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ESA | EFTA Surveillance Authority

2021 ESA Annual Report to the Joint Committee established under the Separation Agreement

1 Introduction

This report is prepared in accordance with Article 64(3) of the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union ("the Separation Agreement/the Agreement"),[1] and Article 2 of Protocol 9 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement"/"SCA").[2] It aims to provide a general overview of the various measures undertaken by the EFTA Surveillance Authority ("ESA") to implement procedures in order to ensure effective monitoring of, and compliance with Part Two of the Separation Agreement, as well as a summary of the correspondence received from UK nationals in the EFTA States falling under the personal scope of the Agreement. The report also provides information concerning measures undertaken by the EEA EFTA States (that is, in Iceland, Liechtenstein, and Norway) to implement and to comply with Part Two of the Agreement.

[1] This report is submitted to discharge the obligation set out in Article 64(3) of the Separation Agreement, which provides that *"The EFTA Surveillance Authority …shall … annually inform the Joint Committee on the implementation and application of Part Two in the EEA EFTA States…"*
[2] Article 2(2) of Protocol 9 of the Surveillance and Court Agreement states: *"The EFTA Surveillance Authority shall annually inform the Joint Committee established by Article 65 of the Separation Agreement on the implementation and application of Part Two of the Separation Agreement in the EFTA States. The information provided shall, in particular, cover measures taken by the EFTA States to implement or comply with Part Two and the number and nature of complaints received."*

ESA has been tasked with overseeing the implementation and application in the EEA EFTA States of Part Two of the Separation Agreement, which is entitled "Citizens' Rights".

Article 64(2) of the Agreement empowers ESA *"to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the EEA EFTA States and to receive complaints from United Kingdom nationals and their family members for the purposes of conducting such inquiries".* The same article provides that ESA is to have *"the right to bring a matter before the EFTA Court pursuant to the Surveillance and Court Agreement".*

Article 64(3) of the Separation Agreement provides that *"The EFTA Surveillance Authority…shall…annually inform the Joint Committee on the implementation and application of Part Two in the EEA EFTA States …. The information provided shall, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received."*

This is the first annual report prepared by ESA and reports on the 12-month period commencing from the end of the Transition Period, at midnight CET (11pm GMT) on 31 December 2020.

In addition to the prescribed matters on which ESA is obliged to report, the report also contains information that is relevant to ESA's activities in relation to the Agreement during this period.

The report is submitted to the Joint Committee established under Article 65(1) of the Agreement.

2 ESA's role under the Agreement

ESA took up its new functions with respect to the Agreement as of midnight CET (11pm GMT) on 31 December 2020. While ESA's counterpart with respect to the rights of the nationals of the EEA EFTA States in the UK, the UK Independent Monitoring Authority ("UK IMA") is a newly-established and bespoke body that is tasked with ensuring that the rights of EU and EEA EFTA citizens and their family members living in the UK and Gibraltar as at the 31 December 2020 are upheld following the departure of the UK from the EU, ESA's genesis pre-dated the Agreement by more than a quarter century.

ESA's principal task, and that for which it was originally established, involves monitoring compliance with the Agreement on the European Economic Area ("EEA Agreement") in Iceland, Liechtenstein and Norway; the EFTA States that are parties to the EEA Agreement ("EEA EFTA States"), allowing them to participate in the Internal Market of the European Union ("EU"). The EEA Agreement, broadly speaking, extends the EU's four economic freedoms to the EEA EFTA States.

ESA operates independently of the EEA EFTA States and seeks to protect the rights of individuals and market participants who find their rights infringed by rules or practices of the EEA EFTA States or companies within those states. ESA monitors the timely implementation of EEA law (such as directives and regulations) by the EEA EFTA States and may investigate whether national legislation or practices are in line with EEA law. Such an investigation may lead to the launching of formal infringement proceedings against an EEA EFTA State, a three-step procedure which may result in ESA referring the case to the EFTA Court.

With respect to the Separation Agreement, this is the first time that ESA has been tasked with the oversight of a new international treaty completely separate from the EEA Agreement. While there are significant similarities in terms of ESA's monitoring tasks under the EEA Agreement on the one hand, and the Separation Agreement, on the other, there are also important distinctions.

ESA's role is restricted to the monitoring of Part Two of the Separation Agreement, entitled "Citizens' Rights". This entails that ESA is responsible for monitoring rights of UK nationals in the EEA EFTA States falling under this Part of the Separation Agreement. Broadly speaking, the rights falling under Part Two reflect rights previously held by UK nationals (that is, by natural persons holding UK nationality, as defined by Article 2(d) of the Agreement)[3] on the basis of the EEA Agreement, until the end of the Transition Period (that is, until 31 December 2020). However, the rights due to UK nationals are significantly more circumscribed than those previously available under the EEA Agreement. The territorial, material, and personal scope of ESA's monitoring obligations under the Separation Agreement

[3] Article 2(d) of the Agreement provides that *""United Kingdom national" means a national of the United Kingdom, as defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' [OJ C 23, 28.1.1983, p. 1] together with Declaration No 63 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon [OJ C 306, 17.12.2007, p. 270.]."*

are all distinct from those obtaining under EEA law. However, under Article 2 of Protocol 9 to the SCA, ESA's powers that follow from the EEA Agreement shall apply to the Separation Agreement *mutatis mutandis*. This includes the power to receive complaints, and to bring cases before the EFTA Court.

Personal scope

Articles 8, and 9 of the Separation Agreement jointly determine the definitions and personal scope for the purposes of the application of Title II of Part Two of the Separation Agreement on rights and obligations relating to residence, residence documents, workers and self-employed persons, and on professional qualifications (Title III on social security coordination has its own personal scope). The beneficiaries of Title II of the Separation Agreement consist of EEA EFTA nationals and UK nationals having exercised the right to reside or work in accordance with EEA law before the end of the transition period and continuing to do so after that period, as well as their respective family members.

The definitions of an EEA EFTA national and UK national are set out in Article 2(c) and (d) of the Agreement. Importantly, this entails that UK nationals who arrive in the EEA EFTA States after the end of the Transition Period, and who are not family members of other UK nationals who derive rights from the Separation Agreement, cannot themselves fall under the personal scope of the Separation Agreement, and are thus outside the scope of ESA's monitoring obligation.

Further information concerning the personal scope of the Agreement can be found in ESA's Guidance Note (Doc No 1186826), annexed to this Report.

Territorial Scope

While Article 3(2) provides as a general rule that *"any reference in this Agreement to EEA EFTA States, or their territory, shall be understood as covering the territories of Iceland, Liechtenstein and Norway to which the EEA Agreement applies,"* the territorial scope of the Separation Agreement is more circumscribed than the EEA Agreement would be in similar circumstances, as free movement rights between the EEA EFTA States – or between EU Member States, on the one hand, and the EEA EFTA States, on the other – are not covered by the Separation Agreement.

As a result, the territorial scope must be read in tandem with the personal scope of the Agreement. UK nationals who derive rights from the Agreement in Iceland, for example, are generally not entitled to use those rights in Norway, or indeed, in Germany or France.

Material Scope

As noted, the material scope of Part Two of the Agreement is confined to "Citizens' Rights". This entails that other issues contemplated by the Agreement, including, but not limited to:

(a) goods placed on the market, including ongoing customs procedures;

(b) intellectual property;

(c) ongoing police and judicial cooperation in criminal matters;

(d) data and information processed or obtained before the end of the Transition Period or on the basis of the UK-EU Withdrawal Agreement ("The Withdrawal Agreement");

(e) ongoing public procurement and similar procedures; and

(f) ongoing judicial procedures (representation before the EFTA Court)

all fall outside the scope of ESA's monitoring obligations under the Separation Agreement. Moreover, in relation to goods specifically, Article 41 of the Agreement provides that *"The market surveillance authorities of the EEA EFTA States and the market surveillance authorities of the United Kingdom shall exchange without delay any relevant information collected with regard to the goods referred to in Article 39(1) in the context of their respective market surveillance activities. They shall, in particular, communicate to each other and to the EFTA Surveillance Authority any information relating to those goods presenting a serious risk, as well as any measures taken in relation to non-compliant goods, including relevant information drawn from networks, information systems and databases established under the provisions of the EEA Agreement or United Kingdom law in relation to those goods."* While this does not establish a monitoring obligation for ESA *per se*, it does entail

an additional responsibility, namely to receive communications from the market surveillance authorities in the EEA EFTA States under the Separation Agreement. The “Citizens’ Rights” provisions extend, broadly, to the following categories of rights, which may be exercised by UK nationals covered by the personal scope of the Separation Agreement and their family members:

(a) Residency: this means the right to live in Iceland, Liechtenstein or Norway (depending on in which of the EEA EFTA States the UK national in question was established prior to the end of the Implementation Period). It also includes the right to enter and exit Iceland, Liechtenstein, or Norway.
(b) The right to work: this means the right to work, including self-employed work and also the right to continue to be a frontier worker.
(c) Mutual recognition of professional qualifications: this means the right to have qualifications that have already been recognised before 31 December 2020 (or that were in the process of being recognised at that juncture) to continue to be recognised in Iceland, Liechtenstein, or Norway.
(d) Co-ordination of social security systems: this means that individuals who have lived in both the UK and the EEA EFTA States before the end of the transition period can continue to be able to access pensions, benefits and other forms of social security.
(e) Equal treatment and non-discrimination: within scope of the rights set out above, UK nationals and their family members are entitled to be treated equally with the citizens of the EEA EFTA States and not to be discriminated against on the grounds of their nationality. This includes ensuring access to certain public services such as education, healthcare and certain benefits.

With respect to ESA’s mandate under the Separation Agreement, ESA monitors the EEA EFTA States and their public institutions and actors exercising public functions to ensure that they adequately and effectively implement the rights provided for by the Agreement. ESA promotes the adequate and effective implementation and application of the Agreement by holding public bodies to account where there is not full compliance, and by engaging in dialogue and correspondence to ensure early and where possible amicable and informal case resolution. In addition, Article 2 of Protocol 9 to the SCA provides that ESA’s powers that follow from the EEA Agreement shall apply *mutatis mutandis* to the Separation Agreement. This entails

that ESA can begin infringement proceedings against the EEA EFTA States, and can bring matters before the EFTA Court.

As to the scope of ESA's powers, these are framed by the rights set out in the Agreements. These rights are extensive and were designed to broadly provide UK nationals and their family members the same entitlements to work, study and access public services and benefits as they enjoyed before the UK left the EU, subject to the limitations set out by the material scope of the Agreement. These powers reflect, to a significant degree, the powers allotted to ESA in terms of its monitoring obligations under the EEA Agreement and the Surveillance and Court Agreement.

In summary, ESA's specific powers are as follows:

2.1 ESA's power to receive complaints and correspondence

ESA can receive complaints and other correspondence from persons who claim to have a right under the Separation Agreement. Complaints may report where one of the EEA EFTA States has failed to comply with the Agreement, or a public body has acted or is proposing to act in a way that prevents the person exercising the right in question.

Although ESA does not generally dispense legal advice to members of the public, ESA will nonetheless assess all correspondence received in relation to potential rights arising under the Separation Agreement to assess whether such correspondence indicates a potential breach of the Agreement. ESA will further consider whether any potential breach may be a general or systemic failing, and will decide, *inter alia*, on this basis whether to pursue the case further. Individual complaints and correspondence may be particularly useful in providing information or alerting ESA to possible issues of a general or systemic nature.

ESA will, in all cases, log any information received (in accordance with its Data Protection Policy) as it may help form part of a wider set of information gathered over time which could indicate a systemic failing.

2.2 ESA's power to conduct inquiries

ESA's power to conduct inquiries is set out in Article 64(2) of the Agreement. This provides that ESA may conduct inquiries on its own initiative concerning alleged

breaches of Part Two by the administrative authorities of the EEA EFTA States and to receive complaints from UK nationals and their family members for the purposes of conducting such inquiries. In this regard, Article 64(2) states that ESA *"shall have equivalent powers as those that follow from the EEA Agreement and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement")."*

This entails that, by and large, ESA's responsibilities under the Separation Agreement mirror those under the EEA Agreement and the SCA. As such, and as shall be explained in greater detail below, ESA has determined that the best *modus operandi* for the exercise of its functions under Article 64(2) is to, wherever possible, follow pre-established procedures that replicate those under the EEA Agreement and SCA. This has the advantage of leaning on ESA's quarter century of experience, and of minimising costs and administrative complications associated with the implementation of new procedures for a new international treaty monitoring regime.

ESA may decide to conduct such inquiries either as a result of information received via correspondence from a member of the public, or of its own initiative.

When considering whether to carry out an inquiry, ESA will consider the importance of addressing general or systemic failings. ESA may not carry out an inquiry unless it has reasonable grounds to believe that the inquiry may conclude that a failure to comply with the Separation Agreement has occurred or that a public body has acted or is proposing to act in a way that prevents a person from exercising their rights under the Agreement.

To inform this assessment, ESA may, in certain cases, carry out pre-inquiry investigations. This may involve informal consultations with the EEA EFTA States. In carrying out such investigations ESA may be able to resolve any issues in a more timely way than proceeding to a full inquiry.

To date, ESA has not started any inquiries confined specifically to the Separation Agreement. However, a number of cases undertaken by ESA concern parallel matters pertaining to Part Two of the Separation Agreement, on the one hand, and rights of EEA nationals under the EEA Agreement, on the other. In such circumstances, the *modus operandi* on the part of ESA has been to open a single case, with the principal legal framework that of the EEA Agreement, and any

annotations or adjustments relevant to UK nationals covered by the Separation Agreement noted thereafter. Given that, at present, very little of the substantive EEA secondary law relevant to rights mirroring those under the Separation Agreement has been amended, this method will likely serve ESA well in the majority of such cases for the foreseeable future, though this situation will of course evolve as time progresses, and the EEA legal order incorporates new secondary legislation in relevant areas, whereas the Separation Agreement will remain static in most areas. However, it should be noted that, under Article 34 of the Agreement, two important Regulations (No 883/2004 and No 987/2009) relevant to rights in the area of social security coordination may evolve dynamically in tandem with provisions of the EEA Agreement.[4]

Pre-inquiry investigations are proceeding and have concluded with regard to a number of issues which are outlined in Section 4.3, below, in relation to the emerging themes of some of the corrrespondence ESA has received to date. This has also involed early stage case resolution via informal contact with the EEA EFTA States on individual issues, without the need to open formal inquiry cases.

2.3 ESA's power to bring matters before the EFTA Court

Article 64(2) of the Agreement also provides that ESA shall also have the right to bring a matter before the EFTA Court pursuant to the SCA in respect of cases arising under the Separation Agreement. This also follows from Article 2 of Protocol 9 SCA, which provides that ESA's powers under the EEA Agreement shall apply to the Separation Agreement *mutatis mutandis*.

Bringing a matter before the EFTA Court will generally follow a full inquiry involving formal correspondence with the EEA EFTA State that ESA determines to be in breach of its obligations under the Separation Agreement. The stages of escalation

[4] Specifically, Article 34(1) provides that "Where Regulations (EC) No 883/2004 and (EC) No 987/2009 are amended or replaced after the end of the transition period and where amendments or replacements to those Regulations are incorporated into and in force under the EEA Agreement, references to those Regulations in this Agreement shall be read as referring to those Regulations as amended or replaced under the EEA Agreement, in accordance with the acts listed in Part II of Annex I to this Agreement.
The Joint Committee shall revise Part II of Annex I to this Agreement in order to align it to any act amending or replacing Regulations (EC) No 883/2004 and (EC) No 987/2009, provided that:
(a) the EU-UK Withdrawal Agreement has been aligned accordingly; and
(b) the act has been incorporated into and is in force under the EEA Agreement.
The Joint Committee shall revise Annex I as soon as the second of the events in points (a) and (b) has been completed.

in this regard will follow established procedures developed by ESA in its quarter century of existence in relation to breaches arising under the EEA Agreement.

To date, ESA has not brought any matters before the EFTA Court on a matter confined specifically to the Separation Agreement. Moreover, ESA has not brought any cases to the EFTA Court on a matter that pertains both to UK nationals falling under the scope of the Separation Agreement and to EEA nationals falling under the scope of the EEA Agreement.

In the latter instance, while the facts – and the relevant secondary legislation under the EEA Agreement and Separation Agreement – may be identical in certain cases, the context of the agreements will be divergent, as will the impact of EEA law provisions that may fall outside the scope of the Separation Agreement, but that may impact upon the analysis undertaken in respect of the case under the EEA Agreement. As such, it may be the case that the EFTA Court will choose to make divergent conclusions with respect to certain issues in certain cases. While the purpose of the Separation Agreement is to ensure the continuity of certain rights obtaining under EEA law to persons falling under its scope post-2021 (entailing an effective requirement of homogenous interpretation of certain provisions of the Separation Agreement with their EEA counterparts), and while Article 4(3) of the Separation Agreement requires that the provisions of Part Two of the Separation Agreement shall be interpreted in conformity with the provisions of Part Two of the EU-UK Withdrawal Agreement, in so far as they are identical in substance, this two-dimensional homogeneity objective is not absolute, and it will be for the EFTA Court to determine its boundaries.

It is, in any event, appropriate to afford the Court the opportunity to examine cases under the Separation Agreement alone, also with a view to developing a corpus of case law with respect to the Agreement, which may guide the Court, the EEA EFTA States, and ESA in the future with respect to the Agreement's interpretation and application.

It should further be noted that, given the novelty of the issues referred to above, in respect of both the approach to parallel cases before the EFTA Court and parallel case handling procedures, ESA will undertake periodic reviews to determine whether and to what extent its means of approaching parallel cases is fit for purpose.

3 Measures Taken on the Implementation and Application of Part Two of the Agreement

3.1 Internal measures

In order to enable ESA to comply with its monitoring obligations in the most effective and efficient way possible, ESA's Internal Market Affairs Directorate undertook a mapping exercise of tasks that needed to be undertaken in order to ready ESA for its new mandate. In this regard, the following measures were taken:

(a) the Rules of Procedure were updated;

(b) ESA's website was updated, with new pages added for UK nationals covered by the Separation Agreement;

(c) a new complaints and correspondence portal and new email address were established (UKnationals@eftasurv.int);

(d) a detailed Guidance Note[5] concerning the Separation Agreement, ESA's powers thereunder, and the rights of UK nationals and their families falling under its scope was compiled (also accessible via the website);

(e) new templates were agreed with ESA's registry for cases falling under the Separation Agreement;

(f) training took place for ESA's case handlers who are likely to handle cases that may touch upon issues under the Separation Agreement; and

(g) an informal internal review process was established to monitor and evaluate the fitness for purpose of ESA's internal procedures with respect to the Separation Agreement as time progresses.

In addition to the above, ESA has constructed a typology of case types that are likely to arise under the Separation Agreement, in order to manage and classify the case load as it develops over time. Three principal types of cases are expected:

[5] https://www.eftasurv.int/cms/sites/default/files/documents/gopro/ESA%20Guidance%20Note%20on%20the%20UK%20EEA%20Separation%20Agreement.pdf (also annexed to the present report)

(a) 'Parallel' cases: these cases are likely to be very common initially, and will arise where EEA law and Separation Agreement law are substantively identical. Such cases can effectively be handled together. Case 85895 concerning COVID measures undertaken by Norway is a good example of such a case.

(b) 'Divergent' cases: these cases will arise when post-2021 secondary legislation has been implemented into the EEA Agreement. The Separation Agreement legal order, on the other hand, will rely on the 'old' EEA law as it stood on 1 January 2021, except in matters relating to social security co-ordination under Regulations (EC) No 883/2004 and (EC) No 987/2009, and under the conditions set out in Article 34 of the Agreement. Case 87307, concerning COVID vaccination certificates, is a good example of such a case, because in this instance, the COVID certificates in question were regulated by secondary legislation implemented into the EEA Agreement after 1 January 2021. As such, the rights of UK nationals, on the one hand, and those of EEA nationals, on the other, were subject to differing legal frameworks.

(c) 'Transitional' cases: such cases are likely to involve measures adopted by one or more of the EEA EFTA States to implement the Separation Agreement into their domestic legal orders. Such cases may relate to changes in the documentary requirements for UK nationals, formalities related to the acquisition and maintenance of rights under the Agreement, et cetera. As of yet, ESA has not opened any inquiries related to such issues, and it would seem that the three EEA EFTA States have invested quite some time and energy into ensuring that the transition from EEA national status to the status of persons falling under the Separation Agreement has been smooth and comparatively problem-free for UK nationals and their families.

3.2 External measures

In order to comply with its obligations, arising *inter alia* from Article 64 of the Agreement, ESA has liaised both formally and informally with UK IMA, with either

side keeping the other regularly apprised of developments with respect to their respective monitoring obligations. A fruitful relationship has begun in this regard, and it is hoped that many further such meetings will take place in the future.

In addition, ESA has liaised with the European Commission in respect of the Withdrawal Agreement. As noted above, Article 4(3) of the Separation Agreement provides that the provisions of Part Two of the Separation Agreement shall be interpreted in conformity with the provisions of Part Two of the Withdrawal Agreement, in so far as they are identical in substance.[6] This entails that there is a close relationship between the law of the Separation Agreement, on the one hand, and that of the Withdrawal Agreement, on the other, and while the Separation Agreement does not provide for any formal role for the European Commission, ESA has found it useful to develop links on this axis in order to take account of any issues encountered by the European Commission in its work.

ESA and UK IMA have also informally discussed the potential establishment of a tripartite working group in this regard.

4 Measures undertaken by the EEA EFTA States to implement and to comply with Part Two of the Agreement

As noted above, Article 64(3) requires that ESA should annually inform the Joint Committee on the implementation and application of Part Two in the EEA EFTA States, and that the information provided should, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received. While Section 5 of the present report deals with complaints and other correspondence received by ESA during 2021, the present section will discuss the measures undertaken by the EEA EFTA States.

4.1 **Norway**

The Norwegian Government has implemented a comprehensive system of legislative and regulatory amendments to domestic law, that aim to implement

[6] Much of the respective texts are either identical or very similar, while adaptations and adjustments have been made where differences between the two agreements entail or require divergences in implementation and application of provisions of the Separation Agreement compared to those in the EU-UK Withdrawal Agreement.

Norway's obligations under the Separation Agreement. Norway has also provided a significant amount of publicly-available information for UK nationals and their families concerning rights arising under the Agreement.

4.1.1 Information for UK nationals

The Norwegian Directorate of Immigration ("UDI") has compiled an online portal (in English and Norwegian), which provides essential information concerning residence rights for UK nationals falling under the personal scope of the Separation Agreement and their family members.[7] This portal makes it clear that UK nationals (described at "British citizens"; terminology which should ideally be corrected)[8] and their family members who had a right of residence before the transition period expired are still entitled to reside and work in Norway. Such persons have the opportunity to apply for a special "Brexit Permit". The application deadline for such a permit was 31 December 2021. However, it is still possible to apply at a later date, if there were particular reasons for not applying within the deadline.

From 1 January 2022, all UK nationals and their family members who wish to settle in Norway must apply for a permit through ordinary regulations.

The Norwegian Labour and Welfare Administration ("NAV") has also established a separate portal for UK nationals falling under the personal scope of the Separation Agreement and their family members.[9] This provides information concerning Brexit and how this may affect the social security rights of UK nationals and their families, whether or not they fall within the personal scope of the Separation Agreement.

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[7] The portal is available at https://www.udi.no/en/word-definitions/brexit/#link-18875

[8] Given that, under the Separation Agreement, UK nationals are specifically defined in Article 2(d) as *"national[s] of the United Kingdom, as defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' …together with Declaration No 63 annexed to the Final Act of the intergovernmental conference which adopted the Treaty of Lisbon",* this distinction has the potential to cause significant confusion, particularly with respect to persons who may be either UK citizens or nationals, but who may fall outside of this definition. Further, while the term "Britain" is often used in the vernacular to refer to the UK, it excludes Northern Ireland, and may lead to further confusion, given the special status enjoyed by Northern Ireland on the basis of the Protocol on Ireland and Northern Ireland ("Northern Ireland Protocol") to the Withdrawal Agreement. It should be observed that, notwithstanding the Northern Ireland Protocol, the rights of UK nationals from Northern Ireland, and those from Great Britain under the Separation Agreement are identical.

[9] The portal is available at https://www.nav.no/en/home/rules-and-regulations/brexit-information

4.1.2 Legal provisions

Norway's principal legislative enactment in relation to arrangements connected to the United Kingdom's departure from the EU and the EEA is the so-called "Brexit Act."[10] Section 2 of the Act stipulates that the following provisions should apply as law in Norway:

- Articles 22 (equal treatment), 23 and 24 (rights of workers and self-employed) and 29 to 34 (coordination of social security systems) of the Separation Agreement; and
- Annex VI (Social security), part III (United Kingdom Nationals) of the EEA Agreement, covering social security co-ordination.

Residence rights

With respect to the residence rights of UK nationals and their family members, in accordance with Section 19-33(1) of the Immigration Regulation[11] (added by Regulation of 9 December 2020; in force as of 1 January 2021), UK nationals who were residing in Norway before the end of 2020, and who continue to live there, have, subject to an application, a right of residence if the conditions of Section 112 Immigration Act are fulfilled. The latter provision mirrors the conditions laid down by Article 7 of Directive 2004/38/EC.

Family members of such individuals, who had a right of residence before the end of 2020 also have a right to reside, subject to an application, if the conditions for residence in Sections 113 (replicating the conditions for residence applicable to family members of EEA citizens in Norwegian law) or 114 (conditions for residence applicable to family members of non-EEA citizens) are fulfilled. The same applies to family members who did not previously have a right of residence in Norway, but who established the family relationship before the end of the Transition Period. Section 19-33(2) of the Immigration Regulation provides that the same applies to children of UK nationals born or adopted after the end of the Transition Period.

[10] Act on transitional rules etc. upon the United Kingdom's departure from the European Union/Lov om overgangsregler mv. ved Storbritannias uttreden fra Den europeiske union (brexit-loven), https://lovdata.no/pro/auth/login#document/NL/lov/2020-11-27-131?searchResultContext=2081&rowNumber=1&totalHits=626

[11] https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286/KAPITTEL_19-16#%C2%A719-33

Section 19-33(3) of the Immigration Regulation stipulates that the conditions of Chapter 13 of the Immigration Act (covering EEA nationals) apply *mutatis mutandis* to the persons falling within the personal scope of the provisions discussed in the previous paragraphs.

In terms of documentary requirements, Section 19-33(4) stipulates that those who were not registered in Norway before the end of the Transition Period are required to provide the same documents as those required by EEA nationals and their family members. Those who were registered before that date will merely be subject to a identity check, unless there are reasons to believe that the individual in question has provided false information or do not fulfil the conditions for residence.

Per Section 19-33(7), the right of residence is given for a duration of up to five years, and may be renewed. This residence forms a basis for permanent residence. No fees apply to the first-time application for, nor the renewal of, this residence.

Frontier workers

This area is regulated by Section 19-34 of the Immigration Regulation.[12] UK nationals who at the end of 31 December 2020 are employed or self-employed in Norway, but who do not reside here, and continue to carry out such activities after 31 December 2020, are entitled to a residence permit upon application. This also applies to their family members. Such a residence permit is granted for up to one year at a time and can be renewed. The residence permit does not form the basis for a permanent residence permit. When applying for a residence permit and for its renewal, no fee is payable.

Permanent residence

This area is regulated by Section 19-35 of the Immigration Regulation.[13] UK nationals and their family members who had a right of permanent residence by the end of the Transition Period, or who fulfil the conditions for such residence, have a right to permanent residence, subject to a formal application. The period for the submission of applications was the end of the Transition Period. This application

[12] https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286/KAPITTEL_19-16#%C2%A719-34
[13] https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286/KAPITTEL_19-16#%C2%A719-35

entailed only an identity check, unless there were reasons to believe the individual had provided false information, or do not fulfil the conditions for permanent residence.

Social security

With respect to social security, as noted above, Articles 29 to 34 of the Separation Agreement; and Annex VI, part III of the EEA Agreement, covering social security co-ordination were incorporated into the Norwegian legal system by reference via the Brexit Act.

Recognition of professional qualifications

Section 2 of the Regulations on authorisation, license and specialist approval for health care personnel with professional qualifications from other EEA states or from Switzerland[14] stipulates that the regulations apply to the processing of applications from applicants who completed their education in the UK before the end of the transition period. This also entails retention of recognition for those persons who have already had their qualifications recognised.

4.2 **Iceland**

The Icelandic Government has, like its Norwegian counterpart, undertaken a comprehensive programme of measures that serve both to implement its obligations under the Separation Agreement, and to inform UK nationals and their family members falling under the personal scope of the Agreement of their rights and how they may avail of them. However, ESA notes that a certain amount of the guidance refers to "Britain", rather than the United Kingdom, and to "British citizens" rather than "UK nationals." This terminology should ideally be corrected.[15]

[14] Forskrift om autorisasjon, lisens og spesialistgodkjenning for helsepersonell med yrkeskvalifikasjoner fra andre EØS-land eller fra Sveits, https://lovdata.no/dokument/SF/forskrift/2008-10-08-1130

[15] Given that, under the Separation Agreement, UK nationals are specifically defined in Article 2(d) as *"national[s] of the United Kingdom, as defined in the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of the term 'nationals' …together with Declaration No 63 annexed to the Final Act of the*

4.2.1 Information for UK nationals

The Icelandic Government has established an online portal on matters related to Brexit.[16] This provides important information and relevant links to other sites, and make it clear that the position of the Icelandic Government is that UK nationals registered as residents in Iceland before the end of the Transition Period will be able to keep broadly the same rights as they previously enjoyed. It highlights that it is important that all UK nationals living in Iceland register their domicile with the Civil Registry *(Þjóðskrá Íslands)*, which confirms their right to reside in Iceland.

4.2.2 Legal provisions

The legal provisions pertaining to the rights of UK nationals are dispersed between a number of government departments, each of which provides information on its own web portal. The main Brexit portal on the Icelandic Government's website provides helpful links to many of these sites.

Residence rights

The Directorate of Immigration has compiled an information page devoted to information for UK nationals ("British citizens").[17] This notes that the Directorate of Immigration will issue residence permit cards for UK nationals that had the right to reside in Iceland prior to the end of the Transition Period. In order to qualify for such a card, UK nationals must simply make an appointment to have their picture taken for the residence permit card, and must present their passport as evidence of their identity. However, the same portal provides that *"[i]f you registered your right of residence at Registers Iceland (Þjóðskrá Íslands) before the end of the transition period (31 December 2020), you do not need to meet any new requirements in*

intergovernmental conference which adopted the Treaty of Lisbon", this distinction has the potential to cause significant confusion, particularly with respect to persons who may be either UK citizens or nationals, but who may fall outside of this definition. Further, while the term "Britain" is often used in the vernacular to refer to the UK, it excludes Northern Ireland, and may lead to further confusion, given the special status enjoyed by Northern Ireland on the basis of the Protocol on Ireland and Northern Ireland ("Northern Ireland Protocol") to the Withdrawal Agreement. It should be observed that, notwithstanding the Northern Ireland Protocol, the rights of UK nationals from Northern Ireland, and those from Great Britain under the Separation Agreement are identical.

[16] https://www.government.is/topics/foreign-affairs/iceland-in-europe/brexit/

[17] https://utl.is/en/information-for-british-citizens

order to retain your right of residence." As such, the (post-Brexit) residence card would not appear to be required to retain residence *per se*. Rather, the card is merely a practical document for evidentiary purposes. The Directorate's website provides:

"From 1 January 2021, British citizens will need to apply for a residence and work permit to have the right to live and work in Iceland.

A residence permit card confirms that you already have this right; that your stay in Iceland is legal and that you are allowed to work here. It can therefore be a good idea to have a residence permit card to demonstrate your right to reside and work in Iceland."

The website also provides, with respect to family members that:

"children who are born or adopted after the transition period ends (31 December 2020) will also be covered by the Separation Agreement."

It further provides that:

"If you are a British citizen residing in Iceland and registered your right of residence in Iceland with Registers Iceland before the end of the transition period, your spouse will still be able to apply for family reunification under the current rules for EU/EEA citizens, if you were married before the transition period ended (31 December 2020)."

Frontier workers

It would appear that situations concerning frontier workers who are UK nationals falling under the personal scope of the Separation Agreement will be assessed on an individual basis by the Directorate of Immigration. The Directorate's website provides that:

"If you are a worker who is employed in Iceland, since before 31 December 2020, and returns each day or at least once a week to Britain, and you do not have a registered domicile in Iceland, you will need to contact the Directorate of Immigration for registration."

Recognition of professional qualifications

The website of the Directorate of Health[18] provides a portal for the recognition of professional qualifications. Informal correspondence between ESA and the Directorate indicates that as a matter of practice, Regulation on the recognition of professional qualifications of healthcare practitioners from other Member States of the European Economic Area or Switzerland for the pursuit of an activity in Iceland, No. 510/2020[19] will be applied with respect to the processing of applications for recognition of qualifications from applicants who completed their education in the UK before the end of the transition period. This also entails retention of recognition for those persons who have already had their qualifications recognised.

4.3 **Liechtenstein**

The Government of Liechtenstein has, like those of Iceland and Norway, undertaken a programme of measures that serve both to implement its obligations under the Separation Agreement, and to inform UK nationals and their family members falling under the personal scope of the Agreement of their rights and how they may avail of them. However, owing to the distinctions in the way in which Liechtenstein incorporates international law into its domestic legal system, less legislative and regulatory intervention has proven necessary.

4.3.1 Information for UK nationals

The Office of Foreign Affairs has established an online portal on matters related to Brexit.[20] This provides important information and relevant links to other sites, as well as links to the text of the Separation Agreement as it has been incorporated into Liechtenstein domestic law.[21] Also included is a comprehensive report regarding the withdrawal of the UK from the EU and EEA Agreement.[22] However, the Separation Agreement is referred to as the *"Austrittsabkommen",* which

[18] https://www.landlaeknir.is/english/
[19] https://www.government.is/library/04-Legislation/Regulation%20on%20the%20recognition%20of%20professional%20qualifications%20of%20healthcare%20practitioners%20from%20other%20Member%20States%20of%20the%20European%20Economic%20Area%20or%20Switzerland%20for%20the%20pursuit%20of%20an%20activity%20in%20Iceland.pdf
[20] https://www.llv.li/inhalt/118946/amtsstellen/zukunftige-beziehungen-mit-uk
[21] https://www.gesetze.li/konso/2020051000
[22] https://bua.regierung.li/BuA/default.aspx?nr=139&year=2019&backurl=modus%3dnr%26filter1%3d2019

translates as “Withdrawal Agreement”. This may lead to confusion with the EU-UK Withdrawal Agreement, referred to above. It is suggested that referring to the Separation Agreement as the *“Trennungsabkommen”* might be preferable in this regard.

4.3.2 Legal provisions

Liechtenstein’s incorporation and implementation of the Separation Agreement is significantly different from that of the other two EEA EFTA States. Liechtenstein, as a monist State, uses the ‘incorporation doctrine’ for the implementation of international treaties. Therefore, the Separation Agreement, in addition to the Protocol 9 of the SCA, became an integral part of Liechtenstein’s domestic law following their respective ratifications and entry into force. Within the hierarchy of norms within the Liechtenstein legal order, the Separation Agreement, as an international treaty, at a minimum enjoys at least the status of statutory law in the domestic legal order and takes precedence over earlier laws (*lex posterior*). However, according to Liechtenstein’s Constitutional Court in its decision StGH 1996/34 (LES 1998, 80), international law, or at least the most important international treaties to which Liechtenstein is a party, including the EEA Agreement and the European Convention on Human Rights, have the character of *"supplementary constitutional law".* Given that the Separation Agreement is intended to facilitate the continued enjoyment of rights previously covered by the EEA Agreement, it remains to be seen whether the Separation Agreement will also enjoy this status.

5 Complaints and own initiative cases pursued

5.1 **Divergent and transitional cases**

ESA receives complaints and other correspondence concerning alleged violations of rights that are protected by the Separation Agreement. In its capacity as the surveillance authority for the EEA Agreement, ESA also receives complaints and other correspondence concerning issues under the EEA Agreement that correspond directly to rights in the Separation Agreement, which may also concern UK nationals falling within the personal scope of the Separation Agreement, as the rights covered in the two agreements are, in certain areas, identical or very similar.

ESA received approximately ten communications from members of the public that related specifically to the Separation Agreement over the course of 2021. These consisted of emails via the dedicated email address or through ESA's Registry, and telephone calls. None of these were escalated to the level of an inquiry. Rather, all were resolved informally. Communications received related exclusively to Iceland and Norway, with no correspondence received relating to Liechtenstein. The majority related to minor issues of public administration, such as exchanges of driving licences, inquiries concerning deadlines for exchange of documents, or a lack of publically available information on the pages of the relevant ministries of the respective EEA EFTA States. A number of the communications originated from third country nationals with UK family members who fell outside the personal scope of the Agreement.

It should be noted that ten communications is a low number. However, given that, as noted in Section 3.1, the performance of the EEA EFTA States with respect to transitional issues between the end of the Transition Period and the period thereafter has generally been smooth and comparatively problem-free for UK nationals and their families, it is perhaps unsurprising that the amount of correspondence received in relation to issues pertaining exclusively to the Separation Agreement has been small. In addition, the absolute number of UK nationals falling within the personal scope of the Agreement and living in the EEA EFTA States is quite low, meaning that in any event, complaints are likely to be quite infrequent.

Moreover, the Separation Agreement and the EEA Agreement did not substantially diverge from one another in almost any relevant area (with perhaps the sole significant exception of vaccination certificates) during 2021. This means that ESA did not need to open separate own initiative cases into issues pertaining to the Separation Agreement, rather incorporating issues under the Separation Agreement into cases principally undertaken on the basis of the EEA Agreement.

Despite the above, it might perhaps be argued that greater awareness of the Separation Agreement might potentially result in a greater volume of correspondence. However, ESA notes that Article 35 of the Agreement, entitled "Publicity", which is modelled on Article 34 of Directive 2004/38/EC, imposes an obligation on the EEA EFTA States and the UK to disseminate information and

create awareness of the Agreement. It does not impose any obligation on others, such as on employers, the Joint Committee, or indeed ESA.

5.2 **Parallel cases**

As shall be described below, ESA pursued three own initiative cases, principally on the basis of the EEA Agreement, that involved significant consideration of rights under the Separation Agreement. Such cases are important, as it is considered likely that, at least in the initial years of the Separation Agreement's existence, this will constitute the bulk of ESA's case work in relation to the Separation Agreement. These are described below.

Case 85895: Own initiative case concerning Norwegian entry restrictions and COVID-19

This case was opened – initially solely on the basis of the EEA Agreement – in November 2020. The case concerned the (then constantly and rapidly evolving) suite of measures imposed by the Norwegian Government in order to counter the COVID 19 pandemic. These measures, justified by Norway on the basis of the protection of public health, included entry restrictions to Norway and quarantine restrictions that differentiated, in law and in fact, between EEA nationals on the one hand, and Norwegian nationals on the other.

By the time ESA sent a Letter of Formal Notice (Doc No 1199663) in May of 2021, it was necessary to consider parallel impacts upon UK nationals covered by the Separation Agreement as well as EEA nationals as falling within the scope of the case, as such persons were, in many cases, similarly impacted. For example, UK nationals resident in Norway who had travelled back to the UK and who wished to re-enter Norway, were often impeded from doing so, in a manner that contradicted their rights, *inter alia*, under provisions of the Separation Agreement mirroring the rights provided for under Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC, although the frame of reference for EEA nationals in the case was significantly broader, also entailing *inter alia*, rights with no analogues under the Separation Agreement, including Article 36 of the EEA Agreement, and Articles 9 and 16 of Directive 2006/123/EC.

The facts of the case – in particular those related to measures adopted by Norway – are quite complex due to the fact that the measures in question evolved so often and were regulated by a multi-layered system of permanent and temporary laws, administrative regulations, circulars, and administrative practices. However, they significantly impeded the free movement of persons, both for EEA nationals and for UK nationals falling under the scope of the Separation Agreement.

It was determined by ESA that there was no need to open a new case with respect to the issues faced by UK nationals falling under the Separation Agreement (largely Articles 11, 12-17, and 23-25 thereof). Rather, all rights enjoyed by UK nationals would also be enjoyed by EEA nationals under the EEA Agreement (who, as noted above, also enjoyed certain rights not enjoyed by UK nationals, due to the EEA Agreement's broader scope). As such, it was decided instead to broaden the case – initially opened solely on the basis of the EEA Agreement – to cover the Separation Agreement – via the insertion of an explanatory paragraph into the Letter of Formal Notice:

"*For the purposes of the present case, it should be noted that [ESA] is also responsible for oversight of the rights of UK nationals covered by the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union ("the Separation Agreement"). In general, UK nationals covered by the Separation Agreement are in an equivalent situation to EEA nationals with respect to the rules in question. As such, the conclusions expressed above in relation to EEA nationals under the EEA Agreement should be seen to cover UK nationals who fall under the Separation Agreement mutatis mutandis."*

Norway has since significantly relaxed its restrictive measures adopted to deal with the COVID-19 pandemic, and in particular, has withdrawn the measures with which ESA had taken issue in its Letter of Formal Notice in the case in question, and ESA has not found it necessary to send further correspondence in the case in question. The case, however, remains open, due to the continuing pandemic and the prospect that further measures may be adopted in the future.

The Letter of Formal Notice submitted in this case is annexed to the present report as an example of ESA's case handling in such cases.

Case 86978: Own initiative case concerning the obligation of air carriers to inspect COVID-19 certificates in international flights to Iceland

This case was opened in June 2021, again, initially purely on the basis of the EEA Agreement. Here, ESA took issue with the compatibility of Law No 41 of 28 May 2021 amending Act No 60/1998 ("*Lög um breytingu á lögum um loftferðir, nr. 60/1998*, *með síðari breytingum* (*skyldur flugrekenda vegna COVID-19)"*) concerning the obligations of air carriers to take measures due to COVID-19, in tandem with the related national Regulation No 650/2021 of 1 June 2021 *("Reglugerð um skyldu flugrekenda til að kanna vottorð vegna COVID-19 í millilandaflugi"*), with EEA law. In particular, ESA's concerns pertained to the obligation of air carriers to deny boarding to passengers who did not possess the required documentation relating to COVID-19, and the fact that the Icelandic domestic legal provisions in question stated that denial of boarding in such circumstances shall not constitute "denial of boarding" under Article 4 of Regulation (EC) No 261/2004.

While the case was initially opened on 'narrow' transport grounds (outside the scope of the Separation Agreement), the remit of the case broadened following correspondence with Iceland. After having examined the relevant legislation and regulations, as well as the explanations received from Iceland, ESA determined that by maintaining in force the rules in question, Iceland had failed to fulfil its obligations arising from EEA law, specifically Article 4 of the EEA Agreement, Articles 5, 6 and 7 of Directive 2004/38/EC, and Article 4 in combination with Article 2(j) of Regulation (EC) No 261/2004. Articles 5, 6 and 7 of Directive 2004/38/EC have been implemented into Articles 12-17 of the Separation Agreement, while Article 4 of the EEA Agreement is substantially replicated by Article 11 of the Separation Agreement (though the latter is reduced in substantive scope). As such, UK nationals resident in Iceland and covered by the Separation Agreement could potentially have been impacted by the Icelandic rules, in violation of their rights under the Separation Agreement.

These issues were noted by ESA. However, as ESA had in any event heard from Iceland that the legislative provisions in questions were to be immediately amended, it was decided to expedite the Letter of Formal Notice in the case (omitting the provisions concerning the Separation Agreement) in the interests of speedy delivery, since much of the legal analysis undertaken in writing the letter would otherwise have been useless. It was also noted that a supplementary Letter of Formal Notice, noting the concerns with respect to the Separation Agreement, could always be sent if the legislative amendments enacted by Iceland did not address the issues raised in the context of the case. Ultimately, these issues (including those related to the Separation Agreement) were resolved by the legislative amendments in question, and ESA's assessment since then has been that there is no need to send further correspondence to Iceland in the case.

Case 87307: Own initiative case concerning eligibility and procedures applicable to certain categories of EEA nationals in Norway who wish to receive a COVID-19 vaccination certificate

This case, opened in September 2021, on the basis of both the EEA Agreement and the Separation Agreement (though with the EEA Agreement constituting the principal frame of reference), concerned the application of the procedures pertaining to the acquisition of a certificate providing proof of having been vaccinated against COVID-for EEA nationals in Norway. It may properly be described as a 'hybrid' case, having both characteristics of a parallel case and of divergent cases, and may point at the complexities that may arise in respect of the EEA Agreement's interaction with the Separation Agreement moving forward as the two legal orders diverge.

Here, ESA was concerned about situations involving EEA nationals living in Norway who did not have either a National Identification Number, or a D-number. Such persons were ineligible for the same facilitated procedures for acquiring vaccination certificates as Norwegian citizens. Indeed, an initial assessment by ESA indicated that such EEA nationals, while offered the opportunity to receive a vaccine while living in Norway, were unable to acquire a vaccination certificate using *any* of the methods provided by the Norwegian Government. Given the increasing requirement for such certificates to be presented in order to travel throughout the

EEA and receive services, ESA then noted that the lack of such a certificate has the potential to restrict the free movement of EEA nationals. On this basis, ESA drew the attention of the Norwegian Government to *inter alia* Articles 28 and 36 of the EEA Agreement, and Articles 5, 6 and 7 of Directive 2004/38/EC. These provisions are, in part, replicated by the Separation Agreement.

However, complicating the case was the fact that post-2021 secondary legislation was also applicable in the context of the EEA Agreement, specifically Articles 3(1) and (2), and 5(1) of Regulation (EU) 2021/953. This Regulation, dealing with the parameters for, and mutual recognition of, vaccine certificates in the European Union (extended to the EEA EFTA States), had been enacted after the end of the Transition Period. As such, UK nationals falling under the scope of the Separation Agreement were not covered by the Regulation, and could not derive rights on the basis of the Separation Agreement from the Regulation. However, such UK nationals would still have more general free movement and residence rights under Articles 12-17 and 23-25 of the Separation Agreement (largely replicating the provisions of Articles 28 and 36 of the EEA Agreement, and Articles 5, 6 and 7 of Directive 2004/38/EC), that would still be relevant to the case. As such, the two frames of reference would have been significantly different enough, in ordinary circumstances, to justify the opening of a second, 'divergent', case on the basis of the Separation Agreement.

Despite the above, no second case was opened. Rather, the two issues were addressed in parallel (though it should be noted that the case was never escalated beyond a Request for Information, Doc No 1224350). This was due to the fact that the secondary legislation adopted under the EEA Agreement post-2021 – rather unusually – created parallel rights for Third Country Nationals ("TCNs") largely identical to those for EEA nationals. These rights included identical rights for residents of EEA States, whether EEA nationals or TCNs, to receive a vaccination certificate that would be accepted for travel and other purposes by the governments of EEA States. This essentially entailed that UK nationals resident in the EEA EFTA States were considered TCNs under the Regulation, but that, in essence, their rights were identical to those of EEA nationals. It represented a rare instance in which UK nationals could derive rights from the EEA Agreement after the end of the Transition Period. As a result, via a combination of the Separation Agreement (substantively replicating the rights under the EEA Agreement until 31 December

2020) and the EEA Agreement (and Regulation (EU) 2021/953, adopted thereunder), the rights of UK nationals falling under the scope of the Separation Agreement were substantively the same as those of EEA nationals.

On the basis of the foregoing, the following text was inserted into ESA's Request for Information:

"The Directorate further notes that the obligations flowing from the EEA Agreement itself, as well as Directorate 2004/38/EC also apply in respect of UK Nationals in an analogous position to EEA nationals who are covered by the UK-EEA Separation Agreement, and that in respect of such persons, Regulation (EU) 2021/954 is further applicable."

This passage obviated the necessity to open a second "divergent" case exclusively under the Separation Agreement, and the two legal frameworks were instead addressed in tandem via a single parallel case.

The case will likely soon be closed, as the issue would seem to have been resolved.

5.3 Correspondence not meeting the threshold for being treated as a complaint

Most instances of correspondence received from members of the public ostensibly in relation to the Separation Agreement have not reached the threshold to be treated as complaints. Nor have such instances prompted ESA to undertake an inquiry on its own initiative. This has been for a number of reasons.

Firstly, some correspondence raised issues that did not fall within the scope of the Separation Agreement. TCNs with no ostensible link to either the EEA EFTA States or the UK contacted ESA to ask about their rights under the Agreement. This happened particularly with respect to a number of persons from Nepal, Bangladesh and India.

Secondly, there were some instances of individuals seeking independent legal advice, something which ESA does not dispense. In such circumstances, ESA typically replies with a standard email to inform members of the public that this is not its role.

Thirdly, ESA was contacted by UK nationals and families of UK nationals who had visas refused on the basis of having forms filled out incorrectly. ESA took the view

that these were instances of maladministration (which would potentially have been covered by SOLVIT under the EEA Agreement, although there is no similar mechanism under the Separation Agreement), and outside its competence.

Fourthly, ESA was contacted about rights that UK nationals 'lost' after 31 December 2020. A good example of this is the Driving Licences Directive (2006/126), which falls outside the scope of the Separation Agreement. As such, UK nationals who may have arrived in the EEA EFTA States before the end of the Transition Period had no right to request conversion of a UK licence to that of the host EEA EFTA State as a matter of Separation Agreement law, and might, for example, be required to take driving lessons and apply for a new driving test. Any rights to the exchange of driving licences expired at the end of the Transition Period. However, in these instances, ESA contacted the EEA EFTA States in question (Iceland and Norway), and received updates from both in relation to plans concerning facilitation of driving licence exchange for UK nationals.

Fifthly, ESA has been contacted by UK nationals falling outside the scope of the Separation Agreement (for example, by UK nationals living in EU States who wish to move to the EEA EFTA States) to ask about their right to work and provide services under the Agreement.

These lines of correspondence are slightly concerning, as they indicate a good deal of misunderstanding about the substantive content of the Separation Agreement on the part of UK nationals and others. ESA again notes that Article 35 of the Agreement, entitled "Publicity", imposes an obligation on the EEA EFTA States and the UK to disseminate information and create awareness of the Agreement.

6 Exercise of ESA's Functions

6.1 Early Case Resolutions

As has been the case for UK IMA, ESA has endeavoured to resolve issues identified as quickly as possible, so that UK nationals are not disadvantaged, and are denied their rights for as short a time as possible. This particularly pertains to transitional cases (as defined in Section 3.1, above), where there has been no need to escalate correspondence received to the level of a formal complaint, and where

cases have, thus far, been concluded via correspondence with ministries and public bodies in the EEA EFTA States in order to resolve issues as quickly as possible.

This has been done by undertaking early case resolutions which are agreed interventions with public bodies to make improvements or changes to overcome potential issues.

These inquiries have included issues pertaining to the acquisition and maintenance of European Health Insurance Cards (EHIC), documentation required for a change of status from EEA nationals to UK nationals covered under the Separation Agreement, and website issues, including a lack of clear information in the English language and a lack of guidance on where to find such information. Typically, these were resolved at a very early stage via telephone contact.

6.2 **Legislation Monitoring**

ESA does not engage in formal legislation monitoring. However, if ESA is alerted by a member of the public or another actor to any issues with a particular piece of legislation falling under the Separation Agreement, or with relevance to the Agreement, ESA will certainly scrutinise it, as is the case with respect to any information submitted by any inquirer. It should be noted that ESA is occasionally consulted for *ex ante* review of draft legislation by the EEA EFTA States in its role under the EEA Agreement. In this regard, it is germane to note that ESA is certainly willing to continue this activity with respect to any issues that may potentially arise under the Separation Agreement.

6.3 **Litigation**

As noted above in Section 2.3, ESA has yet to exercise its powers to bring a matter pertaining under the Separation Agreement before the EFTA Court pursuant to the SCA. It seems quite unlikely that a divergent or transitional case will give rise to such proceedings in the near future, though the likelihood of this may change over time. With respect to parallel cases, as further noted in Section 2.3, it will be for the EFTA Court to determine whether the two agreements require separate proceedings or joined cases.

7 Annexes

Guidance Note relating to the Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union (Doc No 1186826)

Letter of formal notice to Norway concerning Norwegian restrictions upon entry on the basis of COVID-19 (Decision No: 072/21/COL) (Doc No 1199663)