EFTA Bulletin
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Legal Notes by the EFTA Secretariat on the EEA Agreement

The Two-Pillar Structure

Adaptation Texts

EEA 25 YEARS

EFTA

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The EEA Agreement, now into its 25th anniversary with some 10 000 EU legal acts incorporated, has delivered well in safeguarding a dynamic and homogenous European Economic Area.

At the core of the EEA Agreement is its institutional structure with the EFTA pillar on the one hand and the EU pillar on the other, commonly referred to as the "EEA two-pillar structure". Most EU acts can be incorporated within this institutional structure without recurring discussions on the need for special adaptations for the purpose of the EEA.

Sometimes, however, adaptations or adjustments need to be made to EU acts for the purposes of the EEA Agreement. An important example is new forms of EU cooperation in policy areas that fall within the scope of the EEA Agreement. This could be cooperation and competencies that were not foreseen when the Agreement was negotiated and where the EEA Agreement does not give a clear answer to how these acts should be incorporated. Yet such cooperation often takes place within important sectors of the internal market, where the EEA EFTA States wish to participate. One example is the EU financial supervisory authorities.

When these questions arise, experts and lawyers need to come together to find solutions. Solutions that fit within the institutional set-up of the EEA Agreement. Sometimes this has been both challenging and time consuming. However, over the past 25 years we have always managed to find solutions. This is also why we like to say that the Agreement has proven to be both robust and flexible.

Subcommittee V on legal and institutional questions plays an important role in this work. It maps out legal questions, finding solutions and managing the EEA EFTA States' common legal knowledge. These are topics that you could not easily read up on in a text book on EEA law. By publishing the EFTA Secretariat's legal notes on the two-pillar structure and on the need for adaptation texts, we would like to share this knowledge more widely amongst colleagues in public administration, with EEA law practitioners, academia as well as our colleagues in EU institutions.

Subcommittee V and the legal work of the EFTA Secretariat in Brussels

By Andrea Entner-Koch and Kyrre Isaksen [1]

Introduction

In 2019 it is 25 years since the EEA Agreement entered into force. Through this Agreement the three EEA EFTA States – Iceland, Liechtenstein and Norway – participate fully in the Internal Market of the European Union (EU). The objective of the Agreement is to establish a dynamic and homogeneous European Economic Area (EEA), based on common rules and equal conditions of competition.

In practice this means that new EU legislation regarding the Internal Market is incorporated into the EEA Agreement by decisions of the EEA Joint Committee.[2] The EEA Joint Committee meets around eight times per year and takes approximately 250 decisions, incorporating 400-600 new EU acts yearly into the EEA Agreement.

Before the EEA Joint Committee takes a decision to incorporate an EU act into the EEA Agreement, the act has to be assessed and scrutinised by the EEA EFTA States, to determine the relevance and the need for adaptations. To coordinate and facilitate the incorporation process, the EEA EFTA States have set up a Standing Committee, where they can consult and arrive at a common position before meeting with the EU in the EEA Joint Committee. The Standing Committee normally meets the day before the EEA Joint Committee.

The Standing Committee has set up five so-called subcommittees.[3] Subcommittees I-IV, which in practice function as one committee, meet one week ahead of the Standing Committee and are tasked with preparing for the incorporation of new EU acts into the EEA Agreement.[4] As part of the structure set up under the Standing Committee there are also a number of Working Groups and Expert Groups, responsible for processing all EU legislation to be incorporated into the EEA Agreement.[5] The fifth Subcommittee is *Subcommittee V on Legal and Institutional Matters*.

Subcommittee V on Legal and Institutional Matters

Subcommittee V assists the Standing Committee in legal and institutional issues and meets regularly to discuss issues on the Subcommittee's own initiative, or upon request by the Standing Committee or Subcommittees I-IV. Subcommittee V is composed of legal experts from the EEA EFTA States. The delegates from Iceland and Norway are representatives from the Foreign Ministries, whilst Liechtenstein is represented by the EEA Coordination Unit, which reports directly to the Prime Minister.

The EFTA Secretariat coordinates and prepares the meetings of Subcommittee V and the Head of EEA Legal Coordination is the secretary to the committee.

1 Dr Andrea Entner-Koch is Director of the EEA Coordination Unit in Liechtenstein and the current Chair of Subcommittee V. Kyrre Isaksen is Head of EEA Legal Coordination at the EFTA Secretariat in Brussels and secretary to Subcommittee V.

2 This procedure is described *e.g.* in Articles 98 and 102 of the EEA Agreement. For more information about how EU law becomes EEA law, see www.eealaw.efta.int

3 The Subcommittees are set up pursuant to Article 5 of the Agreement on a Standing Committee of the EFTA States and Article 18 of the Decision of the Standing Committee of the EFTA States No. 1/94/SC (Rules of Procedure of the Standing Committee).

4 Set up under the EEA Joint Committee, the *Joint Subcommittees I-IV*, with representatives from the EEA EFTA States and the EU (The European External Action Service – EEAS), meet just after the Internal Subcommittee I-IV meeting.

5 Currently, there are 30 Working Groups and 23 Expert Groups.

As is also the case for the EEA Agreement, Subcommittee V celebrates its 25-year anniversary in 2019.[6] Already at the first meeting on 26 January 1994, a *leitmotif* for the work of Subcommittee V occurred on the agenda, as the Subcommittee had been tasked with identifying problems arising from the list of acquis to be incorporated into the EEA Agreement.[7] The most important task of Subcommittee V is precisely that; to discuss challenges linked to the incorporation of specific EU acts, with the aim of finding a solution that is acceptable both to the EEA EFTA States and the EU.

When looking at the discussions that have taken place in Subcommittee V over the last 25 years, two categories of challenges particularly stand out: Firstly, the question of *EEA relevance* of EU acts and, secondly, questions related to the institutional set-up of the EEA Agreement, often referred to as the *two-pillar structure*.

EEA relevance refers to whether an EU act falls within the scope of the EEA Agreement. The material scope of the Agreement is, generally speaking, legislation regarding the internal market. This means that certain areas falling within the competence of the EU fall outside the scope of the EEA Agreement, and EU acts in such areas would hence not be considered EEA relevant. In most cases the assessment of EEA relevance is rather straightforward and unproblematic, especially where new EU legislation is replacing or amending legislation that has already been incorporated. However, Subcommittee V has discussed several difficult questions about EEA relevance, for example regarding the relevance of rules on criminal sanctions and on rules concerning the EU's relations to third countries.

The two-pillar structure refers to the fact that the institutional framework of the EEA consists of two pillars: The EU and its institutions constitute one pillar, while the EEA EFTA States and their institutions constitute the other pillar, mirroring certain institutions of the EU. In addition, there are joint bodies, such as the EEA Joint Committee. Finding solutions that are in line with the two-pillar structure, for example in cases where EU Agencies have the competence to take binding decisions, has been a recurring topic for Subcommittee V. To facilitate these discussions, the Secretariat has drafted a comprehensive Legal Note on the two-pillar structure with an overview of EU acts raising two-pillar challenges.[8]

6 As of April 2019, Subcommittee V has met 128 times.

7 Another item on the agenda that occurs both on the agenda of the first meeting of Subcommittee V as well as recent meetings is the Rules of Procedure for the EFTA Court. The recent discussions however concern the ongoing revision.

8 Can be found on page 9 of this EFTA Bulletin.

When EU acts raising two-pillar challenges are incorporated into the EEA Agreement by a Joint Committee Decision, there might be a need for a specific adaptation text in the respective Decision. In such cases, an adaptation would be used to make the act fit within the institutional framework of the EEA Agreement. Adaptations can, however, also be necessary in various other situations, e.g. where an EFTA State needs an exemption due to special situations or circumstances. Subcommittee V has on many occasions discussed the need for adaptations, and to give input and examples, the Secretariat has prepared a Note on adaptation texts.[9]

In addition to the topics and challenges already mentioned, Subcommittee V is generally active in trying to ensure consistency of legal drafting and knowledge management about various legal issues linked to the EEA Agreement. In this respect the Secretariat is often tasked with drafting and updating various legal notes of a more horizontal and general nature, which are subsequently discussed in the Subcommittee. Some of the notes are formally approved by the Subcommittee, hence reflecting a common position.[10]

The legal notes are as a starting point only made for the EEA EFTA States. The Secretariat keeps an internal overview of all legal notes, sorted by subject matter. As the notes often contain an overview or analysis of previous challenges and solutions, they are important for the institutional memory of the Secretariat and the EEA EFTA States.

Since 2016 Subcommittee V has spent much of its time discussing Brexit and the consequences for the EEA Agreement. From early 2018 the focus has been on the preparations and negotiations of an Agreement between the EEA EFTA States and the United Kingdom,[11] mirroring relevant parts of the Withdrawal Agreement between the EU and the United Kingdom.[12] Subcommittee V formally mandated the EFTA Secretariat with preparing a first draft and the Secretariat has coordinated and updated the text following the discussions and negotiations between the EEA EFTA States and the United Kingdom.

Subcommittee V is also an arena for the EEA EFTA States to exchange information and share views with the EFTA Surveillance Authority, whose representatives are invited to the meetings as observers. At the meetings the EFTA Surveillance Authority updates the EEA EFTA States on ongoing and upcoming cases in the EFTA Court, as well as relevant cases in the Court of Justice of the European Union.

As part of the institutional setup of the EEA there is also a Joint Subcommittee V assisting the EEA Joint Committee, where legal experts both from the EEA EFTA States and the EU attend.[13]

9 Can be found on page 37 of this EFTA Bulletin.

10 Such notes would be labelled 'Legal Note by Subcommittee V'.

11 Text as initialled on 30 November 2018: https://www.efta.int/sites/default/files/documents/eea/eea/legal-texts/2018_12_20_UK-EEA-EFTA_separation_agreement.pdf

12 Text as agreed at negotiators' level on 14 November 2018: https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf

13 See Article 15 of Decision of the EEA Joint Committee No 1/94 on the Rules of Procedure of the EEA Joint Committee.

The legal work of the EFTA Secretariat in Brussels

The EFTA Secretariat in Brussels is the secretariat to the Standing Committee, the Subcommittees and all the Working/Expert Groups. In practice this means that the Secretariat assists the EEA EFTA States in the process of incorporating new EU acts into the EEA Agreement.[14] Legal questions come up at different stages of this process.[15]

At the early stages, when the Commission publishes proposals for European Parliament/Council acts, the Secretariat will make a preliminary analysis of possible challenges and send this to the responsible Working Group or Expert Group.

After an act has been adopted by the EU, the Secretariat also identifies possible challenges and sends its assessment to the responsible Working Group or Expert Group. Based on feedback from the EEA EFTA States, the Secretariat drafts a Joint Committee Decision which is approved by Subcommittees I-IV before it is sent to the European External Action Service (EEAS) for further processing on the EU side.

In cases where a draft Joint Committee Decision incorporating an EU act contains an adaptation text, it is accompanied by an explanatory note when it is sent to the EEAS for further processing. The purpose of the explanatory note is to explain why the EEA EFTA States consider that adaptations would be necessary in the concrete case. The explanatory notes would normally be drafted by the Secretariat but based on input from the EEA EFTA States.

The EFTA Secretariat in Brussels is organised in two divisions: The Internal Market Division (IMD) and the EEA Coordination Division (ECD). Together these divisions number around 35 employees, and supported by an administration of around 15 people, they carry out the functions as secretariat to the Standing Committee.

The Secretariat has set up a cross-divisional legal team coordinated by the Head of EEA Legal Coordination from ECD. The legal team consists of the legal officers and lawyers involved in the drafting of Joint Committee Decisions. In addition to ad hoc discussions and meetings, the legal team meets once a week at the Legal Coordination meeting to discuss current legal issues linked to the incorporation of new acts into the EEA Agreement, especially with the aim of ensuring consistency.

14 The legal basis for the role of the EFTA Secretariat can be found in Article 8 of the Standing Committee Agreement and Article 22 of the Rules of Procedure to the Standing Committee. Pursuant to these provisions, the Secretariat provides services to the Standing Committee, the subcommittees, the working groups and the expert groups.

15 The procedure is based on the Decision of the Standing Committee No 1/2014. See also EFTA Bulletin October 2016 – Handbook on EEA EFTA procedures for incorporating EU acts into the EEA Agreement.


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The Two-Pillar System of the EEA Agreement:

Legal framework and overview of cases raising two-pillar challenges

Note to the reader

This Legal Note by the Secretariat is updated on a regular basis and was last updated in January 2019.

The note explains general aspects of the two-pillar structure of the EEA Agreement and contains case studies of two-pillar issues and summaries of different solutions. These include, among others, regulatory agencies and bodies, competence to impose fines and authorisation procedures.

1. Introduction

1. Pursuant to Article 1 of the Agreement on the European Economic Area (EEA Agreement) and the Preamble of Protocol 35 to the Agreement, the EEA Agreement aims at achieving a homogeneous European Economic Area based on common rules and equal conditions of competition, without the transfer of legislative powers to supranational institutions. This is ensured through the incorporation of relevant EU legal acts into the EEA Agreement, and mechanisms catering for uniform interpretation and application of such rules throughout the EEA.[1]

2. The institutional set-up of the EEA Agreement is based on a two-pillar structure, which consists of independent EU and EFTA pillars. In the EFTA pillar, certain EU bodies are mirrored, such as a surveillance authority and a court of justice. Substantive decisions relating to the EEA Agreement and its operation are a joint venture between the EFTA States and the EU in the hands of EEA joint bodies.

3. The EEA Joint Committee is tasked with ensuring the effective implementation and operation of the EEA Agreement, including taking decisions to incorporate new EEA-relevant acts into the annexes and protocols to the EEA Agreement pursuant to Article 98 EEA.[2] Due to the two-pillar structure of the EEA Agreement, specific adaptations may be needed when incorporating EU acts into the Agreement. When EU acts, for instance, confer to EU institutions the competence to adopt binding decisions, to grant authorisations or to issue fines or other pecuniary measures, an adaptation text in the EEA Joint Committee Decision (JCD) is generally needed to describe how this should be dealt with on the EFTA side.[3]

4. Achieving homogeneity throughout the EEA in the context of the two-pillar structure, where independent EU and EFTA surveillance authorities and courts apply the same substantive rules, is made possible by mechanisms in the EEA Agreement providing for uniform interpretation and application of EEA law. Nevertheless, institutional developments in EU law, which are not catered for in the main part of the EEA Agreement, imply that two-pillar challenges may arise in the context of the incorporation of EU acts into the EEA Agreement. The increasing delegation of tasks to EU regulatory agencies and bodies in the EU pillar and, in particular, the power of such bodies to issue binding decisions, give rise to specific challenges for the institutional set-up underpinning the EEA Agreement.

5. Section 2 of this note gives an overview of the provisions governing the two-pillar system of the EEA Agreement, and how uniform interpretation and application of EEA law is achieved. Section 4 includes an overview of the main two-pillar issues that have arisen upon incorporation of acts into the EEA Agreement, and how these have been dealt with by the EFTA States. Annex 1 to this note sets out upcoming two-pillar issues.*

*The Annex is not part of this Bulletin.

1 See "How EU acts become EEA acts and the need for adaptations", available at: http://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf

2 See also Article 92(1) EEA.

3 See "Exemptions, derogations and adaptations" (2015), available at: http://www.efta.int/sites/default/files/publications/bulletins/efta-bulletin-2015.pdf

2. The two-pillar structure of the EEA Agreement

2.1 The legal framework governing the two-pillar system

6. The two-pillar structure of the EEA Agreement partly originates from Opinion 1/91 of the Court of Justice of the European Union (CJEU), in which the CJEU assessed the compatibility of the system of judicial supervision initially proposed under the EEA Agreement with the EEC Treaty.[4] The European Commission (Commission) made a request to the CJEU for such an assessment after political consensus was reached between the Contracting Parties to create a Joint EEA Court functionally integrated with the CJEU at a Joint Ministerial Meeting in May 1991.[5]

7. The CJEU rejected the proposed solution of the Contracting Parties as regards the establishment of a joint judicial mechanism, on the grounds that such a system of judicial supervision would have been "*incompatible with the Treaty establishing the European Economic Community*", as this would have likely adversely affected "*the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice*" on the basis of its exclusive jurisdiction for the interpretation and application of Community legislation.[6] Accordingly, a two-pillar structure was created, catering for independent surveillance and judicial control in the EU and EFTA pillars, respectively.

8. The legal framework governing the two-pillar system is set out in particular in Chapters 1 to 3 of Part VII of the EEA Agreement (Institutional Provisions).

9. The system of surveillance and judicial control in the EEA follows from Chapter 3 of Part VII of the EEA Agreement. Pursuant to Articles 108 to 110 EEA, the EFTA States shall establish an independent surveillance authority and a court of justice reflecting the surveillance and court system in force in the EU pillar, based on the competences of the Commission and the CJEU. In particular, it follows from Article 108(1) EEA that the EFTA States shall establish procedures similar to those in force in the EU, including procedures aimed specifically at guaranteeing the fulfilment of obligations under the EEA Agreement and control of the legality of acts of the EFTA Surveillance Authority (Authority) in the field of competition. The system of surveillance and judicial control in the EFTA pillar must accordingly encompass both infringement procedures similar to those in Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU), and procedures similar to those under Article 263 TFEU on the review of the legality of legislative acts.

10. The two-pillar system presupposes that internal EFTA matters are regulated in the EFTA pillar by agreement between the EFTA States. In this context, the EFTA States have entered into a Surveillance and Court Agreement (SCA), as referred to in Article 108 EEA, establishing the Authority and the EFTA Court and mirroring the system of surveillance and judicial control in the EU. This internal agreement between the EFTA States determines the composition, or-

4 See the second subparagraph of Article 228(1) EEC.

5 Norberg S. et al., *EEA Law – A Commentary on the EEA Agreement*, 1993, Fritzes, p. 66.

6 Opinion 1/91 [1991] ECR I-6079, paras 55-56. See also Opinion 2/13 [2014].

ganisation, functions and competences of the Authority and of the EFTA Court. The system also encompasses rules of procedure of the Authority, adopted by the Authority in its own capacity, and rules of procedure of the EFTA Court, as adopted by the Court and approved by the Governments of the EFTA States.

11. The General Court of the European Union (previously the Court of First Instance) recognised the two-pillar institutional set-up of the EEA Agreement in its judgment in the *Opel Austria* case, stating that "*by establishing an EFTA Surveillance Authority and an EFTA Court with powers and jurisdiction similar to those of the Commission and the Court of Justice, a two-pillar system has been created in which the EFTA Surveillance Authority and the EFTA Court monitor the application of the Agreement on the part of the EFTA States, while the Commission, the Court of Justice and the Court of First Instance do so on the part of the Community*".[7] Hence, the Authority has been granted competences mirroring those of the Commission as regards surveillance, whilst the EFTA Court is competent for actions concerning the surveillance procedure regarding the EFTA States, for appeals against decisions issued by the Authority, and for the settlement of disputes between two or more EFTA States.

12. The EEA institutional set-up furthermore comprises four EEA joint bodies, as provided for in Chapters 1 and 2 of Part VII of the EEA Agreement. Articles 95 and 96 EEA establish the *EEA Parliamentary Committee* and the *EEA Consultative Committee*. These are advisory bodies and provide for a system of parliamentary co-operation and cooperation between economic and social partners. Article 89 EEA sets out that the *EEA Council* shall have overall political responsibility for the development of the EEA Agreement and lays down general guidelines for the *EEA Joint Committee*. This latter body is tasked with ensuring the effective implementation and operation of the EEA Agreement, by carrying out exchanges of information and taking decisions in the cases provided for in the EEA Agreement in accordance with Article 92(1) EEA. This competence includes taking decisions to incorporate new legislation into the EEA Agreement by amending annexes and protocols to the EEA Agreement as stipulated in Article 98 EEA.

13. The two-pillar structure implies that the EU and EFTA sides are to supervise and control their internal matters separately and independently. In the event of conflicting decisions between institutions in the EU and EFTA pillars, agreement is to be reached between the Contracting Parties in the EEA Joint Committee pursuant to the procedure laid down in Article 111 EEA.[8] In addition, the system includes other mechanisms and procedures to cater for uniform application of EEA law. These are explained in further detail in the following sections.

7 Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR II-39, para. 108. The Authority and the EFTA Court are set up by the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (SCA), also referred to in Article 108, which contains rules on the internal organisation of those bodies and their competences.

8 See Articles 105(2), (3) and 109(5) EEA.

2.2 The two-pillar system and uniform application of EEA law

14. Pursuant to Articles 1, 7 and 102 EEA, the aim of the EEA Agreement is inter alia to create a homogeneous EEA through the harmonisation of legislation in the fields covered by the EEA Agreement.

15. Homogeneity presupposes that common rules are implemented, interpreted and applied uniformly across the EEA. In order to achieve homogeneity within the two-pillar system, specific tasks and competences attributed to the Commission by EU legislation are conferred to a body in the EFTA pillar for the purpose of application of EEA law in the EFTA States. This applies both in relation to acts concerning the Commission's role as a general surveillance authority monitoring the implementation of legislation in national law, and for acts assigning the Commission the task of market oversight, such as market authorisations, imposition of fines and conformity assessment. Since the EEA Agreement does not provide for any transfer of legislative competence, acts providing for the allocation of tasks and responsibilities in the EU pillar to the Commission must be assessed on a case-by-case basis. Depending on the case at hand, tasks and responsibilities in the EFTA pillar may be allocated to the Authority, the Standing Committee of the EFTA States (Standing Committee) or to the national authorities of the EFTA States. This may be agreed with respect to a specific act as well as on a broader basis (e.g. in sectoral or horizontal adaptations texts).

16. In respect of state aid and competition, the allocation of competences is provided for in the EEA Agreement itself.[9] The Authority has been given extensive powers in these fields.

17. Specific rules are also applicable where the Commission is entrusted, through provisions in EU secondary legislation, with a number of competences of administrative and executive nature, and in the field of surveillance.[10] These acts may, as the case may be, confer upon the Commission the competence to exercise functions inter alia relating to information or approval procedures, and precautionary and safeguard measures. In order to provide for the swift incorporation of such acts into the EEA Agreement upon their entry into force, and in order to avoid recurring general adaptations in every JCD, a special referencing technique was included in Protocol 1 EEA on horizontal adaptations.

18. Protocol 1 EEA stipulates how EU acts incorporated into the annexes to the EEA Agreement shall be applied under the EEA Agreement. The horizontal adaptations set forth inter alia how provisions on EC Committees and provisions setting up procedures for adapting or amending Community acts shall be applied under the EEA Agreement. Further, it stipulates how the exchange of information shall take place, and how the rights conferred and the obligations imposed upon Member States or their public entities, undertakings and individuals shall be understood for the EFTA States and their entities, undertakings and individuals. Protocol 1 EEA also sets out how the language and the publication requirements in the EU shall be understood in the EEA context.

9 See Articles 55 and 62 EEA.

10 See Norberg et.al, cit., p. 702.

19. For example, pursuant to Paragraph 4(d) of Protocol 1 EEA, the functions of the Commission in the context of procedures for verification or approval, information, notification or consultation and similar matters shall, for the EFTA States, be carried out according to procedures established among them. These arrangements are set out in the SCA and the Agreement on a Standing Committee of the EFTA States.[11] The horizontal adaptations in Protocol 1 EEA apply to all acts incorporated into the annexes to the EEA Agreement, unless sectoral or specific adaptations provide for the contrary.

20. As the institutional set-up of the EU has changed significantly since the entry into force of the EEA Agreement, with (technical) legislation increasingly delegating executive tasks to bodies and agencies, it may be difficult or unnecessarily burdensome to mirror fully the system established in the EU in the EFTA pillar. In such cases, the Contracting Parties to the Agreement may agree to deviate from the two-pillar system by agreeing on a "one-pillar solution", where the EFTA States allocate tasks to be performed by a body in the EU pillar.

21. Achieving homogeneity within the EEA also requires that interpretation and surveillance of the EEA Agreement be carried out as uniformly as possible throughout the EEA.[12] The EEA Agreement provides for cooperation mechanisms between the two pillars designed to cater for a homogeneous EEA with equal conditions of competition.[13]

22. The sections below will explain how uniform interpretation and application of EEA law are attained within the two-pillar structure, by addressing the surveillance and court system in the EFTA pillar and its relation to the EU surveillance and court system. In particular, the analysis will focus on the mechanisms that provide for a system of cooperation between the two surveillance bodies and on the uniform interpretation of EEA law by the EFTA Court and the CJEU.

2.2.1 Cooperation between the surveillance authorities

23. The EEA Agreement provides for the establishment of a two-pillar system of surveillance, which entails that the EFTA States establish a surveillance authority and a court to mirror the surveillance and enforcement functions of the Commission and the CJEU.[14] The Authority was constituted following the conclusion of the SCA, which provides under Article 4 that an independent surveillance authority is established. Article 5 SCA stipulates that the Authority is to ensure the proper functioning of the EEA Agreement inter alia by taking decisions and other measures, issuing opinions and notices, formulating recommendations and carrying out cooperation, exchange of information and consultations with the Commission.

11 See in particular Article 1 of Protocol 1 SCA.

12 See Part VII, Chapter 3 EEA.

13 See Fifteenth recital of the Preamble to the EEA Agreement, Article 6 EEA and Article 3(2) SCA.

14 See e.g. Case T-115/94 *Opel Austria GmbH* v *Council of the European Union* [1997] ECR II-39, para. 108.

24. In order to ensure that rules are implemented, interpreted and applied uniformly throughout the EEA, the EEA Agreement includes rules on cooperation mechanisms between the two competent surveillance authorities (the Commission and the Authority, respectively).

25. Article 109 EEA provides the framework for general cooperation between the Authority and the Commission, first and foremost with respect to monitoring the fulfilment of the obligations under the EEA Agreement, thereby ensuring uniform surveillance and homogeneous application of EEA law throughout the EEA. According to Article 109 EEA, the Authority and the Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases. Each of the competent surveillance authorities shall also receive any complaints concerning the application of the EEA Agreement, and they shall inform each other of complaints received. The Authority and the Commission shall further examine all complaints falling within their competence and shall pass to the other body any complaints falling within the competence of that body.

26. Further, in practice, the Authority participates in meetings of various Commission committees and expert groups, and also invites representatives of the Commission to EFTA committee meetings. The Authority and the Commission have the opportunity to participate as observers in their respective inspections in various areas and also to participate in relevant training courses organised by the Commission or the Authority. Therefore, cooperation between the Authority and the Commission is wide ranging and extends to formal procedures and more informal contacts, in the interest of homogeneous interpretation, application and surveillance of EEA law.

27. The general duty of cooperation between the surveillance authorities applies in the field of infringement procedures, procurement, state aid and competition. As the Commission and the Authority are tasked with enforcing the same substantive rules in these policy fields, specific provisions regulate the division of competences and functions of these two surveillance authorities.

28. It is worth mentioning that during the negotiations of the EEA Agreement, considerable efforts were spent on regulating the division of competences and the attribution of cases between the Authority and the Commission in the field of competition. The negotiations led to the solution framed in Articles 56 and 57 EEA, which provide for the "one-stop shop" principle. In simplified terms, this principle implies that the Commission is responsible for cases that also fall under the competition rules of the TFEU. The Authority is responsible for cases where there is an effect on trade between EFTA States alone. In all instances either the Commission or the Authority, but not both, handles a given case. In practice, most cases fall under the competence of the Commission.

29. The practical implication of the one-stop shop principle, as noted by the General Court of the European Union in the *Nippon Steel* case, is that each of the two authorities are under an obligation to cease investigating or handling a case and to transfer the file to the other authority if it determines that the other authority is competent to handle the case. However, as noted by the General Court, the "one-stop shop" rule cannot apply from the start of the investigation if it is not possible at that stage to determine which authority is competent. Otherwise, in the event of the Authority initiating the case but the Commission ultimately proving to be the competent authority, there would be a breach of the principle whereby the

provisions of the EEA Agreement cannot deprive the Commission of the powers conceived in the Treaty (in particular the Commission of its power to investigate anticompetitive conduct affecting trade between Member States of the Union).[15]

30. Article 109(5) EEA provides for dispute settlement between the two surveillance bodies. It follows from this provision that in the case of disagreement between the two surveillance authorities with regard to the action to be taken in relation to a complaint or with regard to the result of the examination, either of the bodies may refer the matter to the EEA Joint Committee, which shall deal with the dispute in accordance with Article 111 EEA (settlement of disputes). However, neither authority has yet identified a need to invoke such a procedure. It may therefore be concluded that the system is functioning well in practice and has fulfilled the aim of ensuring homogeneity in the EEA.

31. Whilst neither surveillance authority has previously referred a matter to the EEA Joint Committee in accordance with Article 109(5) EEA, it may be noted that certain institutional issues may arise in circumstances where a dispute between the Contracting Parties is referred to both the EEA Joint Committee and the Authority in its capacity as a surveillance body. This was the case for Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructure, which was incorporated into the EEA Agreement by JCD No 5/2002.

32. The background to the dispute between the Contracting Parties was the introduction by Liechtenstein of a heavy vehicle fee on all roads within its territory based on the fee foreseen by a Bilateral Agreement between Liechtenstein and Switzerland. The EU considered this to be a breach of the provisions of the Directive and asked the Authority to examine the matter. Furthermore, the EU President of the EEA Joint Committee considered himself obliged by the EU to formally bring the matter before the Joint Committee in accordance with Article 111 EEA.[16]

33. The Standing Committee discussed the double-track approach in which the Commission had on the one hand referred to the Authority and on the other hand initiated the dispute settlement procedure under Article 111 EEA. The Standing Committee concluded that such parallel procedures could result in unforeseeable consequences as different EEA institutions could reach different or even incompatible conclusions. The observer from the Authority said that the division of tasks set forth in Article 109 EEA had to be respected by all parties involved. The EFTA States were entitled to due process, similar to the EU Member States, and as long as the Authority had not reached a decision there was no dispute to be settled under Article 111 EEA.

34. In the Joint Committee, the EFTA States stated that only after proper handling by the Authority and potentially the EFTA Court, could the matter be addressed by the EEA Joint Committee according to Article 111 EEA. It was pointed out that the text and purpose of

15 Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *Nippon Steel et al. v Commission of the European Communities supported by Authority* [2004] ECR II-2514, paras 489-490.

16 EEA Joint Committee, Annual Report 2001, 19 April 2002, para 10.

Article 111(2) EEA required the party launching the procedure to provide the Joint Committee with all information that might be useful for a comprehensive examination of the situation. That had not been done and therefore the procedure could not be considered properly launched.

35. The Authority stated that the dispute settlement procedure should not be placed over surveillance procedures in the EEA Agreement in such a way as to undermine existing legal rights, and in the Authority's view would impose a primacy of the Joint Committee over EEA law. It also pointed out the problematic matter if the Joint Committee were to take it upon itself to intervene in surveillance matters on a regular basis. In doing so, it would take on a task that would be difficult for it to perform because of the sheer volume of work involved. The Authority's view was that the Joint Committee's involvement in surveillance matters was only a safety net. The Commission, however, maintained recourse to Article 111 EEA. In June 2001, the Commission and Liechtenstein finally reached an agreement by which the Swiss heavy vehicle fee would still be applied, but with a flat deduction of 3 km at each crossing of the Schaanwald border with Austria.

2.2.2 Uniform interpretation and application of EEA law

36. The two-pillar system of the EEA Agreement implies that judicial control of EEA law is conducted separately in the EU pillar and in the EFTA pillar. The EFTA Court has jurisdiction with regard to the EFTA States and is competent to deal with infringement cases brought by the Authority, appeals against decisions of that Authority and to give advisory opinions to the national courts of the EFTA States.

37. There are no provisions in the EEA Agreement providing for formal links between the EFTA Court and the CJEU. In order to secure the general aim of homogeneity in the EEA, and thus to secure a level playing field for individuals and economic operators, both the EEA Agreement and the SCA contain special provisions on homogeneity.

38. First, uniform interpretation of EEA rules is to be achieved through the exchange of information between the two pillars, which is set up and managed by the EEA Joint Committee pursuant to Article 106 EEA. The EEA Joint Committee shall, pursuant to Article 105 EEA, also keep under constant review the development of the case law of the CJEU and the EFTA Court. To this end, judgments of these courts shall be transmitted to the EEA Joint Committee, which shall act so as to preserve the homogeneous interpretation of the EEA Agreement. Should there be a difference in that development the matter may be brought to the EEA Joint Committee, which can invoke the dispute settlement procedure provided for in Article 111 EEA, which inter alia provides that the Contracting Parties may agree to request the CJEU to give a ruling on the interpretation of the relevant rules. Protocol 48 EEA stipulates that decisions taken by the EEA Joint Committee under Articles 105 and 111 EEA may not affect the case law of the CJEU. In the 25 years of managing the EEA Agreement no such cases of divergent case law have been brought up in the EEA Joint Committee.

39. Second, pursuant to Article 6 EEA, the EFTA Court is obliged to follow the rulings of the CJEU given prior to the date of signature of the EEA Agreement as regards provisions that are identical in substance to corresponding rules in the EU Treaties and secondary legislation

adopted in application of those EU Treaties.[17] Article 3(2) SCA stipulates that, without prejudice to future developments of case law, the provisions of Protocols 1 to 4 EEA and the acts corresponding to those listed in Annexes I and II EEA[18] insofar as they are identical in substance to EU law, shall be interpreted in conformity with the relevant rulings of the CJEU delivered after the signature of the EEA Agreement.

40. Further means intended to contribute to the homogeneous development of case law in the EEA are the rights of the Commission and EU Member States to submit statements of case or written observations[19], and to intervene in cases before the EFTA Court.[20] The Authority and the EFTA States have similar, albeit somewhat more limited, rights to submit statements of case or written observations, or to intervene in cases before the CJEU.[21] Despite the absence of any procedural link between the two judicial bodies and their full independence,[22] these procedures ensure the uniform interpretation and application of EEA law.

41. The EFTA Court and the CJEU have repeatedly stated their commitment to achieving a homogenous EEA by reference to the above-mentioned procedures. In the *Ospelt* case, the CJEU noted that "*several provisions of the EEA Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA and it is for the [CJEU], in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States*".[23]

42. The development of case law of the EFTA Court also demonstrates that the Court takes the homogeneity principle seriously. In the *Fokus Bank* case, concerning the interpretation of the rules of free movement of capital within the EEA, the EFTA Court emphasised that the objective of homogeneity "*has consistently guided the jurisprudence of the [EFTA] Court as well as of the Court of Justice of the European Communities*". Therefore, the EFTA Court concluded that "*the case law of the Court of Justice of the European Communities on Article 56 EC is thus relevant for the interpretation of Article 40 EEA*".[24]

43. In *Sveinbjörnsdóttir*,[25] the EFTA Court expanded on the notion of homogeneity. The Court held that the homogeneity objective and the objective of establishing the right for individuals and economic operators to equal treatment and equal opportunities were so strongly expressed in the EEA Agreement that

17 The norm of Article 6 EEA specifically refers to the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

18 Protocol 1 – general surveillance, Protocol 2 – public procurement, Protocol 3 – state aid and Protocol 4 – competition. Annex I lists acts in the field of state aid and Annex II lists acts in the field of competition.

19 Article 20 of the Statute of the EFTA Court, Protocol 5 SCA.

20 Article 36(1) of the Statute of the EFTA Court. See e.g. Case E-16/11 *EFTA Surveillance Authority* v *Iceland*, Order of the President of 23 April 2012, nyr.

21 See Articles 23(3) and 40 of the Statute of the CJEU.

22 See Article 106 EEA.

23 Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* [2003] ECR I-09743, para. 29. See also e.g. Case C-286/02 *Bellio F.lli Srl v Prefettura di Treviso* [2004] ECR I- 03465, para. 34.

24 Case E-1/04 *Fokus Bank ASA v Norway*, para. 22. See also e.g. Case E-1/03 *EFTA Surveillance Authority* v *Iceland*, para. 27.

25 Case E-/97 *Sveinbjörnsdóttir* v *Iceland*, [1998] EFTA Ct. Rep. p. 98.

the Agreement entailed state liability.[26] When examining the conditions of state liability the Court modelled its judgment on the case law of the CJEU on state liability under EU law, although in the absence of identical provisions, Article 6 EEA and Article 3 SCA did not come into play.[27]

44. It is worth mentioning that with regard to the interpretation of the procedural rules laid down by the SCA, the EFTA Court has in practice considered the relevant case law of the CJEU, although it is not expressly required to do so under that Agreement. The Court has in this regard developed the notion of so-called "procedural homogeneity". Thus, for instance in *Bellona,*[28] the EFTA Court relied on the case law of the CJEU concerning the interpretation of Article 230 EC (now 263 TFEU) when addressing the issue of *locus standi* of the applicant under Article 36 EEA. The EFTA Court firmly stated that the reasoning which led the CJEU to its interpretations of expressions in Community law was relevant when those expressions were identical in substance to those to be interpreted by the EFTA Court.[29]

45. References to the case law of the CJEU in the EFTA Court's rulings and the acknowledgment of the rulings of the EFTA Court by the CJEU further suggest that the overall goal of homogeneity has been achieved. Presidents of both courts have also stated that interaction between the courts may be coined as a judicial dialogue.[30] This is further illustrated by the fact that the EEA Joint Committee has never been called upon to seek to align divergent case law as provided for in Article 105 EEA.

3. Conclusions

46. As demonstrated above, the EEA Agreement is based on a two-pillar structure, where competences and tasks to be carried out in the EU pillar are conferred upon bodies in the EFTA pillar for their application in the EFTA States. In order to achieve homogeneity throughout the EEA, the EEA Agreement includes mechanisms catering for the uniform interpretation and application of EEA law.

47. The Authority and the Commission cooperate extensively in order to ensure uniform surveillance under the EEA Agreement. This uniform surveillance in turn provides a solid basis for the overall aim of homogeneous interpretation, application and implementation of EEA law. The EFTA Court has taken the principle of homogeneity very seriously and extended it beyond the substantive homogeneity stipulated by the EEA Agreement and the SCA to include what has been referred to as effect-related homogeneity and procedural homogeneity.

26 Ibid, para. 60.

27 Other cases include Case E-1/94 *Restamark* [1994 - 1995] EFTA Ct. Rep. p. 15 and Case E-10/04 *Paolo Piazza* v *Paul Schurte AG* [2005] EFTA Ct. Rep. p. 76.

28 Case E-2/02 *Bellona* et al v *EFTA Surveillance Authority* [2003] EFTA Ct. Rep. p. 52.

29 Other cases include Case E-13/10 *Aleris Ungplan AS* v *EFTA Surveillance Authority* [2011] EFTA Ct, Rep. p. 3, Case E-14/11 [2012] *DB Schenker* v *EFTA Surveillance Authority* EFTA Ct. Rep. p. 1178, paras 77 and 78, Case E-12/11 *Asker Brygge* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep. p. 513, para. 80. Case E-15/10 *Posten Norge* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep. p. 546, paras 95 to 97.

30 See C. Baudenbacher in The EFTA Court – Ten Years On, C. Baudenbacher, P. Tresselt and T.Örlygsson (ed.) 2005 Hart publishing, p. 13, and V. Skouris, ibid, p. 123.

48. Institutional developments in EU law have resulted in the increased delegation of tasks and competences to bodies and agencies, many of which were not envisaged or catered for upon the signing of the EEA Agreement. This development is not reflected in the main part of the EEA Agreement and poses challenges for the two-pillar system. Discussions on the incorporation of acts raising two-pillar challenges may hence take time. The types of cases raising two-pillar challenges and how these have been dealt with by the EFTA States are addressed in section 4 below.

4. Cases raising two-pillar challenges

4.1 Introduction

49. Whilst the EEA Agreement includes mechanisms catering for uniform application and interpretation of EEA rules, specific two-pillar challenges are nevertheless raised by a number of EU acts foreseen to be incorporated into the EEA Agreement. Such two-pillar issues have in the past been dealt with by the EFTA States in different ways, often on a case-by-case basis.

50. In circumstances where a specific act is not clearly covered by the institutional framework of the EEA Agreement, an adaptation text to an act raising two-pillar issues is in most cases necessary upon its incorporation into the EEA Agreement, to ensure a solution that is both practical and acceptable to the EFTA States. Negotiations on such adaptation texts can require considerable time and effort by all parties, depending on the specific two-pillar challenge, and the complexity of the relevant EU legislation.

51. In addition, adaptations catering for the two-pillar structure may serve as precedents or as a model for the incorporation of other acts raising two-pillar issues. Nevertheless, suggestions for solutions are made taking into account the particularities of the act and institutional challenges in question on a case-to-case basis. It is therefore important that the EFTA States continue to examine carefully all new two-pillar challenges, and provide sound argumentation for the solution decided upon in explanatory notes, reiterated by declarations as the case may be.

52. The following sections will outline the main two-pillar issues that have arisen in the context of the incorporation of acts into the EEA Agreement, and illustrate how these have been dealt with in different cases.

4.2. Regulatory agencies and bodies

4.2.1. Overview of main two-pillar challenges

53. The number of regulatory agencies established in the EU tasked with implementing policies and regulating specific sectors has increased significantly since the signing of the EEA Agreement. This development poses challenges to the two-pillar system of the EEA Agreement. As the number of EU agencies is likely to increase in the future and the functions and powers of such agencies are likely to be extended, it is important to have an overview of how these two-pillar challenges have been/can be dealt with when incorporating legislative acts on regulatory agencies and bodies into the EEA Agreement.

54. The EEA Agreement does not contain any rules on participation in regulatory agencies or similar decentralised and independent bodies. An important recurring challenge arising in the context of regulatory agencies and bodies concerns the participation of the EFTA States

in the management boards of these bodies. Participation in management boards gives the EFTA States an opportunity to influence the decision shaping and decision making of the agencies, as well as to monitor the work they carry out. Such influence is particularly important where the decentralised agencies assist the Commission in the preparatory work for the updating and development of Union legislation, which may ultimately be incorporated into the EEA Agreement. The EFTA States have consistently pursued a solution where the EFTA States shall have the right to participate fully in the management boards of bodies and agencies without the right to vote. This solution was agreed upon inter alia with regard to the European Medicines Agency and the European Aviation Safety Agency (EASA). The tendency in the EU to regulate third-country participation rights directly in EU legislation (including the status of the EFTA States in management boards) regularly gives rise to two-pillar challenges, as terms for the incorporation of acts into the EEA Agreement are to be negotiated and agreed upon in the EEA Joint Committee.

55. Another challenge for the two-pillar system as regards the increasing number of regulatory agencies concerns the extent of powers conferred upon such agencies. Decentralised agencies and bodies have gradually been given more powers to adopt legally binding decisions. Such decision-making powers extend to both procedural[31] and substantive matters. In this context, the agency may be competent to take decisions addressed to individual undertakings, to individual EU Member States or to the EU Member States in general. The European Financial Supervisory Authorities (ESAs) are examples of agencies having extensive competences, with the power to adopt legally-binding decisions addressed to private undertakings.

56. In circumstances where an EU agency has autonomous decision-making competences, the main two-pillar issue is whether, and how, binding decisions shall apply to the EFTA States or undertakings/persons based in the EFTA States, and the judicial review of such decisions. In this respect, it should be noted that challenges to acts of the EU agencies would take place before the EU Courts and the Board of Appeal of the agency where necessary. The EFTA Court would thus not be competent to handle these cases.

57. In view of the constitutional constraints of the EFTA States and the two-pillar structure, the power to impose binding decision or sanctions on market participants based in an EFTA State must normally be vested with a body in the EFTA pillar. In this context, decisions on fines addressed to market authorisation holders in the EFTA States were originally vested with the EFTA States concerned in the case of medicinal products,[32] whilst the EFTA Surveillance Authority has been given the competence to issue such decisions in the field of civil aviation.[33]

58. Regulatory agencies also have an important role in assisting the Commission and the Member States by providing opinions, recommendations, reports and guidelines, and

31 All agencies will most likely have certain competences to adopt procedural decisions.

32 Following the adoption of JCD 92/2017 incorporating Regulation (EC) No 1901/2006 on Medicinal Products for Paediatric Use, the power to impose fines on market authorisation holders is now vested with the EFTA Surveillance Authority.

33 See the case analysis on Regulation (EC) No 726/2004 (European Medicines Agency) and Regulation (EC) No 216/2008 (European Safety Aviation Agency) below.

engaging in dialogues. In an EEA context, the question is whether the agencies can address such "soft law" measures (i.e. non-binding instruments) towards the EFTA States and to undertakings based in those states. Since the measures are not binding, it may not pose the same constitutional challenges and raise the same concerns in terms of the two-pillar structure to give the agencies soft-law competences towards undertakings established in the EFTA States. Depending on the case at hand, it may nevertheless be necessary to include an adaptation text regulating how soft-law measures shall be dealt with.

59. Due to the nature of two-pillar challenges arising in the case of EU acts concerning regulatory agencies or bodies, the inclusion of an adaptation text upon incorporation of the act into the EEA Agreement is in most cases necessary, to ensure a solution respecting the two-pillar system of the EEA Agreement and, if the agencies or bodies are given the competence to issue individual decisions towards private market participants, to maintain the sovereignty of the EFTA States and their constitutions.

60. In addition to the two-pillar issues mentioned above, specific questions in relation to the EFTA Surveillance Authority may arise as regards its observer status in the management or administrative boards of an EU agency. In order for the Authority to have a right to participate as an observer in board meetings of an agency, an adaptation text is necessary upon incorporation of the relevant acts into the EEA Agreement.

61. The Authority has emphasised that it would be beneficial to secure participation of the Authority as observer in the management boards of agencies in order to obtain information at an early stage, foster a good working relationship with the agencies, enhance accountability of the agencies and increase EEA awareness. The lack of legal basis in the EEA Agreement for the Authority to participate in the management boards of EU agencies absent any adaptation text thereto, is therefore an element the EFTA States may consider, as appropriate, when discussing the incorporation of an act establishing an EU agency into the EEA Agreement.

4.2.2. European Supervisory Authorities

62. Regulation (EU) No 1092/2010 establishes the European Systemic Risk Board (ESRB). The purpose of the ESRB is to monitor the health of the financial institutions, to issue warnings and recommendations and to elaborate a system of classification of different risk levels, determining the system's sensitivity to economic shocks. In addition to the ESRB, three European Supervisory Authorities (ESAs) supervising the micro level have been set up by Regulation (EU) No 1093/2010 (European Banking Authority (EBA)), Regulation (EU) No 1094/2010 (European Insurance and Occupational Pensions Authority (EIOPA)) and Regulation (EU) No 1095/2010 (European Securities and Markets Authority (ESMA)).

63. The Regulations establishing the ESAs grant them extensive decision-making powers. The ESAs are inter alia competent to take decisions to (i) temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of the financial markets or their stability; (ii) adopt individual decisions addressed to financial institutions/ market participants requiring the necessary action to comply with their obligations under EU law; (iii) adopt individual decisions in emergency situations requiring competent national authorities to take necessary action; and (iv) settle disagreements between competent national authorities in cross-border

situations.[34] The fundamental EEA challenge related to the incorporation of the EU ESAs into the EEA Agreement has been how to preserve the key advantages of supervision by a single authority whilst respecting the two-pillar structure.

64. Following extensive negotiations, the Regulations establishing the ESRB and the three EU ESAs (EBA, ESMA and EIPOA), were incorporated into the EEA Agreement by JCDs No 198-201/2016 on 30 September 2016,[35] respectively. JCDs including related legal acts pertaining to credit rating agencies, over-the-counter derivatives, central counterparties and trade repositories, short-selling and credit default swaps, and alternative investment fund managers were also adopted in the same package (JCDs No 202-206/2016, respectively – in total 9 JCDs containing 31 legal acts[36]).

65. As to the power to issue decisions towards market participants in the EFTA pillar, the adaptation texts specify that the EFTA Surveillance Authority shall be competent to take decisions of a binding nature towards market participants in the EFTA States. During the negotiations, the importance of vesting such powers within the EFTA pillar was highlighted, however, concerns related to the possibility of disharmonious supervision on the extended Internal Market were also brought forward. As a result, the negotiated JCDs envisage that the decisions of the Authority are to be based on a draft from the relevant EU ESA.[37]

66. The EU ESAs are competent to perform actions of a non-binding nature, such as adoption of recommendations and non-binding mediation, also vis-à-vis EFTA competent authorities and market operators. Action on either side will be preceded by, as appropriate, consultation, coordination, or exchange of information between the EU ESAs and the EFTA Surveillance Authority. These mechanisms have also been catered for in adaptation texts to the respective acts. In addition, a new Protocol 8 to the Surveillance and Court Agreement has been concluded, setting out the powers and functions of the EFTA Surveillance Authority in the field of financial services.

4.2.3. The Agency for the Cooperation of Energy Regulators (ACER)

67. Regulation (EC) No 713/2009 establishes the Agency for the Cooperation of Energy Regulators (the ACER Regulation). The purpose of ACER is to improve the internal market for electricity and natural gas. ACER focuses in particular on cross-border infrastructure and cooperation between energy regulators. To this end, ACER interacts with national regulatory authorities (NRAs), transmission system operators and the Commission. ACER is a Community body with a legal personality. Pursuant to Article 4 of the ACER Regulation, ACER is competent to issue recommendations, opinions and guidelines on certain matters. ACER may also take individual decisions on cross-border infrastructure in the specific cases referred to in Articles 7, 8 and 9 of the Regulation.

34 To be noted that natural or legal persons may appeal against binding decisions of the Authority to the Board of Appeal. Decisions of the Board of Appeal can be brought before the CJEU.

35 JCD No 198/2016, 199/2016, 200/2016, 201/2016.

36 JCD No 202/2016, 203/2016, 204/2016, 205/2016, 206/2016.

37 See paragraph 5 of the EEA Council Conclusions of 14 October 2014: http://www.efta.int/sites/default/files/documents/eea/eea-news/2010-10-14-EEA-EFTA-ECOFIN-joint-conclusions.pdf

68. The ACER Regulation raises two-pillar issues in terms of the EFTA States' participation in the ACER Board of Regulators, and whether binding decisions by ACER shall also apply to NRAs based in the EFTA States.

69. JCD No 93/2017 incorporating the ACER Regulation into the EEA Agreement as part of the Third Energy Package was adopted by the EEA Joint Committee on 5 May 2017.[38]

70. The JCD foresees that national regulators of the EFTA States will participate as full members of the ACER Board of Regulators, but they will not be granted voting rights. As a consequence, the EFTA States cannot be subject to a decision by the same body.

71. The adaptation text foresees that the EFTA Surveillance Authority should adopt decisions addressed to the NRAs in the EFTA States in cases involving one or more EFTA States. The decisions will thus not be directed at market operators. The adaptation text sets out that decisions of the Authority shall be based on drafts prepared by the Agency. In order to ensure that decisions on similar matters are consistent, the adaptation text foresees that the Authority and the Agency shall cooperate and exchange views in specific cases. This set-up builds on the institutional solution agreed upon in the area of financial services.

4.2.4. The European Data Protection Board (EDPB)

72. The General Data Protection Regulation (EU) 2016/679 (GDPR) was adopted on 27 April 2016 and replaces the Data Protection Directive 95/46/EC. In addition to substantive innovations, the GDPR creates a new institutional framework for the supervision of compliance with data protection rules by data controllers and processors: A one-stop shop system is established, whereby businesses and data subjects will only need to refer to the data protection authority in their place of establishment. In cross-border situations, the authorities concerned will then agree on common decisions through a consistency mechanism. In case of disagreement, the new European Data Protection Board (EDPB) will be competent to settle disputes between data protection authorities (DPAs) with binding effect for the authorities concerned. This body, which replaces the current Article 29 Working Party, is composed of the heads of national authorities. It has legal personality, but its secretariat is staffed by the European Data Protection Supervisor's office. Decisions of the EDPB are subject to review before the European Court of Justice, while national decisions of DPAs that implement EDPB decisions are amenable to challenge through the national court systems. The EDPB is also competent to promote best regulatory practices by issuing guidelines and recommendations, as well as to assist the Commission in preparing implementing standards.

73. Under the GDPR's consistency mechanism, the EDPB may adopt legally binding decisions where there are disputes between national DPAs regarding the correct and consistent application of the GDPR. In accordance with the system of legal remedies under the Treaty on the Functioning of the European Union (TFEU), such decisions of the EDPB are subject to judicial review before the Court of Justice of the European Union (CJEU).

38 The entry into force of JCD No 93/2017 is pending fulfilment of constitutional requirements in Iceland.

74. The JCD incorporating GDPR was adopted on 6 July and entered into force on 20 July 2018. The JCD sets out that the supervisory authorities of the EFTA States shall participate to the fullest extent possible in the so-called one-stop shop and the consistency mechanism.

75. The JCD further provides that the supervisory authorities of the EFTA States shall participate in the activities of the EDPB. To that effect, they shall, but for the right to vote and to stand for election as chair or deputy chairs of the EDPB, have the same rights and obligations as supervisory authorities of the EU Member States in the EDPB, unless otherwise provided in the EEA Agreement. The positions of the supervisory authorities of the EFTA States shall be recorded separately by the EDPB.

76. The rules of procedures of the EDPB shall give full effect to the participation of the supervisory authorities of the EFTA States and the EFTA Surveillance Authority with the exception of voting rights and to stand for election as chair or deputy chairs of the Board.

77. Finally, the JCD provides that, where it is relevant to the exercise of its functions under Article 109 of the EEA Agreement, the EFTA Surveillance Authority shall have the right to request advice or opinions from, and to communicate matters to, the EDPB pursuant to Articles 63, 64(2), 65(1)(c) and 70(1)(e) of the GDPR, and that the Chair of the EDPB, or the secretariat, shall communicate to the EFTA Surveillance Authority the activities of the EDPB, where relevant pursuant to Articles 64(5)(a) and (b), 65(5), and 75(6)(b) of the GDPR.

4.3. Competence to impose fines/ penalties on undertakings

4.3.1. Overview of institutional challenges

78. The Commission has had the longstanding competence to impose fines on undertakings for breaches of competition law. Due to the special nature of competition cases, the EEA Agreement also recognises that the Commission may, in cases where it is competent pursuant to Articles 56 and 57 EEA, issue fines directly to undertakings in the EFTA States.[39] Apart from the area of competition, there are no other fields where the Commission is competent to impose fines on undertakings in the EFTA States.

79. On account of developments in EU legislation, the Commission is also increasingly being given the power to issue fines directly to undertakings in other policy areas. When EEA-relevant acts afford such powers to the Commission, an adaptation text is needed to appoint the body which shall have the competence to impose fines on undertakings based in the EFTA States.

80. The two-pillar structure requires that the power to impose fines on undertakings based in the EFTA States should be vested in a body in the EFTA pillar. This begs the question of whether the competence to issue fines on undertakings based in the EFTA States should be entrusted to the EFTA Surveillance Authority or to the national authorities of the EFTA States. Whilst the question of how the competence of the Commission should be reflected on the EFTA side is not strictly an issue

39 Due to the special nature of competition cases, it is not possible to adhere strictly to the two-pillar structure in the field of competition. In this context, it should be recalled that the one-stop shop principle is an inherent feature of competition law and implies that either the Commission *or* the Authority is competent to act in mergers and behavioural cases on restrictive agreements/cartels and the abuse of a dominant position involving undertakings from EU Member States and EFTA States. The rules governing division of competence are set out in Articles 56 and 57 EEA.

under the two-pillar structure, it is nevertheless closely linked and thus addressed in this section.

4.3.2. Cases where the power to impose fines is vested with national authorities

81. Following the adoption of JCD No 92/2017 incorporating Regulation (EC) No 1901/2006 on Medicinal Products for Paediatric Use (see below), there are not currently any cases where the power to impose fines is vested with national authorities.

4.3.3. Cases where the power to impose fines is vested with the EFTA Surveillance Authority

Medicinal Products

82. Regulation (EC) No 726/2004 sets out the Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishes the European Medicines Agency. Pursuant to Article 84(3) of the Regulation, the Commission may, at the agency's request, impose financial penalties on the holders of marketing authorisations if they fail to observe certain obligations laid down in connection with the authorisations.

83. JCD No 61/2009 incorporated the Regulation on the European Medicines Agency into the EEA Agreement. Pursuant to the original adaptation text of the JCD, if the holder of the market authorisation was based in an EFTA State, the fines should be issued by the EFTA State concerned, based on a proposal of the Commission.[40]

84. However, the adaptation text to Regulation (EC) No 726/2004 was amended with the incorporation into the EEA Agreement of Regulation (EC) No 1901/2006 on Medicinal Products for Paediatric Use by JCD No 92/2017 of 5 May 2017 (see below).[41] The competence to impose penalties provided for in Regulation (EC) No 726/2004 has now been given to the EFTA Surveillance Authority. It follows from the adaptation text that the powers vested in the Commission in relation to the infringement procedure foreseen in Article 84(3), including the power to impose financial penalties on the holders of marketing authorisations, shall, in cases where the marketing authorisation holder is established in an EFTA State, be carried out by the Authority in close cooperation with the Commission. Further, the adaptation text specifies that before the Authority takes a decision regarding financial penalties, the Commission shall provide it with its own assessment and a proposal on what action to take.

Medicines for Paediatric Use

85. Regulation (EC) No 1901/2006 on Medicinal Products for Paediatric Use (the "Paediatrics Regulation") sets out rules for the development of medicinal products for children under 18 years. According to Article 49(3) of the Regulation, the Commission may impose financial penalties for infringements of the provisions of the Regulation or implementing measures, in relation to medicinal products authorised through the procedure set out in Regulation (EC) No 726/2004.

86. As the Commission cannot be entrusted with the task of imposing fines directly on undertakings established in the EFTA States, an adaptation text to the Regulation was necessary in order to ensure coherence with the two-pillar structure.

40 See Points 15zb and 15zj of Chapter 13 of Annex II.

41 Entry into force 1 June 2018.

87. The negotiations on a two-pillar solution for the incorporation of the Paediatrics Regulation into the EEA Agreement were finalised in March 2015. It was incorporated by JCD No 92/2017 of 5 May 2017.[42]

88. The JCD includes an adaptation text stating that the imposition of financial penalties on the holders of marketing authorisations established in an EFTA State is to be carried out by the Authority in close cooperation with the Commission. Before the Authority takes a decision regarding financial penalties, the Commission shall provide it with its own assessment and a proposal on the action to be taken. Due to the special circumstances, notably that the Commission grants marketing authorisations and the technical nature of the infringement procedures, it was considered acceptable for the Authority to cooperate closely with the Commission and to await the Commission's assessment and proposal for action before taking a decision regarding financial penalties to the holders of marketing authorisations established in an EFTA State.

Code of conduct for computerised reservation systems

89. The EFTA Surveillance Authority was given the competence to issue fines under Council Regulation (EEC) No 2299/89 on a Code of Conduct for Computerised Reservation Systems.[43] This act is closely related to the field of competition, as the intention is to avoid the abuse of reservation systems for air carriers.[44]

90. Regulation (EC) No 80/2009 repeals Council Regulation (EEC) No 2299/89 on a code of conduct for computerised reservation systems. This regulation was incorporated into the EEA Agreement by JCD No 318/2015. Article 13 of the Regulation confers on the Commission power to issue a cease-and-desist decision in cases of infringements, whilst Article 14 concern powers of investigation (i.e. request for information). Article 15 of Regulation (EC) No 80/2009 confers a similar, albeit slightly wider, power on the Commission to impose fines than was the case in Regulation 2299/89. Pursuant to this provision, the Commission may, by decision, impose fines on undertakings for intentional or negligent infringement of the Regulation or for intentionally or negligently supplying incorrect or incomplete information.

91. The JCD contains an adaptation text based on the two-pillar structure setting out that the EFTA Surveillance Authority shall carry out the tasks of the Commission for the EFTA States and clarifying that the EFTA Court shall have unlimited jurisdiction to review decisions of the Authority to impose a fine.

European Aviation Safety Agency

92. Regulation (EC) No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA) replaces the former EASA Regulation (EC) No 1592/2002. Regulation (EC) No 216/2008 was repealed in the EU by Regulation (EU) 2018/1139 on 11 September 2018. Pursuant to Article 25 of the Regulation, the Commission may,

42 Entry into force 1 June 2018.

43 See Point 63 of Annex XIII to the EEA Agreement.

44 The purpose of the act is the same as for Articles 102 TFEU and 54 EEA, which prohibit the abuse of a dominant position in the market.

at EASA's request, impose fines or periodic penalty payments on the persons or undertakings to which EASA has issued a certificate.

93. As the Regulation affords the Commission the power to impose fines on undertakings, an adaptation text was necessary upon incorporation of the Regulation into the EEA Agreement regulating which authority should be granted similar competences in the EFTA pillar.

94. In the EFTA pillar, the Authority had been afforded the competence to impose fines, and an adaptation text to this effect was included in JCD No 163/2011. The power to impose fines and periodic penalty payments on the persons and undertakings to which EASA has issued a certificate is, in cases where such persons or undertakings are established in an EFTA State, consequently vested in the Authority.

Cross-border exchanges in electricity

95. Regulation (EC) No 714/2009 lays down the conditions for access to the network for cross-border exchanges in electricity. Pursuant to Article 22(2) of the Regulation, the Commission may impose fines on undertakings that intentionally or negligently fail to supply the Commission with requested information or intentionally or negligently supply incorrect, incomplete or misleading information. Due to the two-pillar structure, an adaptation text to this provision was necessary upon incorporation of the Regulation into the EEA Agreement.

96. Regulation (EC) No 714/2009 was incorporated into the EEA Agreement by JCD No 93/2017. The adaptation text to the Regulation stipulates that the competence to issue fines shall be carried out in the EFTA pillar by the EFTA Surveillance Authority.[45]

Emission performance standards for new passenger cars and light-duty vehicles

97. Regulation (EC) No 443/2009 sets out emission performance standards for new passenger cars. Pursuant to Article 9 of the Regulation, the Commission shall impose excess emissions premiums on car manufacturers or pool managers that do not comply with the requirements set by the Regulation. The amount of such penalties is calculated according to the formula set out in the Regulation. Those penalties are of an administrative nature and involve no discretionary power. The definition of these operators is such that it includes, to a certain extent, manufacturers' permanent representatives in a given country. The Regulation was incorporated into the EEA Agreement by JCD No 109/2017 of 13 June 2017.

98. In line with the two-pillar system, the competence to impose excess emissions premiums on manufacturers in the EFTA States has been vested with the EFTA Surveillance Authority. An adaptation text has thus been included to the effect that it will be for the Authority to impose excess emissions premiums on manufacturers in the EFTA States. It should be noted, however, that the competence given to the Authority regarding Regulation (EC) No 443/2009 is strictly to execute the rules and procedures stipulated in the Regulation. It does not contain any discretionary powers. Thus, excess emissions premiums in Article 9(1) are fundamentally different from financial penalties like those imposed according to certain other legal acts.

45 See Point 20 of Annex IV to the EEA Agreement. The Regulation replaced Regulation (EC) No 1228/2003. In the previous Regulation, the power to impose fines in the EFTA pillar was, by way of an adaptation text, placed with the national regulatory authorities of the EFTA States.

99. An additional two-pillar issue was also raised by the EU, concerning the competence to approve eco-innovations. The draft adaptation text to the JCD initially foresaw that the Authority would be competent to approve eco-innovations in the EFTA pillar. However, the EU asserted that decisions to approve eco-innovations have general effect and can therefore only be taken by the Commission and not by the Authority (similar to that in the case of Regulation 391/2009 and Directive 2009/30 mentioned above). With regard to the discussion on the nature of decisions approving innovative technologies, the EFTA States accepted the position of the Commission that such decisions have general effect and are to be taken by the Commission and subsequently to be incorporated into the EEA Agreement. An adaptation text to this effect was included in the JCD.

4.4. Information, notification and authorisation procedures (Protocol 1 4(d))

4.4.1. Overview of two-pillar issues

100. Protocol 1 EEA on horizontal adaptations concerns inter alia provisions on EC Committees, the setting up of procedures for adapting and amending Community acts, the exchange of information, the rights and obligations imposed upon Member States or their public entities, undertakings and individuals, language requirements and publication requirements. The horizontal adaptations in Protocol 1 EEA apply to all acts incorporated into the annexes to the EEA Agreement, unless either sectoral or specific adaptations to an act provide for the contrary.

101. According to Paragraph 4(d) of Protocol 1 EEA, the functions of the Commission in the context of procedures for verification or approval, information, notification or consultation and similar matters shall for the EFTA States be carried out according to procedures established among them. These arrangements are set out in the SCA and the Agreement on a Standing Committee of the EFTA States.

102. Centralised market authorisation schemes, registries, assessment and verification procedures and surveillance acts pose certain challenges in this respect. The main challenges concern whether inter alia authorisation decisions or surveillance acts are to be regarded as legislation that should be incorporated into the EEA Agreement according to Article 102 (1) of the Agreement, or if they fall under the category of acts that, according to Paragraph 4(d) of Protocol 1 EEA, should in the EFTA pillar be carried out according to procedures established among the EFTA States.

4.4.2. Surveillance acts *vs* regulatory acts

103. The two-pillar system implies that the competence to issue certain decisions shall be divided between the Commission and the Authority. Such "two-pillar decisions" should have effect without having to be incorporated into the EEA Agreement.[46] Surveillance acts in the veterinary and phytosanitary field have nevertheless been regularly incorporated into Annex I EEA. Since February 2015, the EU and EFTA side have agreed not to incorporate such acts into the EEA Agreement in future.

46 Subcommittee V already noted that the incorporation of surveillance acts into Annex I EEA was not in line with ending the practice of incorporating such acts into the EEA Agreement in 1999 (reiterated in April 2006), See Legal note by the Secretariat for Subcommittee V: Incorporation into the EEA Agreement of acts adopted by the Commission in its capacity as a surveillance authority – 3 April 2006 – Ref. 1059031.

104. Directive 2009/30/EC of 23 April 2009 amends Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amends Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC.

105. The Directive confers the power to the Commission to recognise voluntary schemes for biofuels, which may be used by economic operators to demonstrate compliance with the sustainability criteria. The main two-pillar challenge of the Directive related to how the power to recognise voluntary schemes should be dealt with under the EEA Agreement. The EU stressed their view that implementing decisions adopted by the Commission for the purpose of recognising voluntary schemes under the Directive were of regulatory character and should apply throughout the EEA. The delegations agreed to the Commissions positions and the Directive was incorporated into the EEA Agreement by JCD No 270/2015 on the 30 of October 2015. Regulation (EU) No 995/2010 empowers the Commission to recognise, monitor and withdraw the recognition of monitoring organisations that develop and operate due diligence systems for operators who place timber and timber products on the market (See Article 8 of the Regulation).

106. The functions of the Commission set out in Article 8(3), (5) and (6) fall within the scope of paragraph 4(d) of Protocol 1 EEA. However, in order to ensure full clarity of the functions of the EFTA Surveillance Authority, an adaptation has been added stating that the Authority is to carry out these functions of the Commission relating to monitoring organisations as regards the EFTA States. JCD No 75/2013 incorporating Regulation (EU) No 995/2010 was adopted by the EEA Joint Committee in May 2013.

4.4.3. Market authorisations

107. Most products may be placed on the market without prior authorisation. However, it has been decided that for certain types of products, the risk of placing them on the market without prior control is too high, and therefore authorisation requirements have been introduced.

108. The authorisation schemes may be divided into two main groups: Authorisation schemes with decentralised procedures whereby the Member States themselves authorise products; and schemes with centralised procedures whereby the Commission or another EU body authorises products. Certain authorisation schemes operate with a combination of the two procedures.

109. Two-pillar issues may arise in relation to centralised procedures, especially if the authorisation applies only to the applicant and the authorisation is adopted as a standalone act. The main question is how to deal with such authorisations on the EFTA side.

110. If there is no adaptation text, Protocol 1 EEA on horizontal adaptations applies. There have been discussions as to whether market authorisations are to be regarded as legislation to be incorporated into the EEA Agreement, or whether they are covered by Paragraph 4(d) of Protocol 1 EEA and therefore the responsibility of the EFTA Surveillance Authority. A third option, which has also been put forward during these discussions, is to regard them as administrative provisions falling outside the definition of legislation and acts covered by Paragraph 4(d). It is therefore recommended to have an adaptation text that clearly sets out the solution agreed upon.

111. A specific solution has been inserted in the adaptation texts in JCD No 25/2008 as regards the authorisation of medicines and for

chemicals pursuant to Regulation (EC) No 1907/2006. When the Commission authorises a product, the national authorities of the EFTA States will adopt a corresponding decision within 30 days. The EEA Joint Committee shall be informed and shall periodically publish lists of such decisions in the EEA Supplement to the Official Journal of the European Union (OJ). If an EFTA State does not issue a corresponding decision, the Commission may bring the matter to the EEA Joint Committee. This solution respects the autonomy of the Parties and ensures a coherent Internal Market in the area of medicinal products and chemicals.

112. A similar solution was used when Regulation (EC) No 258/97 was incorporated into the EEA Agreement by JCD No 147/2015. Regulation (EC) No 258/97 on the marketing of novel foods and novel food ingredients establishes an authorisation scheme for the marketing of novel foods and food ingredients. Pursuant to the Article 4 of the Regulation, the applicant shall submit a request for authorisation to the Member State in which the product is to be placed on the market for the first time. This Member State will carry out the initial assessment and draw up a report with its recommendations, see Article 6. The report will be submitted to the Commission, who will forward it to Member States for comments or reasoned objections. If the risk assessment is considered sufficient and there are no objections, the Member State informs the applicant that the product may be placed on the Community market. When additional assessment is considered necessary or when objections are raised, the Commission takes the decisions on authorisations, after having consulted the Standing Committee according to the regulatory procedure, in accordance with Articles 7 and 13. The authorisations are made in the form of Commission Decisions addressed to the applicant.

113. In order to safeguard the constitutional requirements of the EFTA States, an adaptation text to Article 7 of the Regulation, concerning the authorisation decisions, was included in the JCD. The adaptation stipulates that when the Commission takes authorisation decisions, the EFTA States will simultaneously and within 30 days of the Community Decision, take corresponding decisions. The EEA Joint Committee shall be informed, and shall periodically publish lists of such decisions in the EEA Supplement to the Official Journal. Should any disagreement between the contracting parties arise to the administration of these provisions, Part VII of the Agreement shall apply. This solution is based on the similar solutions already established for the European Union authorisation of medicinal products, see above.

114. Aircrafts and parts for aircrafts are type-certified by the European Aviation Safety Agency (EASA) pursuant to Regulation (EC) No 216/2008. According to the adaptation text to JCD No 163/2011 incorporating the Regulation into the EEA Agreement, these type-certifications are directly applicable throughout the EEA. This direct applicability in the EFTA States constitutes a deviation from the two-pillar structure. The fact that decisions by EASA are technical in nature and that all Member States have a common interest in having safe aircraft may explain why the transfer of competence to EASA was acceptable to the EFTA States.

4.4.4. Recognition of professional qualifications

115. The Architects Directive 85/384/EEC[47] provided for a procedure in Articles 7 to 9 to acknowledge new diplomas in the field of architecture. Each Member State was required to inform the other Member States and the Commission of any new diplomas which the Commission was to publish in the OJ after expiry of a three-month period, unless a Member State or the Commission was uncertain that the diploma met the conditions laid down in the Directive. In that case, the Commission would bring the matter before the Advisory Committee on Education and Training in the Field of Architecture.

116. Within the EFTA pillar, the task of the Commission was entrusted to the Authority pursuant to paragraphs 4(b) and (d) of Protocol 1 EEA, assisted by the EFTA Committee on Mutual Recognition of Diplomas.[48] Accordingly, on 1 September 1999, Liechtenstein informed the Authority of a new diploma in Architecture, "Dipl. Arch. FH", awarded by the Fachhochschule Liechtenstein, triggering the procedure set out in Articles 7 to 9 of Directive 85/384/EEC. Based on doubts raised by several EU Member States, the Authority brought the matter before the EFTA Committee on Mutual Recognition of Diplomas, including observers from the Commission or from the EU Member States concerned. On 4 May 2000, the Committee delivered a positive opinion on the new Liechtenstein diploma and on 29 November 2000, the Authority decided that the Liechtenstein diploma fulfilled the criteria of Directive 85/384/EC.

117. Following a letter from the Commission stating that the European Community reserved its right not to approve the diploma in question, the EFTA side emphasised the importance of maintaining and respecting the two-pillar structure.[49] When the Commission confirmed that the Community would not recognise the diploma, the Authority replied that this would create an additional condition for the free circulation of persons and mutual recognition that would not be equal for all Contracting Parties or individuals, and would not be in conformity with the way the EEA had been designed and had functioned thus far.[50]

118. On 8 February 2001, the Authority published the new Liechtenstein diploma in the OJ. At the following EEA Joint Committee meeting, the EU reserved the right to come back to the issue, possibly even for a potential dispute settlement at a later stage. Consequently, discussions on the matter continued between Liechtenstein and the Commission.[51] Finally, on the list of recognised architectural diplomas published by the Commission on 2 June 2005,[52] the title "Dipl.-Arch. FH" awarded by the Fachhochschule Liechtenstein appeared.[53]

47 Referred to in point 18 of Annex VII until the entry into force of JCD No 142/2007 incorporating Directive 2005/36/EC.

48 Decision 10/94/SC of the Standing Committee, as amended by Decision 15/94/SC.

49 EEA Joint Committee meeting of 15 December 2000.

50 EEA Joint Committee meeting of 25 January 2001.

51 Reference to these discussions during 2001 is made in the Annual Report of the EEA Joint Committee 2001, which is referred to in the report of the EEA Joint Committee meeting of 19 April 2002.

52 OJ C 135, 2.6.2005, p. 6.

53 With an additional note stating that it applies to studies begun in the 1999-2000 academic year, including students who followed the study programme of model B until the 2000-2001 academic year, under the condition that they follow additional and compensatory training during the 2001-2002 academic year.

4.4.5. Verification and approval

Emissions Trading Scheme I

119. Directive 2003/87/EC on the European Union Greenhouse Gas Emission Trading Scheme (EU ETS) was incorporated into the EEA Agreement by JCD No 146/2007.

120. The scheme provides that, for a given trading period, each EU Member State must submit a National Allocation Plan (NAP) to the Commission, stating the amount of carbon dioxide (CO_2) emissions within that participating State. The Commission is given the role of assessing whether each NAP is in line with the Member State's Kyoto target. If the Commission finds that the NAP is not in line with the Kyoto target or other allocation criteria, it can reject the plan in part or in full.

121. In line with the two-pillar system, the JCD sets out that the role of the Commission is to be assumed by the Authority in the EFTA pillar. The Commission accepted this approach, with cooperation mechanisms explicitly provided for in the recitals of the JCD.[54]

Emissions Trading Scheme II

122. Directive 2009/29/EC amending Directive 2003/87/EC, as well as nine related acts revising and improving the EU ETS, were incorporated into the EEA Agreement by JCD No 152/2012 of 26 July 2012.

123. This JCD deals with various two-pillar issues. Article 9a of Directive 2003/87/EC, as amended by Directive 2009/29/EC, foresees that the quantity of allowances to be issued from 1 January 2013 shall be adjusted by the Commission to reflect the average annual quantity of allowances issued in respect of those installations during the period of their inclusion, adjusted by a linear factor. Under the Directive, this adjustment is to be performed on a Community-wide basis. However, the JCD provides that, for the EFTA States, the adjustment shall be performed by the Commission on an EEA-wide basis, with the EFTA States providing the relevant figures for the base years in the text of the JCD. In that manner the Commission, rather than performing the adjustment using a two-step approach (calculating first the Community adjustment, then the EEA adjustment), may proceed to do so directly on an EEA-wide basis.

124. Another adaptation relating to the Auctioning Regulation (Commission Regulation (EU) No 1031/2010) provides that the EFTA States are to notify the identity of the auctioneer and its contact details to the Authority, which will forward this information to the Commission. Under the Regulation, EU Member States are to notify the Commission.

Emissions Trading Scheme III

125. Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the EU was incorporated into the EEA Agreement by JCD No 6/2011 of 1 April 2011.

126. The system introduced by this Directive is based on an EU-wide cap[55] set by Commission Decision 2011/149/EU of 7 March 2011 on historical aviation emissions pursuant to Article 3c(4) of Directive 2003/87/EC.

54 See Recitals 18 and 19.

55 The Directive uses the term "total quantity of allowances". An "allowance" means an allowance to emit one tonne of carbon dioxide equivalent.

127. In order to respect the two-pillar structure as far as possible, JCD No 6/2011 foresees that the EEA Joint Committee shall decide on the EEA-wide historical aviation emissions on the basis of the figures provided by the Authority, in cooperation with Eurocontrol. The JCD foresees that the total quantity of allowances for the EEA, the EEA-wide allowances to be auctioned, the EEA-wide allowances to be put into a special reserve and those to be allocated for free are also decided upon by the EEA Joint Committee on the basis of the figures provided by the Authority, in cooperation with Eurocontrol.

128. With regard to benchmarks, the Commission Decision should include the EEA-wide benchmarks, which should be established in close cooperation with the Authority and swiftly incorporated into the EEA Agreement. This solution calls for close cooperation between the EFTA States (including the Authority) and the Commission during the decision-making process. In order to increase transparency in the EEA for all aviation operators concerned, the Commission will include special clauses in its decisions implementing Directive 2008/101/EC, making reference to the extension of Commission decisions to the EFTA States by JCDs.

Emissions Trading Scheme IV

129. Commission Regulation (EU) No 920/2010 of 7 October 2010 for a standardised and secured system of registries pursuant to Directive 2003/87/EC and Decision No 280/2004/EC was incorporated into the EEA Agreement by JCD No 156/2011 of 1 December 2011. The JCD contains several adaptation texts regarding the two-pillar structure.

130. The incorporation into the EEA Agreement of Commission Regulation (EU) No 1193/2011 establishing a Union Registry for the new trading period was necessary to enable the EFTA States to participate in the third phase of the EU ETS, which started on 1 January 2013. Under this Regulation, a registry, centralised at Union level, took over central tasks that had hitherto been assumed by the national registries and was assigned the task of administering a new IT platform for the EU ETS, the European Union Transaction Log (EUTL).

131. This new registry is headed by a Central Administrator to whom the Regulation confers powers, notably in respect of the issuing, transfer and cancellation of allowances. The Central Administrator is also competent to suspend the accounts for maintenance or security purposes, for example in the case of fraud or threat thereof. As this situation raises questions in respect of the two-pillar system, adaptations were foreseen to the effect that Commission must inform the Authority whenever accounts under the jurisdiction of EFTA States are concerned. If suspension of access to these accounts is not horizontal and directed at individual accounts under the jurisdiction of an EFTA State, the Authority shall adopt a decision on the applicability of the Commission's instruction to suspend access. There are also certain other adaptations concerning the involvement of the Authority, which is quite limited. The adaptation texts were designed to respect the need for the Central Administrator to be able to efficiently execute the tasks required for the good operation and maintenance of the Union Registry and the EUTL, irrespective of whether these concern operators or aviation operators administered by the EFTA States.

Single European Sky II

132. Regulation (EC) No 1070/2009 amends four regulations which are referred to as the first Single European Sky (SES) Package.[56] The Regulation was incorporated into the EEA Agreement by JCD No 228/2013.

133. The new Article 9a of Regulation (EC) No 550/2004 stipulates in paragraph 3 that the Member States shall establish functional airspace blocks.[57] A functional airspace block needs to cover the airspace of at least two Member States. According to paragraph 6 of the same Article, the Commission shall assess the fulfilment by each functional airspace block of the requirements and present the results to the Single Sky Committee for discussion.

134. Two-pillar issues arise when an airspace block is under the responsibility of both an EFTA State and an EU Member State. The JCD sets out a solution, whereby the Commission and the Authority are to cooperate with a view to agreeing on the assessment and, where necessary, the Commission will engage in a dialogue with the EU Member States and the Authority will do the same with the EFTA States.

135. The new Article 11 of Regulation (EC) No 549/2004 establishes a performance scheme for air navigation services and network functions. In particular, the Commission shall assess the consistency of the national or functional airspace block targets with the Community-wide performance targets. If the performance targets are not adequate, the Commission may decide that a Member State shall take corrective measures (see Article 11(3)(c)). In the same way as above, the question arises as to the involvement of the Authority in cases where the corrective measure needs to be addressed to a functional airspace block plan that involves airspace belonging to both an EFTA State and an EU Member State.

136. The JCD sets out a solution, whereby the Authority and the Commission will cooperate with a view to adopting identical positions with regard to functional airspace blocks that cover the airspace of one or more EU Member States and one or more EFTA States.

137. Furthermore, Article 11(2) of the same Regulation foresees that the Commission may appoint Eurocontrol or another body to act as a performance review body, which will assist the Commission and the national supervisory authorities in the implementation of the performance scheme. Eurocontrol may also be entrusted with the performance of air traffic flow management according to Article 6 of Regulation (EC) No 551/2004.

138. The JCD sets out an adaptation text, according to which the Standing Committee is to designate the performance review body for the EFTA States. The adaptation text further specifies that if the Commission has designated a performance review body, the Standing Committee shall endeavour to designate the same entity under similar conditions to fulfil the same tasks with regard to the EFTA States. The adaptation ensures, nevertheless, the formal respect of the two-pillar system of the EEA Agreement.

56 Regulation (EC) No 549/2004, Regulation (EC) No 550/2004, Regulation (EC) No 551/2004 and Regulation (EC) No 552/2004.

57 "Airspace block" means an airspace of defined dimensions, in space and time, within which air navigation services are provided.

Geographical indications of spirit drinks

139. Regulation (EC) No 110/2008 lays down rules on the definition, description, presentation and labelling of spirit drinks as well as on the protection of geographical indications of spirit drinks.

140. The procedures for obtaining protection of geographical indications of spirit drinks are similar to those that apply for agricultural products and foodstuffs (see Chapter III of the Regulation).[58] Applications for the protection of geographical indications for spirit drinks must be submitted by the relevant Member State to the Commission. If the application does not comply with the Regulation, the Commission may, in accordance with the regulatory procedure with scrutiny, refuse to register the product.

141. The Regulation was incorporated into the EEA Agreement on 30 April 2012 by JCD No 90/2012. An adaptation text sets out a deviation from the two-pillar structure for this Regulation, so that applications from the EFTA States for protection of geographical indications for spirit drinks are to be handled by the Commission and decided according to the regulatory procedure with scrutiny.

Intellectual property rights

142. Council Regulations (EC) No 40/94 and (EC) No 6/2002 set up a unitary system of protection of Community trademarks and Community designs throughout the EU Member States via registration at the Office for Harmonization in the Internal Market (OHIM) in Alicante. The Regulations stipulate that Member States should designate a limited number of national courts of first and second instance to have jurisdiction in matters of infringement and validity of Community trademarks and design. Decisions of these courts can then ultimately be appealed to the CJEU. Due to two-pillar issues, these Regulations were never incorporated into the EEA Agreement.

5. Conclusions

143. As is evident from the cases referred to above, various two-pillar issues have arisen in relation to the incorporation of acts into the EEA Agreement. As demonstrated by the case studies, the EFTA States have in most cases opted for a solution in line with the two-pillar structure of the EEA Agreement. It should also be noted that in most cases, solutions to such two-pillar issues have been dealt with on a case-by-case basis to cater for the specificities of the case at hand, even though inspiration may be drawn from solutions found in other cases.

58 Whereas the legislation concerning agricultural products and foodstuffs is based on the Common Agricultural Policy and therefore not considered EEA relevant, the Regulation on spirit drinks is based on Article 95 of the TEC (now Article 114 TFEU).

Adaptation texts to EU acts upon incorporation into the EEA Agreement

Note to the reader

This Legal Note by the Secretariat was drafted in May 2017 and updated in May 2019.

The purpose of the note is to explain the need for and use of adaptation texts when new EU legal acts are incorporated into the EEA Agreement. The note explains the distinction between horizontal, technical and substantive adaptations and gives examples. It also contains an explanation of which situations are covered by Protocol 1 to the EEA Agreement on horizontal adaptations. Finally, the note includes a check-list for when adaptation texts are necessary.

1. Introduction

1. The Agreement on the European Economic Area (EEA Agreement) allows Iceland, Liechtenstein and Norway (hereinafter the EFTA States) to participate fully in the Internal Market of the European Union. The aim of the EEA Agreement is to achieve a homogeneous EEA based on common rules and equal conditions of competition, thus extending the Internal Market to the EFTA States.[1] To ensure homogeneity, EU acts are continuously incorporated into the EEA Agreement by EEA Joint Committee Decisions (JCDs).[2]

2. When an EU act is eligible to be incorporated into the EEA Agreement, the act is scrutinised by experts in the EFTA States to determine whether it contains provisions that need to be adapted for the purposes of the EEA Agreement.[3] This may be necessary because the scope and institutional set-up of the EEA Agreement differ in certain respects from the EU Treaties, or because of the specific situation of an EFTA State. Such adjustments to EU acts upon their incorporation into the EEA Agreement are categorised as technical adaptations, substantive adaptations or exemptions.

3. The following sections of this note will explain what adaptation texts are and how they are categorised, as well as provide some practical examples. Some guidance as to when specific adaptations are not necessary, because the situation is already covered by a horizontal or sectoral adaptation, will also be provided.

2. Different categories of adaptations to EU acts

2.1. The difference between horizontal, sectoral and specific adaptations

4. An adaptation to an act implies that the relevant provisions of that act shall be read in a specific way for the purposes of the EEA Agreement. While adaptations are most commonly used to make the act fit within the framework of the EEA Agreement or to specify the legal position of the EFTA States (in which case, the phrase "as regards the EFTA States" may be used in the adaptation text), an adaptation may also concern the rights and obligations of authorities in the EU Member States or the EU institutions, or set out cooperation mechanisms between the EU and EFTA pillars of the EEA. The main point is that any act incorporated into the EEA Agreement has to be read with the agreed adaptations. This is the determining framework for rights and obligations in the EEA.

5. When scrutinising an act in order to determine whether any adaptations are necessary, it is important to be aware that certain *horizontal adaptations* follow already from Protocol 1 EEA. Protocol 1 EEA sets out how all EU acts incorporated into Annexes to the EEA Agreement shall apply, in order to *avoid recurring general adaptations to every act included in a JCD*. For example, a reference in an EU act to rights and obligations of EU Member States shall be understood in the EEA context as a reference to the Contracting Parties to the EEA Agreement, therefore also including the EFTA

1 Case C-452/01 *Ospelt* [2003] ECR I-09743, paragraph 29.

2 A JCD is a simplified form of international agreement between the EU and its Member States on the one hand, and the EFTA States that are party to the EEA Agreement on the other. See the Judgment of the EFTA Court in E-06/01 *CIBA*, paragraph 33.

3 This is done in the standard sheet sent by the EFTA Secretariat to the experts, which includes an analysis of possible EEA horizontal challenges.

States.[4] If a scenario is covered by Protocol 1 EEA, there is therefore, in principle, no need for a specific adaptation text (an explanation of the different paragraphs in Protocol 1 EEA may be found in section 3 below).

6. In addition to the horizontal adaptations in Protocol 1 EEA, some of the Annexes to the EEA Agreement contain *sectoral adaptations*. In order to determine whether an adaptation is necessary when incorporating an act into the EEA Agreement, it should first be checked whether the specific situation is covered by a sectoral adaptation.[5] Sectoral adaptations typically cover all acts to be incorporated into an Annex, or the chapter of an Annex, and therefore render specific adaptations to every act unnecessary. For example, Annex I to the EEA Agreement includes a sectoral adaptation specifying that Liechtenstein is exempted from acts incorporated into Chapter I on veterinary issues. Accordingly, it is not necessary to include an adaptation text to this effect when acts are to be incorporated into Chapter I of Annex I EEA.[6]

7. Similarly, a sectoral adaptation has been included in Annex XIV EEA (Competition), specifying, for example, that the term "Commission" shall be read as "competent surveillance authority". Since both the Commission and the EFTA Surveillance Authority can be competent to enforce the competition rules in the EEA Agreement in accordance with Article 56 EEA, the sectoral adaptation in Annex XIV EEA renders it unnecessary to address this issue upon incorporation of new acts into Annex XIV EEA.

8. A specific adaptation to an EU act can also be included in the JCD upon incorporation of the relevant act into the EEA Agreement.[7] In that instance, the adaptation text will be included in the Annex to the EEA Agreement where the act is incorporated. Where there is an adaptation to a basic legislative act (i.e. the main regulation or directive forming the basis for later acts), this adaptation may also be valid for related acts (typically implementing/delegated acts). For instance, an adaptation to the mother act stipulating that a specific provision shall not apply to an EFTA State has the effect of excluding later implementing/delegated acts adopted on this legal basis. Hence, it is not necessary to also stipulate that the delegated/implementing act is not to apply.

9. It is important to be aware that although different in name, horizontal, sectoral and specific adaptations all produce the same legal effect in the sense that the act incorporated into the EEA Agreement has to be read in light of these adaptations. Consequently, there is, from a legal perspective, no need to repeat a specific adaptation that already follows from sectoral or horizontal adaptations, and so on.

10. As regards specific adaptations to EU acts and sectoral adaptations, these may be either of technical and/or substantive character. Technical adaptations ensure that the participation of the EFTA States in the Internal Market is reflected, but do not have any substantive bearing on the legislation being incorporated into the EEA Agreement. Substantive adaptations, on the other hand, typically entail a deviation

4 See paragraph 7 of Protocol 1 EEA.

5 Sectoral adaptations can be found in Annexes I, II, V, IV, IIV, IIIV, IX, XII, XIII, XIV, XV, XVI, XVII, XIX, XX, XXI and XXII EEA.

6 For the purpose of clarity, it is nevertheless repeated in a recital in all JCDs regarding Annex I EEA. See, for example, JCD No 136/2016 of 8 July 2016.

7 On some occasions, adaptation texts may be agreed upon by the EEA Joint Committee after the relevant act has been incorporated into the EEA Agreement.

from or an amendment of the system or rules laid down in the act. The following sections of this chapter will set out some examples of technical and substantive adaptations and will explain why the distinction between them is of practical importance.

2.2. Technical adaptations

11. The most common adaptations are technical adaptations. A typical example of this type of adaptation is a text that adds the EFTA States to a list of EU countries in an act, for instance in JCD No 158/2015 incorporating Commission Regulation (EU) No 361/2014 laying down detailed rules regarding documents for the international carriage of passengers by coach and bus. Upon incorporation of the act into the EEA Agreement, a technical adaptation was included stipulating that in the documents set out in Annexes II, III, IV, V and VI to the regulation, the words "Iceland (IS), Liechtenstein (FL) and Norway (N)" were to be added to any list of international distinguishing signs. The adaptation text also specifies that the abbreviations "IS", "FL" and "N" shall be inserted into the table of the document set out in Annex VI to the Regulation.[8] Whilst not impacting the substance of the act in any way, this adaptation ensures that the EFTA States' participation in the Internal Market, in accordance with the EEA Agreement, is duly reflected.

12. Similarly, an adaptation stipulating that undertakings/regulatory authorities of the EFTA States shall be added to a list displaying the names of such entities in the EU Member States also constitutes a technical adaptation. This is the case in JCD No 293/2015, which incorporates Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings. According to the Directive, coordination measures prescribed by it shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of undertakings listed. The adaptation text to Annex I to the Directive contains a list of types of undertakings in their native languages. The undertakings for Iceland, Norway and Liechtenstein are added in their native languages by virtue of the adaptation text.[9] Accordingly, coordination measures prescribed by the Directive also apply to these undertakings when the Directive is implemented nationally.

13. The EEA Agreement is modelled on the primary legislation of the EU (Treaty of Rome) at the time of the EEA Agreement's entry into force, as well as secondary legislation (EEA-relevant regulations, directives, decisions and certain non-binding instruments). Hence, a large part of the EEA Agreement is identical in wording to the relevant provisions governing the four freedoms as laid down in the Treaty on the Functioning of the European Union (TFEU).

8 See adaptation (e) in JCD No 158/2015. See also JCD No 272/2015 of 30 October 2015, incorporating Commission Regulation (EU) No 1304/2014 of 26 November 2014 on the technical specification for interoperability relating to the subsystem "rolling stock – noise" into Annex XIII (Transport) EEA. The adaptation text inserts "Norway and" before the word "Sweden"' in Annex 7.3. 2.3 (a) and 7.3. 2.4 (a) to the Regulation, thereby extending the application of the specific rules for Sweden to Norway.

9 See also JCD No 128/2014.

14. However, when an EU act refers to a provision of the TFEU (EU primary law), it is necessary to replace these references with references to the corresponding provision in the main part of the EEA Agreement. This is because the legal framework for determining rights and obligations in the EEA as a whole is the EEA Agreement, as the EU internal legal framework does not apply directly to the EFTA States. In cases where the provisions of the EEA Agreement and the EU Treaties are identical in wording, such adaptations will be merely technical in nature.

15. One example of this can be found in JCD No 152/2014 incorporating Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the Internal Market in application of Articles 107 and 108 TFEU. The adaptation text stipulates that Article 107 of the Treaty shall be read as Articles 61 or 62 of the EEA Agreement. Furthermore, the term "compatible with the Internal Market" shall be read as "compatible with the functioning of the EEA Agreement" and the term "Union law" shall be read as "the EEA Agreement".[10]

16. The distinction between a technical and substantive adaptation is not always clear. An example of this is third-country provisions in EU acts. Whilst there are no provisions in the EEA Agreement explicitly excluding third-country issues from the scope of the EEA Agreement, the EFTA States have not transferred their respective treaty-making powers to any kind of supranational organ. Provisions allowing the EU to conclude international agreements concerning third countries are not usually adapted for the purposes of the EEA Agreement, as provisions on Union competence as regards international agreements will in any event not apply to the EFTA States. In principle, it is thus not necessary to adapt such provisions when incorporating acts into the EEA Agreement. However, specific adaptations to this kind of third-country provisions are sometimes included for clarity. In these cases, the adaptation should be characterised as technical rather than substantive, since it does not entail a deviation from Internal Market elements of the legislation.

17. An example of a third-country adaptation that should be considered technical in nature can be found in JCD No 97/2016, incorporating Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on public procurement into the EEA Agreement. The JCD contains an adaptation text that explicitly exempts the EFTA States from the third-country provisions and from the EU's trade policy towards third countries (e.g. the WTO regime and the Agreement on Government Procurement (GPA)).[11] This adaptation does not, however, imply a deviation from the Internal Market rules for the EFTA States, as it merely specifies what already follows from the EEA Agreement, namely that the Agreement does not cover external relations

10 Some adaptations cater for nation-specific cases for all EU Member States. The adaptation text then caters for each EEA EFTA State. See, for example, JCD No 187/2015 amending Annex XIII EEA on Transport. The act regards a technical specification for interoperability relating to the rolling stock locomotives and passenger rolling stock subsystem of the rail system and applies to electric traction units.

11 In particular, the adaptation to Directive 2014/24/EU specifies that Article 25 of the Directive, which concerns conditions relating to the GPA and other international agreements, shall not apply to the EFTA States. The adaptation text to Directive 2014/25/EU states that Articles 43, 85 and 86 shall not apply. These provisions deal with conditions relating to the GPA and other international agreements, tenders comprising products originating in third countries and relations with third countries as regards works, supplies and service contracts. These provisions clearly constitute a part of the EU's external relations policy, which falls outside the scope of the EEA Agreement and is consequently not to apply to the EFTA States.

and trade towards third countries. Consequently, this may be taken as an example of a technical adaptation to an EU act.[12] The situation would have been different if the provisions had predominantly contained third-country elements having an impact on the functioning of the Internal Market.

18. Many EU acts include provisions on transitional arrangements. One example of this is Article 46 of Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps. This Regulation was applicable in the EU as of 1 November 2012, but the JCD incorporating the Regulation was only adopted on 30 September 2016 with an entry into force on 1 February 2017.[13] Article 46 of the Regulation stipulates a transitional period until 25 March 2012 for certain credit default swap transactions. The adaptation text to the Regulation stipulates that the date "25 March 2012" shall read "the date of entry into force of Decision of the EEA Joint Committee No 204/2016 of 30 September 2016". The incorporation of such acts without an adaptation text as regards transitional measures for operators in the EFTA States will imply that these cannot benefit from the transitional arrangements in the same manner as EU operators, since the time for transitional arrangements might already have lapsed by the time the act is incorporated into the EEA Agreement. Such adaptations should be regarded as technical in nature, as they do not imply substance alterations.

19. Similarly, JCD No 202/2016 incorporating Directive 2011/61/EU includes adaptations to align certain cut-off dates for the EFTA States with those in the EU, see adaptation (h) regarding conditions to be fulfilled by depositaries under Article 21(3)(c); adaptation (i)(ii) for Member States to allow the marketing of Alternative Investment Funds (AIFs) to retail investors under Article 43(2); and adaptation (l) for Alternative Investment Fund Managers (AIFMs) to avail themselves of certain transitional measures under Article 61. Such adaptations affect the rights and obligations of market participants in the EFTA States, which also would seem to qualify them as substantive in nature. However, they predominantly aim to mirror the situation in the EU, affording market participants in the EFTA States the same transitional arrangements as in the EU. They do not aim to narrow or otherwise alter the scope of legal obligations. Consequently, this would suggest that these adaptations are technical in nature.

2.3. Substantive adaptations

2.3.1. Institutional set-up – two-pillar issues

20. In addition to technical adaptations, it may sometimes be necessary to include substantive adaptations to acts that are to be incorporated into the EEA Agreement. As mentioned above, typically, substantive adaptations entail a deviation from or an amendment of the system or rules laid down in the act.

21. Substantive alterations may be necessary in order to make an act compatible with the constitutional boundaries of the EFTA States and the two-pillar structure of the EEA Agreement. For instance, EU acts may establish new tasks or competences allocated to EU institutions which were not envisaged at the time of conclusion of the EEA Agreement and therefore not reflected in the Agreement. This is increas-

12 The EU took the same view on this issue, as the JCDs were adopted on behalf of the EU by the Commission and not sent to the Council.

13 Incorporated into the EEA Agreement by JCD No 204/2016.

ingly the case with acts establishing agencies and supervisory authorities. As the EEA Agreement does not directly regulate the creation of separate *EEA regulatory bodies or agencies* in the EFTA pillar to mirror those of the EU, the Contracting Parties usually need to find solutions to reflect modalities for EFTA participation within the existing bodies, respecting the two-pillar structure.

22. One example of this is the incorporation into the EEA Agreement of Regulation (EU) No 1093/2010 (European Banking Authority (EBA)), Regulation (EU) No 1094/2010 (European Insurance and Occupational Pensions Authority (EIOPA)) and Regulation (EU) No 1095/2010 (European Securities and Markets Authority (ESMA)).[14] These three authorities are collectively known as the EU Supervisory Authorities (EU ESAs). In the regulations establishing them, they are granted extensive decision-making powers. The EU ESAs are inter alia competent to take decisions to (i) temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of the financial markets or their stability; (ii) adopt individual decisions addressed to financial institutions/market participants requiring the necessary action to comply with their obligations under EU law; (iii) adopt individual decisions in emergency situations requiring competent national authorities to take necessary action; and (iv) settle disagreements between competent national authorities in cross-border situations.[15] The fundamental EEA challenge related to the incorporation of the EU ESAs into the EEA Agreement has been how to preserve the key advantages of supervision by a single authority whilst respecting the two-pillar structure of the EEA Agreement.

23. Whilst decisions in the EU pillar pursuant to the Regulations rest with an EU ESA, the adaptation text stipulates that the competence to adopt decisions in the EFTA pillar shall be vested in the EFTA Surveillance Authority. A decision by the EFTA Surveillance Authority will be based on a draft from the relevant EU ESA. The EFTA Surveillance Authority may also request an EU ESA to issue a draft where it considers that measures are required. This is an example of where the nature of the powers of an agency on the EU side has called for substantive adaptations upon incorporation of the act into the EEA Agreement.[16]

24. Another example of an adaptation due to the institutional set-up in the EEA is JCD No 147/2015, which incorporates Regulation (EC) No 258/97 concerning novel food and novel food ingredients into the EEA Agreement. Article 7 of the Regulation gives the Commission the competence to take authorisation decisions in certain instances for products to be placed on the market. The adaptation text to Article 7 states that:

> *When the Commission takes authorization decisions, the EFTA States will simultaneously and within 30 days of the Community Decision, take corresponding decisions. The EEA Joint Committee shall be informed, and shall periodically publish lists of such decisions in the EEA Supplement to the Official*

14 See JCD Nos 199/2016, 200/2016 and 201/2016.

15 To be noted that natural or legal persons may appeal against binding decisions of the EU ESA to the Board of Appeal. Decisions of the Board of Appeal can be brought before the Court of Justice of the European Union.

16 The same could be said for the incorporation of Regulation (EC) No 713/2009 (ACER) into the EEA Agreement, see JCD No 93/2017.

Journal. Should any disagreement between the contracting parties arise to the administration of these provisions, Part VII of the Agreement shall apply mutatis mutandis.

25. The adaptation text makes clear that authorisation decisions adopted by the Commission in the EU pillar, shall be followed up by corresponding decisions by the EFTA States in the EFTA pillar. This constitutes a substantive adaptation to the EU act, as the system of authorisation decisions in the EU pillar has been centralised, whilst the process is decentralised for the EFTA States. The solution is based on similar solutions already established for the EU authorisation of medicinal products as set out in Annex II EEA, Chapter XIII and of chemicals as set out in Annex II EEA, Chapter XV (Regulation (EC) No 1907/2006 – the REACH Regulation).

2.3.2. Exemptions

26. Substantive adaptations can also be necessary due to a specific situation in an EFTA State. This could be the case where geography, topography, climate, infrastructure, the economic or demographic situation or other similar circumstances in an EFTA State require a substantive adaptation before incorporation of the act into the EEA Agreement. Such substantive adaptations usually take the form of exemptions.

27. Exemptions are a form of substantive adaptation where one or more of the EFTA States are exempted from certain provisions of an act or an entire act upon its incorporation into the EEA Agreement. In these cases, it is useful to recall that EU acts may on occasion include exemptions for certain Member States due to specific reasons, e.g. the exemptions for Malta and Cyprus in railway acts,[17] and the exemption from Directive (EU) 2016/1629 for countries that do not have inland waterways.[18] Since the EFTA States are not part of the EU and this situation cannot be addressed in the legal act, similar needs of the EFTA States must be addressed at the incorporation stage.

28. Some exemptions were negotiated during the establishment of the EEA Agreement and still apply to Iceland and Liechtenstein due to their specific size and situation. For example, Iceland has been exempted from legislation concerning the movement of pet animals due to fear of the spread of diseases in Iceland.

29. Exemptions can also be negotiated on a case-by-case basis. One example where an exemption from an EU act has been included is JCD No 10/2006 amending Annex XIII EEA (Transport). This JCD incorporates Directive 2004/54/EC on minimum safety requirements for tunnels in the Trans-European Road Network. It follows from the adaptation text that, as regards the minimum safety measures referred to in Article 3 of the Directive and laid down in Annex I to the Directive, "[a]n exception [to the rules on emergency exists in new tunnels] can be made for tunnels shorter than 10 km and with traffic volume lower than 4 000 vehicles per lane if a risk analysis shows that the same or better overall safety can be obtained with alternative safety measures". This is an example of an adaptation where the EFTA States (for practical purposes, Norway), were exempted from the legal requirements regarding safety measures as laid down in the Directive.

17 See e.g. Article 64(2) of Directive 2012/34/EU establishing a single European railway area.

18 See Article 40 of Directive (EU) 2016/1629 on technical requirements for inland waterway vessels.

30. Another example of an exemption can be found in JCD No 175/2013 incorporating Regulation (EU) No 70/2012 on statistical returns in respect of the carriage of goods by road. It follows from the adaptation text that the Regulation shall not apply to Iceland. A similar exemption was made for Iceland to Council Regulation (EC) No 1172/98, which was repealed by Regulation (EU) No 70/2012. The reason at that time was the total isolation of the Icelandic road system from the European road system. For that reason, Icelandic statistics on domestic carriage of goods by road would not add any further information to the statistics on European carriage of goods by road. As the situation was still the same at the time of incorporation of Regulation (EU) No 70/2012, the adaptation states that the Regulation shall not apply to Iceland. This is a typical example of an exemption agreed upon due to country-specific issues. It is difficult to see how the exemption may have an effect on the functioning of the Internal Market.

31. When discussing the need for adaptation text, and specifically exemptions, a distinction should be made between *"true" exemptions* (referred to above) and *derogations*. On the EU side there are essentially two ways in which a Member State may be exempted from the obligations laid down by the legal act. Firstly, an exemption for a specific country can be provided for directly in the EU act itself (see for example the exemptions for Cyprus and Malta in the railway acquis as mentioned above). If EU legislation provides for an exemption for one of its Member States in the act itself and the same exemption is to apply to an EFTA State, this needs to be negotiated and manifested in an adaptation text in the JCD.

32. Secondly, the relevant legal act could contain a provision according to which a Member State may derogate from certain provisions of the act, with an obligation to inform the Commission that it is making use of this possibility. This is by far the most common in EU legislation. If a legal act allows Member States to derogate from certain provisions of the act, there is no need for an adaptation text in order for the same possibility to apply to the EFTA States. This follows from paragraph 7 of Protocol 1 EEA read in conjunction with paragraph 4(d) (see below).

2.3.3. Distinction between technical and substantive adaptations in practice

33. The distinction between a technical and substantive adaptation is first and foremost of practical importance as regards the timeline for the adoption of a JCD. In certain cases, the discussions have taken several years. Furthermore, a JCD including substantive adaptations will need approval from the Council of the EU before it can be adopted in the EEA Joint Committee, whereas a JCD including only technical adaptations can be adopted by the Commission.[19]

34. In circumstances where a JCD introduces substantive adaptations to an EU act, the European External Action Service (EEAS) has to prepare a draft Council decision on the position of the EU regarding the draft JCD. The draft Council decision is then transmitted to the Commission's cabinet, normally with a deadline of a few weeks for silent approval. Once the draft Council decision on the position of the EU regarding the draft JCD has been approved, the Commission's services start to translate the draft Council decision into all

19 See Article 1(2) and (3) of Regulation (EC) No 2894/94 concerning arrangements for implementing the EEA Agreement.

other official languages of the EU, which takes at least one month. The translations are done in parallel with the Council procedures.

35. The draft Council decision is then sent to the Council, together with the draft JCD. These documents are first analysed by the Council Working Party. Once the Working Party has agreed on both texts, they are submitted to the Committee of Permanent Representatives (Coreper).[20] At least two weeks are needed between the decision of the Working Party and the meeting of Coreper, where these documents will be put on the agenda (as "A-list" items). Once the Council has approved both texts, the draft JCD is ready to be adopted on the EU side. It is then put on the "long list" of JCDs to be adopted at the next EEA Joint Committee meeting. This implies that the timeline for the adoption of a JCD with substantive adaptations is usually three to six months after negotiations on the JCD have been concluded with the Commission, sometimes longer.

36. The above implies that the difference between technical and substantive adaptations is first and foremost an issue of *EU administrative law*. Apart from arguing that an adaptation is technical or substantive, the EFTA States have no say in whether a JCD including adaptations will be sent to Council or not. Consequently, if it is not obvious whether an adaptation text will be classified as technical or substantive, referring to previous cases/precedents may be useful in order to speed up the timeline for the adoption of the JCD.

3. Protocol 1 EEA – Assessment of the need for adaptations

3.1. Introduction

37. As mentioned above, Protocol 1 EEA lays down horizontal adaptations to acts incorporated into the Annexes to the EEA Agreement. In principle, each EU act incorporated into the EEA Agreement has to be read in the light of Protocol 1 EEA.

38. According to the introductory paragraph of Protocol 1 EEA, the provisions of the acts referred to in the Annexes to the EEA Agreement shall be applicable in accordance with the EEA Agreement and Protocol 1 EEA, unless otherwise provided in the respective Annex. This implies that, insofar as provisions of an incorporated act are covered by the paragraphs in Protocol 1 EEA, a specific adaptation is not necessary. The reservations mentioned in the introductory paragraph also imply that in cases where sectoral adaptations have been provided for in an Annex to the EEA Agreement, or in the case of a specific adaptation text to an act in a JCD, these will prevail over the horizontal adaptations included in Protocol 1 EEA. It should also be mentioned that Protocol 1 EEA explicitly refers to the acts incorporated into the Annexes to the EEA Agreement, and as such does not explicitly cover the protocols to the EEA Agreement.

20 Coreper stands for the "Committee of the Permanent Representatives of the Governments of the Member States to the European Union". Its role and different formations are explained in Article 240(1) TFEU. Coreper is the Council's main preparatory body. All items to be included in the Council's agenda (except for some agricultural matters) must first be examined by Coreper, unless the Council decides otherwise.

3.2. Guidance on the use of Protocol 1 EEA

3.2.1. Paragraph 1 – Introductory parts of the acts

39. It follows from paragraph 1 of Protocol 1 EEA that preambles to acts are not adapted for the purposes of the EEA Agreement. The term "preamble" means everything between the title and the enacting terms of the act, typically the citations and the recitals.[21] The preamble to the act is to be applied to the extent that it is relevant and necessary for the proper interpretation of the act.

40. In *DB Schenker*, the EFTA Court referred to the necessity to take account of the preamble by virtue of Protocol 1 EEA. The Court stated that:

> *Chapter II of Protocol 4 SCA contains general procedural rules implementing Articles 53 and 54 EEA. These provisions largely transpose Regulation EC/1/2003, without explicitly reproducing that Regulation's preamble. However, Article 1 of Protocol 1 EEA states that the preamble is relevant to the extent necessary for the proper interpretation and application, within the framework of the EEA Agreement, of relevant provisions. The Court holds that a proper interpretation and application must be made in accordance with the principle of homogeneity.*[22]

One interesting feature of the judgment is that the EFTA Court referred to paragraph 1 of Protocol 1 EEA when interpreting Regulation (EC) No 1/2003, which is incorporated into Protocol 21 EEA (and thus not an Annex to the EEA Agreement). The legal reasoning nevertheless appears to be vested in the principle of homogeneity and not Protocol 1 EEA as such.

3.2.2. Paragraph 2 – Provisions on EU committees

41. Paragraph 2 of Protocol 1 EEA stipulates that procedures, institutional arrangements or other provisions concerning EU committees contained in the acts referred are dealt with in Articles 81, 100 and 101 EEA and in Protocol 31 EEA. In principle, this paragraph only reproduces the rights of the EFTA States pursuant to Articles 99 to 101 EEA and Protocol 31 EEA to participate in EU committees and, in particular, EU comitology committees.

42. In light of this, an adaptation text stipulating that the EFTA States would have the right to participate in comitology committees is, from a legal perspective, unnecessary and should be avoided. If practical experience demonstrates that access to certain committees has been problematic, the EFTA States can refer to the main text of the EEA Agreement, Protocol 31 EEA and Protocol 1 EEA as the legal basis for participation rights.

21 See http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf, paragraph 7.2. The "recitals" are the part of the act containing the statement of reasons for its adoption; they are placed between the citations and the provisions of the act. The statement of reasons begins with the term "whereas:" and continues with numbered points (see Guideline 11) comprising one or more complete sentences. It uses non-mandatory language and must not be capable of being confused with the enacting terms.

22 See Case E-14/11 [2012] *DB Schenker v EFTA Surveillance Authority* EFTA Ct. Rep. p. 1178, para. 115. See also Case E-16/11 [2013] *EFTA Surveillance Authority v Iceland* EFTA Ct. Rep. p. 7, para. 122.

43. On a separate note, it is nevertheless doubtful that the aforementioned provisions and Protocol 1 EEA can be used as a legal basis for participation in committees referred to in acts that are not yet incorporated into the EEA Agreement (due to the "backlog" in the incorporation of acts).

3.2.3. Paragraph 3 – Provisions setting up procedures for adapting/amending EU acts

44. Paragraph 3 of Protocol 1 EEA concerns provisions contained within an incorporated EU act relating to procedures for adapting or amending the act. Such procedural provisions do not apply in an EEA context, as only the EEA Joint Committee is competent to amend the acts incorporated in accordance with the decision-making procedures of the EEA Agreement. Therefore, if, for example, an incorporated act gives the Commission the competence to make amendments to the same act, such amendments would not apply to the EFTA States unless also the amending act was incorporated into the EEA Agreement through a Joint Committee Decision.

45. The paragraph does not have any additional legal implications, besides reaffirming that the EFTA States are only bound by the acts that are incorporated into the EEA Agreement. The procedures for incorporation of EU acts into the EEA Agreement already follow from Part VII of the main text of the EEA Agreement. Only once an act is incorporated into the EEA Agreement in accordance with these procedures, is it binding upon the EEA Contracting Parties and should be made part of their legal orders. This already follows from Article 7 of the EEA Agreement.

3.2.4. Paragraph 4 – Exchange of information and notification procedures

46. Paragraph 4 of Protocol 1 EEA concerns exchange of information and notification procedures. It renders many adaptations to EU acts unnecessary in practice and has a wide sphere of application.

47. Paragraph 4(a) of Protocol 1 EEA covers the information process between an EFTA State (or its competent authorities) and the EFTA Surveillance Authority. Specifically, it follows from paragraph 4(a) that where an EU Member State is to submit information to the Commission, an EFTA State shall submit such information to the EFTA Surveillance Authority, which shall pass it on to the Standing Committee of the EFTA States. The same shall apply when the transmission of information is to be carried out by the competent authorities. The Commission and the EFTA Surveillance Authority shall exchange information that they have received from the EU Member States, the EFTA States or the competent authorities.

48. Therefore, where an EU act concerns information and notification obligations imposed on Member States, an adaptation text is in most cases unnecessary. One example of a situation where paragraph 4(a) was applicable and a specific adaptation text was unnecessary is Article 21(2) of the Services Directive (Directive 2006/123/EC). It follows from this provision that Member States shall communicate to the Commission the names and contact details of the bodies they designate according to this Article. Pursuant to paragraph 4(a) of Protocol 1 EEA, the EFTA States have to communicate their designated bodies to the EFTA Surveillance Authority.[23]

23 See also the IMI Regulation (EU) No 1024/2012, which was incorporated into the EEA Agreement by JCD No 102/2015.

49. It may nevertheless be questioned whether an adaptation text is needed where the Commission shall communicate the information received by the EFTA Surveillance Authority to the EU Member States, and the EFTA Surveillance Authority information received from the Commission and the EFTA States to the Standing Committee for distribution to all EFTA States. If interpreted strictly, this is not covered by Protocol 1 EEA.[24]

50. Paragraph 4(b) of Protocol 1 EEA deals with the transmission of information between Member States. It follows from this provision that where an EU Member State is to submit information to one or more of the other EU Member States, it shall also submit the same information to the Commission, which shall pass it on to the Standing Committee for distribution to the EFTA States. In the same way, an EFTA State submitting information to one or more of the other EFTA States, shall submit the same information to the Standing Committee, which shall pass it on to the Commission for distribution to the EU Member States. The same applies when information is to be submitted by competent authorities.

51. Article 28(2) of the Services Directive is an example of how paragraph 4(b) applies in practice. Article 28(2) of the Directive stipulates that Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States and the Commission. Pursuant to paragraph 4(b) of Protocol 1 EEA, the EFTA States shall submit this information to the other EFTA States and the Standing Committee. No adaptation text to this effect was therefore necessary upon incorporation of the Services Directive into the EEA Agreement.

52. Paragraph 4(c) of Protocol 1 EEA establishes the possibility to deviate from the principle that the exchange of information across the two pillars is to take place through the EFTA Surveillance Authority and/or the Standing Committee by stating that "[i]n areas where, for reasons of urgency, rapid transfer of information is called for, appropriate sectoral solutions providing for direct exchange of information shall apply".

53. When the Telecom Package[25] was discussed, the Secretariat took the view that paragraph 4(c) of Protocol 1 EEA only applied where the flow of information needed to be accelerated. Where the urgency lies with the measure to be adopted and not with the information to be consequently transmitted, paragraphs 4(a) and (b) of Protocol 1 EEA are applicable.

54. Through the application of paragraph 4(d) of Protocol 1 EEA, certain administrative, executive and surveillance functions of the Commission are to be carried out for the EFTA States according to procedures to be established by them. Various two-pillar issues are resolved by Protocol 1 EEA, such as procedures for verification or approval, the submission and exchange of information, notifications or consultations and similar matters.

24 As regards Article 21(2) of the Services Directive, an adaptation text to take account of this was included in the JCD. Cf. JCD No 45/2009.

25 Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (OJ L 108, 24.4.2002, p. 33), Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (OJ L 108, 24.4.2002, p. 7), Directive 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 108, 24.4.2002, p. 21) and Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (OJ L 108, 24.4.2002, p. 51).

55. When EU acts are incorporated into the EEA Agreement, it must be decided which EFTA institution will be allocated the tasks that are given to the Commission in the EU legislation. This is often referred to as "division of tasks", i.e. the process whereby the EFTA States and the EFTA Surveillance Authority agree on the responsibility for these tasks between themselves.

56. Protocol 1 EEA does not take a position on whether these tasks have to be carried out by the Standing Committee or the EFTA Surveillance Authority, but merely specifies that they shall be carried out according to procedures established among the EFTA States. Such procedures were established through the Surveillance and Court Agreement (SCA) and the Standing Committee Agreement. The division process is consequently done according to: (1) the EEA legal basis allocating the task to the EFTA pillar (Protocol 1 EEA); and (2) an "internal" legal basis allocating the task to the EFTA Surveillance Authority and/or Standing Committee (Protocol 1 SCA/Protocol 1 to the Standing Committee Agreement). The guiding principle of this division is to entrust all surveillance-related functions to the EFTA Surveillance Authority. The functions entrusted to the Standing Committee include mostly elements of a legislative character, as well as certain administrative functions.

57. It can nevertheless be difficult to ascertain sometimes whether a particular provision entails a task of surveillance character, which is to be allocated to an EFTA institution pursuant to Article 4(d) of Protocol 1 EEA.

58. A good example of a situation that is covered by paragraph 4(d) of Protocol 1 EEA and to be allocated to the EFTA Surveillance Authority pursuant to Article 2(1) of Protocol 1 SCA is Article 7 of Directive 2009/125/EC on eco-design for energy products. Article 7(3) stipulates that a Member State shall *inform* the Commission and the other Member States immediately of any decision taken pursuant to the safeguard clause in Article 7(1). In this sense, a passive role is also a task covered by paragraph 4(d) of Protocol 1 EEA (i.e. the task is to receive the information from the Member States).

59. Whether or not Protocol 1 EEA covers situations where the tasks of the Commission relate to an undertaking, and not to a Member State, has been the topic of some discussions, for example in relation to the discussion on the incorporation of Regulation (EU) No 995/2010 (the Timber Regulation) into the EEA Agreement. Article 8(3), (5) and (6) relate to the Commission's tasks of recognising, monitoring and withdrawing recognition of monitoring organisations. It may be argued that these tasks fall within the scope of paragraph 4(d) of Protocol 1 EEA. To ensure full clarity of the functions of the EFTA Surveillance Authority and to increase the legal certainty for the undertakings that are subject to the obligations in these acts, an adaptation might all the same be useful in these cases. Such an adaptation was added to the Timber Regulation, stating that the EFTA Surveillance Authority was to carry out these tasks as regards the EFTA States.

3.2.5. Paragraph 5 – Review and reporting procedures

60. Pursuant to paragraph 5 of Protocol 1 EEA, the EFTA Surveillance Authority or the Standing Committee, depending on the case, shall draw up a report or an assessment with regard to the EFTA States, corresponding to a report being prepared on the EU side. This is therefore also subject to a division of tasks between the EFTA Surveillance Authority and the Standing Committee, as described above. Whenever the Standing Committee is preparing a report with aspects linked to implementation, it will normally also receive input from the EFTA Surveillance Authority.

Furthermore, Protocol 1 EEA foresees that the EFTA Surveillance Authority or the Standing Committee shall consult and exchange views with the Commission. A copy of the report is to be sent to the EEA Joint Committee.

61. The preparation of the report referred to in paragraph 5 of Protocol 1 EEA seldom takes place in practice, as in most instances this would require a disproportionate amount of resources and timely notifications by the Commission. For the purposes of this note, the main point of importance in any event is that such a provision will not need to be adapted upon its incorporation into the EEA Agreement.

3.2.6. Paragraph 6 – Publication of information

62. It follows from paragraph 6(a) that where, according to an act referred to, an EU Member State is to publish certain information on facts, procedures and the like, the EFTA States shall also, under the Agreement, publish the relevant information in a corresponding manner. Pursuant to paragraph 6(b) where, according to an act referred to, facts, procedures, reports and the like are to be published in the Official Journal of the European Union (OJ), the corresponding information regarding the EFTA States shall be published in a separate EEA section thereof. Accordingly, there is no need for an adaptation text to this effect when a new act containing such provisions is incorporated.

63. One example of when paragraph 6 of Protocol 1 EEA would apply can be found in Regulation (EU) No 1370/2007 on public passenger transport services. Article 7(2) stipulates that each competent authority shall take the necessary measures to ensure that, at least one year before the launch of an invitation to tender procedure or one year before the direct award, information is published in the OJ regarding the name and address of the competent authority, the type of award envisaged, and the services and areas potentially covered by the award. Since paragraph 6 of Protocol 1 EEA covers this scenario, no adaptation text to this provision was included.[26]

64. The publication clause in paragraph 6 of Protocol 1 EEA refers to the publication of information as stipulated in the *act* itself. This should not be confused with the publications pursuant to the exchange of letters between the EFTA States and the EU concerning the publication of information relevant to the EEA Agreement.[27] This agreement provides for publication of, among other things, JCDs, information regarding technical standards, notices in competition and state aid cases and texts from the EFTA Court and the EFTA Surveillance Authority in the EEA Supplement to the OJ.

3.2.7. Paragraph 7 – Rights and obligations

65. It follows from paragraph 7 of Protocol 1 that rights and obligations placed on the EU Member States or their public entities, undertakings or individuals in relation to each other, shall be understood as to be placed upon the EFTA States as well, including, their competent authorities, public entities, undertaking or individuals.

66. The term "in relation to each other" should be read as to refer to EU Member States, their public entities and undertakings, as well as individuals. Whilst in English "in relation to each other" could be read as referring only to individuals, such a reading appears to be too

26 See JCD No 85/2008.

27 See arrangements regarding publication of EEA-relevant information, annexed to the Final Act of the EEA Agreement, page 18: http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Final%20Act/FinalAct.pdf

narrow pursuant to the Norwegian, German and French texts. The purpose appears to be to avoid application of paragraph 7 in cases where a legal act only imposes obligations or gives rights to one particular Member State, or one undertaking or individual, due to specific circumstances. In such cases, paragraph 7 of Protocol 1 EEA should not apply.

67. One example where paragraph 7 of Protocol 1 EEA applies can be found in Article 2(2) of Decision 2014/287/EU, which gives all Member States the right to respond to the call for interest to establish a European Reference Network. An interpretation of this provision suggests that Member States must be considered to have this right "in relation to each other". Accordingly, the provision is covered by the horizontal adaptation in paragraph 7 of Protocol 1 EEA.

68. Protocol 1 EEA does not explicitly include agencies, and they cannot be understood to form part of the Commission (see above in relation to paragraph 4(d)). Furthermore, under Protocol 1 EEA, agencies cannot be considered public entities of the Member States. It is therefore evident that Protocol 1 EEA does not cover the relationship between Member States or their public entities on the one hand, and agencies on the other. For these reasons, an adaptation text should be included as regards rights and obligations in relation to agencies. This was done, for example, when Regulation (EC) No 216/2008 establishing a European Aviation Safety Agency (EASA) was incorporated into the EEA Agreement.[28]

3.2.8. Paragraph 8 – Reference to territories

69. Whenever the acts referred to contain references to the territory of the "Community" or of the "Common Market", these references shall for the purposes of the EEA Agreement be understood to be references to the territories of the Contracting Parties as defined in Article 126 of the Agreement. Article 126 EEA stipulates that the EEA Agreement applies in the territories of the EU, in addition to the territories of Iceland, Liechtenstein and Norway. This means that provisions in EU acts concerning territorial application normally do not need to be adapted when incorporated into the EEA Agreement.

3.2.9. Paragraph 9 – Reference to nationals of EU Member States

70. It follows from paragraph 9 of Protocol 1 EEA that whenever an act contains references to nationals of EU Member States, the references shall for the purposes of the Agreement be understood to be references also to nationals of the EFTA States. It is thus not necessary to include an adaptation text to this effect when incorporating an act into the EEA Agreement.

3.2.10. Paragraph 10 – Reference to languages

71. Where an act referred to confers rights or imposes obligations upon the EU Member States or their public entities, undertakings or individuals regarding the use of any of the official languages of the EU, it follows from paragraph 10 of Protocol 1 EEA that corresponding rights and obligations regarding the use of any of the official languages of all Contracting Parties shall be understood to be conferred or imposed upon Contracting Parties, their competent authorities, public entities, undertakings or individuals. Hence, no adaptation is

28 JCD No 163/2011.

necessary for rights and obligations to include the languages of the EFTA States.

3.2.11. Paragraph 11 – Entry into force and implementation of acts

72. Paragraph 11 of Protocol 1 EEA concerns provisions on entry into force and implementation contained within an EU act. Firstly, if the entry into force and implementation *date* of an EU act *has passed* when the act is incorporated into the EEA Agreement, the EFTA States are not bound by those particular dates. On the other hand, they are bound by the entry into force and implementation date according to the JCD incorporating the act into the EEA Agreement. This conclusion is based on paragraph 11 of Protocol 1 EEA and the fact that a JCD cannot have retroactive effect unless otherwise stipulated.[29]

73. Secondly, if the implementation *date* of an EU act *has not passed* at the time of incorporation of the act into the EEA Agreement, the EFTA States are bound by that particular date. If the implementation date were to follow from the incorporation of the act into the EEA Agreement, it would lay stricter obligations upon the EFTA States than the EU Member States, since the act would be applicable to the EFTA States before it was applicable to the EU Member States.

74. In certain cases, it may be appropriate to ensure that market participants in the EFTA States are ensured similar *transitional* periods as operators in the EU when incorporating an act into the EEA Agreement. However, transitional arrangements laid down in the EU act are not covered by Protocol 1 EEA but may be addressed in an adaptation text.

3.2.12. Paragraph 12 – Addressees of acts

75. It follows from paragraph 12 of Protocol 1 EEA that provisions indicating that an EU act is addressed to the EU Member States are not relevant for the purposes of the EEA Agreement. Such provisions are found, for example, amongst the final articles of Directives, stating that the act is addressed to all EU Member States, to certain EU Member States, or to all EU Member States except for some. Depending on the specific case and circumstances it may, however, be relevant to include a specific adaptation text in a JCD to exempt one or more of the EFTA States from application of the act.

29 It may be mentioned that a specific regime has nevertheless been applied as regards Protocol 31 EEA and participation in programmes. As regards block exemptions in the field of competition and state aid, these have on occasion also been given retroactive application (it may be noted that such acts typically alleviate the burdens on market participants/grant further rights), and as such the retroactivity of such an act may not raise problems of principle notwithstanding national implementation measures.

4. Checklist for new EU acts – The need for adaptations

1. What kind of acts are incorporated into the EEA Agreement?

a. **Binding acts (e.g. regulations, directives and decisions)**
   If EEA relevant, then normally incorporated into the EEA Agreement

b. **Non-binding acts (e.g. recommendations and opinions)**
   Not normally incorporated into the EEA Agreement

c. **Surveillance acts**
   Not incorporated into the EEA Agreement
   Surveillance acts are generally individual and specific acts addressed to one or more Member State or undertaking

2. EEA relevance?

a. **Starting point: The assessment of the need for adaptation texts presupposes that the act itself is found relevant for incorporation into the EEA Agreement, and thus does not raise the question of whether the entire act is EEA relevant or not.**

b. **But: EEA-relevant acts can contain provisions that are not EEA relevant or make reference to acts that are not incorporated into the EEA Agreement:**
   i. Reference to EU acts that are not incorporated into the EEA Agreement (and will not be incorporated at a later stage)
      1. Problematic: Reference to provisions that contain definitions/framework for interpretation
         Adaptation text may be needed
      2. Normally not problematic: Reference to provisions only for information purposes

   ii. Third-country provisions
      1. Problematic: Provisions on export to third countries
         Adaptation text may be needed
      2. Normally not problematic: Provisions on import from third countries

3. Two-pillar issues

a. **Does the act delegate tasks to the Commission?**
   i. Is it covered by Protocol 1 EEA? (See also Protocol 1 SCA and Protocol 1 to the Standing Committee Agreement)
      1. If covered by Protocol 1 EEA: adaptation text not needed, e.g.
         a. Information exchange: Commission = EFTA Surveillance Authority/Standing Committee (paragraph 4 of Protocol 1 EEA)
         b. Functions in connection with verification/approval procedure: Commission = EFTA Surveillance Authority/Standing Committee (paragraph 4 of Protocol 1 EEA)
      2. If not covered by Protocol 1 EEA: adaptation needed

b. **Does the act confer delegated/implementing powers on the Commission?**
   Not problematic: The Commission's act, if EEA relevant, will normally be incorporated into the EEA Agreement

c. **Does the act delegate power to the Commission to impose fines or issue binding decisions on market participants?**
   Adaptation text needed – not covered by Protocol 1 EEA

d. **Does the act delegate tasks/powers to an EU agency?**
   Adaptation text needed – not covered by Protocol 1 EEA

4. Entry into force provisions

Not problematic: Provisions on entry into force or implementation of acts are not relevant (paragraph 11 of Protocol 1 EEA)
No adaptation text needed (unless need for transitional measures)

If in doubt, contact the EFTA Secretariat.

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