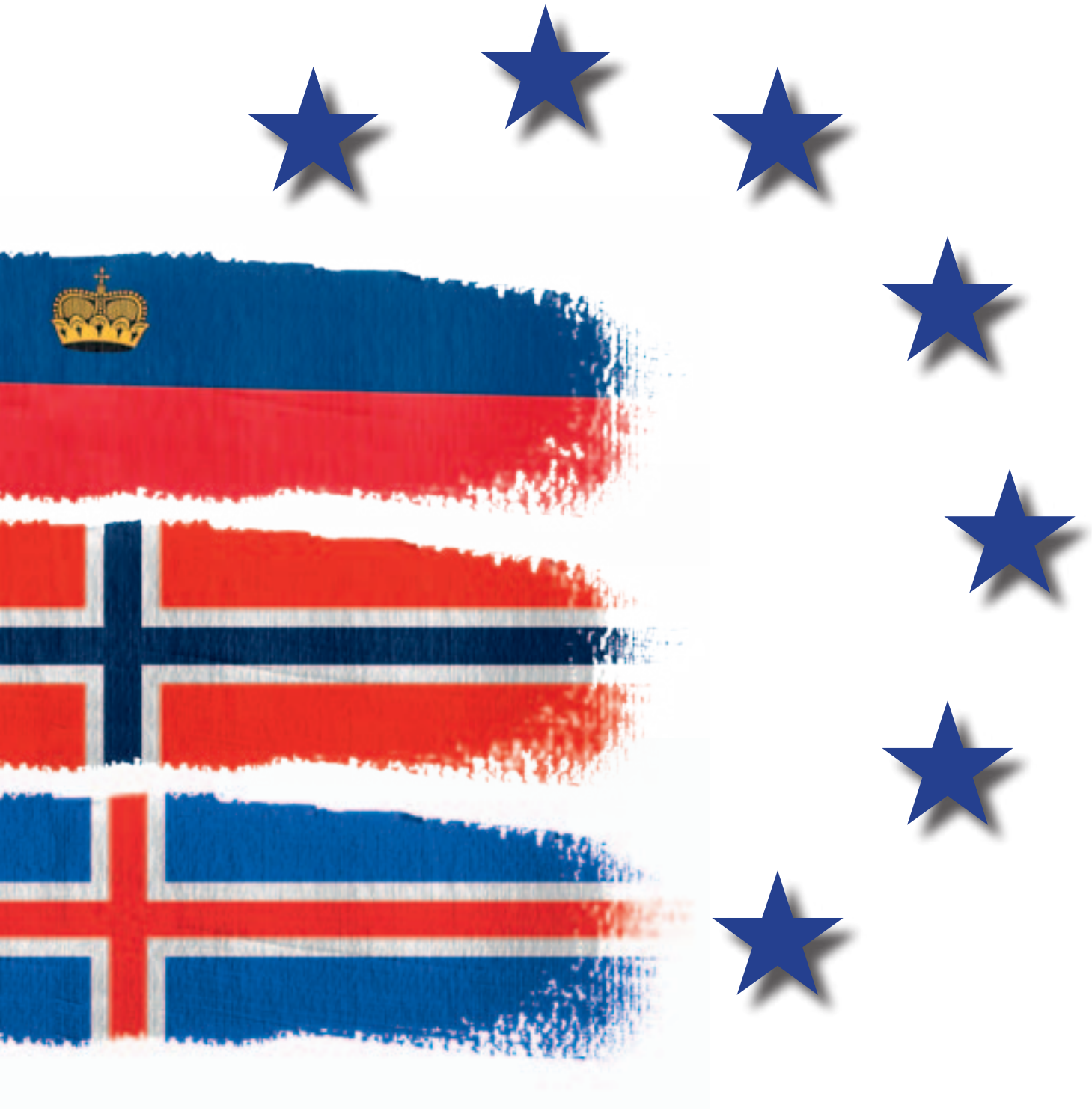

EFTA Surveillance Authority

Annual Report 2011

EFTA SURVEILLANCE AUTHORITY

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ISSN: 1373-1793

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EFTA Surveillance Authority (p. 53)

Designed and printed by IMPRIMERIE CENTRALE, Luxembourg

Foreword

2011 has been a year of dramatic changes. The financial crisis, the growing burden of sovereign debt and the uncertain economic situation have been followed by lack of economic growth and jobs in many European countries. Focus has again turned towards the European institutional architecture and new negotiations have been launched on the future economic governance of the European Union. There is, however, broad agreement that an open and strengthened Single Market, the main feature of the EEA Agreement, is key to restore growth.

One of the reasons for the success of the Single Market is the institutions and their decision-making capacity. Even if the correct application of the common European rules first and foremost is the responsibility of national administrations, independent institutions at European level are crucial to ensure that commitments are upheld and common rules enforced across Europe. Together with the European Commission and the courts, the EFTA Surveillance Authority is part of this system and plays an important role in ensuring stable framework conditions and a level playing field for businesses and citizens of the 30 States which are parties to the EEA Agreement.

There is broad agreement that an open and strengthened Single Market, the main feature of the EEA Agreement, is key to restore growth.

Under the Agreement the Authority is under the obligation to co-operate, exchange information and consult with the European Commission on policy as well as on specific cases to ensure uniform surveillance. The co-operation is good at all levels, but unlike the Commission the Authority does not propose or amend laws even if we see good arguments for change. The Authority takes its decisions independently, with a view to homogeneity and on the basis of European law as it is being understood and interpreted by the European courts. I am particularly pleased to note that the recent report of the independent and research-based review of Norway's agreements with the EU confirms that the Authority seems to have struck a good balance between independent and uniform surveillance in the whole of the EEA in exercising its control with the EFTA States' compliance with EEA rules.

The case load in the Authority has in 2011 again been dominated by a number of complex cases stemming from the collapse of the financial sector in Iceland in 2008. Important decisions have been taken regarding the high profile Icesave case which is now pending before the EFTA Court, as well as in the area of state aid where the merger of two banks that previously have been recapitalised by the State was approved by the Authority in November. Formal state aid investigations into the recapitalisation by the Icelandic state of the failed banks in the autumn of 2008 have been pursued in 2011 and are to be concluded in 2012.

The Authority concluded in June the formal investigation on possible state aid involved in the Norwegian State's decision in 2008 to increase its compensation to the coastal express, Hurtigruten, and ordered the Norwegian authorities to recover

the unlawful aid. The decision has been challenged and is now pending before the EFTA Court.

In early 2011, the Authority has given green light to a new Liechtenstein tax status scheme. The Authority concluded that the new tax status entitled "Private Investment Structure" (P.I.S) does not involve state aid, since it can only be granted to entities which do not engage in economic activity.

The Authority has also taken an important decision in the field of competition where a Norwegian ferry company was given an administrative fine for breach of the competition rules and abuse of dominant position on their services from Sandefjord, Norway, to Strömstad, Sweden.

In 2011, the Authority has continued to focus on closing old cases. The number of old cases was at an all time low by the end of the year and average case-handling times for complaints are pointing downwards. The Authority does not see formal infringement procedures as an aim in itself, but failure by an EFTA State to notify measures transposing a directive, or make a regulation part of its national legal order, is quickly followed up by letters of formal notice. Many cases are, however, solved informally and at the early stage of the administrative procedure because the EFTA States take appropriate action in response to the Authority's requests to comply with EEA law.

To maintain strong and relevant structures for co-operation in Europe is in our common interest. In this we all have a stake.

The Authority has also, in specific sectors, the obligation to examine compliance with EEA rules directly on the ground, such as in the veterinary, maritime and aviation areas. A team of competent inspectors from the Authority work together with colleagues on the EU side and in the national administrations to check that the relevant standards are applied and rules followed to safeguard public and animal health as well as passenger security and the safety of ships and airplanes.

The Authority is well aware of the impact of our decisions on governments, businesses and citizens of the EFTA States and takes very seriously its responsibility to examine all aspects of a case before taking a decision. When taking office on 1 July, I was very pleased to join a dedicated and highly competent internationally-minded organisation with expert knowledge of European law as well as good insight into the economies and law of the EFTA States. The Authority will continue to strive to fulfil its mandate under the EEA and expects 2012 to be another challenging year for European co-operation which the Authority, in its own way and within the scope of the EEA Agreement, will be trying to advance. To maintain strong and relevant structures for co-operation in Europe is in our common interest. In this we all have a stake.

Oda Helen Sletnes,
President

CONTENTS

Chapter 1

INTRODUCTION

The EFTA Surveillance Authority monitors compliance with European Economic Area rules in Iceland, Liechtenstein and Norway, enabling them to participate in the European Internal Market

The European Economic Area

The European Economic Area (EEA) consists of the 27 Member States of the European Union (EU) and three European Free Trade Association (EFTA) States: Iceland, Liechtenstein and Norway. It was established by the EEA Agreement, which came into force in 1994, an international agreement which enables the three EFTA states to participate fully in the European Internal (or Single) Market.

The purpose of the EEA Agreement is to guarantee, in all 30 EEA States, the free movement of goods, people, services and capital – "the four freedoms". As a result of the agreement, EU law on the four freedoms, state aid, and competition rules for undertakings, is incorporated into the domestic law of the participating EFTA States. All new relevant EU legislation is continuously incorporated in the EEA Agreement so that it applies throughout the EEA, ensuring a uniform application of laws relating to the Internal Market.

The Agreement ensures equal rights to participate in the Internal Market for citizens and economic operators in the EEA and equal conditions of competition. It also provides for co-operation across the EEA in important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture. By removing barriers to trade and by opening new opportunities for some 500 million Europeans, the Internal Market of the EEA creates jobs and growth and adds to the international competitiveness of the EEA States.

The success of the EEA Agreement depends upon uniform implementation and application of the common rules in each of the 30 EEA States. The Agreement provides for a system of supervision where EU Member States are supervised by the European Commission, while the participating EFTA States are supervised by the EFTA Surveillance Authority. The two institutions co-operate closely on policy as well as individual cases.

The role of the Authority

The EFTA Surveillance Authority ensures that the participating EFTA States (Iceland, Liechtenstein and Norway), respect their obligations under the EEA Agreement.

The Authority protects the rights of individuals and market participants who find their rights violated by rules or practices of the EFTA States or companies within those States. Such rules or practices may, for example, be discriminatory, impose unnecessary burdens on commercial activity, or constitute unlawful state aid. The Authority may initiate proceedings against the relevant EFTA State at the EFTA Court, seeking a change in the relevant rules or practices unless the State concerned decides to take appropriate action in response to the Authority's request.

The Authority also enforces restrictions on state aid, assessing its compatibility with the functioning of the Internal Market. The Authority has the power to order repayment of unlawful state aid.

The Authority also ensures that companies operating in the EFTA States abide by the rules relating to competition. The Authority can investigate possible infringements of EEA provisions, either on its own initiative, or on the basis of complaints. It can impose fines on individual undertakings and assess mergers between undertakings where certain thresholds are met.

In monitoring and enforcing the Agreement, the Authority has powers that correspond to those of the European Commission and there is close contact and co-operation between the Commission and the Authority. The two institutions oversee the application of the same laws in different parts of the EEA.

Organisation of the Authority

College

The Authority operates independently of the EFTA States and is based in Brussels. The Authority is led by a College which consists of three members, each appointed for a period of four years by the three participating EFTA States. Although College members are appointed by the Member States, they undertake their functions independently and free of political direction.

During 2011, the composition of the College was:

- Per Sanderud (Norway), President until 30 June 2011
- Oda Helen Sletnes (Norway), President from 1 July 2011
- Sverrir Haukur Gunnlaugsson (Iceland)
- Sabine Monauni-Tömördy (Liechtenstein)

The College is assisted by four departments: the Internal Market Directorate, the Competition and State Aid Directorate, the Legal and Executive Affairs Department and the Administration.

Budget and accounts

The activities and operating expenses of the Authority are financed by contributions from Iceland (9%), Liechtenstein (2%) and Norway (89%). The Authority's annual budget was almost EUR 12.2 million in 2011, at the same level as in 2010.

On 29 June 2011, the Authority submitted its Financial Statement for the preceding financial year (2010), and the accompanying Audit Report by the EFTA Board of Auditors (EBOA), to the EFTA States. The audit certificate stated that:

a) the financial statements give a true and fair view of the financial position as at the end of the period and of the results of the operations for the period;
b) the financial statements were prepared in accordance with the stated accounting principles;
c) the accounting principles were applied on a basis consistent with that of the preceding financial year;
d) transactions were in accordance with the Financial Regulations and Rules of the Authority.

On 1 December 2011, the Authority's Financial Statement for 2010 was approved by the EFTA States, and the Authority was discharged of its accounting responsibilities for that period.

The Authority's budgets for 2012 break down as follows:

Total budget proposal	**Budget 2012**
Financial income	-15,000
Contributions & Other income	-12,413,354
Other income	-32,500
Contributions from the EEA/EFTA States	-12,380,854
Total Income	-12,428,354
Salaries, Benefits, Allowances	9,509,354
Salaries	6,358,151
Benefits, allowances & turnover costs	3,151,203
Travel, Training, Representation	729,000
Office Accommodation	1,065,000
Supplies and Services	1,120,000
Financial costs	5,000
Total expenditure	**12,428,354**

Personnel

In 2011, the Authority consisted of 61 personnel, made up of College Members and staff employed on fixed-term contracts, in addition to temporary staff, national experts seconded from the EFTA States' public administrations, and trainees. In 2011, 12 nationalities were represented amongst the staff, but approximately half come from the EFTA States. 57% of staff members were men, 43% were women, which is the same ratio as the previous year. At management level (Director and Deputy Director), the ratio was 60% men and 40% women. In accordance with the Authority's staff regulations established by the EFTA States, staff are employed for a three year period, normally renewable only once.

Glossary of terms

EFTA – The European Free Trade Association, an intergovernmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States: Iceland, Liechtenstein, Norway and Switzerland.

EEA – The European Economic Area, an area of economic co-operation that consists of the 27 EU Member States and three of the EFTA States: Iceland, Liechtenstein, Norway. (Switzerland is not part of the EEA). Inside the EEA, the rights and obligations established by the Internal Market of the European Union are expanded to include the participating EFTA States.

EEA Agreement – The Agreement which creates the European Economic Area.

EEA EFTA States – The three EFTA States that participate in the EEA: Iceland, Liechtenstein and Norway.

EFTA Surveillance Authority – The organisation which ensures that the three EEA EFTA States fulfil their legal obligations as stated in the EEA Agreement. Referred to as "the Authority" for the purposes of this report.

EFTA Court – The judicial body with jurisdiction with regard to the obligations of the EFTA States and the Authority pursuant to the EEA Agreement. The main functions of the Court consist of judgments in direct actions, in particular infringement cases brought by the Authority against the EFTA States, and advisory opinions in cases referred to it by the national courts of the EFTA States.

EEA Joint Committee – A committee of representatives of EU and EFTA States competent to incorporate legislation into the EEA Agreement.

Chapter 2

INTERNAL MARKET

Introduction

The role of the EFTA Surveillance Authority's Internal Market Affairs Directorate (IMA) is to monitor the EFTA States in order to ensure that they effectively implement the Internal Market rules, which mostly consist of regulations and directives, into their national legal orders and that they apply those rules correctly. In this context the Authority performs broadly the same tasks as the European Commission, and the two bodies work closely together.

The Internal Market is based on the rules concerning the four freedoms – the free movement of goods, persons, services and capital – which have been at the centre of European integration ever since the signing of the Treaty of Rome in 1957. Those rules are further supplemented by a number of "horizontal provisions", covering areas such as health and safety at work, labour law, equal treatment of men and women, consumer protection, environment and company law. The Internal Market rules cover most areas relevant to commercial activities in the EEA.

The EFTA States are required to notify the Authority of the measures they adopt to implement directives and, if requested by the Authority, to inform the Authority of the incorporation of regulations into national law. If an EFTA State does not implement the EEA rules, the Authority will intervene and may initiate infringement proceedings against the EFTA State concerned.

Where the Authority has information about national legislation or practices that may not comply with the EEA Agreement, it may decide to initiate an investigation. This may be based on incorrect implementation of EEA law or where national rules or practices are incompatible with the Agreement. Such investigations can be initiated on the basis of the Authority's own surveillance of the EFTA States, or on the basis of a complaint, which anyone may submit to the Authority.

Investigation by the Authority may lead to the launching of formal infringement proceedings, which is a three step procedure. The first step, opening the proceedings, is a letter of formal notice whereby the Authority sets out its opinion of the issue and gives the State a chance to comment and bring forward its arguments. If the case is not solved at this stage, the Authority may deliver a reasoned opinion (step two). Finally, the Authority may bring the case to the EFTA Court which will then hand down a judgment in the case (step three). However, problems can often be resolved through exchange of information and discussions between the Authority and the EFTA State concerned without a need to resort to formal proceedings.

In 2011, the Authority dealt with several important cases related to Internal Market rules, which are described in more detail in this chapter. Probably the most significant case is the so-called Icesave case. The Authority maintains that Iceland was under an obligation to ensure that depositors of UK and Netherlands branches of the collapsed Landsbankinn received payment of the minimum guarantee provided for in the *Deposit Guarantee Directive*. The Authority delivered a reasoned opinion in June and after a thorough examination of Iceland's response decided at the end of the year to bring the case to the EFTA Court. (See page 12)

Another important case is the Norwegian labour clause case. Norwegian rules obliged contracting authorities to have in

their public procurement contracts a clause requiring their contractors to pay wages as laid down in the applicable collective agreement or what is normal in the place and profession concerned. The Authority delivered a reasoned opinion concluding these rules were not compatible with the *Posting of Workers Directive*. Norway has now amended the rules and the Authority is currently evaluating whether that is sufficient to meet its concerns. (See page 14)

In another noteworthy case concerning the obligation to comply with judgments of the EFTA Court, the Court held that Norway was in breach of the Surveillance and Court Agreement as it had failed to comply with an earlier judgment of the Court concerning a breach of the *Equal Treatment Directive* with regard to survivors' pensions. This was the first time the Authority brought an EFTA State before the Court for failing to comply with a judgment. (See page 15)

Furthermore, in 2011 the Authority opened its first infringement proceedings on the basis of the Services Directive. The Directive is one of the most important pieces of legislation concerning the Internal Market to enter into force in recent years. The Authority's formal actions concern licence requirements in the Norwegian Planning and Building Act and the requirement in Liechtenstein to appoint a co-trustee resident in Liechtenstein if the trustee resides elsewhere. (See page 18 and 19)

Other cases worth noting concern exit tax and ownership restriction of stock exchanges in Norway. The Authority delivered a reasoned opinion to Norway concluding that rules which impose an immediate tax on companies transferring their seat to another EEA State were in breach of the right of establishment and free movement of capital under the EEA Agreement. In response to the reasoned opinion Norway changed its legislation. (page reference) The Authority also referred Norway to the EFTA Court claiming that Norway was in breach of the free movement of capital by having in place a general ban of owning more than 20% of shares in stock exchanges and securities depositories. (See page 13)

Internal Market Scoreboard

Twice a year the Authority publishes, in parallel with the European Commission, the Internal Market Scoreboard. The Scoreboard indicates how the EFTA States perform with regard to the timely implementation of directives.

In the latest Scoreboard, due to be published in spring 2012, the average implementation deficit of the EFTA States was 0.5%. All three states were below the deficit target of 1% set by the European Council.

- Iceland 0.5%
- Norway 0.6%
- Liechtenstein 0.4%

The latest Internal Market Scoreboard for the EFTA States, showing the implementation status of directives, can be found at http://www.eftasurv.int/press--publications/scoreboards/internal-market-scoreboards/

Financial services

Icesave case brought before the Court

In December 2011, Iceland was brought before the EFTA Court because of its failure to ensure that Dutch and UK Icesave depositors received minimum compensation after the collapse of the Icelandic bank Landsbanki.

Landsbanki had branches in the UK and the Netherlands taking deposits under the brand Icesave. When the bank collapsed in October 2008, the Icelandic Deposit Guarantee Scheme never paid compensation to the depositors at these branches because of lack of funds. Instead, the UK and the Dutch governments arranged for compensation to most of the depositors of the branches. On the other hand, depositors at the branches in Iceland had their claims transferred to a new state-owned bank and thereby had access to their funds in full at all times.

On 26 May 2010, the EFTA Surveillance Authority sent a letter of formal notice to Iceland.

In the view of the Authority, the Icelandic Government was in breach of its obligations under the EEA Agreement as it failed to ensure the payment of 20,000 EUR, the minimum amount under the *Deposit Guarantee Directive*, to foreign depositors of Landsbankinn within the time limits set out in the Directive. The Authority concluded that the Directive imposes an obligation on the EEA States to ensure that a deposit guarantee scheme

is set up, which must be capable of guaranteeing deposits up to the minimum amount of the Directive. The differentiation in treatment of domestic and non-domestic depositors protected by the Directive constituted indirect discrimination based on nationality prohibited by Article 4 EEA and could not be justified. Furthermore, the Authority found that the exceptional circumstances Iceland encountered in 2008 did not release the Icelandic Government from its responsibilities under the *Deposit Guarantee Directive*.

After long negotiations, the Icelandic, UK and Dutch governments reached an agreement in December 2010 on how Iceland should compensate the UK and the Netherlands for payments made to the depositors at the branches. The agreement was turned down in an Icelandic referendum in April 2011.

After analysing the answer from the Icelandic Government to the letter of formal notice, the Authority sent a reasoned opinion in June 2011, where it maintained its previous position. The Authority underlined the importance of the Directive to ensure the protection of depositors and avoid that they are forced to rely on bankruptcy proceedings to receive payments. The Icelandic Government responded in September 2011 and maintained that Iceland had fulfilled its EEA obligations by setting up a deposit guarantee scheme and that the bankruptcy estate would pay all deposit claims. After a thorough examination of the arguments brought forward by the Icelandic Government, the Authority was still of the opinion that Iceland had breached its EEA obligations as expressed in the letter of formal notice and the reasoned opinion.

Against this background, the Authority decided to bring the matter before the EFTA Court in December 2011.

Free movement of capital

Ownership of stock exchanges

The Authority decided to bring Norway to the EFTA Court for maintaining in force restrictions on ownership and voting rights in financial services infrastructure institutions.

Norwegian law provides for a general ban of ownership above 20% of the shares in stock exchanges and securities depositories.

There are three possibilities to exceed the 20% limitation. Those possibilities are, however, either limited to special circumstances and time-limited or only applicable to specific types of companies. Furthermore, Norwegian law restricts voting rights to 20% of the total votes or 30% of the votes represented at a shareholders' meeting.

In the Authority's view the rules restrict, in an unjustified manner, the possibility to invest in these undertakings and to participate effectively in their management. Therefore, the rules are incompatible with the EEA rules on free movement of capital and the freedom of establishment.

In December 2009, the Authority issued a letter of formal notice to Norway on this matter. It then followed up with a reasoned opinion in December 2010, requesting Norway to comply with its obligations within two months. As Norway had not complied with the reasoned opinion, the Authority, in May 2011, decided to bring Norway to the EFTA Court. At the time of writing, judgment is pending.

Freedom of establishment

Exit taxation in Norway

In March 2011, the Authority delivered a reasoned opinion to Norway for imposing an immediate tax on companies, or the shareholders of companies, that transfer their seat to another EEA State.

Under Norwegian law, when a company transferred its residence to another EEA State in order to relocate its activities, unrealised capital gains on its assets were to be included in the taxable base of that financial year. Furthermore, a tax on unrealised capital gains on the company's shares was to be paid by its shareholders. In contrast, capital gains on assets or shares of similar domestic transactions were not taxable until they were realised.

In its reasoned opinion, the Authority considered the rules in question to be likely to dissuade companies from exercising their right to freedom of establishment and, in certain circumstances, also the free movement of capital.

In its reply to the reasoned opinion in May 2011, Norway informed the Authority about its intention to amend the rules on exit taxation of companies.

The proposed amendments were adopted in June 2011 and the Authority is currently assessing the compatibility of the new exit tax rules with the EEA Agreement.

Labour law

Labour clauses in public procurement

In July 2011, the Authority sent a reasoned opinion to Norway concerning a regulation which required authorities, at state and municipal level, to impose so-called labour clauses in their public procurement contracts.

These clauses stipulated that wages and working conditions of the workers engaged by the contractors must be no worse than what the relevant nationwide collective agreement provides for, or what is otherwise normal for the relevant place and profession. It applied equally to Norwegian and foreign companies.

Requirements relating to social standards in public procurement do not breach EEA law. However, the Authority was of the opinion that the scope and wording of the Norwegian regulation did not comply with the *Posting of Workers Directive* (96/71/EC) and the freedom to provide services as interpreted by the Court of Justice of the European Union in the Rüffert judgment.

The *Posting of Workers Directive* aims to strike a balance between workers' rights and the rules on the free movement of services. The Directive sets out the methods which EEA States must use when imposing working conditions on undertakings established in another EEA State posting workers to their territory. This can either be done by fixing general minimum wages and working conditions by law, and/or by making collective agreements applicable to specific sectors generally binding.

The Directive aims to increase legal certainty by facilitating the definition of working conditions applicable to posted workers. This is in order to avoid the risk of posted workers being exploited. Furthermore, it provides the foreign companies with clear rules as to what their obligations are with regard to their workers.

Norway does not fix minimum wages by law. Instead it has in place a legal system whereby collective agreements can be declared universally applicable in the meaning of the Directive. Currently, Norway has such universally applicable agreements in the construction sector, maritime construction industry, agriculture and horticulture, and the cleaning sector.

However, instead of referring only to these universally applicable collective agreements, Norway created a new type of reference through its labour clause requirement. In fact, the Regulation created rights for workers in sectors which are currently not covered by any of the universally applicable collective agreement. While this is beneficial for workers within public procurement contracts, it gives no such guarantees to workers within private contracts.

In its reasoned opinion, the Authority recalled that social protection of workers can be used as a justification for imposing restrictions on the freedom to provide services. However, national rules imposing such restrictions must apply equally to public and private contracts, according to case law.

In November 2011, Norway took notice of the arguments presented by the Authority by introducing certain amendments to the Regulation. The labour clause is now based on pay and working conditions arising from universally applicable agreements. This provides for more legal certainty for undertakings and workers in the relevant sectors. However, the reference to nationwide collective agreements which have not been declared generally binding, remains in the Regulation.

The Authority is currently examining whether the amendments to the Regulation are sufficient to bring it in line with the Posting of Workers Directive.

Equal treatment

Survivors' pensions

Norway's delay in paying out pensions following a judgment of the EFTA Court was pursued in a new case before the EFTA Court in 2011.

In its initial judgment, delivered in October 2007, the EFTA Court concluded that provisions relating to survivors' pensions in the Public Service Pension Act in Norway breached EEA rules on equal treatment for men and women. This was due to the fact that survivor pension of a widower was subject to a reduction in relation to his other income, whereas a widow in the same situation received her survivor's pension without such a reduction.

However, it was only in January 2010, that Norway adopted the necessary amendments to the Public Service Pension Act necessary in order to comply with the judgment of the Court. Furthermore, the Authority was informed that the process of recalculating past pensions and adjusting current ones, which was also a part of the judgment, would not be finalised until the end of 2011. The number of cases subject to reassessment was estimated to be around 3,000.

Since the widowers had not yet been paid their correct pensions, the Authority decided in December 2010 to bring the matter before the EFTA Court again; this time on the basis of Norway's failure to comply with the first judgment.

As Norway had not, more than two years after the Court delivered its first judgment, fully adopted the measures necessary to comply with that judgment, the Court concluded in June 2011 that Norway had failed to fulfil its obligations under Article 33 SCA.

What is article 33 SCA?

Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") requires the EFTA States to take the necessary measures to comply with the judgments of the EFTA Court.

In a judgment delivered in June 2011, the EFTA Court stated that the process of compliance with a judgment must be commenced immediately and must be completed as soon as possible.

This was the first time a case had been brought by the Authority before the EFTA Court due to a failure by an EFTA State to comply with a judgment delivered against it.

In December 2011, Norway informed the Authority that the recalculation in all cases involving persons currently receiving pensions would be finalised by the end of that month. The remaining cases concerning payments to heirs were expected to be closed within the first six months of 2012.

Labour law

Icelandic Posting Act; follow-up

Iceland must amend rules applicable to posted workers following a judgment of the EFTA Court.

On 28 June 2011, the EFTA Court (in Case E-12/10) declared that Articles 5 and 7 of the Icelandic Posting Act relating to sickness pay and accident insurance do not comply with the *Posting of Workers Directive* (96/71/EC).

In Article 5 Iceland extends its legislation concerning the right of workers to receive wages during sick leave to posted workers. In the same manner, Article 7 extends the obligation imposed on employers to insure their workers against accidents at work. The Authority, which brought the case before the Court, took the view that both Articles are in breach of EEA law. The Directive pre-supposes that posted workers are already protected under their home state legislation in respect of these issues.

According to the EFTA Court, the Directive expressly defines the degree of protection that host EEA States can require undertakings established in other EEA States to observe when they post workers to their territory. The Directive is setting out an exhaustive list of the matters in respect of which the EEA States may give priority to the rules in force in the host EEA State. The right to "minimum rates of pay, including overtime rates" is included in this list.

The EFTA Court held that the contested Articles of Icelandic law could not fall within Article 3(1) of the Directive and therefore were not permissible.

The Authority has received information from Iceland that it is discussing possible changes in the law with the social partners.

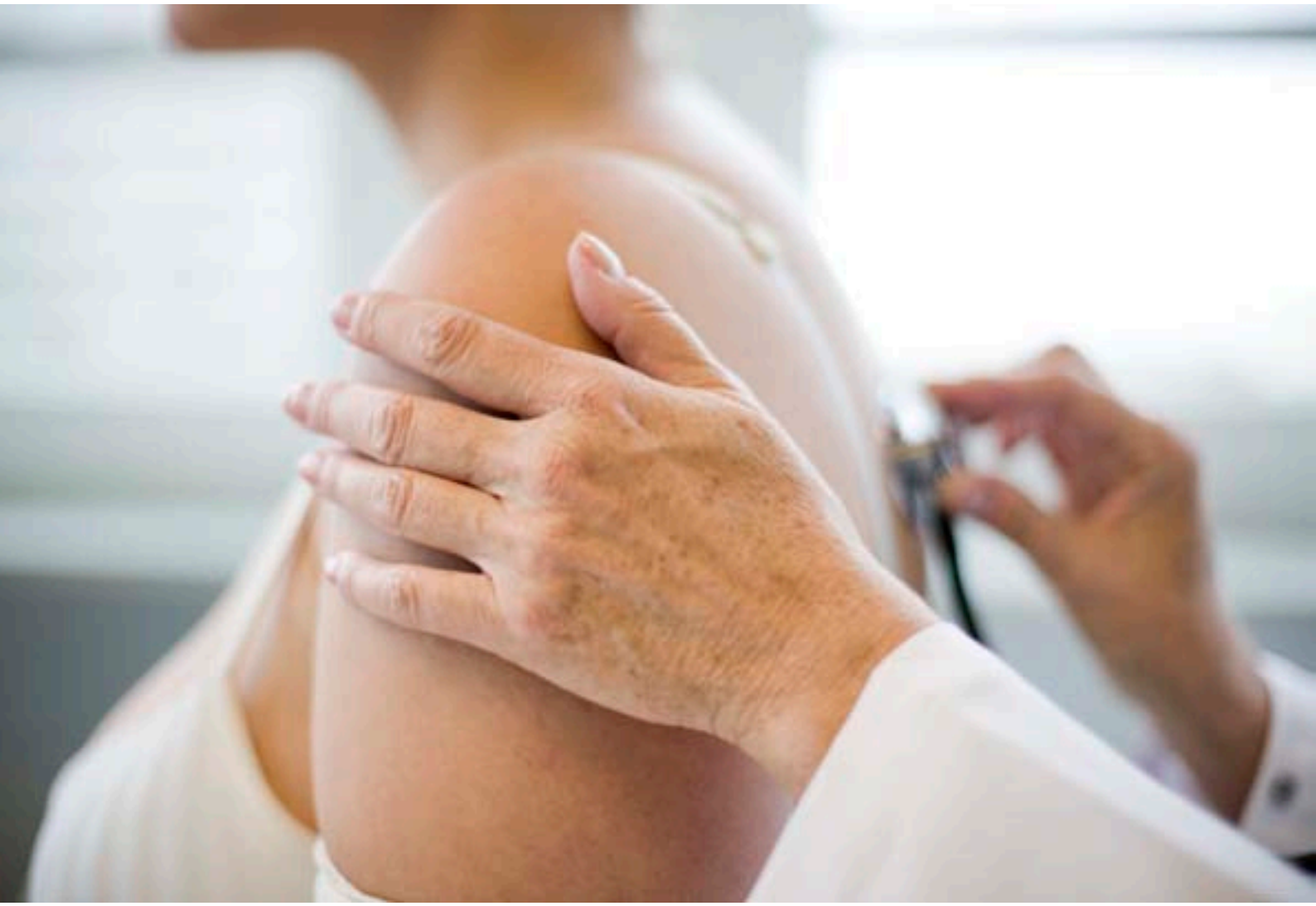
Practical training for foreign doctors

Norway has removed the obligation of foreign doctors with finalised basic medical education to go through the *turnus* system before taking up work in Norway.

The foreign doctors were until recently forced to complete the *turnus* (practical training) even though they had such training in the State where they received their education. Several complaints have been lodged with the EFTA Surveillance Authority since 2009. In June 2010, the Authority opened infringement proceedings against Norway, because the practice of Norway did not recognise the education received in another EEA State automatically as foreseen under the *Professional Qualifications Directive* (2005/36/EC).

Some EEA States provide practical training throughout the medical education, which is in line with the Directive, and not only at the end. Norway would not recognise this kind of practice as equivalent to their *turnus* programme. By obliging foreign doctors to do the *turnus*, Norway required them to repeat a part of the education they had already finalised in their home state. That is exactly what should be avoided by the rules of the *Professional Qualifications Directive*.

Early in 2011, Norway informed the Authority that it has changed its practice accordingly and will also reassess pending applications. Still, doctors benefitting from automatic recognition need to have sufficient language knowledge and good repute to start practising in Norway, which is in line with the Directive.



Social security

Restrictions on unemployment benefits

Iceland and Norway have removed restrictions to unemployment benefits for migrant workers.

Until recently, both countries automatically denied access to unemployment benefits for migrant workers who only worked for a short period of time in the respective labour markets. However, the rules of the *Social Security Coordination Regulation* (1408/71/EC) under the EEA Agreement foresee that work periods from other EEA States have to be taken into account when assessing the entitlement.

Nonetheless, Norway would only count together these periods if migrants had worked full time during eight out of the last 12 weeks in Norway before becoming unemployed. Iceland had a similar rule, requiring one full month of work in Iceland. The consequence for a migrant would be that if he became involuntarily unemployed during these periods, for example due to unexpected bankruptcy of the employer during the economic crisis, he would not receive any unemployment benefits from any EEA State. For this reason, in the view of the EFTA Surveillance Authority, such periods have to be counted together as of the first day of work in Iceland or Norway to avoid such gaps.

Accordingly, infringement proceedings were initiated against both states in 2010. By autumn 2011, Iceland and Norway had indicated that they would change their legislation by abolishing the national rules which discriminated between migrant and national workers.

Social security

Restrictions on family benefits

Norwegian law contains restrictions on the payment of child benefits in cases where one parent is working in Norway, while the child is living with the other parent in another EEA State.

In Norway a parent is entitled to family benefits when the child lives with him or her. This rule does not entail any problem on EEA level as long as the parents are married or live together. However, a problem occurs when a parent residing in Norway is separated, factually or by divorce, from the rest of the family, which resides in another EEA State.

The rules of the *Social Security Co-ordination Regulation* (1408/71/EC) under the EEA Agreement foresee that in such cases it has to be assessed whether the child is mainly dependent on that parent. The Norwegian authorities do not examine this, but deny the benefits, as the child cannot be seen as a family member anymore according to Norwegian law. The case law of the European Court of Justice, however, states clearly that when it comes to the allocation of family benefits in cross-border cases, no distinction based on marital status can be allowed. It has thus to be assessed whether the child is financially dependent on the parent living separately, for example through mandatory maintenance payments.

The EFTA Surveillance Authority has initiated infringement proceedings and issued a reasoned opinion in July 2011. Norway disagrees with the Authority's assessment. Norway claims that it is up to the EEA States to establish entitlement criteria for benefits and that the coordination system cannot change that.

Free movement of services

Storage of book-keeping information

Norway has changed its legislation which required undertakings to store book-keeping information within the Norwegian territory.

After receiving a complaint, the Authority stated in a letter of formal notice in May 2009 that the obligation, which required information to be held in Norway for up to ten years after the end of the fiscal year, restricted the possibilities for Norwegian undertakings to make use of services offered by undertakings established in other EEA States. This would specifically be the case if undertakings established in Norway wanted to store book-keeping information electronically on servers located in other EEA States.

In a reasoned opinion of March 2010, the Authority stated that geographical restrictions on the storage of accounting information was in breach of Article 36 of the EEA Agreement. In May 2010, the Norwegian Government amended the book-keeping regulation. Under the new rules, accounting records may be stored in other EEA States, provided that Norway has entered into agreements with the relevant State concerning access to tax records. This new system is more balanced than the previous one. It gives the possibility for companies to store book-keeping in other EEA States while ensuring Norway the possibility to perform effective tax control.

The new legislation appears to be in conformity with the EEA Agreement. Following this change, the Authority in 2011 informed the complainant of its intention to close the case.

Free movement of services

Deposit for staffing agencies

Liechtenstein has proposed to change its legislation on deposits for temporary working agencies.

Today, an agency established in Liechtenstein with its responsible person residing in Liechtenstein is required to deposit 50,000 Swiss francsto provide financial guarantees when offering their services. In comparison, undertakings where the responsible person is resident outside Liechtenstein, or undertakings established outside Liechtenstein providing cross-border temporary employment services, have to provide a guarantee of 100,000 Swiss francs.

In February 2010, the EFTA Surveillance Authority received a complaint from a temporary work agency which wanted to provide services in Liechtenstein. The Authority found that the Liechtenstein legislation is contrary to the freedom to provide services, and issued a letter of formal notice in October 2010. The difference on the amount of deposit is important, as a foreign service provider will be less competitive and be less attracted to provide services in Liechtenstein.

In addition, the Authority considers that the Liechtenstein legislation is contrary to the freedom of establishment, as it links the amount of the guarantee to the residence of the person responsible for running a staffing agency.

While understanding the necessity to secure this type of activity in order to protect workers, the Authority is of the view that the measure goes beyond what is necessary to achieve its objectives. Indeed, similar deposit mechanisms or other measures might eventually be imposed in the EFTA States of establishment in order to ensure the protection of workers.

In February 2011, Liechtenstein replied by proposing to amend its legislation, but the case was still pending at the end of the year.

Free movement of services

Norwegian Building and Planning Act

In Norway, undertakings are required to be approved by local governments before they can carry out construction services. This requirement is not in line with EEA law.

After receiving a complaint concerning the requirement, the Authority sent a letter of formal notice to Norway in July 2011 emphasising the incompatibility of this legislation with the *Services Directive* (2006/123/EC).

The authorisation scheme undermines considerably the possibility for companies established in other EEA States to provide services in Norway. They have to apply and wait for the result of the authorisation before starting any activity. This procedure has to be repeated for each project.

The Norwegian Government has claimed that the measure is aimed at ensuring the quality of construction works. In the view of the Authority, less restrictive measures could be used in order to achieve the same goal. This could be rules concerning the quality of construction products, qualitative requirements of the buildings and the qualifications of the responsible persons, on-the-spot checks in relation

to ongoing projects and ex-post controls of completed construction works.

The Norwegian authorities have now indicated that it will look into amending the legislation.

Free movement of services

Co-trustee residence requirements

The Liechtenstein Persons and Companies Acts requirement of appointing a co-trustee resident in Liechtenstein if the trustee resides abroad is in breach of EEA law.

After receiving a complaint, the Authority opened infringement proceedings in a letter of formal notice in September 2011 stating that the requirement is contrary the freedom to provide services. Liechtenstein has claimed that a co-trustee residing in Liechtenstein is necessary to ensure legal certainty against third parties with regard to the applicability of the Liechtenstein law to the trust. However, both the EFTA Court and the European Court of Justice have consistently held that national rules under which a distinction is drawn on the basis of residence are not in line with EEA law. Furthermore, such a rule is neither suitable nor necessary to obtain the objective pursued by the Liechtenstein Government.

The Authority is awaiting Liechtenstein's reply to the letter of formal notice to consider further actions.

Energy

Petroleum and gas production

In 2009, the Authority initiated infringement proceedings by sending letters of formal notice to Norway and Iceland concerning their petroleum licensing legislation.

The legislation of both States required that oil and gas companies manage their offshore activities autonomously from a seat established in those States and have their onshore operational bases in those States. These requirements constituted disproportionate restrictions on the freedom of establishment and the freedom to provide services. Moreover, in the view of the Authority, they were also in breach of the *Hydrocarbons Licensing Directive*.

After extensive discussions, both States amended their petroleum legislation in 2011. Under the new legislation now applicable, organisational and residency requirements can only be imposed on oil and gas companies where this is objectively justified. As for the requirements for companies to maintain onshore operational bases in those States, these will have to be justified by the protection of good resource management, health, safety and the environment.

The Authority has thus closed its infringement cases against the two EFTA States.

In the same area, the Authority has also closed its infringement case against Norway concerning the implementation of the *Natural Gas Directive*. Norway has amended its legislation and has now put in place the required rules protecting natural gas customers. Other amendments include the establishment of an independent dispute settlement body for disputes related to third party access on the upstream pipeline network.

The Authority will continue to monitor the implementation of EEA law in this sector on an ongoing basis.

Environment and climate change

The environmental sector

Implementation of the Water Framework Directive

The *Water Framework Directive* is now transposed in all three EFTA States. The focus this past year has thus been on ensuring correct implementation.

One particular challenge for the EFTA States concerns the application of the Directive to rivers harnessed for hydropower production. The Authority has received complaints against both Norway and Liechtenstein regarding that specific issue. The questions raised by the complaints relate to the interaction between the national hydropower licensing legislation and the processes foreseen by the Directive to set environmental objectives for rivers and ensure a timely implementation of the necessary actions to reach those objectives. The Authority is now investigating the complaints.

Beyond that specific issue, the Authority has launched a project to assess the nine pilot river basin management plans prepared by Norway. The result of that project, carried out in close co-operation with the European Commission, will allow the Authority to formulate recommendations to Norway and help ensure that when the final river basin management plans are prepared, they fully comply with the Directive.

Environmental impact assessments

The Authority has launched investigations into the implementation of the directives on environmental impact assessment of plans and projects. The main problem identified related to the existence of purely size-based thresholds to decide which projects should be subject to impact assessment. The applicable directives require that other aspects also must be taken into account, such as location of the project or cumulative effect with other projects.

The three EFTA States have indicated they will address the issue and it is hoped that the cases will be solved in 2012.

Ambient air quality

The quality of air is a concern in many cities across the EEA, including in the EFTA States. After having received a complaint against Norway concerning compliance with the applicable EEA air quality legislation, the Authority has started to examine the issues. These concern compliance with the limit values themselves but also with the obligation to prepare action plans to address the problem.

Preparation for an expanded EU ETS

The European Union's Emissions Trading Scheme (EU ETS) is the world's largest cap and trade scheme and a key policy tool for reducing industrial greenhouse gases. The EFTA States have participated in the EU ETS since 2008. The scheme works by imposing a cap on the total amount of certain greenhouse gases, which can be emitted by participating installations. Each year, installations covered by the EU ETS are required to surrender allowances based on their total emissions of these gases or face heavy fines. Companies are able to buy additional allowances if required, as well as to sell any surplus allowances generated by reducing their emissions.

The EU ETS already covers electricity generation and the main energy-intensive industries such as iron and steel production as well as factories making cement, glass, lime, bricks, ceramics, pulp, paper and board. In 2012, the EU ETS will be expanded to include aviation activities, which will cover both Norway and Iceland.

Over the past year, detailed rules have been developed by the European Commission for the revised EU ETS which will take effect in 2013. Although these changes have yet to be incorporated into the EEA Agreement, the Authority has been closely following developments to ensure that it is prepared for any task which it may be assigned in the future.

Free movement of goods

Ban on the use of personal watercraft

By banning the use of personal watercraft, Norway is in breach of the principle of free movement of goods.

In a letter of formal notice sent to Norway in July 2009, the Authority stated that the Norwegian legislation on the use of personal watercraft is incompatible with the EEA Agreement. The European Court of Justice had a little earlier found a similar Swedish ban to be in breach of the free movement of goods.

In March 2011, Norway notified a draft regulation to the Authority that modifies the existing prohibition on the use of personal watercraft. In the summer, the Authority issued comments on the draft and it was discussed with the Norwegian Government throughout the autumn.

It is to be expected that a new Norwegian regulation will be adopted early in 2012. If the new regulation does not meet the concerns expressed by the Authority, it will consider starting new infringement proceedings against Norway.

Free movement of goods

Prevention of technical barriers to trade

The *Technical Standards and Regulations Directive* (98/34/EC) establishes a notification procedure obliging the EFTA States to inform the Authority in advance of their intention to adopt new technical regulations. This prevents the creation of new, unjustified barriers to trade that could arise from the adoption of restrictive technical regulations.

Following such notifications from the EFTA States, there is a three-month standstill period during which the Authority, the European Commission and other EEA States have time to examine the notified measures and issue comments if it appears that the draft regulation raises questions as to its compatibility with the EEA Agreement.

In 2011, the Authority received only 14 notifications of draft technical regulations from the EFTA States. This is a decrease in comparison to previous years. Out of the 14 notifications, seven came from Iceland, six came from Norway and one from Liechtenstein. Four of the notifications prompted the Authority to send comments. The Commission commented on five of the notifications.

The Authority also received 676 notifications from the EU Member States, which were forwarded to it by the Commission.

Year	EFTA notifications	Comments from the Authority	EU notifications	Single co-ordinated communications
2000	19	3	751	0
2001	22	5	530	1
2002	49	4	508	1
2003	29	5	486	0
2004	37	10	557	1
2005	55	11	733	0
2006	23	6	668	1
2007	28	7	757	0
2008	25	6	601	1
2009	16	9	708	0
2010	19	5	817	0
2011	14	4	676	0

Electronic communications

Regulation of the telecom sector

Article 7 of the Electronic Communications Framework Directive (2002/21/EC) is one of the main instruments to regulate the telecoms sector.

It is a consultation and notification mechanism that requires national telecoms regulators (NRAs) to inform the EFTA Surveillance Authority about measures they plan to introduce to solve market problems.

In 2011, the Authority assessed a total of six notifications from the NRAs, covering four product markets:

- voice call termination on individual mobile networks (all EFTA States)
- transit services in the fixed public telephone network (Norway)
- call origination on the public telephone network provided at a fixed location (Norway)
- call termination on individual public telephone networks provided at a fixed location (Norway).

The Authority issued four "comments letters" in respect of the proposed measures.

In April 2011, the Authority set out clear guidance for EFTA telecoms regulators on the cost-based method to be used when calculating termination rates. These rates are the wholesale fees charged by operators to connect the call from another operator's network which are part of everyone's phone bill.

The guidance was issued in the form of a "Recommendation". It indicates specifically that termination rates at national level should be based only on the real costs that an efficient operator incurs to establish the connection. This promotes greater regulatory transparency and eliminates price distortions between phone operators across the EEA countries in the Single Telecoms Market.

More information: http://www.eftasurv.int/internal-market-affairs/areas-of-competence/services/electronic-communications/

Public Procurement

Bus contracts in Aust-Agder

A letter of formal notice was sent to Norway in October 2011 following the award of five bus service contracts by the County of Aust-Agder. The contracts, worth 1 billion NOK, were awarded without any competitive tendering or publication.

The decision to award the contracts was made by the County in June 2007 for the period 2009-2012, with an option for extension of a maximum of four years. These contracts were awarded to the operators providing local network and school transport services under existing contracts, which expired at the end of 2008, without any competitive tendering or publication. In June 2010, the County decided to make use of the prolongation clause in the contracts and extended the contracts by another four years until 31 December 2016 (for Nettbus Sør AS only by another two years until 31 December 2014). Also, this decision was taken without any competitive tendering or publication.

Service concessions are excluded from the procedural obligations for awarding public contracts laid down in the Directive. A service concession contract gives the awarded company either solely the right to exploit the service or this right together with payment. It is essential for a service concession that the operator takes on a substantial part of the risk related to the operation of the service.

On the basis of the case law by the Court of Justice, the award of a service concession is subject to the fundamental rules of EEA law, including the principle of non-discrimination. This principle implies a duty of transparency to allow for competition and equal treatment between potential candidates. This transparency obligation applies when the concession may be considered to be of cross-border interest.

Based on the value of the contracts (roughly estimated between 40 and 640 million NOK) and the duration of the contracts (eight years including the options for prolongation), the Authority has taken the view that the contracts are of cross-border interest and that, therefore, an EEA-wide publication of the intention to award the contracts should have been done.

In a reply received by the Authority in December 2011, the Norwegian Government contested the Authority's conclusions in the letter of formal notice. The Government claims that direct award was permissible in this case and that concessions were awarded in a transparent manner due to media coverage and public accessibility of documents in the County.

Transport

Transport inspections

Aviation security

The main objective of the European Union's aviation security legislation is to establish and implement appropriate measures in order to safeguard passengers, crew, ground personnel and the general public against acts of unlawful interference perpetrated on flights or within the confines of an airport. By the incorporation of this aviation security legislation into the EEA Agreement, the legislation is also applicable in the EFTA States. This ensures that the EFTA States also benefit from the "one stop security" regime within the EU.

A key component of the EEA Acts within the field of aviation security is the organisation of inspections by the European Commission. For the EFTA States, these inspections are carried out by the Authority. The Authority has been carrying out airport security inspections since 2005.

In 2011, new aviation security regulations were adopted in the EFTA States and the focus of the Authority has been the incorporation of these acts. The Authority inspected the national authorities for aviation security in both Iceland and Norway during 2011. In addition, the Authority carried out four airport inspections in the EFTA States.

The Authority inspections have identified deficiencies in several areas, some more serious than others. This relates especially to new requirements in the EEA Acts. However, monitoring activities have also indicated that there have been improvements within key areas of aviation security in the EFTA States.

The Authority has not initiated any infringement proceedings linked to findings made on inspections, since the EFTA States have addressed the findings made during these inspections in a satisfactory manner.

The Authority cooperates with the appropriate authorities in the EFTA States and the Commission to work towards the common goal of increasing aviation security within the EEA.

Maritime security

In 2011, the Authority has put special focus on the implementation of the *Port Security Directive* in Norway and Iceland and inspected three ports, eleven port facilities and four Norwegian flagged ships.

The European Maritime Safety Agency (EMSA) has provided valuable technical assistance to the Authority's ship inspections.

As in aviation security, there is also close co-operation with the Commission in this field. In 2011, the Commission observed two Authority inspections. The co-operation between the Authority and the Commission ensures that inspections are carried out in a harmonised manner in all EEA States.

Transport

Driving and rest time in road transport

By Decision of June 2011 the Authority rejected Iceland's request to be authorised to grant permanent exemptions from the EEA rules on driving and rest time in road transport.

In May 2010, Iceland requested the Authority to authorise the grant of exemptions from Regulation (EC) No 561/2006. The request covered (1) the transport of perishable foodstuff between Reykjavík and the towns of Neskaupsstaður, Egilsstaðir and Ísafjörður and (2) the extension of driving time in order to reach Freysnes when driving between Reykjavìk and Eigilsstaðir in both

directions (crossing the desert-like areas of Breiðamerkursandur and Skeiðardrsandur). The request concerned the winter period 30 October 2010 to 15 April 2011. In its application Iceland referred to the special features and challenges of the above mentioned stretches. Highlighting the limited period for which the authorisation was requested (only one winter season), the Authority found, by Decision of 21 June 2010, that the application could exceptionally be granted.

In February 2011, Iceland reverted to the Authority and requested to be authorised to grant the similar exceptions, but this time for an *indefinite* period of coming winter seasons (30 October to 15 April each year). By Decision of 29 June 2011 the Authority rejected the request, concluding that the transport operations in question could not be regarded as carried out under "exceptional circumstances", as required by Article 14(1) of the Regulation. In light of, *inter alia*, the general and permanent nature of the requested exceptions the Authority found that the conditions for granting the authorisation were not met.

Transport

Passenger departure taxes in Iceland

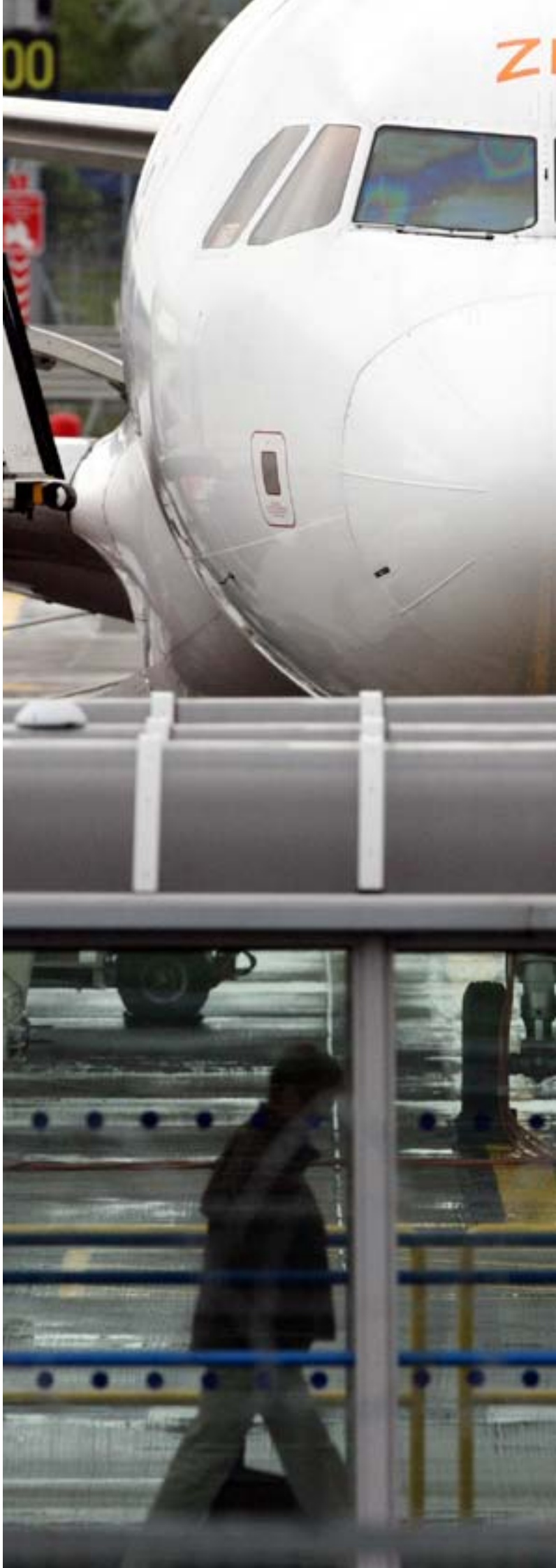
Following a ruling of the EFTA Court, the Authority has closely monitored Iceland's efforts to implement non discriminatory passenger taxes and charges.

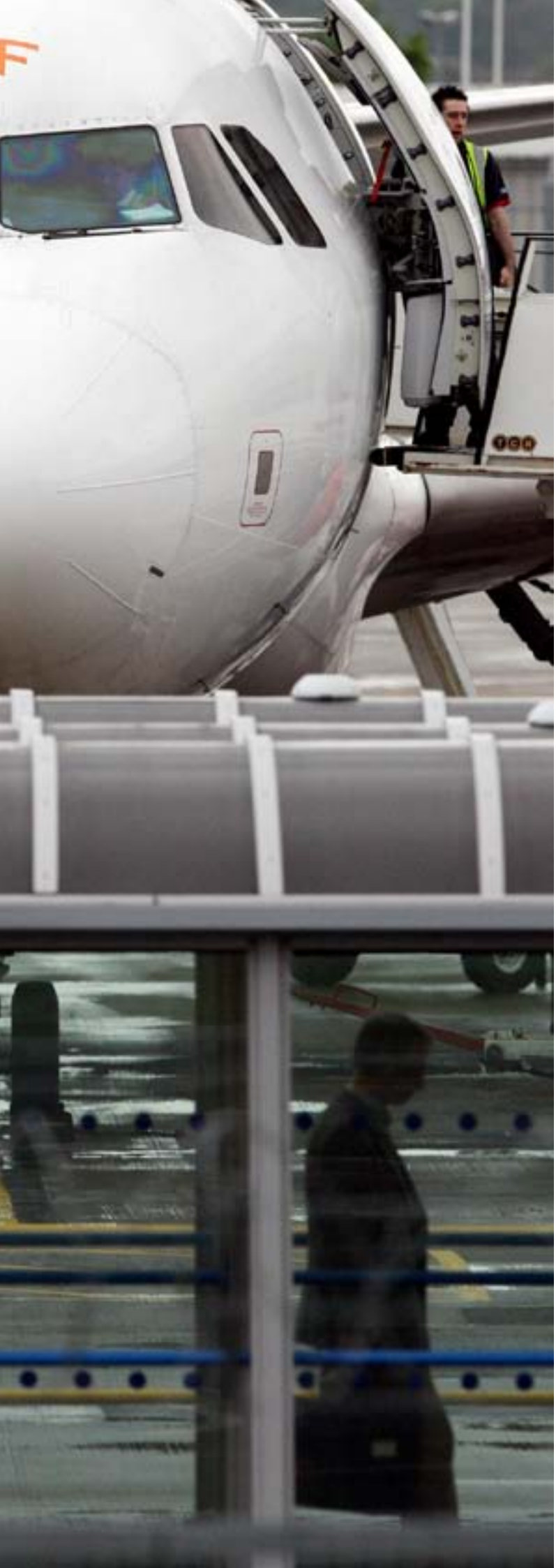
EEA law forbids EFTA States from imposing higher taxes on air services which cross borders within the EEA than on domestic routes. However, charges may be modulated for issues of general and public interest.

The contested tax levied per passenger travelling on intra EEA flights was, before the ruling, seven times higher than the tax levied per passenger travelling on domestic flights. The EFTA Court then found the tax to constitute an unjustified restriction on the freedom to provide services.

A new passenger departure charge was introduced by Iceland on 1 October 2004 to finance the costs arising from operation and maintenance of alternative international airports in Iceland. The charge was levied on departure passengers on international flights in addition to a modified passenger departure tax levied at a single rate regardless of the destination of the flight.

The alternative airports charge was initially constructed to be a fully cost related charge. However, as the charge





exempted transit passengers, cargo and domestic passengers and remained at the same levels despite changes in the cost base, the Authority, in a dialogue with Iceland, questioned the cost relatedness of the charge.

In May 2009, the Icelandic Government acknowledged that the alternative airports charge was in fact a tax and committed to the abolishment of the present system and implementation of a new system of airport charges fully based on cost relatedness. A major step in this direction was taken by adoption of amendments of the national aviation law in 2009 with final amendments adopted in 2011.

The new charging regime, based on cost relatedness and transparency, entered into effect on 1 April 2011.

Transport

Landing charges in Iceland

In June 2011, the Authority opened an own initiative case regarding landing charges at three international airports in Iceland.

According to information provided by Iceland, landing charges at Reykjavik airport were 378% higher per ton of maximum take-off mass for an aircraft landing on international routes than for an aircraft landing on a domestic route. The landing charges at Akureyri airport and Egilsstadir airport were 308% higher for aircraft on international routes. All international airports in Iceland are operated by Isavia ohf., a public limited liability company, wholly owned by the Icelandic state.

Landing charges are generally charged to airport users for the exploitation and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft. Normally, services supplied by airports related to landing do not vary according to the origin of the flight. Therefore, the application of higher landing charges to intra-EEA flights than to domestic flights, to comparable circumstances, appears discriminatory and incompatible with the freedom to provide air services.

In November 2011 the Icelandic Government indicated to the Authority that the discriminatory charges will be abolished early 2012.

The Authority will continue to monitor Iceland's progress to modify the landing charges.

Food and feed safety, animal health and animal welfare

The EFTA Surveillance Authority is responsible for monitoring the EFTA States' implementation and application of EEA legislation related to the whole food chain.

The legislation covers fields such as seeds, feed and food, animal health and welfare, animal by-products, residues of medicines, pesticides and contaminants.

The surveillance by the Authority includes controls on application of the EEA legislation in the EFTA States through on-the-spot inspections of the effectiveness of the national control systems.

The Authority has the legal competence for adopting decisions related to animal disease status, eradication and monitoring programmes, approved border inspection posts, etc.

A list of decisions adopted in the areas of food and feed safety, animal health and animal welfare are available on the Authority's website.

Veterinary inspections

The Authority carried out 10 planned inspections in the EFTA States in 2011. The mission programme and the final reports from the inspections carried out in 2011 are available on the Authority's website.

The topics inspected in Iceland were feed hygiene, food hygiene and import controls of food of non-animal origin, live bi-valve molluscs, residues and veterinary medicinal products and a joint inspection with the Food and Veterinary Office of the European Commission (FVO) on the approval of border inspection posts for new categories.

The topics inspected in Norway were red meat and milk, import controls on catering waste, pet animals and personal imports, fishery products, identification of bovine animals and labelling of beef products and game meat. A mission on food hygiene and import controls of food of non-animal origin was postponed to 2012.

Several issues were brought to the attention of the national authorities on hygiene conditions in establishments and official controls.

In order to harmonise and co-ordinate the inspections carried out by the Authority and by the FVO, the Authority participated as observer in a number of inspections by the FVO. Two of these were pre-accession missions to Iceland, one on meat and milk and one general assessment audit. Likewise, the FVO participated in inspections by the Authority in the EFTA States. The good co-operation of the two institutions is a key element in ensuring the functioning of the EEA Agreement in the field of food and feed safety, animal health and welfare.

Hygiene package

The hygiene package comprises several regulations setting out general and specific principles in food and feed law. Iceland had a transitional period of 18 months to implement provisions in areas which did not apply to Iceland prior to the entry into force of the hygiene package on 1 May 2010.

As of 1 November 2011, acts referred to in Chapter I of Annex I (Veterinary and phytosanitary matters) to the EEA Agreement apply to Iceland. Exceptions are the provisions that concern live animals, other than fish and aquaculture animals, and animal products such as ova, embryo and semen.

Ban on the use of caffeine

Icelandic legislation provides for a general ban on the addition of caffeine in food products other than beverages. In effect, this is a prohibition of the retail in Iceland of food products, other than beverages, containing caffeine.

Following a complaint, the Authority issued a letter of formal notice to Iceland in July 2011. In the Authority's view, by maintaining the ban Iceland is in breach of Article 11 of the EEA Agreement, the principle of free movement of goods. Furthermore, Iceland has failed to demonstrate that such a restriction is justified and proportionate in pursuing the protection of health under Article 13 of the EEA Agreement.

In November 2011 the Icelandic Government responded to the Authority's letter of formal notice. The Authority is currently assessing Iceland's reply to the letter of formal notice.

Ban on import of raw meat to Iceland

At the beginning of November 2011, the Authority started examining the Icelandic ban on the importation of raw meat, which has been in place for a very long time. In December 2011, the Federation of Trade & Services in Iceland (SVÞ) lodged a complaint to the Authority concerning the ban. After the provisions of the so-called

hygiene package concerning meat and milk became applicable to Iceland on 1 November 2011, the issue is of particular importance.

In the complaint, it is alleged that Iceland, by keeping this ban without reference to available scientific evidence or relevant risk assessment, has failed to comply with its obligations under the EEA Agreement. Since such a measure could constitute a restriction on trade in the EEA, the complainant argues that it would have to be justified under Article 13 EEA. Consequently, Iceland would have to demonstrate that the risk alleged for public health appears sufficiently established on the basis of the latest scientific data available and that no "less trade restrictive measures" were available to Iceland to achieve the same objective. Iceland has already indicated that the purpose of maintaining the ban is disease prevention in humans and animals.

A request for information has been sent to Iceland. Iceland is expected to respond in early 2012.

Import control system in Iceland

The Authority opened infringement proceedings against Iceland related to repeated findings of what it considers to be incorrect application of EEA legislation related to import control.

Directive 97/78/EC lays down rules on veterinary checks of products of animal origin imported to the EEA from third countries. Following repeated findings during inspections in Iceland, the Authority considers that Iceland does not correctly apply the legislation, as products that do not comply with the import conditions are not destroyed or re-dispatched within the maximum period of 60 days as required by the Directive.

A letter of formal notice was sent to Iceland in November 2011. Iceland is expected to respond within the deadline of two months following the receipt of the letter.

Chapter 3

STATE AID

Highlights of 2011

2011 was another busy state aid year for the EFTA Surveillance Authority. It adopted a total of 35 state aid decisions regarding subject matters ranging from financial crisis aid to energy and environment, public service compensation. The Authority has over the last years experienced a significant increase in case load that partly explains the high number of decisions. Another important factor is an increase in the number of complaints and a continued effort to shorten the average case handling time. The Authority has, moreover, experienced an increase in court challenges of its decisions. There are currently a total of seven pending challenges in the field of competition and state aid before the EFTA Court.

Cases stemming from the collapse of the financial sector in Iceland in 2008 continued to be one of the main focus areas of the Authority in 2011. It received during the course of the year restructuring plans for the three main Icelandic banks, approved rescue aid for the fourth largest bank in Iceland, Byr hf, and the later state aid implications in a merger between this bank and Islandsbanki. The Authority moreover assessed a rescue capitalisation of the Icelandic housing agency HFF.

The Authority also assessed a number of complex and important state interventions in the area of energy, environmental aid, media and taxation. Special reference should be made to long-term power contracts since the Authority assessed a guarantee scheme for payments under long-term power contracts in Norway and potential state aid in two long-term power contracts to power intensive industries in Iceland. The Authority approved a new Energy Fund Scheme, an important tool to support alternative energy and energy saving measures in Norway. In addition, the Authority approved several individual grants of environmental aid for alternative energy production and energy saving measures where the amount of aid exceeded certain thresholds.

The Authority assessed several cases regarding compensation for services of general economic interest (SGEI), amongst others in the field of land and sea transport, sale of pharmaceutical products and waste collection. It had particular focus on service providers that also operate on commercial markets.

Two new recovery cases were opened regarding Norwegian aid recipients: the recovery of aid granted to Asker Brygge AS through the sale of a plot of land by the Municipality of Asker below market price and the recovery of additional payments made to Hurtigruten AS for the provision of a coastal public transport service. It moreover ordered the recovery of illegal state aid granted under an Icelandic impaired asset relief scheme.

Priorities for 2012

The Authority will focus on finalising the assessment of various state interventions in the financial sector in Iceland, in particular the closure of the formal investigations opened with regard to the three main banks, the HFF and the reorganisation of the savings banks sector.

The Authority will moreover give priority to assessment of notifications of EFTA States' plans to grant new or alter

existing aid measures. For such notifications the Authority must act according to strict time limits. There was a slight reduction in the number of notifications in 2011 but it is too early to conclude that there is a trend towards less state intervention in the economy. The notification of the Norwegian State's plans regarding the financing of the development phase of the carbon capture plant at Mongstad (CCM) is worth mentioning. As regards Iceland, the authorities have requested clearance of certain amendments to the national legislation on value added tax pertaining to the data centres industry.

The Authority will continue to devote resources to assessment of complaints. A number of newer complaints concern the issue of potential cross-subsidisation of commercial activities as mentioned above. Complaints are important sources of information for the Authority and contribute to increase the awareness of the state aid problems. The Authority has over the last three years seen a strong increase in complaints from Iceland. The number from Norway has been relatively low whereas the absence of complaints from economic operators in Liechtenstein continued also in 2011.

Important in 2012 will also be the adoption and EEA implementation of new rules regarding state support for services of general economic interest, which form part of the Authority's Procedural and Substantive Guidelines in the field of state aid.

Financial crisis

The Authority's financial crisis cases are assessed on the basis of special financial crisis guidelines, applicable for a limited period of time in order to address the crisis that emerged in 2008. Due to the situation in global and European markets in 2011, the financial crisis rules were amended and prolonged at the end of 2011.

Scheme for savings banks

Following two judgments of the Supreme Court of Iceland in 2010 concerning illegality of exchange rate indexation of loans, the aid scheme regarding the settlement of claims on the savings banks approved in June 2010 by the Authority had to be reviewed with regard to three savings banks: Vestmannaeyjar, Þórshöfn and Svarfdælir.

In its decision of 13 April 2011, the Authority considered the notified amendments to be compatible with the functioning of the EEA Agreement.

Two decisions regarding Byr hf.

In April 2011, the Authority temporarily approved state aid in support of the Icelandic bank Byr hf., the fourth largest commercial bank in Iceland, subject to the submission of a restructuring or a liquidation plan for the bank within six months.

The aid measures included an initial share capital contribution of 900 million ISK (approximately 5.6 million

What is an SGEI (services of general economic interest)?

There is no specific definition of SGEI available, but the concept typically covers services which would not have been provided by the market without state intervention. The EFTA States enjoy a wide margin of discretion in defining SGEIs. Examples are transport services in remote areas, public broadcasting services, development of broadband in remote areas, waste collection services and social housing.

How can SGEIs be financed by state aid?

Following the Altmark judgment of the European Court of Justice, the Authority has issued guidelines on the compatibility of state aid in the form of public service compensation. State aid can be granted to cover the net cost of providing the SGEI including a reasonable profit. Aid in excess of that represents over-compensation, which is incompatible with the EEA Agreement. Additionally, aid has to be granted in a transparent manner, separate accounts for commercial activities must be in place and the fixed common costs shared proportionally.

EUR) and a subordinated loan facility agreement of up to 5 billion ISK (approximately 31 million EUR). These measures were considered necessary to enable the bank to meet the capital adequacy (CAD) requirements in Iceland of 16%.

However, it later became clear that the bank needed additional capital in order to fulfil the requirements laid down in Icelandic law. Instead of granting more state aid to Byr the Icelandic authorities decided to initiate an open sales procedure, which ended in the acquisition of Byr by Islandsbanki.

On 19 October 2011 the Authority cleared the state aid in connection with that merger. The Authority approved a prolongation of the government loan facility for Byr until the merger with Islandsbanki has become effective, and it authorised Islandsbanki to go ahead with the merger, even though the bank previously has received state aid.

Banks that have received aid and are in a process of restructuring – such as Islandsbanki – are normally not allowed to buy competitors – such as Byr. This is so because state aid should not be used to acquire new market shares. An exemption from this rule can be granted subject to two main conditions: the acquisition is necessary and proportionate to safeguard financial stability and it does not entail undue distortions of competition.

The Authority concluded that these conditions were met. Islandsbanki needs, however, to submit a restructuring plan to the Authority for the merged entity within three months of the envisaged transaction. This plan will have to include measures that ensure an effective competition in the Icelandic banking market after the merger.

HFF purchase of mortgage loans

As a response to the liquidity shortage faced by the Icelandic financing institutions in 2008 and 2009, the Icelandic authorities introduced the Mortgage Loan Scheme authorising the Housing Financial Fund to acquire mortgage loans from financial undertakings and to provide them with HFF bonds in exchange.

Given the market circumstances at the time it was unlikely that a private market investor would have engaged in a similar asset swap. Thus, the Authority concluded that the scheme entailed state aid. The scheme did not fulfil the requirements of the state aid guidelines on impaired asset relief because of shortcomings in the method for asset valuation, a lack of adequate remuneration for the granting authority as well as lack of time and scope limits. The Authority ordered Iceland to abolish the scheme and to recover incompatible aid.

Rescue aid to HFF

In a decision adopted on 16 March 2011, the Authority approved a capital injection of 33 billion ISK (approximately 205 million EUR) to HFF as it was necessary and proportionate to counter the effect of a measure introduced to the benefit of HFFs and other banks mortgage loans customers, namely to offer a write down of mortgage loans to 110% of the value of the property. Due to HFF's significant position in the Icelandic financial markets and the importance of HFF's bonds the State's intervention was also essential to avoid negative effects for the economy as a whole.

The capital injection was approved temporarily subject to the submission of a detailed restructuring plan, which should demonstrate that the aid is necessary and proportionate to ensure the future viability of the HFF. To make this assessment the Authority needs a clarification of the public service definition, including the future lending activities of HFF.

HFF

The Housing Financing Fund (HFF) is a State entity, which operates on an arms-length basis under the Icelandic Housing Act. HFF is entrusted with a public service in the form of providing long-term stable lending for housing purposes on manageable terms to the general population of Iceland. HFF provides loans to individuals, municipalities, companies and associations to assist them in acquiring, construction or renovation of residential housing or housing for rental purposes. HFF finances its lending through returns on its own equity and by issuing HFF bonds and charging service fees from its customers. HFF enjoys *inter alia* an unlimited state guarantee and an income tax exemption.

Following an EFTA Court judgment in 2006, the Authority initiated an existing aid procedure in order to assess whether the financing of HFF complies with the EEA state aid rules on public service compensation. In the course of this procedure, the Authority proposed that the scope of HFF's public service activities should be more clearly defined. It must ensure that the various state aid measures only benefit the public service activities of HFF and not other commercial activities outside the scope of the public service. The proposals included, amongst other things, that Iceland introduces stricter limits on cost and size of the dwellings eligible for HFF funding.

Recovery cases

Hurtigruten

On 29 June 2011, the Authority ordered recovery of the over-compensation granted by the Norwegian authorities to Hurtigruten AS for transport services from Bergen to Kirkenes which was incompatible with the EEA Agreement.

Under the Hurtigruten Agreement signed in 2004, the company was to provide a public service on the Bergen – Kirkenes route, serving 34 ports of call on a daily basis with ships of a minimum capacity to carry 400 passengers. For this, Hurtigruten was entitled to an annual compensation in the approximate range of 215–250 million NOK (27-31 million EUR) in 2005 prices. A new agreement concluded in 2008 entitled Hurtigruten to extra compensation that, depending on the circumstances, could entail an increase in payments of up to 90 million NOK (11 million EUR) annually.

In 2010, the Authority initiated a formal investigation of the extra compensation. The Authority held that it constituted state aid within the meaning of the EEA Agreement and that the aid was incompatible with EEA rules in so far as it constituted over-compensation. The fundamental problem was that Hurtigruten had not kept separate accounts for the public service operation. When determining the amount of extra compensation, a clear distinction between those two sets of costs and revenues was not made. Specially for one component of the agreed extra compensation, the 90% coverage of Hurtigruten's Nitrogen Oxide (NOx) costs, the compensation did not only cover the part of the NOx costs related to the public service, but also a large part of the NOx costs of the commercial cruise activities. Such over-compensation is incompatible with the EEA Agreement and has to be recovered.

Both the Norwegian authorities and Hurtigruten have challenged the Authority's decision before the EFTA Court. These challenges do not, however, affect the recovery procedure, which has to be carried out independently of the procedure before the EFTA Court.

Asker Brygge AS

The Authority concluded a formal investigation procedure in July 2011 regarding the sale of a plot of land under market value by the municipality of Asker to Asker Brygge AS. A sale of land below market value is regarded as state aid, which in principle is incompatible with the EEA Agreement. Consequently, in its decision the Authority required Asker Brygge AS to re-pay the

The process of recovery

An important tool to enforce state aid rules, is to order recovery of unlawfully granted state aid. **Unlawful aid** is state aid which an EFTA State grants without notifying the Authority. **Incompatible aid** is state aid which is not covered by the derogations from the general ban on state aid. In cases of unlawful incompatible aid the Authority adopts a negative decision and shall order recovery of the aid including interests from the time it was granted. The EFTA States have an obligation to recover the aid **effectively** and **immediately** from the beneficiary. This includes taking all necessary procedural steps before national courts.

The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the aid to ensure that the level playing field in the Internal Market is maintained. The recovery of unlawful and incompatible aid is therefore not a penalty.

incompatible state aid received. The decision has been challenged before the EFTA Court.

Existing aid cases

Publicly owned power companies

In 2011, discussions continued on the issue of abolishing the unlimited state guarantees enjoyed by the National Power Company, Landsvirkjun, and Reykjavik Energy, Orkuveita Reykjavíkur. Iceland accepted in 2009 to eliminate the state aid as of 1 January 2010. However, necessary changes to the legislation were only adopted in 2011 and there are still outstanding issues to be resolved, mainly related to establishing the appropriate premium payable to the State and to the revision mechanism.

National broadcasting in Iceland

The Authority has formally requested Iceland to change the financing regime of the Icelandic National Broadcasting Service *Ríkisútvarpið* (RÚV). RÚV provides a wide range of services in traditional radio and television broadcasting, as well as Internet and teletext services. It is financed by a special fee and commercial revenues. The aim of the requested changes is to provide for greater transparency of public funding of RÚV and to minimise possible distortions of competition. In practical terms, this means that Iceland should bring the financing regime in line with the Authority's guidelines on state aid to the public service broadcasting sector.

The Authority has put particular emphasis on separation of the Icelandic Government's functions of RÚV's owner on the one hand and the regulatory functions over public service broadcasting on the other hand. This is in order to ensure an independent entrustment and monitoring of RÚV's activities. Another important issue has been the separation of RÚV's publicly funded activities and commercial activities.

Existing aid

According to Art 62 (1) EEA and Art 1(1) of Protocol 3, the Authority shall keep under constant review existing systems of aid, in co-operation with the EFTA States.

Existing aid is aid that precedes the entry in force of the EEA Agreement, has been approved (or is deemed approved) by the Authority or has become aid due to the liberalisation of a market that was not exposed to competition when the measure was put into effect.

The rationale behind providing a specific regime for existing aid is legal certainty. Existing aid is thus never treated as illegal state aid and cannot be recovered. However, the Authority can – if it concludes that existing aid has become incompatible with EEA state aid rules – propose (binding) appropriate measures to bring it in line with these rules.

Energy

Long-term power contracts in Norway

The Norwegian guarantee scheme for purchase of electricity on long-term contracts enables certain power intensive industries to benefit from a state guarantee for their payment obligations when entering into long-term power contracts. The guarantee can cover up to 80% of the payment obligations of contracts lasting from seven to 25 years. The scheme is managed by GIEK (Garantiinstituttet for eksportkreditt), which calculates the guarantee premiums on a case-by-case basis assessing different risk factors. GIEK also requires remuneration for the capital, coverage of its administrative costs and different types of collateral.

In a decision adopted in March 2011, the Authority considered that the model proposed by the Norwegian authorities provided for a realistic assessment of the risks. The model

Cross-subsidisation

Many undertakings receive state funding in order to provide various public services. Undertakings providing such services often also engage in purely commercial activities on other markets in competition with other market players. Cross-subsidisation typically occurs when the state support/aid exceeds what is necessary to cover the cost of the public service. The Authority will continue to require the granting authorities to ensure that such service providers have separate accounts for SGEIs and commercial activities, that the allocation of fixed common costs is reasonable and hence that no cross-subsidisation of commercial services takes place. In general the Authority recommends that the granting authorities make use of public tender procedures to acquire public services or otherwise notify public service compensation to the Authority in accordance with the EEA rules.

should secure that the premiums charged are in line with market pricing and that the scheme will be self-financing in the long run. The model for calculation of the premiums will be reviewed at least once a year. This will also be the subject of an annual review by an independent expert. On this basis the Authority concluded that the scheme excludes state aid and are in line with the relevant provisions of its guidelines on state guarantees.

Power contracts in Iceland

On 14 December 2011, the Authority cleared two power contracts which the state-owned Icelandic power company Landsvirkjun had concluded with Alcanand Íslenska kísilfélagið in 2010 and 2011 respectively. The Authority could not exclude that the contracts are imputable to the Icelandic state, given in particular the fact that Iceland was a guarantor for all of Landsvirkjun's liabilities. However, the Authority found that the contracts did not entail state aid as they do not confer an advantage on the companies. Both contracts should yield an acceptable return for Landsvirkjun.

Sale of concession power rights

In December 2011, the Authority opened a formal investigation in a complaint case concerning a contract to transfer the Norwegian municipality of Narvik's rights to concession power to Narvik Energy AS ("NEAS") for 50,5 years for a fixed price. The Authority will make an in-depth assessment as to whether the municipality acted as a market investor when it concluded the contract. If the municipality sold its concession power rights for their market value, on terms acceptable for a private seller, the transaction would not involve state aid. If, however, the municipality sold the asset below market value, this may be regarded as state aid according to EEA rules.

Environmental aid

The Norwegian Energy Fund Scheme

The Authority approved the Norwegian Energy Fund Scheme in 2011, which promotes an environmentally friendly change in the use and production of energy in Norway. Grants can be given to undertakings for the production of renewable energy from biomass, biogas, solar, wind, tide, wave and hydro, for cogeneration, district heating or cooling plants as well as district heating and cooling infrastructure, for energy saving measures, and to develop new energy technologies in the mentioned fields. The Energy Fund is financed under the Norwegian state budget, as well as by a levy on the distribution tariff of electricity, paid by end consumers. The budget for 2011 is 1,865 million NOK, (approximately 241 million EUR).

The Authority also approved the incorporation of the scheme on support for alternative, renewable heating and electricity savings in private households into the Energy Fund Scheme.

Aid granted under the Energy Fund Scheme

For grants of investment aid exceeding 7.5 million EUR, the Authority requires individual notifications in order to assesses whether the positive environmental effects outweigh negative effects on competition. In 2011, the Authority approved the following:

- two grants each of approximately 346.5 million NOK (45 million EUR) for the establishment of new wind parks in Fakken in the north of Norway and Midtfjellet on the Norwegian west coast for an installed capacity of about 50 MW
- 137.2 million NOK (18 million EUR) for the demonstration of an innovative new type of gearless lightweight 10 MW wind turbine developed by Sway Turbine AS
- 175 million NOK (23 million EUR) for the installation of an energy recovery system in the Finnfjord ferrosilicon plant.

Telecoms, media, culture

Broadband in rural areas

The Authority has approved financial support for the construction costs of deployment of a fiber broadband network in rural areas of Tromsø municipality. The supplier of the network should be chosen by way of a public tender based on objective and non-discriminatory criteria. In line with the state aid guidelines on the broadband sector, certain conditions would be imposed on the owner/operator of the network. Further, an appropriate monitoring of prices for the wholesale access has been envisaged to ensure a variety of operators and services with the purpose of preserving competitive conditions.

Support to digital learning material

The Authority has cleared the funding to an inter-municipal co-operation which develops and purchases digital learning material for Norwegian secondary schools (NDLA). The material is made available to Norwegian pupils on a designated website free of charge.

In 2010, the Authority received a complaint arguing that the public funding of NDLA constitutes illegal state aid. The Authority disagreed, since NDLA is not an undertaking engaged in an economic activity and as the development of digital learning material falls within the scope of public education. Furthermore, NDLA is an integrated part of the public administration, which provides its services to the Norwegian public free of charge.

The Authority's conclusion was that the funding falls outside the scope of state aid control and does not have to be notified to the Authority. A challenge to the decision is pending before the EFTA Court.

Media Support Act of Liechtenstein

The Authority approved a prolongation for six years of the Liechtenstein Media Support Act. The scheme aims at facilitating the preservation of media diversity to a small population within the EEA. The scheme is administered by the Liechtenstein Media Commission and has a yearly budgetary allocation of 1.84 million CHF (approximately 1.51 million EUR).

Norsk Film

In June 2011, the Authority closed an investigation into alleged state aid to the Norsk Film group. The Authority investigated two measures. The payment of a grant of 36 million NOK (approximately 4.3 million EUR) to Norsk Film AS in 1998 and 1999 for the upgrading of its production facilities, was found to be part of an existing system of aid pre-dating the EEA Agreement and terminated in 2006. The second measure, the application of a preferential tax treatment for non-profit organisations to some companies previously belonging to the Norsk Film group over the period 1995 to 2001, was found to be part of the general tax regime and the measure could not be considered as being selective. The Authority therefore closed the investigation.

Research and development

Innovation Clusters in Norway

In January 2001, the Authority approved an aid scheme for Innovation Clusters in Norway which allows for up to 50% of the operating costs to be financed by public resources. The main objective of the scheme is to enhance collaboration, innovation, growth and competitiveness in regionally based innovation clusters.

Research based innovation

In March 2011, the Authority approved an amendment of a scheme providing support to centres for research based innovation (CRIs) in Norway and a prolongation until December 2019. Seven new CRIs were to be included in the scheme and the total budget for the scheme was raised from 1,120 million NOK (145 million EUR) to 1,680 million NOK (215 million EUR). The CRIs involve the co-operation of private and public bodies with financial support from the Research Council of Norway.

Taxation

New tax regime in Liechtenstein

In January 2011, the Authority concluded that the introduction in Liechtenstein of a new tax status entitled “Private Investment Structure” (PIS) does not involve state aid. Entities with PIS tax status may essentially only acquire, hold, administer and sell assets and are limited to passively receiving income derived from the assets without commercial trading. Since the PIS tax status can only be granted to entities which do not engage in economic activity, such entities do not constitute “undertakings” within the meaning of the state aid rules and therefore no state aid is involved.

As part of the reform of the tax legislation, the Liechtenstein authorities also notified a scheme on tax deductions in respect of intellectual property rights, which was approved by the Authority in June 2011.

The Norwegian NOx Scheme

On 19 May 2011, the Authority approved a Nitrogen Oxide (NOx) tax exemption scheme proposed by the Norwegian authorities. The exemption scheme was introduced in order to achieve a more efficient reduction of NOx emissions. Fifteen business organisations concluded an environmental agreement with the Norwegian State whereby it is possible for individual undertakings to gain full exemption from the tax, and instead pay a contribution into a privately run fund. The private fund allocates its financial resources among individual participating undertakings to ensure that collectively a total reduction of 16,000 tons of NOx emissions will be achieved between 2011-2017.

Chapter 4

COMPETITION

Main activities in 2011

In 2011, the EFTA Surveillance Authority completed its formal proceedings relating to Color Line, the Norwegian provider of international ferry services. After an in-depth investigation, the Authority concluded that Color Line had infringed the competition rules in the EEA Agreement (Articles 53 and 54) and imposed a fine of EUR 18.8 million.

The Authority also defended its decision in an action brought by Posten Norge AS before the EFTA Court. That action seeks the annulment of a decision in which the Authority imposed a fine of EUR 12.89 million on Posten Norge in 2010 for an infringement of the EEA competition rules.

New guidelines on the application of the EEA competition rules to agreements in the motor vehicle sector were also adopted. The guidelines set out principles for assessing common competition issues in agreements for the sale and repair of motor vehicles and for the distribution of spare parts.

Further, the Authority was involved in national cases in which the EFTA competition authorities envisaged applying Articles 53 and 54 of the EEA Agreement and in cases under the EEA competition rules that fell under the jurisdiction of the European Commission. It participated in discussions relating to regulatory developments and competition policy matters within the framework of the European Competition Network.

The Authority visited the Icelandic Competition Authority in 2011 and held a seminar on relevant topics in EEA competition law for its staff.

Finally, resources were devoted to the Authority's cross-departmental eCOM task force.

Outlook for 2012

In 2012, the Authority intends to follow up the adoption by the European Commission in 2011 of best practice guidelines for the conduct of competition proceedings. The rights of defence and the safeguarding of undertakings' procedural rights is a matter which is given high priority by the Authority already under the existing procedural rules.

In light of the measures recently adopted by the Commission, the Authority will however carefully assess the extent to which the conduct of competition investigations conducted by the Authority can be further improved. This exercise will also include a revision of the mandate of the Hearing Officer who plays a key role as the guardian of procedural rights in competition cases.

The Authority also envisages adopting new guidelines for horizontal co-operation agreements following the Commission's adoption of such guidelines in 2011 and the incorporation of new block exemptions for specialisation and research and development agreements into the EEA Agreement.

Last but not least, the Authority will continue to monitor markets in the EFTA States in close liaison with the national competition authorities with a view to ensuring that undertakings operating in those states comply with the EEA competition rules.

Enforcement of competition rules

The EEA competition rules are enforced across the EEA by the Authority and by the European Commission. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of rules laid down in the EEA Agreement.

The Authority's main task in the field of competition is to ensure that undertakings active in the EFTA States comply with the EEA competition rules. For this purpose the Authority enjoys wide powers of investigation and may impose fines of up to 10% of global turnover on undertakings that act in violation of the competition rules. It is further incumbent on the Authority to supervise the application of the EEA competition rules by the competition authorities of the EFTA States.

In addition, the Authority has exclusive jurisdiction to take action against any EFTA State that enacts, or maintains, in force measures concerning public undertakings or undertakings with special or exclusive rights that are contrary to provisions in the EEA Agreement, including the prohibitions on anti-competitive conduct.

More generally, the Authority seeks to develop and maintain uniform surveillance throughout the EEA and to promote uniform implementation, application and interpretation of the EEA competition rules. The Authority co-operates with the Commission to that effect.

The competition rules of the EEA Agreement

The substantive competition rules set out in the EEA Agreement are virtually the same as those in the Treaty on the Functioning of the European Union and can be summarised as follows:

- A prohibition on agreements or practices that distort or restrict competition (Article 53(1) EEA) with the exception of restrictions necessary for improvements which benefit consumers and which do not eliminate competition (Article 53(3) EEA);
- A prohibition on the abuse of a dominant position by market participants (Article 54 EEA);
- The requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- A prohibition on State measures in relation to public undertakings or undertakings with special or exclusive rights which are contrary to Articles 53 and/or 54 EEA (Article 59 EEA).

The Authority enjoys the same investigative and enforcement powers as the European Commission. The procedural rules relevant to the application of the EEA competition rules by the Authority are set out in the Surveillance and Court Agreement.

The Authority's website provides further information on the EEA legal framework in the field of competition: http://www.eftasurv.int/competition/competition-rules-in-the-eea/.

The Color Line case

In December 2011, the Authority fined Color Line EUR 18.8 million for infringing the EEA competition rules

The Authority concluded its proceedings against Color Line in 2011. It adopted a decision finding that Color Line had infringed the competition rules in the EEA Agreement (Articles 53 and 54) and imposed a fine of EUR 18.8 million.

Color Line is a Norwegian ferry company which operates routes from Norway to Denmark, Germany and Sweden. With its route between Sandefjord in Norway and Strömstad in Sweden, Color Line remained for many years the only provider of short haul passenger ferry services with tax-free sales between these two countries.

The Authority's case concerned an agreement that was concluded in 1991 with the public harbour of Strömstad, Sweden. Through that agreement, Color Line secured long-term exclusive access to harbour facilities in Strömstad harbour. Since there was a lack of alternative harbours in this area of Sweden, the agreement prevented competitors from operating routes in competition with Color Line.

The Authority presented its preliminary objections to Color Line in 2009 and examined carefully Color Line's reply to those objections before adopting its decision.

In its decision, the Authority concluded that Color Line's long-term exclusivity in Strömstad harbour restricted competition and constituted an abuse of Color Line's dominant market position. Through the harbour agreement, Color Line prevented potential competitors from obtaining access to the market. The result of such conduct is reduced consumer choice, limited innovation and increased prices in the market.

An infringement was found from the entry into force of the EEA Agreement in 1994 until December 2005, when a competitor of Color Line was granted access to the harbour.

The investigation of Color Line

The Authority's investigation followed a complaint from ferry operator Kystlink AS to the Norwegian Competition Authority. The case was referred to the Authority by the Norwegian Competition Authority in 2006, following which the Authority carried out an extensive market investigation.

The Authority sent a Statement of Objections to Color Line at the end of 2009. A Statement of Objections is a formal step in antitrust investigations in which the Authority informs the parties concerned in writing of the objections raised against them. The Authority's preliminary view was that Color Line's long-term exclusivity had infringed Articles 53 and 54 of the EEA Agreement.

The addressee of a Statement of Objections can reply in writing to the Authority within a given time limit, in which it may set out all of the facts known to it which it considers relevant to its defence against the objections raised by the Authority. In 2010, Color Line submitted a detailed written reply to the Authority's objections.

On Color Line's request, the Authority conducted an oral hearing in the case in 2010. An oral hearing is an opportunity for the parties to whom the Authority has addressed a Statement of Objections to develop their arguments in defence.

The Authority's decision, which sets out how Color Line breached EEA competition law by engaging in practices which have harmed competition, was adopted pursuant to the EEA competition rules, which are set out in Articles 53 and 54 of the EEA Agreement.

In addition to the fine, the decision requires Color Line not to engage in the same or equivalent practices in the future. By ordering Color Line not to engage in such practices and imposing a fine, competition in the market will in the future play out on the merits to the benefit of consumers. The decision is final and has not been challenged before the EFTA Court.

Posten Norge at the EFTA Court

The Posten Norge case is the first case in which a decision by the Authority imposing fines on undertakings has been challenged before the EFTA Court.

Posten Norge AS brought an appeal before the EFTA Court in September 2010. The company seeks the annulment of a fine of EUR 12.89 million imposed by the Authority on Posten Norge for an infringement of the EEA competition rules.

In the contested decision, the Authority found that Posten Norge had abused its dominant market position from autumn 2000 until spring 2006. Introducing its at the time new "Post i Butikk" (Post-in-Shop) concept, the company used clauses aimed at preventing competitors from opening their own parcel-delivery points in some of the largest supermarket, kiosk and filling station groups in Norway.

Extensive written pleadings were completed in the first half of 2011 and an oral hearing was conducted by the EFTA Court in October. In addition to raising a great number of

Competition cases at the EFTA Court

A decision adopted by the Authority can be challenged before the EFTA Court by the addressee of the decision or by other persons who are directly and individually concerned.

As opposed to most other areas of EEA law, in the field of competition the Authority's decisions will normally be addressed to undertakings rather than an EFTA State.

Undertakings can bring an action for annulment before the EFTA Court within two months after being notified of the decision by the Authority.

Following an Application seeking the annulment of a decision, the Authority is invited by the Court to submit its written observations in a Statement of Defence. In a second round of written pleadings the applicant submits its Reply to the Statement of Defence and the Authority thereafter its Rejoinder.

All the EEA States and the European Commission may also submit written observations to the Court as may third parties to whom the Court grants leave to intervene.

On the basis of the written pleadings, a report for the hearing is prepared by the Court in preparation for an oral hearing. The purpose of the oral hearing is to provide an opportunity for the judges to ask questions and for the parties involved to supplement their written pleadings and to answer or rebut arguments not addressed in their written pleadings.

Judgment in the case is rendered by the EFTA Court on the basis of the written and oral pleadings which have been submitted to it. Judgments of the EFTA Court cannot be appealed.

case specific questions of fact and law, Posten Norge generally claimed that the EEA antitrust procedures were contrary to human rights. It referred in particular to the safeguards of the European Convention on Human Rights (ECHR) in criminal cases and the implications, in its view, such safeguards should have for the EFTA Court's review of the evidence in the case before it. Conversely, the Authority, supported by both the Norwegian Government and the European Commission in that regard, argued that the EEA competition rules as interpreted by the European Union Courts comply with the ECHR.

It is expected that the EFTA Court will hand down its judgment in the case before summer 2012.

New rules for motor vehicles

In May 2011, the Authority adopted new guidelines on the application of the EEA competition rules to agreements between vehicle manufacturers and their authorised dealers, repairers and spare parts distributors.

The adoption of the guidelines completed the introduction of a new competition regime in the EEA Agreement for the distribution and repair of motor vehicles. The aim of the new rules is to strengthen repairers' access to alternative spare parts, increase competition between garages and lower consumer costs.

The new rules will improve access to technical information needed for the repairs and make it easier to use alternative spare parts. Car manufacturers will no longer be able to make the warranty conditional on using original spare parts or having car services performed in authorised garages only. Excepted are repairs covered by the warranty and paid for by the manufacturer.

In addition, the new rules introduce a 30% market share threshold above which agreements between authorised repairers and car manufacturers no longer will be exempted from competition law scrutiny.

With regard to the sale of cars, the Authority's new guidelines contribute to a simplification of the competition rules applicable in this sector. These markets will now be treated like any other market. This will reduce distribution costs for new cars by eliminating overly restrictive rules.

The new rules also provide car makers with more flexibility to organise diverse networks in which multi-brand dealers can co-exist alongside committed single brand dealers.

Co-operation with national authorities

National competition authorities and courts in the EFTA States apply Articles 53 and 54 EEA side-by-side with the equivalent national competition rules.

The activities of the Authority in the field of competition are co-ordinated with the activities of the national competition authorities in the EFTA network of competition authorities. Liechtenstein does not have a competition authority that enforces EEA rules, but it still participates in the network.

The EFTA competition authorities inform each other when they initiate investigations where they envisage that Articles 53 and/or 54 EEA may be applied. The purpose is to allocate cases to the authority that is best placed to act, and to ensure effective enforcement. In 2011, the Authority was informed of seven new investigations by the EFTA competition authorities. One of these cases was referred to the Authority. At the end of the year, 26 pending national investigations were registered with the Authority.

Before adopting decisions applying Articles 53 and/or 54 EEA, the competition authorities of the EFTA States must submit a draft decision to the Authority for review. A final decision may only be adopted when the Authority has been given the opportunity to comment on the draft with a view to ensuring that Articles 53 and 54 EEA are applied in a consistent manner throughout the EEA. Within the network of EFTA competition authorities all members are, however, regarded as equal partners. Therefore, there is an informal exchange of views inside the network with the common goal of securing an effective enforcement of the EEA competition rules. In 2011, the Authority was consulted on four draft decisions which national competition authorities envisaged adopting.

National courts in the EFTA States may, where they find it necessary to reach a decision in a particular case, request assistance from the Authority with regard to the application of EEA competition rules. In 2011, no court in the EFTA States availed itself of this opportunity. Nor were there any cases pending before national courts in which the Authority submitted written observations in order to ensure coherent application of Articles 53 and 54 EEA.

The new regime for distribution and repair of motor vehicles

The new guidelines provide clarification on issues that are particularly relevant for the motor vehicle sector and supplements:

- the General Block Exemption Regulation for distribution agreements which exempts such agreements from the application of Article 53(1) EEA for firms with market shares below 30% if some basic conditions are fulfilled; and
- the specific Block Exemption Regulation for distribution agreements in the motor vehicle sector which contains specific rules for motor vehicle aftermarkets and which introduces a transitional period until June 2013 for the sale of new cars to allow dealers to adapt to the new regime.

The guidelines set out principles for assessing under Article 53 EEA particular competition issues in agreements for the sale and repair of motor vehicles and for the distribution of spare parts.

The guidelines apply both to:

- agreements relating to the conditions under which spare parts and/or repair and maintenance services for motor vehicles are provided; and to
- agreements relating to the conditions under which new motor vehicles are sold.

Co-operation with the European Commission

Rules on co-operation between the European Commission and the Authority in the EEA Agreement allow the Authority and the competition authorities of the EFTA States to be involved in discussions on competition policy at EU level, in particular within the framework of the European Competition Network (ECN). Co-operation between the Commission and the Authority is also foreseen in individual cases in which one of the authorities applies the EEA competition rules.

In a significant number of cases the Commission applies the EEA competition rules side-by-side with the EU competition rules. Cases dealt with by the Commission can have considerable impact on markets and market players in the EFTA States. The EEA rules on co-operation in competition cases ensure that the Authority and the EFTA States can make their voices heard in cases that concern the EFTA territory.

Merger cases in 2011

Mergers are examined at European level if the annual turnover of the companies concerned exceeds specified thresholds in terms of global and European sales. The rules on jurisdiction are such that the European Commission, in practice, is the competent authority to assess mergers under the EEA Agreement. The Authority is involved in merger cases by virtue of the EEA co-operation rules.

Two merger cases that were decided after in-depth investigations in 2011 concerned worldwide markets for hard disk drives. Seagate Technology notified its acquisition of Samsung's hard disk drive business to the Commission one day before Western Digital's notification of its acquisition of Vivital Technologies.

Due to a very limited number of suppliers of hard disk drives worldwide there was a risk that the notified mergers would limit competition and lead to increased prices in Europe to the detriment of EEA consumers. This justified an in-depth review by the Commission.

When carrying out its review, the Commission applied a first come, first served priority rule based on the date of notification. Seagate's acquisition was therefore assessed without taking into account the subsequent acquisition of Vivital by Western Digital. On the other hand, the latter transaction was assessed in the light of the market conditions after the Seagate transaction.

In order to remove competition concerns, the Commission was only willing to approve Western Digital's acquisition on the condition that significant divestments of essential production assets were made to a suitable purchaser. The Commission's approach in this case was fully supported by the Authority.

Antitrust cases in 2011

By virtue of the co-operation rules under the EEA Agreement, the Authority is also involved in cases in which the European Commission applies Articles 53 or 54 of the EEA Agreement.

Many such cases concern cartels uncovered by the Commission, often following an application for leniency by one of the cartelists. Leniency applicants can, on certain conditions, obtain immunity from fines by disclosing its participation in a cartel to the Commission.

One such case that was decided by the Commission in 2011 concerned consumer detergents. Procter & Gamble and Unilever were fined a total of EUR 315.2 million for operating a cartel together with Henkel in eight EU Member States. Henkel was not fined since it revealed the cartel to the Commission. The two other cartelists obtained a 10% reduction in their fines by agreeing to a settlement of the case with the Commission. The Authority supported the position of the Commission and welcomed in particular the use of the settlement procedure which enabled the Commission to conclude the investigation more swiftly and with fewer resources than would otherwise have been the case.

Another case that was decided in 2011 by the Commission and in which use was made of the settlement procedure concerned four producers of cathode ray tube glass (also known as bulb glass) used in televisions and computer screens. The cartel consisted of price coordination activities and exchange of sensitive market data. This case related to the whole of the EEA. The Authority agreed with the Commission both on the finding and infringement, and the setting of the fines which totalled EUR 128 million.

Chapter 5

LEGAL AFFAIRS

The EEA legal world

2011 was another busy year of litigation for the EFTA Surveillance Authority. Once more, it participated in all cases before the EFTA Court, either as a party or by systematically intervening in the preliminary reference proceedings originating from national courts. Furthermore, the Authority continued to take part in a select number of cases before the European Union courts that have a particular impact on EEA law.

In 2011, a total of 19 new cases were brought before the EFTA Court. That is a new record number of registered cases.

Fourteen of the new cases concern the laws governing the EEA Internal Market. Four cases are actions for the annulment of decisions adopted by the Authority in the field of state aid and one case relates to the Authority's public access to documents rules.

The majority of the Internal Market cases raise interesting and substantive issues of EEA law. There is a trend towards an increase in the number of substantive cases before the EFTA Court and a diminution in the number which deal with the failure of States to implement EEA law. That trend shows that while the Authority is successful in bringing the States into compliance with EEA law in most instances, certain cases raise difficult issues which can only be resolved by the EFTA Court.

Of particular note is Case E-16/11 on Iceland's failure to ensure timely minimum compensation for savings made in the British and Dutch Icesave branches of Landsbanki that were lost when that bank failed in October 2008. The Authority claims that Iceland has breached its obligations under the 1994 *Deposit Guarantee Directive* and discriminated between savings made in Icelandic and other EEA branches of the failed Icelandic bank.

Also in 2011, the EFTA Court handed down judgments in nine cases registered in 2010. Noteworthy is Case E-18/10, *the Authority v Norway*, in which the EFTA Court held for the first time that a State had failed to comply with a previous judgment of the Court in Case E-2/07 on sex discrimination concerning the calculation of widowers' pensions. The Court held in Case E-16/10 *Philip Morris*, an important ruling on the free movement of goods, that it is for Norway to show that its ban on any visual display of tobacco products in shops is both necessary to protect public health and that this could not be achieved by less strict means.

Finally, on competition law, the EFTA Court heard oral arguments by the parties and interveners in Posten Norge's appeal against the Authority's first decision to set a fine for an infringement of the EEA competition rules (Case E-14/10). Important issues on human rights were debated and in particular the consequences of the judgment of 27 September 2011 of the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v Italy*.

Case E-4/11 Arnulf Clauder

Mr Clauder, a German pensioner, was granted a permanent residence permit in Liechtenstein in 2002. In 2010, Mr Clauder applied for a family reunification permit for his

new wife, which was rejected. The Liechtenstein authorities stated that as an economically inactive person, Mr Clauder could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. Mr Clauder challenged this decision before the Liechtenstein Administrative Court which requested an Advisory Opinion from the EFTA Court.

In essence, it asked whether the Directive 2004/38 (the residence Directive) allows a pensioner who holds a right of permanent residence in a host State to claim the right to family reunification even if the family would be entitled to social welfare benefits.

The EFTA Surveillance Authority noted that once an EEA national has acquired the right of permanent residence, this right is not subject to conditions such as having sufficient resources. EEA secondary legislation on free movement and residence cannot be interpreted restrictively and the residence Directive would lose its effectiveness if EEA nationals were not allowed to lead a normal family life in the host State. In addition, ESA submitted that the right to preserve family unity is closely connected with the fundamental right to the protection of family life.

On 26 July 2011, the EFTA Court agreed with the Authority's arguments.

Case E-2/11 STX Norway Offshore

This case concerns the terms and conditions of employment to be observed in the host State by employers who post workers there. Acting on a petition filed by the Norwegian Confederation of Trade Unions, the Norwegian "Tariff Board" had adopted a regulation making parts of the Engineering Industry Agreement universally applicable within the maritime construction industry. STX Norway Offshore and eight other companies then sought to have the regulation annulled.

The Norwegian Court asked the EFTA Court whether the *Posting of Workers Directive* permitted Norway to apply to workers posted to its territory the terms and conditions of employment laid down in a universally applicable collective agreement: maximum working hours, additional

New EFTA Court cases 2011

Case E-19/11 Vín Tríó ehf. v Íslenska ríkinu – Do the basic principles of the free movement of goods prohibit a state monopoly on the sale of alcohol to refuse to sell beverages containing stimulants such as caffeine?
Case E-18/11 Irish Bank Resolution Corporation Ltd. v Kaupþingi hf. – Clarification on a discrepancy in language regarding the provision of information to creditors.
Case E-17/11 Aresbank S.A. v Landsbankanum hf & Fjármálaeftirlitinu og íslenska – Clarification of the scope of the definition of "deposit" within the context of deposit-guarantee schemes.
Case E-16/11 EFTA Surveillance Authority v Iceland – ("Icesave") – Failure to ensure timely payment of minimum compensation to depositors having lost access to their deposits.
Case E-15/11 Arcade Drilling AS v Staten v/Skatt Vest – Exit taxation in Norway.
Case E-14/11 DB Schenker v EFTA Surveillance Authority – Public access to documents collected by the Authority during an antitrust inspection at Norway Post's premises.
Case E-13/11 Granville Establishment v Volker Anhalt e.a. – Does non-discrimination of EEA nationals imply a right not to be sued in Liechtenstein on the basis of a private jurisdiction agreement that has not been publicly recorded?
Case E-12/11 Asker Brygge AS v EFTA Surveillance Authority – Appeal against the Authority's decision to order the recovery of state aid granted through both a real estate option and sale agreement in Norway.
Case E-11/11 The Kingdom of Norway v EFTA Surveillance Authority – Appeal against the Authority's decision that Hurtigruten ASA received unlawful state aid which must be recovered.
Case E-10/11 Hurtigruten ASA v EFTA Surveillance Authority – identical as Case E-11/11.
Case E-9/11 EFTA Surveillance Authority v The Kingdom of Norway – Ownership restrictions in stock exchanges and securities depositories.
Case E-8/11 EFTA Surveillance Authority v Iceland – Failure to create strategic noise maps and actions plans under Directive 2002/49/EC.
Case E-7/11 Grund, elli- og hjúkrunarheimili v Lyfjastofnun – Restrictions to the importation of medicinal products into Iceland.
Joined Cases E-17/10 & E-6/11 The Principality of Liechtenstein and VTM Fundmanagement v EFTA Surveillance Authority – Appeals against the Authority's decision that favourable taxation of investment undertakings was unlawful state aid which must be recovered.
Case E-5/11 EFTA Surveillance Authority v The Kingdom of Norway – Failure to incorporate two Regulations regarding the European Maritime Safety Agency (EMSA).
Case E-4/11 Arnulf Clauder
Case E-3/11 Pálmi Sigmarsson v Seðlabanki Íslands – Currency controls and capital movement restrictions in Iceland.
Case E-2/11 STX Norway Offshore AS m.fl. v Staten v/ Tariffnemnda
Case E-1/11 Norwegian Appeal Board for Health Personnel – appeal from Dr A – On conditions under which medical doctors trained in other EEA states may exceptionally be denied authorisation to practice in line with Directive 2005/36/EC.

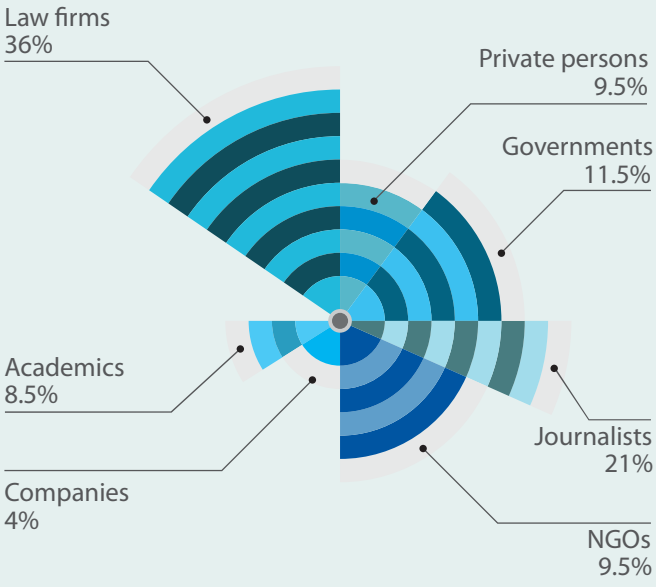
remuneration for work assignments requiring overnight stays away from home, and compensation for travel, board and lodging expenses.

The EFTA Surveillance Authority argued, first, that the Directive does permit the State to regulate maximum working hours this way. Even if it is less clear what remuneration or compensation can be paid in case of work assignments requiring overnight stay, the Authority argued that the additional remuneration which is set at a flat rate could fall under the concept of "minimum rates of pay" as set out in the Directive. This means that it would be applicable to posted workers on an equal footing with other workers in the industry.

In its judgment of 23 January 2012, the EFTA Court followed the Authority on the issue of working hours, but took a stricter view on what remuneration Norway may impose in case of work assignments requiring overnight stay.

Public access to documents

- The total number of access requests decreased from 125 in 2010 to 107 in 2011.
- Only seven requests were denied, most of them concerning pending state aid investigations.
- For the first time an Authority decision to deny access to documents was appealed to the EFTA Court.
- Six requests led to only partial access to the document in question.
- In four instances access was given to whole case files.
- The requests came from the following groups:



Activities in the EU Courts

During 2011, the Authority made written or oral submissions in nine preliminary reference cases before the European Court of Justice (ECJ). The Authority applied to intervene for the first time in cases pending before the General Court in support of the European Commission in two cases on whether the EEA laws governing antitrust investigations comply with fundamental rights (Cases T-289/11 and T-290/11, *Deutsche Bahn* v *Commission*).

Case C-202/11 LAS

This case concerns a non-Belgian national, Mr Las, who was employed by a company operating in Antwerp, Belgium. Mr Las got fired and that gave rise to the dispute. Mr Las claims that his contract of employment was null and void in the first place because it was drafted in English and not in Dutch. The Belgian legislation requires an undertaking situated in the Flemish language region to draft all such documents in Dutch. The company, on the other hand, claims that this Belgian act is incompatible with EU law on the free movement of workers and should not be applied.

The question put before the European Court of Justice is essentially whether Belgian legislation indeed infringes Art. 45 TFEU on free movement of workers.

The EFTA Surveillance Authority's answer in its intervention is "yes". The Belgian obligation is a restriction on free movement of workers which cannot be justified on public interest grounds due to the fact that it is discriminatory and disproportionate. The Authority supported, therefore, that the national court should disapply the Belgian act.

The oral hearing of the case before the ECJ is expected to take place in 2012.

Case C-300/11 ZZ

ZZ - an EU citizen of French and Algerian nationality - had been residing lawfully in the UK with his family when, in 2005, the UK authorities decided to exclude him from the UK on the grounds that his presence was not conducive to the public good. ZZ appealed this decision. However, he was given very limited information about the public security grounds on which his exclusion was based. More detailed information was refused to both ZZ and his lawyers, on the basis that its disclosure would be harmful to the public interest.

Under Article 30(2) of Directive 2004/38 (the residence Directive), where an EEA citizen's freedom of movement or residence is restricted on grounds of public security, that person should be informed, *precisely and in full*, of the grounds on which the decision is based, unless this would be contrary to the interests of State security.

The national court has essentially asked whether the principle of effective judicial protection is respected if only very limited information about expulsion grounds against a person can be disclosed. Or does the *essence* of the grounds need to be disclosed, even if contrary to the interests of state security? The Authority has argued that the principle of effective judicial protection requires that a person expelled from an EEA State on grounds of public policy/public security must be informed of the essence of the grounds against him, even if the disclosure would be contrary to the interests of state security. Only in such circumstances can the legality of an exclusion decision be adequately examined and challenged.

Authority interventions before the EU Courts

Case C-209/10 Post Danmark on Article 102 TFEU regarding selective price rebates by a Danish dominant postal undertaking to clients of its competitors.
Case C-476/10 *projektart* on Austrian restrictions for EFTA nationals to purchase a secondary residence.
Case C-583/10 *Nolan* on a UK case on employers' obligation to consult about collective redundancies pursuant to Directive 98/59/EC.;
Case C-32/11 *Allianz Hungária Biztosító* on whether certain agreements between Hungarian motor insurers and car repairers that also broker motor insurance on hourly car repair charges have the object of restricting competition within the meaning of Article 101 TFEU.
Case C-48/11 *A* on the interpretation of Articles 31 and 40 of the EEA Agreement as regards a Finnish case on the tax-neutrality of an exchange of shares between a company residing in Finland and a company residing in Norway.
Case C-171/11 *FRA.BO* on whether a German private law standardisation entity is subject to the EU rules on free movement of goods and/or to the EU competition rules.
Case C-202/11 *Las*
Case C-226/11 *Expedia* on a French case whether the EU competition rules preclude national competition authorities from bringing proceedings and imposing penalties under national antitrust law when the practice at issue would fall under the Commission's *de minimis* communication.
Case C-239/11 P *Siemens* v *Commission* concerning an appeal in a cartel case on whether the EU antitrust fining procedure (Regulation EC No. 1/2003) is compatible with fundamental rights.
Case C-300/11 *ZZ*
Joined Cases T-289/11 and T-290/11 *Deutsche Bahn* v *Commission* on whether the lack of prior judicial authorisation of unannounced antitrust inspections by the Commission under Regulation EC No. 1/2003 is compatible with fundamental rights.

ESA Day and public presentations

After introducing the concept with success in Reykjavik the year before, ESA Day presentations were given in Vaduz, Oslo and once more in Reykjavik in 2011. The point of the ESA Day is to give government officials in the EFTA States a better understanding of the Authority's approach in different fields of its case handling. In Reykjavik in June more than 100 officials attended the ESA Day, approximately 50 attended the ESA apéro in Vaduz in September and the attendance was 100 at the ESA mini seminar in Oslo in November.

The Authority also continued to receive visitor groups in Brussels. More than 1,500 people attended public presentations given by the Authority throughout 2011. In addition, the Authority's College, Directors and staff members participated in a range of seminars in EFTA and EU Member States.

Chapter 6

STATISTICS

***"Case"* in this section refers to an assessment of the implementation, or application, of EEA law, or to tasks executed for the purpose of fulfilling the Authority's obligations under EEA law, registered during the relevant year. Such cases do not necessarily lead to the initiation of infringement proceedings against one or more EFTA State(s) or undertakings, or the opening of formal investigations.**

Case handling by the Authority

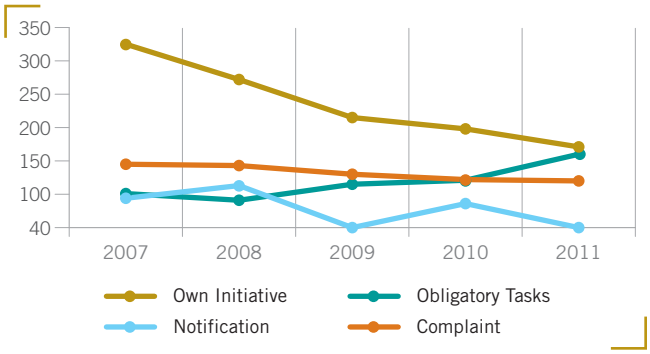
Developments and activities relating to individual cases and sectors in 2011 have been dealt with in the preceding chapters of this annual report. The aim of this chapter is to give a brief overview of the EFTA Surveillance Authority's total case load, categorised by type of case and by country, as well as a calculation of the number of cases that were opened and closed within the Authority's different fields of work during the past year.

Pending cases

The Authority's emphasis in recent years on reducing the backlog of pending cases has been successful and has led to a substantial reduction of such cases since this figure peaked in 2007. At the end of 2011, the Authority had 501 pending cases. This is slightly lower than at the start of the year, and also the lowest number of the last five years.

The following figures show the developments in pending cases from 2007 to 2011 (inclusive).

Figure 1: Pending cases, by category



Complaints are cases where the Authority examines information received from economic operators or individuals regarding measures or practices in the EFTA States which are not considered to be in conformity with EEA rules.

Notifications cover state aid measures, draft technical regulations, and telecommunications market notifications that are submitted to the Authority by the EFTA States for examination or approval.

Obligatory Tasks are cases which are opened on the basis of an obligation on the Authority deriving from the EEA Agreement directly, or from secondary legislation, such as inspections in the area of food safety or transport.

Own Initiative cases are those opened by the Authority at its own instigation. Such cases include the non-implementation of directives, and non-incorporation of regulations which have been incorporated into the EEA Agreement by Iceland and Norway, and the examination of the implementation (*e.g.* the verification of the conformity of national laws with EEA legislation) and application of EEA law. The latter covers, for example, examination of individual award procedures for procurement, state aid or concessions where the Authority considers such examination is warranted based on different sources of information.

Figure 2: Pending cases, by country of origin

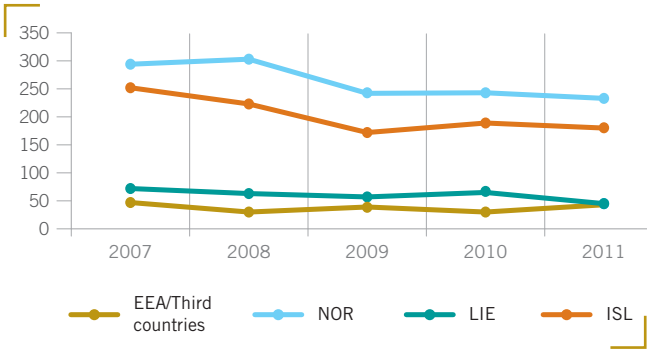


Figure 2 shows the number of pending cases by country from 2006 to 2011 (inclusive). The category "*EEA/Third countries*" refers to cases where more than one EFTA State was involved, typically two or all three EFTA States; or cases transferred to, or dealt with in co-operation with, the European Commission as they concerned EU Member States or third countries.

Cases opened and closed

The activities of the Authority can also be illustrated by the number of cases which were opened and closed during the year. A case is closed when the issue at stake has been resolved, or when the Authority finds that no infringement of EEA law has taken place.

In 2011, the Authority continued the trend from previous years with fewer openings than closures.

Figure 3: Opened (new) cases, by field of work

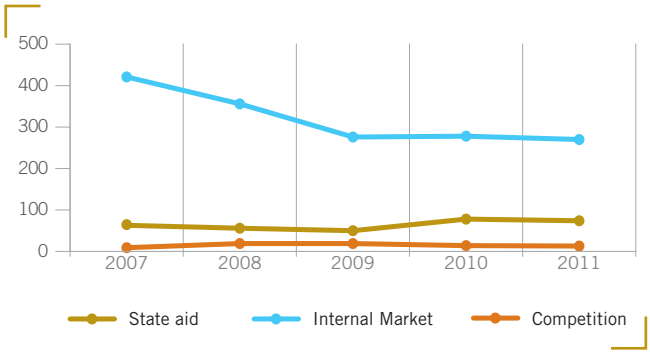
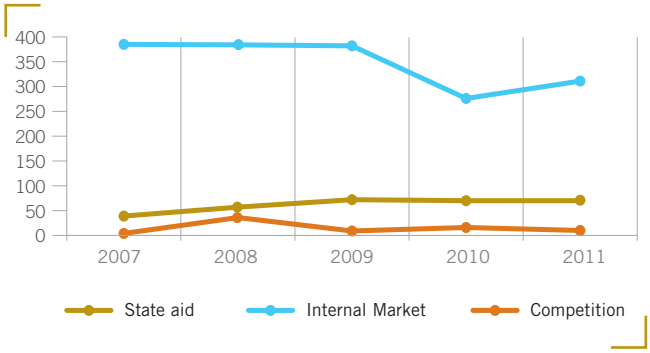


Figure 4: Cases closed by the Authority, by field of work



Figures 3 and 4 show that the great majority of cases is related to Internal Market affairs, which comprise areas such as the free movement of capital, goods, persons and services, the environment and energy matters as well as public procurement. The difference between Internal Market closures and openings is the main contributor to the decrease in pending cases.

In the area of state aid the number of closures and openings was almost the same in 2011.

Figure 5: Opened (new) cases, by country of origin

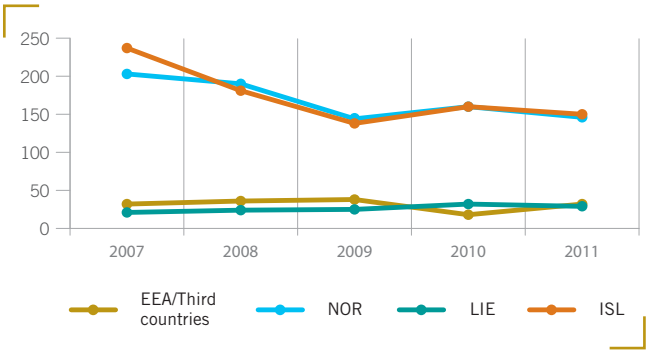


Figure 6: Closed cases, by country of origin

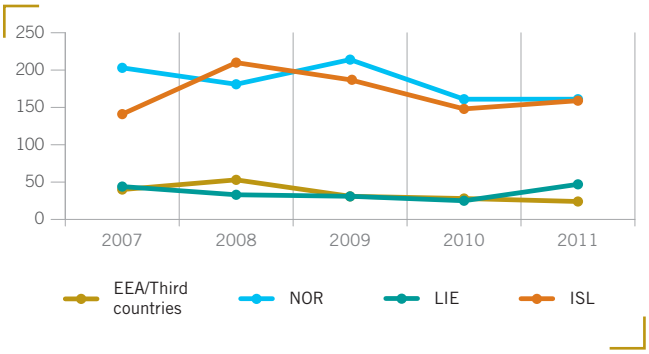


Figure 5 shows that the Authority experienced a slight decrease in the number of new cases in 2011. At the same time the number of closed cases increased (Fig. 6). As a result, and as shown in the section above (Fig. 1), the number of pending cases decreased in 2011.

The Authority opened 146 cases related to Norway and 150 related to Iceland, while 29 related to Liechtenstein. In 2011, most closures were of Norwegian and Icelandic cases, while again only a relatively small, although increasing, number were related to Liechtenstein.

Complaints in 2011

In order to fulfil its surveillance tasks to ensure compliance with EEA law in the EFTA States, the Authority examines

complaints from interested and concerned parties. In principle, anyone is entitled to lodge a complaint with the Authority, which will then examine it to determine whether there is need for an investigation. Following the examination, the Authority may decide to close the case, or to initiate formal infringement proceedings. It must be emphasised that in these circumstances the Authority will pursue a resulting case against one or all EFTA States on its own initiative and not on behalf of the complainant.

In the case of all three EFTA States most new complaints related to Internal Market affairs, followed by state aid and finally competition cases. Although not apparent from these figures, it is notable that the number of new complaints against Iceland dropped significantly (36%) in 2011, after a sharp increase in the two previous years due to complaints relating to the banking sector and/or capital movement in Iceland. At the same time the number of all pending complaints continued to decrease (see Fig. 1).

As in previous years, the bulk of the complaints concerned Norway's implementation and application of EEA law: 80 of 120 cases still pending at year-end concerned Norway. Equally, most new complaints (39 out of 58) and closures (46 out of 60) also concerned Norway.

Number of complaint cases,
by country of origin and field of work:

Figure 7: Pending complaints on 31 December 2011

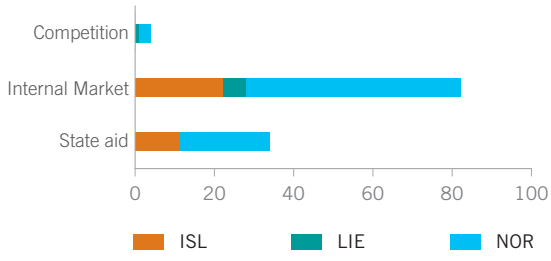


Figure 8: New complaints lodged with the Authority in 2011

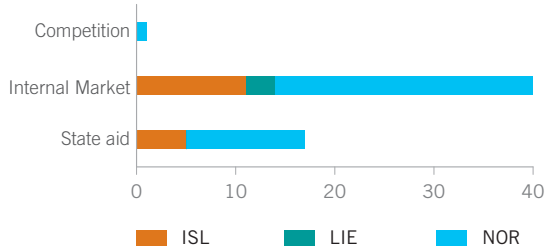
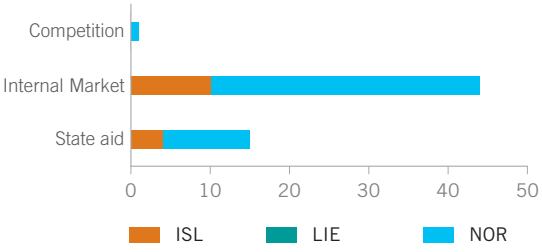


Figure 9: Complaints closed during 2011



Chapter 7

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The following left the Authority in 2011

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Katharina Kraak – CSA
Anders Pilskog – CSA
Lena Sandberg-Mørch – CSA
Marie Wiersholm – CSA
Tuula Nieminen – IMA
Danielle De Borger – IMA
Claire Koeniguer – IMA
Helen Pope – IMA
Camilla Rise – IMA
Ólafur Valsson – IMA
Joakim Zander – IMA
Nora Zenhäusern – IMA
Audny Larsson Helgaland - IMA

Hildur Jónasdóttir – CSA Trainee
Nina Hallenstvedt – IMA Trainee
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EFTA SURVEILLANCE
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