cases initiated against the EEA EFTA States for non-transposition of directives decreased by 14% (three cases) from the time of the previous Scoreboard (**Figure 11**). Iceland had a decrease of four cases and Liechtenstein had one case less compared with the previous Scoreboard. While the number of cases against Norway rose by two cases.

Figure 11: The number of infringement cases against the EEA EFTA States due to non-transposition of directives decreased

2011	ISL		LIE		NOR		EEA EFTA	
	Nov	May	Nov	May	Nov	May	Nov	May
Letter of formal notice	10	13	2	3	2	1	14	17
Reasoned opinion	3	4	0	0	1	0	4	4
Referral to EFTA Court	0	0	0	0	0	0	0	0
Total	13	17	2	3	3	1	18	21

Pending EEA EFTA States infringement cases due to non-transposition of directives, broken down according to the stage of infringement proceedings reached, on 1 November 2011.

Since the previous Scoreboard, no cases concerning non-transposition of directives have been referred to the EFTA Court.

4.2. Non-transposition of regulations

4.2.1 Transposition of regulations “as such” by the EEA EFTA States

A particular situation arises with regard to the incorporation of Internal Market regulations into the EEA Agreement. It follows from Article 7 of the EEA Agreement that regulations incorporated into the Agreement shall “as such” be made part of the internal legal order of the EEA EFTA States.

Pursuant to the constitutional law of the three EEA EFTA States, regulations become part of Liechtenstein’s internal legal order, due to its monistic legal tradition, once they have been incorporated into the EEA Agreement through an EEA Joint Committee decision, whereas Iceland and Norway are obliged to adopt legal measures in order to make regulations “as such” part of their internal legal orders.

Due to the fact that regulations do not contain a provision setting out an obligation to notify implementing measures (unlike directives), the Authority systematically requests that, pursuant to Article 6 of the Surveillance and Court Agreement, Iceland and Norway notify their national measures taken to transpose regulations.

4.2.2 Delays in the transposition of regulations

As explained above, regulations only become part of the internal legal order of Iceland and Norway following an act of incorporation by the national legislative body. This usually requires the prior translation of regulations into the national language, followed by the publication of the translated regulations in the EEA Supplement to the Official Journal. In recent years, delays in the translation and publication of regulations in Icelandic have created a backlog of overdue regulations there.

On 10 November 2011, Iceland had 11 overdue regulations which had not been notified as fully incorporated into its national law. This is five regulations less than at the time of the previous Scoreboard. For Norway, the number of regulations not notified as fully incorporated into its national law decreased by six, bringing the number of outstanding regulations to 8.

4.2.3 Infringement proceedings concerning failure to transpose regulations in a timely manner

The Authority considers the timely transposition of regulations in Iceland and Norway to be necessary for the smooth functioning of the Internal Market. Consequently, enforcement of the non-transposed regulations is handled swiftly and systematically by the Authority. Out of the 74 infringement cases pending in November 2011, 30% concerned the late transposition of regulations by Iceland (17 cases) and Norway (5 cases).

Since the time of the previous Scoreboard, the number of infringement proceedings against Iceland concerning the late transposition of regulations has increased by 11. The corresponding number of new proceedings initiated against Norway decreased by 3 over that period (**Figure 12**).

Figure 12: The number of new infringement cases initiated against Iceland and Norway (letters of formal notice sent out) due to non-transposition of regulations increased since the time of the previous Scoreboard

2011	ISL		NOR		EEA EFTA	
	Nov	May	Nov	May	Nov	May
Letter of formal notice	15	5	3	6	18	11
Reasoned opinion	2	1	0	0	2	1
Referral to EFTA Court	0	0	0	2	0	2
Total	17	6	3	8	20	14

Pending infringement cases against Iceland and Norway due to non-transposition of regulations, according to stage of infringement proceedings, on 1 November 2011.

Due to the considerable increase in the number of letters of formal notice issued to Iceland for non-transposition of regulations, the overall number of infringement actions against Iceland and Norway increased significantly since the previous Scoreboard. The Authority is determined to enhance the transparency and level of public information about the performance of the EEA EFTA States in transposing regulations and will therefore continue to monitor the transposition situation carefully and report on the situation to the public.



EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
Belgium

Tel. +32 2 286 18 11
Fax +32 2 286 18 10
E-mail: registry@eftasurv.int
Internet: <http://www.eftasurv.int>
Twitter: @eftasurv

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