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SUBCOMMITTEE V ON LEGAL AND INSTITUTIONAL MATTERS

Guidelines for Drafting Adaptation Texts for Joint Committee Decisions

Legal Note by Subcommittee V

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1 INTRODUCTION

1. The objective of the Agreement on the European Economic Area (EEA Agreement) of a homogeneous EEA is attained through the continuous incorporation of EEA-relevant EU acts into the EEA Agreement. As the EEA Agreement has a different scope and institutional set-up to the European Union, EU acts require some adjustments before they can apply in the EEA. These adjustments, referred to as adaptations, encompass both technical and substantive alterations that are made to an act upon its incorporation into the EEA Agreement.

2. The EEA Agreement contains three types of adaptations: horizontal, sectoral and specific. Horizontal adaptations are contained in Protocol 1 to the EEA Agreement and apply to all acts incorporated into the annexes. Some annexes also have sectoral adaptations, which apply to all acts incorporated into those specific annexes. Specific adaptations apply to individual acts or provisions of acts.

3. Adaptations are an integral part of the act they apply to and, as such, constitute legally binding provisions of the EEA Agreement. It is important for legal certainty that the drafting of adaptation texts is of a high quality. Adaptation texts should be *clear, transparent and accessible* to enable practitioners to understand the content of EEA acts. This is particularly relevant to adaptations to regulations, as they must be implemented into national law *as such*, in accordance with Article 7 of the EEA Agreement.

4. This note sets out guidelines for when adaptations may be legally necessary or appropriate, and how they should be drafted in a *clear, transparent and accessible* manner. These guidelines include template texts for adaptations that are frequently made to acts incorporated into the EEA Agreement. Adaptations should, as a general rule, be drafted as direct edits to the texts that they adapt.

5. Chapter 2 of this note provides technical guidelines for how adaptation texts should be drafted in the form of direct editing. Later chapters provide guidance on preferred practice and template texts for frequently used adaptations. The templates are intended to be used for drafting Joint Committee Decisions (JCDs). Template texts for declarations may also be provided where relevant.

6. Examples are included for pedagogical purposes. They may be fictional or actual examples, and provide the original provision of the EU act, the adaptation text as written in accordance with these guidelines, and the consolidated EEA version of the provision.

7. If experts in an EFTA working or expert group or in a task force decide to deviate from the drafting templates, which are set out clearly and unambiguously in these guidelines, the EFTA Secretariat shall inform Subcommittee V accordingly.

2 GUIDELINES FOR TECHNICAL DRAFTING

2.1 Introduction

8. This chapter contains general rules on how to draft adaptation texts. The different elements included in or connected to a JCD, namely adaptations, declarations, preambles and explanatory notes, are explained in Chapter 2.2, while the main drafting rule of direct editing is set out in

Chapter 2.3. Chapter 2.4 provides guidance on how to structure adaptations correctly to indicate how the EU legal acts shall be amended, depending on which part of the act the amendments concern. Chapters 2.5, 2.6, 2.7 and 2.8 provide technical drafting guidance for certain questions of general concern.

2.2 What is an adaptation?

9. An adaptation is a legally binding amendment to an act that constitutes an integral part of that act. As such, adaptations must be distinguished from three other features that may be included in, or connected to, a JCD: declarations, preambles and explanatory notes.

10. *Declarations* (joint or unilateral) may be adopted together with a JCD and are used by the EFTA States and the EU and its Member States to express their views on provisions of the EEA Agreement or on a legal act to be incorporated into the EEA Agreement. Joint declarations serve a political purpose. They may be useful tools for treaty interpretation because they reflect the intention of the Contracting Parties at the time of the adoption of a JCD. However, a declaration cannot produce the legally binding effect of overriding the text of an EU act, which is something an adaptation does. Unilateral declarations can also be issued, but their interpretative legal value is lower than that of joint declarations since they do not reflect the express intention of all the Contracting Parties.

11. *Preambles* to JCDs, which include the recitals, provide the reader with the background context of the JCD and may thus aid in understanding the JCD or interpreting the acts therein.

12. *Explanatory notes* are documents produced by the EFTA States to explain the purpose and necessity of the adaptations in a JCD. They are submitted to the Commission alongside the JCD. Explanatory notes do not form part of the JCD and are never published, but are submitted to the Commission as a preparatory aid. Where a JCD requires approval by the Council, the Commission often reproduces text from the explanatory note in the Council Decision.

13. It follows from the above that declarations, preambles and explanatory notes are not strictly binding, and that they only serve as interpretative tools with different legal values. Adaptations, on the other hand, directly form part of the legal rights and obligations created by the JCD.

2.3 Direct editing

14. Adaptation texts should be drafted as direct edits to EU legal acts. Adaptation texts formulated as direct edits will always amend the text of the relevant EU legal act. Direct editing entails replacing or removing the existing text of an EU act or inserting additional text directly into the relevant provision(s). Where it has been agreed that an EU act should be adapted, the direct editing of the relevant provision(s) will show that a diverging EEA version of the original EU text has been adopted. Direct editing will show in a transparent manner how the provision is phrased in the EEA context.

15. There may be situations where an adaptation text has to be of a more general character and/or concerns multiple provisions of the same act. Also in these situations, the adaptation should be drafted as normative text to be inserted directly into the act, be it as a new standalone article or as part of an existing provision. Although the insertion of an adaptation directly in connection with the relevant provision or term that is adapted provides greater clarity, it may in some cases be a more pragmatic solution to insert the adaptations in one general provision covering several aspects.

2.4 Structure of adaptations

16. Since adaptations are amendments to EU legal acts, adaptation texts should be drafted in line with the EU Interinstitutional Style Guide.[1]

17. When an adaptation is made with direct editing, it is important to consider which article the adaptation should be inserted into. In most cases, it is clear that certain words should be added, replaced or deleted in specific articles, paragraphs or subparagraphs. However, as mentioned in paragraph 15 above, there may be situations where an adaptation text has to be of a more general character and/or concerns multiple provisions of the same act. In these situations, the adaptation should be drafted as a new standalone article or as a paragraph in an existing provision.

18. How adaptations are structured in the JCD will depend on which part of an act is to be amended. Below are examples of how to structure adaptations correctly as direct edits to indicate how the EU legal act shall be amended. Adaptations should be introduced by a short chapeau referring to the relevant part of the act and article that is to be amended.

a. Where the adaptation applies to all occurrences of the same term in an article:

19. If the adaptation refers to all occurrences of the same term in an article, the amendment indicated by the adaptation shall apply to all subdivisions of the act:

> In Article X, the words "[agreed adaptation text]" shall be inserted after the words "[relevant words in EU act]".
>
> In Article X, the words "[relevant words in EU act]" shall be replaced by the words "[agreed adaptation text]".

b. Where the adaptation applies to a paragraph of an article:

20. If the adaptation applies to a numbered paragraph, the chapeau of the adaptation shall comply with the following template:

> In Article X([number]), …

21. If the adaptation applies to an unnumbered paragraph, the chapeau of the adaptation shall comply with the following template:

> In Article X, [first/second/nth] paragraph, …

c. Where the adaptation applies to an unnumbered subparagraph of a numbered paragraph of an article:

22. If the adaptation applies to an unnumbered subparagraph of a numbered paragraph of an article, the chapeau of the adaptation shall comply with the following template:

> In Article X([number]), [first/second/nth] subparagraph, …

[1] Home - Interinstitutional Style Guide - Publications Office of the EU (europa.eu)

d. Where the adaptation applies to multiple provisions of an act:

23. If the adaptation applies to multiple provisions of an act, the chapeau of the adaptation shall comply with the following template:

> In Article X, Y and Z, …
> In Annex I, II and III, …

e. Where the adaptation adds text to a provision:

24. Where the adaptation adds a paragraph or subparagraph, the adaptation shall comply with the following template:

> In Article X, the following [paragraph/subparagraph] shall be inserted after [paragraph [number]/[first/ second/nth]subparagraph]…

25. If an adaptation text is to be added at the end of an article or paragraph thereof, the adaptation shall comply with the following template:

> In Article X, the following [words/paragraph] shall be inserted: "[Agreed adaptation text]".
> In Article X([number]), the following [words/subparagraph] shall be inserted: "[Agreed adaptation text]"

26. Where the adaptation is inserted as a direct edit in the middle of, or at the end of, a sentence or paragraph of a subdivision of an act, the adaptation shall comply with the following template:

> In Article X, the words "[agreed adaptation text]" shall be inserted after the words "[relevant words in EU act]".

f. Where the adaptation replaces words in a provision:

27. Replacements are only used when the adaptation text applies to all Contracting Parties. Such adaptations shall comply with the following template:

> In Article X, the words "[relevant words in EU act]" shall be replaced by the words "[agreed adaptation text]".

28. If the adaptation applies only to the EFTA States, a different method should be used. See recommendations below on adaptations only concerning the EFTA States.

g. Where there are several edits to the same subdivision of an act:

29. Where there are several edit to the same subdivision of an act, the adaptation shall comply with the following template:

> Article X is amended as follows
> (i) in paragraph 1, the following [sentence/paragraph] shall be inserted: "[agreed adaptation text]";
> (ii) in paragraph 2, the words "[agreed adaptation text]" shall be inserted after the words "[relevant words in EU act]";

(iii) in paragraph 3, the words "[relevant words in EU act]" shall be replaced by the words "[agreed adaptation text]".

2.5 Adaptations only concerning the EFTA States

30. If the adaptation applies only to the EFTA States, this should be specified in the adaptation text as direct editing so that the limitation follows from the provision as adapted. This specification should only be made when different rules apply to the EFTA States than to the EU Member States.

31. Examples of such situations include, but are not limited to, when the EFTA Surveillance Authority (ESA) is to carry out certain tasks in respect of the EFTA States (and not as regards all Contracting Parties), or when different application dates or transitional periods apply to the EFTA States.

32. Such adaptations shall comply with the following templates:

In Article X, the words "or, as regards the EFTA States, [continued adaptation text] …" shall be inserted after the words "[relevant words in EU act]".

In Article X, the words "or, as regards [undertakings/individuals] in the EFTA States, [continued adaptation text] …" shall be inserted after the words "[relevant words in EU act]".

In Article X([number]), the following [paragraph/subparagraph] shall be inserted:
"As regards the EFTA States, …"

Article 65(2) of Regulation (EU) 2019/1238:

> 2. In accordance with Article 9(5) of Regulation (EU) No 1094/2010, EIOPA may, where the conditions in paragraphs 3 and 4 of this Article are fulfilled, temporarily prohibit or restrict in the Union the marketing, distribution or sale of certain PEPPs or PEPPs with certain specified features.

Example adaptation in line with these guidelines:

In Article 65(2), the words "or, as regards the EFTA States, the EFTA Surveillance Authority" shall be inserted after the word "EIOPA";

Adapted text:

> 2. In accordance with Article 9(5) of Regulation (EU) No 1094/2010, EIOPA or, as regards the EFTA States, the EFTA Surveillance Authority may, where the conditions in paragraphs 3 and 4 of this Article are fulfilled, temporarily prohibit or restrict in the Union the marketing, distribution or sale of certain PEPPs or PEPPs with certain specified features.

2.6 References to the EEA Agreement and the EEA EFTA States

33. While all acts incorporated into the EEA Agreement constitute provisions of the Agreement itself, it is legally sufficient to refer to the EEA Agreement in adaptations as "the Agreement". However, this may create confusion when an incorporated act is read in isolation, and where an act refers to other international agreements. These guidelines therefore set "the EEA Agreement" as the standard term to refer to the EEA Agreement in adaptations.

34. It follows from Article 2(b) of the EEA Agreement that the EEA EFTA States (Iceland, Liechtenstein and Norway) are to be referred to as "the EFTA States". The term "EEA EFTA States" should be avoided in legal text since it has no official legal meaning in the EEA context.

2.7 Adding the EFTA States to lists

35. The EFTA States can be added to lists in a broad number of cases, such as for information purposes, listing targets in the EFTA States, including the EFTA States in monitoring checks, or broadening an exemption to one or more of the EFTA States. In these instances, the reference to the EFTA States shall be inserted as a direct insertion to the act in question. The formatting of the inserted text will normally be in line with the formatting of the list in the relevant act, therefore the adaptations will vary somewhat in order to ensure consistency with the approach taken by the EU.

36. Adaptations adding the EFTA States to lists shall comply with the following template:

In Article/Chapter X, the following shall be added to [table/list/point Y]: [text to be added to the table/list/point, formatted in line with the legal act.]

Excerpt from Annex II to Regulation (EU) 2022/1646:

ANNEX II

Minimum sampling frequency per Member State in the national randomised surveillance plan for production in the Member States (as referred to in Article 5(c))

The minimum number of samples is as follows:

Member State	**Minimum number of samples**	**Member State**	**Minimum number of samples**
Belgium	195	Lithuania	50
Bulgaria	120	Luxembourg	10
Czechia	180	Hungary	165
Denmark	100	Malta	10
Germany	1 425	Netherlands	300
Estonia	25	Austria	150
Ireland	85	Poland	650
Greece	185	Portugal	175
Spain	805	Romania	335
France	1 150	Slovenia	35
Croatia	70	Slovakia	95
Italy	1 050	Finland	95
Cyprus	15	Sweden	175

Latvia	35	United Kingdom (Northern Ireland) (*)	30

Example adaptation in line with these guidelines:

In Annex II, the following shall be added to the table:

Iceland	10
Norway	95

Adapted text:

ANNEX II

Minimum sampling frequency per Member State in the national randomised surveillance plan for production in the Member States (as referred to in Article 5(c))

The minimum number of samples is as follows:

Member State	**Minimum number of samples**	**Member State**	**Minimum number of samples**
Belgium	195	Lithuania	50
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Czechia	180	Hungary	165
Denmark	100	Malta	10
Germany	1 425	Netherlands	300
Estonia	25	Austria	150
Ireland	85	Poland	650
Greece	185	Portugal	175
Spain	805	Romania	335
France	1 150	Slovenia	35
Croatia	70	Slovakia	95
Italy	1 050	Finland	95
Cyprus	15	Sweden	175
Latvia	35	United Kingdom (Northern Ireland) (*)	30
Iceland	10	Norway	95

2.8 Disapplication of acts or provisions

37. In some cases, adaptations may be needed to disapply specific provisions or parts of an act, or even the entire act, towards one or more of the EFTA States. Disapplication is normally used in specific cases where either there are certain circumstances in place that justify it, or specific provisions of an act fall outside the scope of the EEA Agreement (for example provisions on the EU's external relations), which therefore should not apply to the EFTA States. This type of adaptation normally requires solid justification towards the EU, particularly if an EFTA State is to be exempted from an EU act in its entirety, or if the disapplication is based on specific circumstances in one or more of the EFTA States.

38. It is important that when the EFTA States are considering requesting such an adaptation, the possible consequences of disapplication are considered carefully, for example if the disapplication of a specific act or provision may have future consequences as regards the implementation of other EEA-relevant acts. If a provision falls outside the scope of the EEA Agreement there may also be consequences if it is not disapplied, for example unintended precedent effects.

39. For adaptation texts disapplying entire acts as regards one or more of the EFTA States the following template should generally be used:

> [In Article X, the following shall be inserted:]
> "This [Regulation/Directive/Decision] shall not apply to [the relevant EFTA State(s)]."

40. When an entire provision or subdivision thereof shall not apply to one or more of the EFTA States:

> In [Article/paragraph/subparagraph] X, the following shall be inserted:
> "This [Article/paragraph/subparagraph] shall not apply to [the relevant EFTA State(s)]."

41. When selected words of a provision shall not apply to one or more of the EFTA States, the adaptation text must be considered carefully to ensure that the logic of the act is maintained. An example of a possible approach can be found below:

Article 35(5) of Regulation (EU) No 1093/2010 5. Where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, to the national central bank or to the statistical office of the Member State concerned.
Possible adaptation approach: In Article 35(5), the following subparagraph shall be inserted: "As regards Liechtenstein, where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, or to the statistical office of the Member State concerned."
Adapted text: 5. Where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, to the national central bank or to the statistical office of the Member State concerned. As regards Liechtenstein, where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, or to the statistical office of the Member State concerned.

3 ADAPTATIONS CONCERNING INSTITUTIONAL QUESTIONS

3.1 Commission tasks and powers

42. EU legal acts often confer tasks and powers on the Commission. If these tasks and powers relate to the legislative powers of the Commission, e.g. provisions giving the Commission the power to adopt delegated or implementing acts, adaptations are not necessary.

43. Protocol 1 to the EEA Agreement, on horizontal adaptations, contains adaptations that apply to all acts incorporated into the annexes. Some of these adaptations adapt provisions on the role of the Commission in order to clarify the performance of that role in the EFTA pillar, allocating the task to either the EFTA Surveillance Authority (ESA) or the Standing Committee of the EFTA States (the Standing Committee). For example, paragraph 4(a) of Protocol 1 provides that where an EU Member State is to submit information to the Commission, an EFTA State shall submit such information to ESA. Paragraph 4(d) provides that the functions of the Commission "in the context of procedures for verification or approval, information, notification or consultation […]" shall be carried out according to procedures established between the EFTA States. Those functions are then allocated to either ESA or the Standing Committee.[2] If the task is covered by Protocol 1, no specific adaptation is needed.[3]

44. While Protocol 1 covers many tasks, acts sometimes introduce Commission tasks or powers that fall outside the scope of Protocol 1. Legal acts establishing agencies often have provisions in them governing tasks of the Commission in relation to those agencies (see more below in Chapter 3.5).

45. Also, a number of legal acts give the Commission the power to issue binding decisions on market participants (e.g. the power to ask a company for information or the power to take binding decisions towards a company to stop or change certain practices) and the power to impose fines. Such tasks are not covered by Protocol 1 and must therefore be adapted if the task is not to stay within the EU pillar. In such instances, it may be necessary to adopt specific adaptations to provide a role for ESA. The act must then be analysed carefully and a reference to ESA added where it should have similar competences to the Commission.[4]

46. Where an adaptation is necessary to vest a Commission task in ESA, the following template should generally be used:

In Article X, the words "or, as regards the EFTA States, the EFTA Surveillance Authority" shall be inserted after the words "the Commission".

Article 11(2) of Directive (EU) 2016/797:

[2] For the provisions allocating the tasks, see Protocol 1 to the Surveillance and Court Agreement and Protocol 1 to the Agreement on a Standing Committee of the EFTA States.

[3] For more information on the interpretation of paragraph 4 of Protocol 1 to the EEA Agreement, see *Adaptation texts to EU acts upon incorporation into the EEA Agreement – Legal note by the Secretariat* (ref. 16-3438).

[4] For an in-depth analysis of the two-pillar system, see *Legal note by the Secretariat on the two-pillar system of the EEA Agreement* (ref. 15-1908).

2. The Agency, on a mandate from the Commission, shall start the consultation process with the parties concerned without delay and in any case within 20 days of the date of receipt of that mandate. Where, following that consultation, the Agency establishes that the measure is unjustified, it shall forthwith inform the Commission, the Member State that has taken the initiative as well as other Member States, and the manufacturer or his authorised representative. Where the Agency establishes that the measure is justified, it shall forthwith inform the Member States.

Example adaptation in line with these guidelines:

In Article 11(2), the words "or, as regards the EFTA States, the EFTA Surveillance Authority" shall be inserted after the words "the Commission".

Adapted text:

2. The Agency, on a mandate from the Commission or, as regards the EFTA States, the EFTA Surveillance Authority, shall start the consultation process with the parties concerned without delay and in any case within 20 days of the dateof receipt of that mandate. Where, following that consultation, the Agency establishes that the measure is unjustified, it shall forthwith inform the Commission or, as regards the EFTA States, the EFTA Surveillance Authority, the Member State that has taken the initiative as well as other Member States, and the manufacturer or his authorised representative. Where the Agency establishes that the measure is justified, it shall forthwith inform the Member States.

47. A task may, through an adaptation to an earlier Article, have been vested in ESA or the Standing Committee. In later adaptations, it is not necessary to repeat to which body the task has been vested. Where further adaptations are introduced referring to a task that a previous adaptation has vested in ESA or in the Standing Committee, the following template should generally be used:

In Article X, the words "or, as the case may be, the [EFTA Surveillance Authority/Standing Committee of the EFTA States]" shall be inserted after the words "the Commission".

Article 4(4) of Regulation (EU) 2018/1971:

4. Without prejudice to compliance with relevant Union law, NRAs and the Commission shall take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC with the aim of ensuring the consistent implementation of the regulatory framework for electronic communications within the scope referred to in Article 3(1).

Example adaptation in line with these guidelines:

In Article 4(4), the words "or, as the case may be, the EFTA Surveillance Authority," shall be inserted after the words "and the Commission".

Adapted text:

4. Without prejudice to compliance with relevant Union law, NRAs and the Commission or, as the case may be, the EFTA Surveillance Authority, shall take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC with the aim of ensuring the consistent implementation of the regulatory framework for electronic communications within the scope referred to in Article 3(1).

3.2 Decisions directed at individuals or undertakings

a. Introduction

48. In some legal acts, the Commission or an agency is given the power to take decisions directed towards private individuals or undertakings. These can include the powers to request or require information, to impose fines or penalties, or to carry out on-site inspections. Such powers should be adapted to be performed by an entity within the EFTA pillar, as regards individuals or undertakings in the EFTA States.

b. EU institution competence to directly impose fines and penalties

49. The competence to issue fines is not covered under any horizontal adaptation found in Protocol 1 EEA, nor in any sectoral adaptation found in any annex. Therefore, a specific adaptation should be made if the EU act to be incorporated into the EEA Agreement provides an EU institution with the competence to directly impose fines or penalties. If no adaptation is made the competence to impose fines and penalties would remain with the Commission, also in relation to fines or penalties directed at undertakings in an EFTA state.

50. 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 is either the national authorities or, more frequently in recent years, ESA. How detailed and descriptive the adaptation should be depends on the context. The following template should generally be used:

In Article X, the following paragraph shall be inserted:
"The powers to impose [fines, financial penalties, periodic penalty payments on persons/undertakings/licence holders, etc.] shall, in the case where such [persons/undertakings, licence holders, etc.] are established in an EFTA State, be vested in the EFTA Surveillance Authority."

Article 25(1) of Regulation (EC) No 216/2008:

1. Without prejudice to Articles 20 and 55, at the Agency's request the Commission may:

   (a) impose on the persons and the undertakings to which the Agency has issued a certificate, fines, where, intentionally or negligently, the provisions of this Regulation and its implementing rules have been breached;

(b) impose, on the persons and undertakings to which the Agency has issued a certificate, periodic penalty payments, calculated from the date set in the decision, in order to compel those persons and undertakings to comply with the provisions of this Regulation and its implementing rules.

Example adaptation in line with these guidelines:

In Article 25(1), the following subparagraph shall be inserted:
"The powers to impose fines and periodic penalty payments on the persons and undertakings to which the Agency has issued a certificate shall, in the case where such persons or undertakings are established in an EFTA State, be vested in the EFTA Surveillance Authority."

Adapted text:

1. Without prejudice to Articles 20 and 55, at the Agency's request the Commission may:

   (a) impose on the persons and the undertakings to which the Agency has issued a certificate, fines, where, intentionally or negligently, the provisions of this Regulation and its implementing rules have been breached;

   (b) impose, on the persons and undertakings to which the Agency has issued a certificate, periodic penalty payments, calculated from the date set in the decision, in order to compel those persons and undertakings to comply with the provisions of this Regulation and its implementing rules.

   The powers to impose fines and periodic penalty payments on the persons and undertakings to which the Agency has issued a certificate shall, in the case where such persons or undertakings are established in an EFTA State, be vested in the EFTA Surveillance Authority.

c. The competence to charge and collect supervisory fees

51. Some legal acts give EU institutions competence to charge and collect supervisory fees. In line with the two-pillar structure such fees should be charged and collected by ESA as regards undertakings in the EFTA States. The power to charge and collect supervisory fees is not covered by Protocol 1 EEA. Therefore, a specific adaptation would be necessary to vest such power in an entity within the EFTA pillar as regards undertakings in the EFTA States.

52. Such adaptations shall comply with the following template:

In Article X, the following paragraph/subparagraph shall be inserted:
"As regards [undertakings] in the EFTA States, fees shall be charged by the EFTA Surveillance Authority on the same basis as fees charged by the [EU institution]."

Article 19(1) of Regulation (EU) 2009/1060

1. ESMA shall charge credit rating agencies fees in accordance with this Regulation and with the Commission regulation referred to in paragraph 2. Those fees shall fully

cover ESMA's necessary expenditure relating to the registration, certification and supervision of credit rating agencies and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation, in particular as a result of any delegation of tasks in accordance with Article 30.

Example adaptation in line with these guidelines:

In Article 19(1), the following subparagraphs shall be added:

"As regards credit rating agencies established in an EFTA State, fees shall be charged by the EFTA Surveillance Authority on the same basis as fees charged to other credit rating agencies in accordance with this Regulation and with the Commission regulation referred to in paragraph 2."

Adapted text:

"1. ESMA shall charge credit rating agencies fees in accordance with this Regulation and with the Commission regulation referred to in paragraph 2. Those fees shall fully cover ESMA's necessary expenditure relating to the registration, certification and supervision of credit rating agencies and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation, in particular as a result of any delegation of tasks in accordance with Article 30.

As regards credit rating agencies established in an EFTA State, fees shall be charged by the EFTA Surveillance Authority on the same basis as fees charged to other credit rating agencies in accordance with this Regulation and with the Commission regulation referred to in paragraph 2."

d. Allocation of collected fines, fees or premiums

53. Some legal acts provide for fines, fees or premiums being collected by an EU institution. When such fines, fees or premiums on the EU side shall be considered revenue of the EU or of the Member States, an adaptation is needed to provide the EFTA States with full ownership of the funds accruing to them. The adaptation below is normally understood to mean that the EFTA States, in the context of the Standing Committee, make the decision on the allocation.

54. Fines, fees or premiums arising from activities with a strong connection to the EFTA States may sometimes be collected by the Commission but accrue to the EFTA States. Conversely, activities with a strong connection to the EU may be collected by ESA but accrue to the EU. In these situations, an adaptation to allocate the fines, fees or premium between the EU and the EFTA States must be specified. The exact phrasing of the adaptation will vary depending on the context; therefore a template text is difficult to create. An example of a possible approach is found below:

Article 8(1) of Regulation (EU) 2019/631:

1. In respect of each calendar year, the Commission shall impose an excess emissions premium on a manufacturer or pool manager, as appropriate, where a manufacturer's average specific emissions of CO2 exceed its specific emissions target.

Possible adaptation approach: In Article 8(1), the following subparagraphs shall be inserted: "Where the manufacturer or pool manager is established in an EFTA State, the EFTA Surveillance Authority shall impose the excess emissions premium. The amounts of the excess emissions premium shall be distributed between the Commission and the EFTA Surveillance Authority proportionally to the share of the registrations of new passenger cars or new light commercial vehicles registered in the EU or in the EFTA States, respectively, relative to the total number of new passenger cars or new light commercial vehicles registered in the EEA."
Adapted text: 1. In respect of each calendar year, the Commission shall impose an excess emissions premium on a manufacturer or pool manager, as appropriate, where a manufacturer's average specific emissions of CO2 exceed its specific emissions target. Where the manufacturer or pool manager is established in an EFTA State, the EFTA Surveillance Authority shall impose the excess emissions premium. The amounts of the excess emissions premium shall be distributed between the Commission and the EFTA Surveillance Authority proportionally to the share of the registrations of new passenger cars or new light commercial vehicles registered in the EU or in the EFTA States, respectively, relative to the total number of new passenger cars or new light commercial vehicles registered in the EEA.

55. Acts providing for the collection of fines, fees or premiums also frequently include provisions on the budgetary allocation of the collected amounts. To avoid confusion, an adaptation to those provisions should be made to clarify that the EFTA States determine the allocation of the amounts that accrue to them. For such adaptations, the following template should generally be used:

In Article X, the following paragraph shall be added: "As regards the EFTA States, the EFTA States shall determine the allocation of the amounts of [fine/fee]."

Article 8(4) of Regulation (EU) 2019/631: 4. The amounts of the excess emissions premium shall be considered as revenue for the general budget of the Union.
Example adaptation in line with these guidelines: In Article 8(4), the following subparagraph shall be inserted: "As regards the EFTA States, the EFTA States shall determine the allocation of the amounts of the excess emissions premium."
Adapted text:

4. The amounts of the excess emissions premium shall be considered as revenue for the general budget of the Union.

   As regards the EFTA States, the EFTA States shall determine the allocation of the amounts of the excess emissions premium.

3.3 The Courts

56. In the EFTA pillar, it is the EFTA Court that is competent to rule on EEA law. In some legal acts, there are references to the Court of Justice of the European Union (CJEU), including its jurisdiction and which type of proceedings may be brought before it. Often, such a provision refers to specific articles in the Treaty on the Functioning of the European Union (TFEU) and concerns the judicial review of a decision taken by an EU institution. If a decision-making power of an EU institution is, in the EFTA pillar, vested in ESA, it will be the EFTA Court that is competent to review such decisions. The substance and context of the provision determine whether an adaptation is required.

57. References to the general jurisdiction of the CJEU do not require adaptations, as it follows from the EEA Agreement that the CJEU does not have jurisdiction as regards the EFTA States or to review decisions taken by ESA. Likewise, special adaptations to mirror these competences of the EFTA Court as regards the EFTA States are generally not required, as the competences derive from the Surveillance and Court Agreement (SCA). Below are examples of provisions concerning the jurisdiction of the CJEU that do not need adaptations:

Article 16 of Regulation (EU) 2024/139:

> The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 61 of Regulation (EU) 2010/1095:

> 1. Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority.
>
> 2. Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the Authority, in accordance with Article 263 TFEU.
>
> 3. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU.
>
> 4. The Authority shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

58. In both examples, the decisions taken by the EU bodies that are appealable to the CJEU are, as regards the EFTA States, taken by ESA. As mentioned above, it follows from the SCA that decisions taken by ESA are appealable to the EFTA Court.

59. Other references to the CJEU may require adaptations in order to add a reference to the EFTA Court as the competent court in the EFTA pillar.

60. References to the CJEU are often adapted when the provisions entail an obligation to provide information on the right to have decisions reviewed by the CJEU. These provisions do not directly concern the competences of the courts, but introduce an information obligation that does not have an EFTA parallel in the SCA. In such cases, the information provided shall be accurate also for the EFTA pillar and the provision must therefore be adapted to reflect the division of competences between the two courts. Below is an example of this type of adaptation:

Article 62(3) of Regulation (EU) No 648/2012: 3. The persons referred to in Article 61(1) are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 66, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.
Example adaptation in line with these guidelines: In Article 62(3), the following subparagraph shall be inserted: "Decisions by the EFTA Surveillance Authority shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 66 and the right to have the decision reviewed by the EFTA Court in accordance with Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice."
Adapted text: 3. The persons referred to in Article 61(1) are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 66, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice. Decisions by the EFTA Surveillance Authority shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 66 and the right to have the decision reviewed by the EFTA Court in accordance with Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

61. Furthermore, when a provision does not contain a reference to the general jurisdiction of the CJEU, but rather a specifically outlined competence in relation to specific decisions, these references are often adapted for legal certainty. Below is an example of this type of adaptation:

Article 23c(6) in Regulation (EU) 2009/1060:

6. […] However, the national judicial authority shall not review the necessity for the investigation or demand that it be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No 1095/2010.
Example adaptation in line with these guidelines: In Article 23c(6), the following shall be inserted: "As regards the EFTA States, the lawfulness of the EFTA Surveillance Authority's decision shall be subject to review only by the EFTA Court in accordance with the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice."
Adapted text: However, the national judicial authority shall not review the necessity for the investigation or demand that it be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No 1095/2010. As regards the EFTA States, the lawfulness of the EFTA Surveillance Authority's decision shall be subject to review only by the EFTA Court in accordance with the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

62. In some cases, it is relevant to add a reference to the EFTA Court alongside the reference to the CJEU. This can be, for example, where the case-law of the CJEU is cited generally:

Article 2 of Directive (EU) 2019/1158: This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice.
Example adaptation in line with these guidelines: In Article 2, the words "and of the EFTA Court, in accordance with the EEA Agreement" shall be inserted after the words "the Court of Justice".
Adapted text: This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case law of the Court of Justice and of the EFTA Court, in accordance with the EEA Agreement.

3.4 EFTA States' participation in committees and expert bodies

a. Article 81 of the EEA Agreement; participation in programme committees

63. Programme committees are responsible for the development and management of EU programmes outside the four freedoms. When EFTA States participate in EU programmes, it

follows from Article 81 EEA that they have the right to participate in programme committees. Therefore, adaptations are not needed to regulate the participation of the EFTA States in committees or working groups that fall under Article 81.

b. Article 99 of the EEA Agreement; participation in expert bodies

64. When drawing up new legislation, the Commission may seek advice from EU Member States' experts through working groups or other Commission bodies. Article 99 EEA provides for the participation of EFTA States' experts in the preparatory work of the Commission. In accordance with that provision, the Commission "shall informally seek advice from experts of the EFTA States" in the same manner as from EU experts when new legislation is being drawn up in a field covered by the EEA Agreement. Therefore, adaptations to that effect are not needed.

c. Article 100 of the EEA Agreement; participation in comitology committees

65. Comitology committees assist the Commission in drafting and adopting implementing measures. The establishment of the comitology committee and the procedure to be applied will be laid out in the legal act adopted by the European Parliament and the Council.

66. In accordance with Article 100 EEA, the EFTA States have the right to participate in comitology committees under the Commission. This was also confirmed by the Commission when the EEA Agreement was signed.[5] The right of participation of EFTA experts in comitology committees grants the EFTA States the possibility to gain access to, and participate in, decision shaping of EEA-relevant implementing acts.

67. Consequently, EU acts foreseen to be incorporated into the EEA Agreement that establish comitology committees do not require adaptations, as the right of participation for experts from the EFTA States follows from the main agreement itself.

d. Committees under Article 101 of the EEA Agreement

68. Article 101 EEA applies to committees that are neither programme committees nor comitology committees, but the EFTA States are "associated with their work" when called for by the good functioning of the EEA Agreement. These committees are often composed of experts in very specific fields and only have indirect influence regarding programmes or the legislative process. The committees of this sort in which the EFTA States participate are listed in Protocol 37 EEA, and the EFTA States' participation is set out in the JCD incorporating the relevant act.

69. Such adaptations shall comply with the following template:

In Article X, the following shall be inserted: "The EFTA States shall participate fully in (the work of) [Committee/Board] and shall have the same rights and obligations within it as the EU Member States, except for the right to vote."

Article 11(2) of Directive (EU) 2016/1148:

[5] Declaration by the European Community on the participation of the EFTA States' experts in EEA-relevant EC committees in application of Article 100 EEA, contained in the Final Act to the EEA Agreement.

2. The Cooperation Group shall be composed of representatives of the Member States, the Commission and ENISA. Where appropriate, the Cooperation Group may invite representatives of the relevant stakeholders to participate in its work. The Commission shall provide the secretariat.
Example adaptation in line with these guidelines: In Article 11(2), first subparagraph, the following shall be inserted: "The EFTA States shall participate fully in the Cooperation Group and shall have the same rights and obligations within it as the EU Member States, except for the right to vote."
Adapted text: 2. The Cooperation Group shall be composed of representatives of the Member States, the Commission and ENISA. The EFTA States shall participate fully in the Cooperation Group and shall have the same rights and obligations within it as the EU Member States, except for the right to vote. Where appropriate, the Cooperation Group may invite representatives of the relevant stakeholders to participate in its work. The Commission shall provide the secretariat.

70. The operative part of a JCD that includes an Article 101 committee in Protocol 37 shall comply with the following template:

The following point is added in Protocol 37 to the EEA Agreement: '[point X]. [Name of committee ([short title of legal act]).'

Example of Protocol 37 amendment: The following point is added in Protocol 37 to the EEA Agreement: '47. The Cooperation Group (Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union).'

3.5 Adaptations related to agencies

a. References to Member States and their competent authorities

71. The role of EU agencies[6] vis-à-vis the EU Member States is not necessarily covered by paragraph 7 of Protocol 1 EEA. When EU agency acts are incorporated into the EEA Agreement, an adaptation has traditionally been included to clarify that the terms "EU Member State(s)" and

[6] For a comprehensive overview and more information on EU agencies, see *Working Paper on EU Agencies – Note by the Secretariat* (ref. 16-5334).

their respective "competent authorities" in the relevant regulation shall be understood to include the EFTA States and their respective competent authorities.

72. This type of adaptation is not spelled out for each article where the words "Member States" appear. Rather, it applies to the act as a whole. This adaptation is therefore an exception to the main rule of direct editing. Until a horizontal or sectoral solution is found, the existing adaptation practice should be continued for consistency:

> Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms Member States and competent authorities shall be understood to include, in addition to their meaning in the Regulation, the EFTA States and their competent authorities, respectively.

e. General terms for agency participation

73. Participation by the EFTA States in EU agencies is neither generally regulated nor harmonised in the EEA Agreement. Therefore, it is important to secure this through an adaptation to the founding act of the agency. The adaptation shall ensure that the EFTA States shall participate fully in the work of the respective agency, including the management board and all other internal bodies, without the right to vote. This is done with a general participation provision, which may be inserted as a new standalone EEA-specific provision to the act or as a subparagraph under another relevant provision. Since these adaptations provide for full participation in the relevant agency, further adaptations to provide for these rights in specific articles in the act are not necessary. Such adaptation texts shall comply with the following template:

> In Article X, the following paragraph shall be inserted:
> "The [EFTA States / relevant authorities of the EFTA States] shall participate fully in the work of [the Agency], including [relevant management board] and all internal bodies, and within them have all the same rights and obligations as the EU Member States, except for the right to vote."

b. Role of the EFTA Surveillance Authority in agencies

74. ESA's participation in agencies should be ensured where it is relevant to its tasks. It is therefore necessary to consider if ESA should have participation rights in the agency, and if so in which bodies they should participate and whether they should participate as an observer or "fully without the right to vote". This consideration is based on the tasks envisaged to be vested in ESA. At times, participation as an observer is sufficient, but if necessary for its tasks, ESA should participate fully except for the right to vote. This participation helps ESA obtain information at an early stage, foster a good working relationship with the agencies, enhance accountability of the agencies and increase EEA awareness. This is especially important where ESA has direct enforcement powers towards undertakings. ESA should be consulted when considering such participation rights, and its participation should be regulated in a separate adaptation.

75. If ESA should participate fully in the work of an agency, the following template should generally be used:

> In Article X, the following paragraph shall be inserted:

"The EFTA Surveillance Authority shall have the right to participate fully in the work of [Agency] including [relevant management board] [and all internal bodies], except for the right to vote."

76. If ESA should participate in the work of an agency as observer, the following template should generally be used:

In Article X, the following paragraph shall be inserted:
"The EFTA Surveillance Authority shall have the right to participate as an observer in the work of [Agency] including [relevant management board] [and all internal bodies]."

c. Agency tasks and advisory functions

77. Agencies are also routinely entrusted with tasks that are more advisory in nature, such as to assist the Commission and the EU Member States by issuing non-binding instruments like opinions, recommendations and guidelines. This differs fundamentally from the functions of the Commission that are covered by Protocol 1, as well as from the powers to directly impose fines, fees or other binding decisions.[7] Where the actions of an agency are non-binding on the addressee, they do not *prima facie* pose the same constitutional challenges or raise the same concerns as regards the two-pillar structure. Therefore, adaptations are not normally needed for advisory tasks.

78. Sometimes, an agency act will empower an agency to provide advice or assistance to a Member State or competent authority upon request. In such cases, an adaptation would be appropriate to ensure that the agency can provide such advice or assistance to entities within the EFTA pillar. For such adaptations, the following template should generally be used:

In Article X, the following paragraph shall be inserted:
"[The Agency] shall, as and when appropriate, assist the [EFTA Surveillance Authority or the Standing Committee of the EFTA States or the EFTA States] in the performance of their respective tasks."

Article 75 of Regulation (EU) 2018/1139:

1. A European Union Aviation Safety Agency is hereby established.
2. For the purposes of ensuring the proper functioning and development of civil aviation in the Union in accordance with the objectives set out in Article 1, the Agency shall:
   (a) undertake any task and formulate opinions on all matters covered by this Regulation;
   […]
   (j) cooperate with other Union institutions, bodies, offices and agencies in areas where their activities relate to technical aspects of civil aviation.

Example adaptation in line with these guidelines:

In Article 75, the following paragraph shall be inserted:

[7] See above Chapter 3.2.b.

"3. The Agency shall, as and when appropriate, assist the EFTA Surveillance Authority or the Standing Committee of the EFTA States, as the case may be, in the performance of their respective tasks. The Agency and the EFTA Surveillance Authority or the Standing Committee of the EFTA States, as the case may be, shall cooperate and exchange information as and when appropriate."
Adapted text: 1. A European Union Aviation Safety Agency is hereby established. 2. For the purposes of ensuring the proper functioning and development of civil aviation in the Union in accordance with the objectives set out in Article 1, the Agency shall: […] 3. The Agency shall, as and when appropriate, assist the EFTA Surveillance Authority or the Standing Committee of the EFTA States, as the case may be, in the performance of their respective tasks. The Agency and the EFTA Surveillance Authority or the Standing Committee of the EFTA States, as the case may be, shall cooperate and exchange information as and when appropriate.

d. Adaptation to ensure cooperation between the agency and ESA

79. Article 109 EEA provides that the fulfilment of obligations under the EEA Agreement is monitored by the EFTA Surveillance Authority for the EFTA States and the European Commission for the EU Member States. In order to secure uniformity in surveillance across the two-pillar system, paragraph 2 of Article 109 provides that "the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases".

80. The scope of Article 109 does not extend to include cases where surveillance is conducted by an EU agency. As such, there is by default no obligation for EU agencies to cooperate with ESA on EFTA-related matters. Therefore, a provision on general cooperation between the respective agency and ESA may be necessary if ESA is to have any tasks that, in the EU, are placed with the agency.

81. This is done with a general cooperation provision, which may be inserted as a new standalone EEA-specific provision to the act or as a paragraph under another relevant provision. It should be placed in close connection with the provisions laying out ESA's mandate. The following template is a possible adaptation approach:

In Article X, the following [sub]paragraph shall be added: "The [relevant agency] and the EFTA Surveillance Authority shall cooperate, exchange information and consult each other for the purposes of the [Regulation/Directive], in particular prior to taking any action."

Article 25 of Regulation of (EU) 2015/2365: 1. Competent authorities shall provide ESMA annually with aggregated and granular information regarding all administrative sanctions and other administrative

measures imposed by them in accordance with Article 22. ESMA shall publish aggregated information in an annual report.

2. Where Member States have chosen to lay down criminal sanctions for infringements of the provisions referred to in Article 22, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish, in an annual report, data on criminal sanctions imposed.

3. Where the competent authority has disclosed an administrative sanction or other administrative measure, or criminal sanction to the public, it shall, at the same time, report that information to ESMA.

4. ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraphs 1 and 2.

   ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.

   Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Example adaptation in line with these guidelines:

In Article 25, the following paragraph shall be inserted:

"5. The European Securities and Markets Authority (ESMA) and the EFTA Surveillance Authority shall cooperate, exchange information and consult each other for the purposes of the Regulation, in particular prior to taking any action."

Adapted text:

1. Competent authorities shall provide ESMA annually with aggregated and granular information regarding all administrative sanctions and other administrative measures imposed by them in accordance with Article 22. ESMA shall publish aggregated information in an annual report.

2. Where Member States have chosen to lay down criminal sanctions for infringements of the provisions referred to in Article 22, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish, in an annual report, data on criminal sanctions imposed.

3. Where the competent authority has disclosed an administrative sanction or other administrative measure, or criminal sanction to the public, it shall, at the same time, report that information to ESMA.

4. ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraphs 1 and 2.

   ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

5. The European Securities and Markets Authority (ESMA) and the EFTA Surveillance Authority shall cooperate, exchange information and consult each other for the purposes of the Regulation, in particular prior to taking any action.

e. Employment in agencies

82. As regards the possibility of employment for nationals of the EFTA States in the respective agency, adaptations are included with the aim of ensuring the same or similar access to employment as EU nationals. Such adaptations shall comply with the following template:

> In Article X, the following paragraph shall be added:
> "Nationals of the EFTA States enjoying their full rights as citizens may be engaged under contract by [the Agency]."

83. Part of securing equal employability of EFTA nationals in a respective agency is to ensure that the EFTA languages are recognised on a par with EU languages for the purpose of fulfilling linguistic competency requirements imposed by the Conditions of Employment of Other Servants of the EU (CEOS). Adaptations must therefore be made to ensure equal recognition of EFTA languages. Such adaptations shall comply with the following template:

> In Article X, the following paragraph shall be added:
> "The languages referred to in Article 129(1) of the EEA Agreement shall be considered by the Agency, in respect of its staff, as languages of the Union referred to in Article 55(1) of the Treaty on European Union."

f. Privileges and immunities

84. There have traditionally been two wordings for the adaptation ensuring that privileges and immunities contained in Protocol 7 to the EU Treaties are granted equivalently in the EFTA States. In autumn 2022, Subcommittee V and the Commission agreed on the template adaptation below. The EFTA States underlined that the EFTA States give full effect to the privileges and immunities contained in Protocol 7 to the EU Treaties based on the preferred formulation of the adaptation text. See for example JCD Nos 27/2023 and 114/2023. Such adaptations shall comply with the following template:

> In Article X, the following paragraph shall be inserted:
> "The EFTA States shall grant privileges and immunities to the [Agency and its staff] equivalent to those contained in the Protocol on the Privileges and Immunities of the European Union."

85. In the discussions between Subcommittee V and the Commission, it was also agreed that where the adaptation is used it shall also be adopted with a joint declaration stating that:

> The parties acknowledge that the incorporation of this act is without prejudice to the direct application of Protocol 7 on the privileges and immunities of the European Union to the

nationals of EFTA States in the territory of each Member State of the European Union, pursuant to Article 11 of that Protocol.

Article 34 of Regulation (EU) 2018/1971:

> The Protocol on the Privileges and Immunities of the European Union shall apply to the BEREC Office and its staff.

Example adaptation in line with these guidelines:

In Article 34, the following shall be inserted: "The EFTA States shall grant privileges and immunities to the BEREC Office equivalent to those contained in the Protocol on Privileges and Immunities of the European Union."

Adapted text:

> The Protocol on the Privileges and Immunities of the European Union shall apply to the BEREC Office and its staff. The EFTA States shall grant privileges and immunities to the BEREC Office equivalent to those contained in the Protocol on Privileges and Immunities of the European Union.

g. Financial contributions to agencies

86. The modalities for EFTA financial contribution to EU programmes are set down in Article 82(1)(a) EEA and Protocol 32 thereto. When appropriate, these modalities have been applied *mutatis mutandis* to the contribution by the EFTA States towards the agency.

87. Generally, the financial contribution is established as a proportion of the general budget of the European Union towards each EU agency. However, agencies are usually only partly financed by the EU's budget and may also receive other revenues, such as voluntary or mandatory contributions from national public authorities. In such cases, an adaptation may be needed in the respective JCD to address the contribution from entities in the EFTA pillar.

88. For executive agencies, which are agencies tasked with managing one or more EU programmes, the EFTA States participate through financial contributions to the related programme(s) in accordance with the general modalities of programme participation.

89. The adaptation providing the modalities for financial contributions by the EFTA States shall comply with the following template:

In Article X, the following paragraph shall be inserted:
"The EFTA States shall participate in the financing of the Agency. For this purpose, the procedures laid down in Article 82(1)(a) and Protocol 32 to the EEA Agreement shall apply."

Article 21 of Regulation (EC) No 2009/731:

> 1. The revenues of the Agency shall comprise, in particular:
> (a) subsidy from the Community, entered in the general budget of the European Union (Commission Section)
> […]

4. All Agency revenue and expenditure shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget.
Example adaptation in line with these guidelines: In Article 21, the following paragraph shall be inserted: "5. The EFTA States shall participate in the financing of the Agency. For this purpose, the procedures laid down in Article 82(1)(a) and Protocol 32 to the Agreement shall apply."
Adapted text: 1. The revenues of the Agency shall comprise, in particular: (a) subsidy from the Community, entered in the general budget of the European Union (Commission Section); […] 4. All Agency revenue and expenditure shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget. 5. The EFTA States shall participate in the financing of the Agency. For this purpose, the procedures laid down in Article 82(1)(a) and Protocol 32 to the Agreement shall apply.

4 THIRD-COUNTRY ADAPTATIONS

4.1 Introduction

90. The EEA Agreement governs the relations between the Contracting Parties, and does not regulate a common approach or policies with regard to the Contracting Parties' relations with third countries outside the EEA.[8] The Agreement nevertheless contains provisions that, in one way or another, have a bearing on the Contracting Parties' relations with third countries. Due to the large variation in aim, scope, implication and substance of third-country provisions, such specific provisions need to be assessed on a case-by-case basis. A few suggestions are outlined below.

91. In the EFTA pillar, the power to make decisions on external relations and to enter into treaties and agreements with third countries is retained by the individual EFTA States. This contrasts with the EU, which has extensive external competences and where Union bodies frequently adopt binding legal acts that relate to the Union's external relations. Under public international law, agreements concluded by the EU and/or its Member States with third countries cannot bind the EFTA States. Provisions on EU external competence do not apply to the EFTA States.

92. Internal Market legislation may contain provisions with third-country elements, such as product safety requirements for goods from third countries or financial services regulation of financial institutions or other actors established outside the EEA. The exclusion of such provisions may

[8] For more information on third-country provisions in the EEA Agreement, see *Case by Case Analysis of Third-Country Provisions in the EEA Agreement – Legal note by the Secretariat* (ref. 14-64426).

raise challenges in view of the purpose of the EEA Agreement to create a homogeneous Internal Market.

93. Whether third-country provisions of EEA-relevant acts should be incorporated into the EEA Agreement or not must be assessed on a case-by-case basis, taking into account the extent to which they are necessary for the good functioning of the Agreement. If a third-country provision is considered necessary to incorporate, it may be incorporated without adaptations and apply to the EFTA States. Otherwise, Internal Market legislation with third-country elements will often require adaptations or disapplication for clarity on what applies to the EFTA States.

94. Where a provision is incorporated without adaptations, it may be appropriate to issue a joint or unilateral declaration alongside the adoption of the JCD affirming the scope of the EEA Agreement. However, neither joint nor unilateral declarations can fully counteract potential precedent effects of incorporating non-relevant provisions into the EEA Agreement. And declarations cannot be substitutions for adaptations.

4.2 Equivalence rules

95. A specific type of provision with third-country implications are so-called equivalence rules. Such rules are found in many areas within the scope of the EEA Agreement. These provisions generally have in common that they state that the Commission should assess the rules and administrative practices of a third country in order to evaluate whether that third country can be deemed "equivalent" to the EU for the purposes of a specific sector. This assessment is often accompanied by an international agreement with the third country in question.

96. Such equivalence decision may then lead to certain rights or access being granted to operators of that third country on the same conditions as operators established within the Internal Market, or it may facilitate the operations of market participants in the EEA that involve the third country in question.

97. By including equivalence rules in the EEA Agreement, the EFTA States acknowledge both the Commission's competence to carry out such assessments of third countries, and the outcome of these assessments. The EFTA States are generally not involved in the assessment process, although they may participate in comitology committees where such decisions are discussed. However, each decision by the Commission to recognise the equivalence of a third country must be incorporated into the EEA Agreement before it can confer market rights or access to third-country operators in the EFTA States.

98. The inherent time gap in the EEA incorporation procedure inevitably leads to a certain delay, during which the EFTA States are in practice not applying the equivalence rules that the EU has adopted. Where equivalence rules are adopted through Commission decisions that are to be incorporated into the EEA Agreement, the EFTA States can decide on special processing procedures to facilitate and speed up their incorporation.

99. In some cases, recognition of third-country equivalence does not follow from the legal act that is to be incorporated into the EEA Agreement, but from another EU instrument that will not be part of the Agreement, such as a trade agreement. In those situations, adaptations may be appropriate to set out how equivalence procedures will be mirrored in the EFTA pillar. The following example in Regulation (EU) 2018/848 provides a possible adaptation approach:

Article 47 of Regulation (EU) 2018/848:

A recognised third country referred to in point (b)(ii) of Article 45(1) is a third country which the Union has recognised under a trade agreement as having a system of production meeting the same objectives and principles by applying rules which ensure the same level of assurance of conformity as those of the Union.
Possible adaptation approach: In Article 47, the following shall be inserted: "When the Union has recognised a third country in accordance with this provision, it shall notify the Standing Committee of the EFTA States. The EFTA States shall, within 30 days of receiving the notification, take a decision on the recognition of equivalence of the third country and the product conditions specified in the Union notification. The EEA Joint Committee shall be informed of these decisions and shall periodically publish a list of the decisions in the EEA Supplement to the Official Journal of the European Union."
Adapted text: A recognised third country referred to in point (b)(ii) of Article 45(1) is a third country which the Union has recognised under a trade agreement as having a system of production meeting the same objectives and principles by applying rules which ensure the same level of assurance of conformity as those of the Union. When the Union has recognised a third country in accordance with this provision, it shall notify the Standing Committee of the EFTA States. The EFTA States shall, within 30 days of receiving the notification, take a decision on the recognition of equivalence of the third country and the product conditions specified in the Union notification. The EEA Joint Committee shall be informed of these decisions and shall periodically publish a list of the decisions in the EEA Supplement to the Official Journal of the European Union.

4.3 Parallel agreements

100. Provisions on EU external competence to negotiate and conclude agreements with third countries do not apply to the EFTA States. However, the Contracting Parties may agree to establish mechanisms for the coordination of their relations with third countries in specific policy areas or sectors. Such coordination mechanisms include, inter alia, the conclusion of parallel agreements. Where adaptations envisage such coordination, the most important things for the EFTA States are: first, to ensure that they are kept informed of agreements that the EU is concluding; and second, for the EU to secure commitments from the third country of similar treaty terms for the EFTA States.

101. The following template is a possible adaptation approach to an information-sharing and consultation obligation:

In Article X, the following paragraph shall be inserted: "The Contracting Parties shall keep each other informed as regards the negotiation and conclusion of agreements referred to in [provision] and, upon request, consultations shall take place within the EEA Joint Committee."

102. The following template is a possible adaptation approach to securing an offer of similar treaty terms from a third country:

In Article X, the following paragraph shall be inserted: "Whenever [the Union / the European Union] negotiates with a third country in order to conclude an agreement [referred to in Article…], it shall endeavour to obtain [for the EFTA States an offer of a similar agreement / equal treatment] with the third country in question. [The EFTA States shall, in turn, endeavour to conclude with third countries agreements corresponding to those of the Union.]"

Article 9(2) of Regulation (EC) No 1592/2002: […] (c) Member States shall take the necessary measures to renounce agreements as soon as possible after the entry into force of an agreement between the Community and the third country in question, for those domains covered by that latter agreement.
Possible adaptation approach: In Article 9(2), the following point shall be inserted: "(d) Whenever the Union negotiates with a third country in order to conclude an agreement providing that a Member State or the Agency may issue certificates on the basis of certificates issued by the aeronautical authorities of that third country, it shall endeavour to obtain for the EFTA States an offer of a similar agreement with the third country in question. The EFTA States shall, in turn, endeavour to conclude with third countries agreements corresponding to those of the Union."
Adapted text: […] (c) Member States shall take the necessary measures to renounce agreements as soon as possible after the entry into force of an agreement between the Community and the third country in question, for those domains covered by that latter agreement. (d) Whenever the Union negotiates with a third country in order to conclude an agreement providing that a Member State or the Agency may issue certificates on the basis of certificates issued by the aeronautical authorities of that third country, it shall endeavour to obtain for the EFTA States an offer of a similar agreement with the third country in question. The EFTA States shall, in turn, endeavour to conclude with third countries agreements corresponding to those of the Union.

4.4 Disapplication of third-country provisions

103. As stated in the introduction to this chapter, third-country provisions must be assessed on a case-by-case basis. Third-country provisions may have to be adapted to clarify what applies to the EFTA States. Provisions that are directly linked to the Union's trade policy are usually

disapplied for the EFTA States. If a third-country provision should not apply to the EFTA States and is not adapted in other ways to clarify its application, it should be disapplied. For guidelines on how to draft adaptations to disapply provisions, please consult Chapter 2.8 above.

4.5 Declarations reiterating the scope of the EEA Agreement

104. In other cases, the Contracting Parties have issued declarations upon the incorporation of provisions with third-country elements, clarifying their status as regards the EFTA States or reiterating the scope of the EEA Agreement.[9] It must be borne in mind that neither joint nor unilateral declarations can fully counteract potential precedent-setting effects of incorporating non-relevant provisions into the EEA Agreement.

5 REFERENCES TO EU TREATIES, UNION LAW, UNION POLICY, INTERNATIONAL AGREEMENTS AND NON-INCORPORATED ACTS

5.1 References to Union law, Union policy and Union currencies

105. Provisions of EEA acts contain many types of references to the EU, some of which are adapted with a specific adaptation while others are not. The deciding factor in whether an adaptation is needed is whether paragraph 8 of Protocol 1 EEA applies to the reference or not.

106. Paragraph 8 of Protocol 1 reads as follows:

> Whenever the acts referred to contain references to the territory of the "Community" or of the "common market" the references shall for the purposes of the Agreement be understood to be references to the territories of the Contracting Parties as defined in Article 126 of the Agreement.

107. Since the terms "Community" and "common market" are in quotation marks, there would normally be a presumption that paragraph 8 only applies to territorial references using those specific terms. As Protocol 1 has not been amended to update its outdated terminology, the State practice of the Contracting Parties implies that these terms should be understood to include current terminology, i.e. "the European Union" or "the Union", and "the Internal Market" or "the Single Market".

108. Importantly, paragraph 8 only includes references that are territorial rather than political in nature. While distinguishing between the two types of references is not always straightforward, a good metric to apply is to assess whether the relevant provision refers to something that occurs in the Union or something that is of the Union.

109. An example of a territorial reference is the term "Union turnover". The term is employed to reflect the turnover of a company in the EU. This term should not be adapted specifically because it is already adapted upon incorporation by paragraph 8 of Protocol 1.

[9] See also *Declarations and Statements linked to Decisions of the EEA Joint Committee – Note by the Secretariat* (ref. 14-50311).

110. Another example of a territorial reference is when acts refer to the term "Union currency". Since this refers to currencies in use *in the territory* of the Union, these references do not normally need to be adapted.

111. The term "Union law" is, however, an example of a political reference. The term is employed to refer to the law of the EU. As a result, it is not adapted by paragraph 8 of Protocol 1 and must therefore be specifically adapted if it is to have a different meaning in an EEA context, i.e. if it is to refer to EEA law.

112. In principle, references to "Union law" should be replaced by a reference to "the EEA Agreement". The EEA Agreement is equally binding on the EFTA States and the EU Member States, and the adaptations should therefore apply to all Contracting Parties. The exact phrasing of such adaptations will depend on the sentence to which they are applied. Such adaptations shall comply with one of the two following templates, although minor linguistic variations are acceptable when necessary:

In Article X, the words "Union law" shall be replaced by the words "the EEA Agreement". In Article X, the words "Union or national law" shall be replaced by the words "the EEA Agreement or national law".

Point 128 of Article 4(1) of Regulation (EU) No 575/2013: (128) 'distributable items' means the amount of the profits at the end of the last financial year plus any profits brought forward and reserves available for that purpose, before distributions to holders of own funds instruments, less any losses brought forward, any profits which are non-distributable pursuant to Union or national law or the institution's by-laws and any sums placed in non-distributable reserves in accordance with national law or the statutes of the institution, in each case with respect to the specific category of own funds instruments to which Union or national law, institutions' by-laws, or statutes relate; such profits, losses and reserves being determined on the basis of the individual accounts of the institution and not on the basis of the consolidated accounts;
Example adaptation in line with these guidelines: In Article 4(1), point (128), the words "Union or national law" shall be replaced by the words "the EEA Agreement or national law".
Adapted text: (128) 'distributable items' means the amount of the profits at the end of the last financial year plus any profits brought forward and reserves available for that purpose, before distributions to holders of own funds instruments, less any losses brought forward, any profits which are non-distributable pursuant to the EEA Agreement or national law or the institution's by-laws and any sums placed in non-distributable reserves in accordance with national law or the statutes of the institution, in each case with respect to the specific category of own funds instruments to which the EEA Agreement or national law, institutions' by-laws, or statutes relate; such profits, losses and reserves being determined on the basis of the individual accounts of the institution and not on the basis of the consolidated accounts;

Article 6 of Directive 2014/54/EU:

1. Member States shall ensure that the provisions adopted pursuant to this Directive and to Articles 1 to 10 of Regulation (EU) No 492/2011, are brought to the attention of the persons concerned throughout their territory, in particular Union workers and employers, by all appropriate means.
2. Member States shall provide, in more than one official language of the institutions of the Union, information on the rights conferred by Union law concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date. This information should also be easily accessible through Your Europe and EURES.

Example adaptation in line with these guidelines:

In Article 6, the words "Union law" shall be replaced by the words "the EEA Agreement".

Adapted text:

1. Member States shall ensure that the provisions adopted pursuant to this Directive and to Articles 1 to 10 of Regulation (EU) No 492/2011, are brought to the attention of the persons concerned throughout their territory, in particular Union workers and employers, by all appropriate means.
2. Member States shall provide, in more than one official language of the institutions of the Union, information on the rights conferred by the EEA Agreement concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date. This information should also be easily accessible through Your Europe and EURES.

113. As regards references to "Union policy", an adaptation may not necessarily have to apply to all Contracting Parties. The reference could often be maintained for the EU Member States, whereas an adaptation would be needed as regards the EFTA States. The adaptation chosen would depend on the specific provision. Often, it would be correct to insert an adaptation adding "or as regards the EFTA States, the relevant national legislation". Below is an example of a possible adaptation approach:

Article 5(2)(b) of Regulation (EU) 2020/1503:

2. The minimum level of due diligence referred to in paragraph 1 shall include obtaining all of the following evidence:

   […]

   (b) that the project owner is not established in a non-cooperative jurisdiction, as recognised by the relevant Union policy, or in a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849.

Possible adaptation approach:

In Article 5(2), point (b), the words "or, as regards the EFTA States, by the national legislation of the EFTA State concerned" shall be inserted after the words "as recognised by the relevant Union policy".

Adapted text:

2. The minimum level of due diligence referred to in paragraph 1 shall include obtaining all of the following evidence:

[…]

(b) that the project owner is not established in a non-cooperative jurisdiction, as recognised by the relevant Union policy or, as regards the EFTA States, by the national legislation of the EFTA State concerned, or in a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849.

114. In some instances, the terms "Union law" and "Union policy" should *not* be adapted. There is no need for adaptation when, for example, these terms are used in connection with an obligation of an EU institution or an obligation of the EU Member States that should not be conferred on the EFTA States.

5.2 References to the EU Treaties

115. Since the EFTA States are not members of the EU, the EU Treaties do not apply to them, and the EEA Agreement is the common legal framework governing the relations between all the Contracting Parties. As is the case with references to Union law, references to the EU Treaties should, in general, be replaced by references to the EEA Agreement. The adaptations may vary in style depending on whether the reference is a general reference to the EU Treaties or a reference to a specific provision in one of the EU Treaties.

116. Non-specific references to the EU Treaties shall in general be replaced by references to the EEA Agreement as such. Such adaptations shall comply with the following template:

In Article X, the words "[wording of reference to the EU Treaties]" shall be replaced by the words "the EEA Agreement".

117. References to a specific provision in one of the Treaties shall be replaced by the congruent provision of the EEA Agreement. Such adaptations shall comply with the following template:

In Article X, the words "Article[s] Y [TEU/TFEU]" shall be replaced by the words "Article[s] Z of the EEA Agreement".

Article 1 of Directive 2014/54/EU:

This Directive lays down provisions which facilitate the uniform application and enforcement in practice of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of Regulation (EU) No 492/2011. This Directive applies to Union citizens exercising those rights and to members of their family ('Union workers and members of their family').

Example adaptation in line with these guidelines:

In Article 1, the words "Article 45 TFEU" shall be replaced by the words "Article 28 of the EEA Agreement".

Adapted text:

> This Directive lays down provisions which facilitate the uniform application and enforcement in practice of the rights conferred by Article 28 of the EEA Agreement and by Articles 1 to 10 of Regulation (EU) No 492/2011. This Directive applies to Union citizens exercising those rights and to members of their family ('Union workers and members of their family').

118. In some cases, there are no congruent provisions in the EEA Agreement, for example Articles 3, 21 and 145 TFEU. In such situations, the reference shall not apply to the EFTA States, and the reference should be adapted or disapplied as regards the EFTA States (see Chapter 2.8 above).

5.3 References to the Charter of Fundamental Rights of the European Union

119. It is quite common for an EU act to refer to the Charter of Fundamental Rights of the European Union (the Charter). The Charter does not form part of the EEA Agreement, therefore references to the Charter should not apply, as such, to the EFTA States.

120. However, the EU Member States are bound by the Charter when implementing and applying EU law. Since the EEA Agreement forms part of EU law, the EU Member States are also obliged to respect the Charter when implementing and applying the EEA Agreement. An adaptation cannot entail that the EU Member States are not bound by the Charter under the EEA Agreement, as this would be in contradiction to their obligations under the EU Treaties.

121. As a main rule, provisions containing references to the Charter should be adapted. Such references may be disapplied if disapplication does not imply that EEA nationals are deprived of their fundamental rights (see Chapter 2.8 above). In other situations, adaptations should clarify what should apply as regards the EFTA States instead of the Charter. References to the Charter can be adapted to refer to fundamental rights under the EEA Agreement. Such adaptations shall comply with the following template:

> In Article X, the words "or, as regards the EFTA States, fundamental rights under the EEA Agreement" shall be inserted after "[wording of the Charter reference]".

122. In specific cases, selected text of a Charter provision can also be reproduced directly in an adaptation. An example can be found below:

Article 6 of Directive 2010/13/EU:

> 1. Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any:
>
> (a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;
>
> (b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.

2. The measures taken for the purposes of this Article shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter.

Possible adaptation approach:

In Article 6:

(i) in paragraph 1, the words "or, as regards the EFTA States, any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on grounds of nationality" shall be inserted after the words "any of the grounds referred to in Article 21 of the Charter";

(ii) in paragraph 2, the words "or, as regards the EFTA States, fundamental rights under the EEA Agreement" shall be inserted after the word "Charter".

Adapted text:

1. Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any:

   (a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter or, as regards the EFTA States, any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on grounds of nationality;

   (b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.

2. The measures taken for the purposes of this Article shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter or, as regards the EFTA States, fundamental rights under the EEA Agreement.

123. However, where the Charter is referred to in connection with an obligation of an EU institution only, there is no need for any adaptation as regards the EFTA States.

5.4 References to international treaties

124. Sometimes an act makes a reference to an international treaty of relevance to the subject matter of the act. The inclusion of such reference in an EEA act does not entail that the international treaty itself is made part of the EEA Agreement. However, depending on the nature and content of the provision containing the reference, there could be a need for an adaptation to avoid unintended consequences. Where one or more EFTA States is *not* party to the relevant international treaty, an adaptation would most likely be necessary to clarify whether the provision should apply to the EFTA State(s) in question. Below is an example of a possible adaptation approach:

Article 36(2) of Directive 2014/25/EU: Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV.
Possible adaptation approach: In Article 36(2): (i) the words "Union law" shall be replaced by the words "the EEA Agreement"; (ii) the words "or, in the case of Liechtenstein, with standards equivalent to those laid down in the referred ILO Conventions" shall be inserted after the words "Annex XIV".
Adapted text: Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by the EEA Agreement, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV or, in the case of Liechtenstein, with standards equivalent to those laid down in the referred ILO Conventions.

125. Where the provision makes reference to an international treaty to which all EEA States are party, there could still be a need for an adaptation. In such a case, it is necessary to undertake a thorough case-by-case assessment and careful consideration of the legal and practical consequences of any adaptation or non-adaptation of such reference.

126. An adaptation could be necessary due to the differences in transfer of competence between the EU and EFTA pillars. This would *inter alia* be the case for provisions establishing internal EU obligations aimed at fulfilling obligations under the treaty in question. Below is an example of a possible adaptation approach:

Article 18(1)(b) of Regulation (EU) 2017/852: By 1 January 2020 and at appropriate intervals thereafter, Member States shall prepare, provide to the Commission and make publicly available on the internet a report with the following: (a) ... (b) information needed for the fulfilment by the Union of its reporting obligation under Article 21 of the [Minamata] Convention;
Example adaptation in line with these guidelines:

In Article 18(1), point (b), the following sentence shall be inserted after the word "Convention": ". This shall not apply to the EFTA States"
Adapted text: By 1 January 2020 and at appropriate intervals thereafter, Member States shall prepare, provide to the Commission and make publicly available on the internet a report with the following: (a) ... (b) information needed for the fulfilment by the Union of its reporting obligation under Article 21 of the [Minamata] Convention. This shall not apply to the EFTA States;

127. Further, an adaptation would be necessary where the provision containing the reference is drafted in such a way that it would entail that the obligations under the international treaty would be included in the EEA Agreement and with that also in the jurisdiction of ESA and the EFTA Court. Below is an example of a possible adaptation approach:

Article 12 of Regulation (EU) 2019/1021: In accordance with Articles 12 and 13 of the Convention [on Persistent Organic Pollutants], the Commission and the Member States shall cooperate in providing appropriate and timely technical and financial assistance to developing countries and countries with economies in transition to assist them, upon request and within available resources and taking into account their particular needs, to develop and strengthen their capacity to fully implement their obligations under the Convention. Such support may also be channelled through regional centres, as identified under the Convention, non-governmental organisations or the Agency.
Example adaptation in line with these guidelines: In Article 12, the following words shall be inserted: "This Article shall not apply to the EFTA States."
Adapted text: In accordance with Articles 12 and 13 of the Convention, the Commission and the Member States shall cooperate in providing appropriate and timely technical and financial assistance to developing countries and countries with economies in transition to assist them, upon request and within available resources and taking into account their particular needs, to develop and strengthen their capacity to fully implement their obligations under the Convention. Such support may also be channelled through regional centres, as identified under the Convention, non-governmental organisations or the Agency. This Article shall not apply to the EFTA States.

128. Where the reference to an international treaty occurs in the context of a definition and aims to provide a definition in the context of the act that corresponds to the relevant definition under the referred treaty, there is usually no need for an adaptation where all EEA States are party to the relevant treaty. An example may be found below:

> Article 2(5) of Regulation (EU) 2020/852:
> 'climate change mitigation' means the process of holding the increase in the global average temperature to well below 2 °C and pursuing efforts to limit it to 1.5 °C above pre-industrial levels, as laid down in the Paris Agreement;

129. There is also usually no need for an adaptation where a reference to an international treaty is used to limit the scope of a provision, or where it is made merely to clarify that the provisions of an EEA act do not interfere with the performance of obligations stemming from the treaty in question. Such a reference does not create any rights or obligations in itself. The reference could state that a provision of the act should apply "unless" something else follows from the treaty in question, "without prejudice to the obligations under the [international agreement]" or similar, ensuring that the provision does not introduce an obligation that could entail a breach of obligations under the relevant treaty.

130. Below are two examples showing where an adaptation would usually not be necessary:

> Article 13(2) of Directive 2023/2823:
> Member States may provide that a design is to be refused registration where the design constitutes an improper use of badges, emblems and escutcheons other than those covered by Article 6ter of the Paris Convention.

> Article 64(7) of Regulation (EU) 2018/1139:
> The reallocations of responsibility under this Article shall be without prejudice to the rights and obligations of the Member States under the Chicago Convention.

131. References to international treaties that only affect an EU institution do not create any right or obligation in the EFTA pillar and therefore do not require adaptations. Such references could inter alia state that the Commission should perform a task in accordance with obligations under the treaty in question, or that it should adopt implementing acts with a content that is in line with or does not duplicate obligations under the treaty. Examples may be found in Articles 7(3) and 18(2) of Regulation (EU) 2017/852.

5.5 References to EU legal acts already incorporated into the EEA Agreement

132. Where an act contains references to EU acts that are already incorporated into the EEA Agreement, such references are understood by the Contracting Parties as references to the acts *as they are incorporated into the EEA Agreement*, including any adaptations in force. In these situations, there is no need for an adaptation to clarify that the references do not apply to the original EU act, but to the act as adapted.

5.6 References to non-incorporated acts

133. It is undisputed that references to non-incorporated acts in provisions of incorporated acts do not make the non-incorporated act part of the EEA Agreement as such.[10] However, a provision of an incorporated act may create rights and obligations under EEA law that can only be fulfilled through recourse to a referenced non-incorporated act.

134. Whether, and then how, the reference to a non-incorporated act should be adapted or not, depends inter alia on whether the provision referring to the non-incorporated act would establish new rights or obligations for the EFTA States, within the meaning of paragraph 7 of Protocol 1 EEA. First of all, it must be assessed whether the provision referring to a non-incorporated act would create a new obligation (or right) for the EFTA States. If the assessment concludes that the provision referring to a non-incorporated act would create a new obligation (or right) for the EFTA States, an adaptation is generally necessary. If no right or obligations follow from the provision containing the reference, then an adaptation is not necessary.

135. When assessing references to non-incorporated acts, it should also be determined whether the provision referring to a non-incorporated act is needed to apply the incorporated act in a meaningful manner, or whether the provision is necessary to achieve the object and purpose of the incorporated act. If so, an adaptation is normally necessary to address the reference.

136. Moreover, a distinction must be made between references to acts that are not yet incorporated (and will presumably be incorporated) and references to acts that fall outside the scope of the EEA Agreement and will therefore not be incorporated. If the act referred to will be incorporated into the EEA Agreement in the future, the adaptation to – or disapplication of – the reference should cease to be in force with the incorporation of the referred act into the EEA Agreement. This needs to be specified in the adaptation.

137. If the act is not yet incorporated, the following template provides a possible approach:

> In [Article/paragraph X], the words "or, as regards the EFTA States, until the Decision of the EEA Joint Committee incorporating [legal act] enters into force, the [corresponding/equivalent national law/procedures] in accordance with their respective national [potential specification of field of law] legislation" shall be inserted after the words "[reference to non-incorporated act]".

138. Definitions are an example of a provision that is necessary for the application of an act. Where an act refers to definitions in a non-incorporated act, these are, as a general practice, not adapted when the non-incorporated act is expected to be incorporated in the future. Definitions containing references to other non-incorporated acts must be assessed carefully on a case-by-case basis. If such definitions are derived from an act that falls outside the scope of the EEA Agreement, an adaptation may be necessary.

139. In all cases, a thorough case-by-case assessment and careful consideration of the legal and practical consequences of any adaptation or non-adaptation of a reference to a non-incorporated act is necessary and indispensable. In cases of ambiguity or uncertainty, the act in question shall be referred to Subcommittee V.

[10] See also *Principles applying to references to non-incorporated acts in the EEA Agreement – Legal note by the Secretariat* (ref. 22-2021).

140. The following examples provide two possible adaptation approaches that may be taken towards non-incorporated acts:

Article 3(24) and (25) of Regulation (EU) 2019/1020: (24) 'customs authorities' means customs authorities as defined in point 1 of Article 5 of Regulation (EU) No 952/2013; (25) 'release for free circulation' means the procedure laid down in Article 201 of Regulation (EU) No 952/2013;
Possible adaptation approach: Article 3 shall be amended as follows: (i) in point 24, the words "or the customs administrations of the EFTA States responsible for applying the customs legislation and any other authorities of the EFTA States empowered under national law to apply certain customs legislation" shall be added after the reference to Regulation (EU) No 952/2013; (ii) in point 25, the words "or, as regards the EFTA States, the corresponding procedures in accordance with their respective national customs legislation" shall be added after the reference to Regulation (EU) No 952/2013;
Adapted text: (24) 'customs authorities' means customs authorities as defined in point 1 of Article 5 of Regulation (EU) No 952/2013 or the customs administrations of the EFTA States responsible for applying the customs legislation and any other authorities of the EFTA States empowered under national law to apply certain customs legislation; (25) 'release for free circulation' means the procedure laid down in Article 201 of Regulation (EU) No 952/2013 or, as regards the EFTA States, the corresponding procedures in accordance with their respective national customs legislation;

Article 10a(1), third subparagraph, of Directive 2003/87/EC: If an installation is covered by the obligation to conduct an energy audit or to implement a certified energy management system under Article 8 of Directive 2012/27/EU of the European Parliament and of the Council and if the recommendations of the audit report or of the certified energy management system are not implemented, unless the pay-back time for the relevant investments exceeds three years or unless the costs of those investments are disproportionate, then the amount of free allocation shall be reduced by 20 %. The amount of free allocation shall not be reduced if an operator demonstrates that it has implemented other measures which lead to greenhouse gas emission reductions equivalent to those recommended by the audit report or by the certified energy management system for the installation concerned.
Possible adaptation approach:

In Article 10a(1), third subparagraph, the words ", or equivalent obligations, in accordance with national law in the EFTA States," shall be inserted after the words "Article 8 of Directive 2012/27/EU of the European Parliament and of the Council".
Adapted text: If an installation is covered by the obligation to conduct an energy audit or to implement a certified energy management system under Article 8 of Directive 2012/27/EU of the European Parliament and of the Council, or equivalent obligations, in accordance with national law in the EFTA States, and if the recommendations of the audit report or of the certified energy management system are not implemented, unless the pay-back time for the relevant investments exceeds three years or unless the costs of those investments are disproportionate, then the amount of free allocation shall be reduced by 20 %. The amount of free allocation shall not be reduced if an operator demonstrates that it has implemented other measures which lead to greenhouse gas emission reductions equivalent to those recommended by the audit report or by the certified energy management system for the installation concerned.

6 ENTRY INTO FORCE AND TRANSITIONAL PERIODS

141. EU acts are almost always incorporated into the EEA Agreement after they have entered into force in the EU. The provisions of such acts may specify that certain obligations shall apply or shall be complied with on a certain date, which may already be in the past on the date of entry into force of the JCD incorporating the act into the EEA Agreement.

142. Protocol 1 paragraph 11 makes it clear how obligations concerning the entry into force or implementation of acts are to be read in an EEA context; the general rule being that they follow from the date of entry into force of the JCD incorporating the act into the EEA Agreement. The general understanding is that where provisions on entry into force and implementation are already in the past on the date of entry into force of an act in the EEA Agreement, they are binding on the EFTA States from the date of entry into force of the JCD by which they are incorporated.

143. Entry into force dates and implementation dates that are still in the future on the date of incorporation of an act into the EEA Agreement are understood to apply in the same way to all Contracting Parties. Sometimes, there may be reasons for dates, transitional periods or other deadlines in an EU act to nevertheless be adapted for the EFTA States.

144. The entry into force date of an act will always follow from the entry into force clause of the JCD. If the act incorporated by the JCD has already entered into force in the EU, the act will also enter into force in the EEA simultaneously with the JCD. If the act has not yet entered into force in the EU but the JCD has, the act will enter into force in the entire EEA at the same time as it enters into force in the EU.

145. Transitional periods are the periods that EU Member States are given to implement an act or elements within it from the time of adoption of the act. If the JCD is adopted later and there is a need for the EFTA States to be given a similar amount of time to implement the act, the

transitional period must be adapted. An act may contain other deadlines that similarly have to be adapted.

146. Note that the entry into force of the act itself in the EEA follows from the entry into force of the JCD by which it is incorporated and is not affected by adapting application dates or other deadlines. ESA's practice has been to consider that the compliance date of regulations follows from their entry into force, and not from their application date. As a result, ESA has a practice of launching infringement proceedings against the EFTA States where they have not made regulations part of their internal legal order, in accordance with Article 7(a) EEA, by their entry into force dates, regardless of whether the application date has passed.

147. An adaptation to adapt various deadlines found in an act shall comply with the following template:

In Article X, the words "or, as regards the EFTA States, [date]" shall be inserted after the words "[date]".

148. If the adapted date applies to all Contracting Parties, the adaptation shall comply with the following template:

In Article X, the words "[date]" shall be replaced by the words "[adapted date]".

149. If the date is not yet known and shall be set at a certain time period after the entry into force of a JCD, the adaptation shall comply with the following template:

In Article X, the words "[date]" shall be replaced by "the date of entry into force of Decision of the EEA Joint Committee No [nn/yyyy] of [month/year]".

Article 51(3) of Regulation (EU) No 910/2014: 3. A certification-service-provider issuing qualified certificates under Directive 1999/93/EC shall submit a conformity assessment report to the supervisory body as soon as possible but not later than 1 July 2017. Until the submission of such a conformity assessment report and the completion of its assessment by the supervisory body, that certification-service-provider shall be considered as qualified trust service provider under this Regulation.
Example adaptation in line with these guidelines: In Article 51(3), the words "or, as regards the EFTA States, six months after the date of entry into force of Decision of the EEA Joint Committee No 22/2018 of 9 February 2018" shall be inserted after the words "1 July 2017".

Adapted text:

> 3. A certification-service-provider issuing qualified certificates under Directive 1999/93/EC shall submit a conformity assessment report to the supervisory body as soon as possible but not later than 1 July 2017 or, as regards the EFTA States, six months after the date of entry into force of Decision of the EEA Joint Committee No 22/2018 of 9 February 2018. Until the submission of such a conformity assessment report and the completion of its assessment by the supervisory body, that certification-service-provider shall be considered as qualified trust service provider under this Regulation.

7 PROTOCOL 31 TO THE EEA AGREEMENT – ACTS RELATING TO RIGHTS OF INDIVIDUALS AND ENTITIES

150. The purpose of Protocol 31 EEA is to strengthen and broaden the cooperation between the EFTA States and the EU in fields outside the four freedoms covered by Part VII of the EEA Agreement and specifically listed under Article 78 EEA. The acts included in Protocol 31 are generally intended to provide a legal basis for enabling State-level cooperation between the Contracting Parties; not to create rights and obligations for individuals and entities in the Internal Market.

151. It follows from the introductory part of Protocol 1 that the horizontal adaptations contained therein only apply to acts referred to in the annexes to the EEA Agreement. Therefore, if Protocol 1 adaptations are to apply to acts included in Protocol 31, this must be provided in a specific adaptation to the act in Protocol 31.

152. Moreover, since acts included in Protocol 31 primarily concern State-to-State cooperation between the Contracting Parties, the institutional provisions found under Part VII EEA, including the surveillance and enforcement mandate of ESA, do not apply to Protocol 31. This follows from Article 79(3) EEA.

153. Although acts included in Protocol 31 are rarely intended to create rights and obligations for individuals and entities, there may be exceptional circumstances where such acts are included in Protocol 31 rather than in the annexes. Where such an act is included in Protocol 31, it must be ensured that both Protocol 1 and Part VII EEA apply to the act, in order to give individuals and entities full access to the rights set out in the act. This is done through the specific adaptations mentioned below. Such adaptations do not need to be drafted as direct editing, since they concern the application of legal regimes to the act, rather than the introduction of specific rights or obligations into the act.

154. The adaptation text to apply Protocol 1 to the act shall comply with the following template:

> Protocol 1 to the EEA Agreement (Horizontal Adaptations) shall apply to this paragraph.

155. The adaptation text to apply Part VII EEA to the act shall comply with the following template:

> By virtue of Article 79(3) of the EEA Agreement, Part VII (Institutional Provisions) of the Agreement shall apply to this paragraph.