

# Annual report 2021



**ESA** | EFTA  
Surveillance  
Authority

# 2021 ANNUAL REPORT

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# LETTER FROM THE COLLEGE

The year 2021 was characterised by both expected and unexpected challenges. The COVID-19 pandemic continued, with multiple variants emerging, leading to renewed lockdowns and restrictions as well as continued economic and financial difficulties for many people and businesses. At the same time, the distribution of vaccines not only ushered in a new phase of hope and optimism, but also demonstrated that tackling global challenges is best done through cooperation and partnership.

Indeed, getting access to vaccines would have been a heavy burden to carry for the EEA EFTA States without having an already close partnership with the European Union, and being a part of the European Economic Area. The benefits of the EEA Agreement were also apparent in other aspects of the crisis.

At the outset of the pandemic, ESA made a policy decision to prioritise decisions that were critical for the EEA EFTA States Iceland, Liechtenstein and Norway in dealing with the crisis. A large majority of COVID-19-related decisions concerned schemes put in place to ease the pressure on businesses and their employees. Indeed, of the 48 state-aid decisions taken by ESA in 2021, 32 were support schemes seeking to deal with the consequences of the COVID-19 outbreak. While many of these concerned prolongations, renewals and amendments to schemes initially approved in 2020, they still required a thorough review and ESA's full attention.

While pandemic-related state-aid decisions were at the top of our agenda, ESA also decided to continue to ensure that work on decisions concerning the green transition remained on track. This included, for example the approval of state-aid guidelines for projects of common European interest (IPCEI) or greenlighting the

public financing of Norway's Ocean Space Centre.

The pandemic also affected the functioning of the internal market. This was particularly noticeable for people who attempted to exercise their right to move freely across EEA. While states can impose entry restrictions under EEA law under certain circumstances or situations, ESA followed closely the proportionality and non-discrimination of such measures put in place by the EEA EFTA States. As a result, ESA asked both Iceland and Norway to ensure that any entry restrictions were compliant with EEA rules.

Similarly, to ensure the seamless delivery of goods in the EEA, ESA approved derogations for the transport sector, including for drivers to spend travel quarantine in their vehicles.

In the transport and food and veterinary fields, which require close cooperation with national authorities and on-the-ground inspections, these continued to be conducted remotely during the first half of 2021. Thanks to close cooperation with partners, including the European Commission, the development of remote audit technologies meant that inspections could be conducted seamlessly. In the autumn, however, ESA officials were able to carry out their first on-site inspections since March 2020.

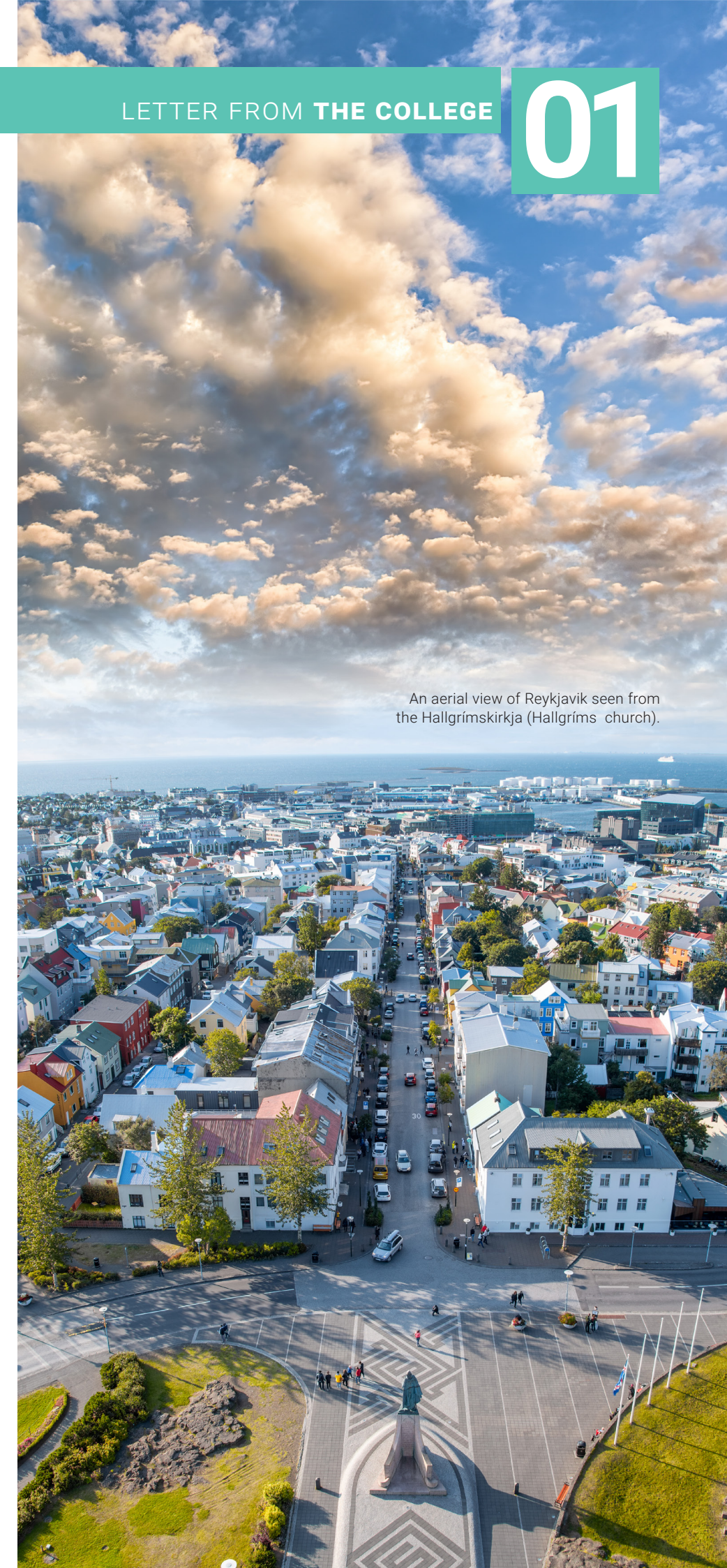
In addition to state-aid related issues, ESA also prioritised work concerning the green transition, including climate change, the environment and innovation. Europe is the global leader in the development and implementation of policies to combat climate change, and the inclusion of efforts to transition towards a green economy in the EEA Agreement means that ESA plays an increasingly important role in this work. In November, for example, ESA approved NOK 219 million (EUR 21.73 million) in aid for the purchase of two zero-emission

hydrogen vessels being developed as part of the Norwegian Topeka Natstruten project, which aims to play a vital role in the transition to a more environmentally friendly maritime sector. ESA approved Norway's aid for dedicated alternative fuels infrastructure from 2021 to 2025, which aims to facilitate the development of vehicles, vessels and other machinery and infrastructure using alternative fuels in Norway. And in July, ESA approved an Icelandic aid scheme consisting of several measures granting tax incentives in favour of low-emission vehicles.

In October, ESA issued its first Climate Progress Report. Set to be published annually, the report tracks the reduction of greenhouse gas emissions in Iceland and Norway in line with their commitments under the Effort Sharing and Land Use, Land-Use Change and Forestry regulations. These commitments come in addition to those made under the Emissions Trade System (ETS), which concerns the reduction of GHG emissions from the aviation, energy and manufacturing sectors.

Another milestone for ESA in 2021 was the adoption and subsequent approval of new Regional Aid Guidelines ("RAGs") for Iceland and Norway. The goal of the RAGs is to enhance regional development while ensuring that disadvantaged areas in the EEA can compete on a level playing field. In December, ESA approved one of the largest aid schemes in Norway on regionally differentiated social security contributions. Covering the period from 2022 to 2027, the scheme aims to reduce or prevent depopulation in

An aerial view of Reykjavik seen from the Hallgrímskirkja (Hallgríms church).







ESA'S COLLEGE: Árni Páll Árnason, Arne Røksund (President), Stefan BARRIGA.

very sparsely populated areas by allowing employers to pay reduced social security contributions, which lowers the cost of employment.

Central to ESA's work in 2021 was the organisation's effort to continue strengthening cooperation synergies with the European Commission and EU agencies such as the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) as well as ACER, the European Union Agency for the Cooperation of Energy Regulators.

In 2021, ESA was finally able to move into its new offices at EFTA House. We are now under one roof with the EFTA Secretariat and the Financial Mechanism Office (FMO) in the heart of the Brussels European district. This new set-up has been welcomed by staff. It also provides opportunities for greater synergies across the

EFTA family, and ensures greater visibility for the EEA Agreement.

The activities highlighted above were undertaken under the responsibility of ESA's previous College, composed of Bente Angell-Hansen, Högni Kristjánsson and Frank Büchel. We warmly thank them for their excellent work and for handing over a well-functioning institution that is ready for the challenges ahead.

Going forward, ESA will continue to focus on issues that are timely and important for people, businesses and the environment. We will continue to strengthen partnerships with European institutions as well as with national authorities, interest groups and citizens. In doing so, we will deliver on our core mandate: to ensure full implementation of the EEA Agreement in Iceland, Liechtenstein and Norway, thereby enabling a level playing field among all 30 States of the European Economic Area.

## THIS IS ESA

**T**he EFTA Surveillance Authority (ESA) monitors compliance with the rules of the European Economic Area (EEA) in Iceland, Liechtenstein and Norway, the EEA EFTA States, enabling the three States to participate in the European Internal Market.

The EEA was established by the Agreement on the European Economic Area in 1994 and joins the three EEA EFTA States with the 27 Member States of the European Union (EU) in a common market, known as the European Internal Market.

The purpose of the EEA Agreement is to guarantee, in all EEA States, the free movement of goods, persons, services and capital. These are known as "the four freedoms". Because of the EEA Agreement, EU law on the four freedoms, state aid and competition rules for undertakings is incorporated into the domestic law of the EEA EFTA States so that it applies throughout the entire EEA and ensures a common market with common rules. This removes barriers to trade and opens new opportunities for over 450 million Europeans, creating jobs and growth and adding to the international competitiveness of the EEA States.

As well as ensuring equal rights for all citizens and undertakings to participate in the Internal Market, and equal conditions of competition, the EEA Agreement provides for cooperation across the EEA in important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture.

The success of the EEA Agreement depends on uniform implementation and application of common rules. Therefore, it provides for a system where the European Commission works with the EU Member States, while ESA works with the EEA EFTA States, to ensure compliance with EEA law.

### THE ROLE OF ESA

ESA ensures that Iceland, Liechtenstein and Norway respect their obligations under the EEA Agreement.

ESA operates independently of the EEA EFTA States and is based in Brussels. The role of ESA in ensuring compliance with EEA law is to protect the rights of individuals and market participants, and to make sure that their rights are not violated by rules or practices of the EEA EFTA States or companies within those States.

ESA also enforces restrictions on state aid, assessing its compatibility with the functioning of the Internal Market, and can order repayment of unlawful state aid.

Likewise, ESA ensures that companies operating in the EEA EFTA States abide by EEA rules relating to competition. ESA can investigate possible infringements of EEA provisions, either by 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.

ESA can request a change in national rules or practices that are in breach of EEA law. Unless the EEA EFTA State concerned decides to take appropriate action in response to ESA's request, ESA may initiate proceedings against that State before the EFTA Court.

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

### HOW ESA IS ORGANISED

ESA is led by a College, consisting of three members. Although appointed by the EEA EFTA States, the College members undertake their functions independently and free of political direction. Until 31 December 2021, ESA College comprised Bente Angell-Hansen (Norway) as current President. Frank J. Büchel (Liechtenstein) until September 2021, thereafter Stefan BARRIGA, and Högni Kristjánsson (Iceland).

On 28 September, the EEA EFTA States appointed a new College to take up their posts from 1 January 2022: Arne Røksund (Norway) as President, and



Stefan Barriga (Liechtenstein), and Árni Páll Árnason (Iceland) as College Members.

Under the leadership of the College, ESA employs experts in law, economics, veterinary science and other fields from all over Europe. In 2021, ESA was divided into the following departments:

- Administration Department, led by Anders Ihr.
- Internal Market Directorate, led by Jónína Sigrún Lárusdóttir.
- Competition and State Aid Directorate, led by Gjermund Mathisen.
- Legal and Executive Affairs Department, led by Carsten Zatschler until 30 June, and Melpo-Menie Joséphidès thereafter.

**CORE VALUES**

ESA's core values – Integrity, Openness and Competence

– are key elements of our ongoing operations. ESA continued to ensure that they were embedded in all of its internal and external activities in 2021.

**Integrity:** ESA operates in a fair, objective and independent manner. ESA's staff take ownership of their tasks and carry out these tasks in an environment of open discussion and high ethical standards.

**Openness:** ESA's communication and outreach activities are aimed at increasing knowledge about our work and tasks, as well as strengthening compliance with the EEA Agreement. ESA and its staff carry out their functions in a manner that is visible, approachable and transparent, while still showing due concern for information that needs to be protected.

**Competence:** ESA employs highly qualified staff, who have the skills and knowledge required for ESA to fulfil its role and to deal with tasks in an effective and efficient manner. ESA's staff develop their competence, and continuously improve their skills and knowledge and aim for excellence. ESA is open to continuous improvement at organisational and individual level.



In March 2021, ESA moved into its new headquarters in EFTA House. The office building is shared with the EFTA Secretariat and the Financial Mechanism Office.

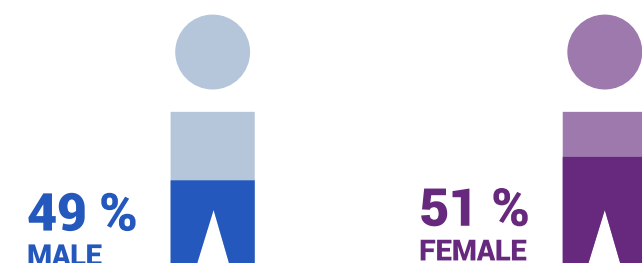
**HUMAN RESOURCES**

ESA's dedicated staff, with their specific expertise and knowledge, are our most valuable assets. We offer a professional, supportive and flexible working environment, with excellent opportunities for collaboration and personal development. These elements of working at ESA once again proved invaluable during 2021.

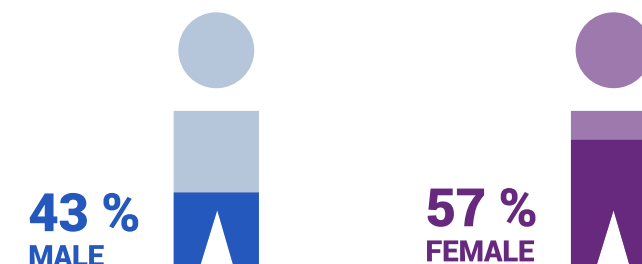
At the end of 2021, ESA employed a total of 70 staff members, representing 18 nationalities and including 34 EEA EFTA nationals. Of these 70 employees, 51% were female and 49% male. In management positions, 57% were female and 43% male.

Each year, ESA engages several trainees from the EEA EFTA States on an 11-month programme to work in the fields of the Internal Market, competition and state aid, legal and executive affairs, and communications. The EEA EFTA States have established staff regulations providing for employment by ESA on a temporary or fixed-term basis. This means that employment opportunities arise frequently for highly qualified candidates within ESA's fields of activity.

**STAFF AT ESA**



**MANAGERS AT ESA**





## BUDGET AND FINANCIAL PERFORMANCE

ESA's activities and operating budget are financed by contributions from Norway (89%), Iceland (9%) and Liechtenstein (2%). ESA's total budget for 2021 was EUR18.3 million, an increase of 5.6% compared to 2020. This increase was primarily due to inflation adjustments, an increase in staffing, and one-off expenditure related to the relocation of ESA to its new offices at EFTA House. Nearly 79% of ESA's budget represents personnel costs and turnover costs, such as salaries, allowances, and benefits as well as recruitment expenses. Actual expenditure levels were significantly impacted by the office relocation as well as the COVID-19 pandemic. Concerning the latter, more temporary staff was hired to address capacity issues. This cost rise was partially offset by less travel and office expenditure.

ESA's annual financial statements, prepared in accordance with the International Public Sector

Accounting Standards (IPSAS), are made available on our website once the relevant ESA/Court Committee (ECC) procedures for the year in question have been finalised. These procedures are normally completed in December of the year after the financial year. ESA's financial statement for the financial year 2020 was approved by the ECC on 9 December 2021, and ESA was discharged of its accounting responsibilities for that period by the EEA EFTA States.

The EFTA Board of Auditors (EBOA) is the auditing authority of ESA. It is a permanent committee consisting of auditors representing the supreme national audit bodies of the EFTA States. EBOA, in cooperation with external auditors, performs annual audits of the financial statements of the EFTA institutions. When auditing the activities of either ESA or the EFTA Court, EBOA meets "at three" with audit representatives from Iceland, Liechtenstein and Norway, and reports to the ECC.

Amounts in thousand EUR	Actuals 2021	Budget 2021	Actuals 2020	Budget 2020
EEA EFTA States' contributions				
- Current year	18 148	18 148	17 306	17 305
- Multi-year contributions for IT investments*	20	20	18	20
<b>Total EEA EFTA States' contributions</b>	<b>18 168</b>	<b>18 168</b>	<b>17 324</b>	<b>17 325</b>
Financial income	-	-	6	-
Other income	1 166	146	146	13
<b>Total income</b>	<b>19 334</b>	<b>18 314</b>	<b>17 476</b>	<b>17 338</b>
Salaries, benefits, allowances and turnover costs	15 262	14 394	13 439	13 105
Travel, training and representation expenses	371	638	253	967
Office accommodation expenses	1 577	1 528	1 275	1 681
Supplies and services expenditure	1 351	1 731	1 524	1 574
Financial expenses	31	23	15	11
<b>Total expenditure</b>	<b>18 592</b>	<b>18 314</b>	<b>16 506</b>	<b>17 338</b>
<b>Net surplus for the year</b>	<b>742</b>	<b>-</b>	<b>970</b>	<b>-</b>

\* Multi-year contributions for IT investments represents income from deferred contributions received in 2018 for new IT projects.

\*\* Includes a one-off grant from the surplus 2020 in the amount of EUR 902,000 for temporary capacity building.

\*\*\* Includes EUR 305,000 interest from a financial lease regarding the office building which has been classified as office accommodation expenses to align with the budgeted expense category,



## THE INTERNAL MARKET IN 2021

The Internal Market of the European Union refers to a common area in which persons, goods, services and capital can move freely, including the possibility for economic operators to be established in any of its Member States. These are known as the "four freedoms" and are supplemented by other horizontal provisions concerning areas such as health and safety at work, labour law, equal treatment of men and women, and company law. These provisions are essential for prosperity, growth, competition and trade. They improve efficiency, raise quality and help cut prices.

To ensure that every citizen and undertaking can reap the full benefits of the Internal Market, ESA continuously monitors the application and implementation of EEA law in the EEA EFTA States, pursuing legal action against a state where necessary. For the Internal Market to function well, the EEA EFTA States must ensure the effective and timely incorporation of EEA rules into their national legislation. One of ESA's main priorities is to investigate instances where the EEA EFTA States have failed to do this.

### FREE MOVEMENT AND RESIDENCE RIGHTS FOR CHILDREN

In July 2021, ESA delivered a reasoned opinion to Norway concerning children's residence rights under [Directive 2004/38/EC on the right to move and reside freely](#) (the Directive). This followed a complaint received by ESA alleging that Norway did not recognise the independent right of residence of EEA national children, or their right to be accompanied by their primary carers.

In its reasoned opinion, ESA concluded that EEA national children who had sufficient resources through their third-country national primary carers could enjoy an independent right of residence in the EEA EFTA States, and be accompanied by their primary carers. ESA further argued that stepchildren of EEA nationals were covered by a specific provision in the Directive and could thus rely on its protection.

Separately, in proceedings brought before the Oslo District Court, the Court requested an advisory opinion from the EFTA Court. The EFTA Court delivered its advisory opinion in November 2021 in [Case E-16/20 Q and Others](#), finding that the child of an EEA national



A view from the Fürstensteig path in Liechtenstein, one of the most spectacular trails of Rätikon mountain range.



who previously worked in another EEA State and the child's third-country national parent caring for that child derive a right of residence on the basis of Regulation (EU) No 492/2011 on freedom for workers within the Union. Following the opinion of the EFTA Court, and as the question concerning the children's residence rights under the Directive has not dealt with by the Court, ESA is now assessing its infringement case against Norway and is in the process of deciding on the next steps.

#### ASSESSMENT OF MARRIAGES OF CONVENIENCE IN NORWAY

Under EEA law, EEA nationals and their third-country national spouses are entitled to free movement and residence rights within the EEA. However, in the situation where the marriage constitutes a "marriage of convenience", namely a marriage that is arranged for practical, financial, political or other reasons, the right of residence of the third-country national spouse can be refused by the domestic immigration authorities.

Having received several complaints concerning Norway's assessment of marriages of convenience, ESA decided to open an own-initiative case to look further into the issue from the perspective of Directive 2004/38/EC and fundamental rights. In principle, the question is what separates a real marriage from one of convenience, and which criteria to use. The concept of marriage of convenience has also been the subject of national court proceedings in Norway, and recently reached the

Norwegian Supreme Court, which asked the EFTA Court for an advisory opinion in [Case E-1/20 Kerim](#). This case addressed the test for assessing whether a marriage is one of convenience, and in particular, in circumstances in which reasonable doubts exist as to whether the marriage in question is genuine. The Court held that it is necessary for the national authorities to establish, on the basis of a case-by-case examination, that at least one spouse in the marriage has essentially entered into it for the purpose of improperly obtaining the right of free movement and residence by a third-country national spouse rather than for the establishment of a genuine marriage. The advisory opinion was delivered in February 2021. ESA is currently assessing Norway's legislation and practices, in particular in light of the clarifications provided by the EFTA Court.

#### REPORTING OBLIGATION RESTRICTING THE FREEDOM TO PROVIDE SERVICES

In 2016, ESA launched an infringement procedure against Norway for unjustified restrictions on the freedom to provide services. This was done by applying various reporting obligations to service agreements above a certain value between service recipients in Norway and service providers based in another EEA State.

Norway required detailed information on any contract with a value exceeding NOK 20 000 to be reported both by the Norwegian recipient of the service and by the provider from another EEA State under threat of fines. No such reporting obligation exists when Norwegian contractors get a contract for work in Norway.

In ESA's view, the reporting obligation was in breach of Article 36 of the EEA Agreement on the free movement of services. The purpose of the reporting was to ensure effective fiscal supervision, tax collection and to prevent tax fraud. Although ESA accepted that these are legitimate objectives, it found that Norway's stringent and deterrent approach was disproportionate with regard to the aims pursued.

Following discussions with ESA, the Norwegian authorities committed to amend the rules and procedures to ensure compatibility with EEA law.

In 2021, the Norwegian Government introduced legislative amendments aimed at addressing the

concerns raised by ESA. These amendments addressed the main aspects of the reporting obligation system, such as changes to the deadline and frequency of reporting, and reduced the overall administrative burden by allowing the reuse of information. In addition to changes to internal guidelines and procedures, the amendments simplified and streamlined the reporting obligations significantly.

Following a detailed assessment of the amended rules, ESA concluded that the changes introduced were sufficient to address the issues previously raised. As Norway had ensured full compatibility with EEA law, there were no grounds for pursuing the matter further and ESA [closed the case](#).

#### PROMOTION OF ICELANDIC PRODUCTS AND SERVICES

In December 2021, ESA delivered a reasoned opinion to Iceland concluding that through its involvement in a campaign encouraging consumers to choose Icelandic products and services, the country had failed to fulfil its EEA obligations to ensure the free movement of goods and the freedom to provide services.

The campaign was based on an agreement between the Icelandic authorities and several private federations, and consisted predominantly of a promotional campaign under the slogan "[Íslenskt, láttu það ganga](#)" (Icelandic, make it work). In ESA's view, this sent the message that by choosing Icelandic products and services, consumers would somehow benefit.

For their part, the Icelandic authorities argued that the campaign encouraged consumption more generally, and was part of wider measures to support the economy and local businesses during the COVID-19 pandemic.

In its reasoned opinion, ESA concluded that the measure was in breach of EEA law, in particular provisions of the EEA Agreement covering free movement of goods and the freedom to provide services. In ESA's view, the measure could not be justified by the circumstances in Iceland brought about by the COVID-19 pandemic.

ESA holds the view that a campaign aimed at protecting domestic businesses and products at the expense of those of other EEA States is contrary to the fundamental purpose of the EEA Agreement.





## ENSURING SAFE, SECURE AND SUSTAINABLE TRANSPORT

The safe, secure and sustainable transport of goods, services and people is fundamental to ensure a functional and competitive Internal Market. The EEA Agreement covers all modes of transport, and ESA monitors the implementation of legislation on aviation, maritime, rail and road transport. ESA ensures compliance with aviation and maritime security rules by conducting onsite inspections in the EEA EFTA States. ESA also makes sure that national rules on electronic communications, postal and audiovisual services comply with EEA legislation.

### EXCEPTIONAL TRANSPORT MEASURES

The extraordinary circumstances brought about by the COVID-19 pandemic led to significant challenges for national transport authorities, transport operators and people working in the industry. While, compared to 2020, the number of COVID-19-related transport measures declined in 2021, a number of pandemic-related transport measures were notified to ESA, mainly in the first half of

2021.

In road transport, Norway notified an exemption from EEA rules on driving times and resting hours, aimed at allowing the swift transportation of COVID-19 vaccines. ESA also authorised Norway, in three subsequent decisions ([27 January 2021](#), [30 March 2021](#), [31 May 2021](#)), to prolong a derogation allowing road transport drivers to carry out their mandatory rest in a vehicle while undergoing entry quarantine. This was approved under the condition that the vehicles had suitable sleeping facilities and were stationary. A subsequent request from Norway to further prolong this derogation was rejected by ESA based on the decreasing impact of the pandemic on road transport operations and the overall well-being of drivers.

### INCREASED MONITORING

Since the beginning of the COVID-19 outbreak in March 2020, ESA has been monitoring measures taken by Iceland and Norway to ensure basic air connectivity, with aviation being one of the sectors hardest hit by the

pandemic. This work continued throughout 2021 and was carried out in close dialogue with the European Commission and the authorities in the two countries.

In 2021, temporary adjustments were made to ongoing public service obligation (PSO) contracts in response to the COVID-19 pandemic. The purpose of this monitoring exercise was to assist the EEA EFTA States in ensuring that the measures put in place were effective and proportional. At the same time, it was crucial to safeguard the fundamental principles of the EEA Agreement, including rights such as non-discrimination and equal treatment. The status of passenger rights for all modes of transport within the EEA EFTA States also continued to be a priority for ESA. While the impact of the pandemic on transport services was still visible in the first half of 2021, the numbers were nowhere near the number of mass cancellations of flights and significant disruptions for passengers travelling by rail, ship, bus or coach in 2020.

### ROAD TUNNEL SAFETY

In December 2021, ESA sent a [reasoned opinion](#) to Iceland concerning its failure to implement minimums safety measures in three of the four road tunnels in Iceland belonging to the trans-European Road Network.

A key aim of the EEA rules on minimum safety in road tunnels is to prevent serious events that can endanger lives. The safety of road tunnel users must be prioritised by advancing refurbishment works, and temporary safety measures should be applied where possible until corrective actions have been implemented.

### ACCESS TO THE TAXI MARKET

In 2016, ESA opened an own-initiative case against Iceland concerning its rules on access to the taxi market. In ESA's view, the numerical limitation of taxi licences – as well as the requirement to have taxi operation as a main profession, and the duty obligations and operational restraints that follow from the requirement to be attached to a dispatch centre – constituted unjustified restrictions on the freedom of establishment in the EEA.

Limiting the number of licences can be necessary to guarantee a satisfactory, round-the-clock supply of taxi services in rural areas, where taxis are often an

indispensable means of transport and thus serve a public interest. However, limiting the number of licences in densely populated areas will likely limit supply, as new operators will be precluded from entering the market.

The Ministry of Transport and Local Government in Iceland had submitted proposals for new legislation on the taxi market in 2019 and 2020, but those proposals were not adopted. ESA issued a [letter of formal notice](#) to Iceland in January 2021 and a [reasoned opinion](#) in November 2021. A new legislative proposal is expected to be submitted to the Icelandic Parliament in the first part of 2022.

### TRANSPORT SECURITY INSPECTIONS

In the field of aviation and maritime security, one of ESA's most important tasks is to carry out inspections. The main objective of the regulatory framework on aviation and maritime security is to establish and implement appropriate measures to safeguard passengers, crew, ground and port personnel, economic operators and entities, and the general public against unlawful acts against aircrafts and airports, or ships and ports. Central to the regulatory framework is the organisation of inspections by the European Commission to verify its implementation by the EU Member States. For the EEA EFTA States, these inspections are carried out by ESA. The fact that inspections are normally conducted onsite, the COVID-19 pandemic and related containment measures made it challenging for ESA to conduct its inspections in the EEA EFTA States in the first half of 2021. However, ESA was able to adapt and modify its approach to conduct inspections remotely. In the second half of 2021, ESA resumed its onsite activities to monitor the implementation of aviation and maritime security rules in the EEA EFTA States.

### ELECTRONIC COMMUNICATIONS AND POSTAL SERVICES

ESA works to ensure that the measures imposed by the national regulatory authorities (NRAs) of the EEA EFTA States on undertakings follow the EEA rules on telecommunications and postal services. It does this by engaging in continuous dialogue with the NRAs and stakeholders to identify solutions that will benefit



businesses and consumers.

In 2021, ESA received and assessed seven notifications from the NRAs concerning the imposition of obligations on undertakings under EEA telecommunications legislation.

### COOPERATION WITH EU AGENCIES AND REGULATORY BODIES

ESA continued to work closely with the specialised EU transport agencies on issues related to aviation ([European Union Aviation Safety Agency \(EASA\)](#)), maritime transport ([European Maritime Safety Agency \(EMSA\)](#)) and railways ([European Union Agency for Railways \(ERA\)](#)). These agencies provide ESA with expert advice, either periodically, in accordance with their work programmes, or on a case-by-case basis, in accordance with the EEA legal framework, or following a specific ESA request. In the maritime transport sector, EMSA assists ESA with security inspections and conducts visits to verify the implementation of EEA legislation concerning maritime safety.

As part of this cooperation, ESA meets regularly with the agencies – at management and case-handler level – to discuss key priorities and common work issues. All meetings with the agencies' management were held remotely in 2021. Another area of cooperation is data protection. ESA is working on a joint controllership agreement on data protection with EMSA for maritime safety and security audits in the EEA EFTA States. In the field of telecommunications, ESA cooperates with the [Body of European Regulators for Electronic Communications \(BEREC\)](#), and participates in the work of the [European Regulators Group for Postal Services](#) and the [European Regulators Group for Audiovisual Media Services \(ERGA\)](#). safety and security audits in the EEA EFTA States.

In the field of telecommunications, ESA cooperates with the [Body of European Regulators for Electronic Communications \(BEREC\)](#), and participates in the work of the [European Regulators Group for Postal Services](#) and the [European Regulators Group for Audiovisual Media Services \(ERGA\)](#).



## FOOD AND FEED SAFETY, ANIMAL HEALTH AND WELFARE

**E**SA is responsible for monitoring the implementation of EEA legislation on food and feed safety, animal health and welfare in Iceland and Norway. Legislation in the sector is characterised by its dynamic nature, this includes the substantial number of legislative texts continually being adopted and the specific procedures for their rapid implementation. New acts must apply without delay across the entirety of the EEA to be effective. Liechtenstein is subject to a different surveillance system for food safety.

### BACK ON THE ROAD

In addition to monitoring compliance with relevant

legislation and dealing with complaints and infringement cases, ESA performs audits to verify that Iceland and Norway implement legislation in the sector appropriately. ESA identifies shortcomings in the official control systems of the national authorities, it issues recommendations aimed at rectifying the situation, including them in reports sent to the EEA EFTA States. The State is then invited to comment on the draft report and to propose corrective actions addressing the recommendations. The proposed corrective actions are included in a final audit report published on ESA's website.

ESA's audits include the gathering of relevant information and carrying out appropriate verifications





through interviews and discussions, as well as reviewing documents and records. This is done to ascertain that the normal control procedures have been adopted, and that measures have been put in place to ensure that corrective actions have been taken when necessary. Most cases require onsite verification, which is a key element of ESA's audits.

Due to ongoing COVID-19-related travel restrictions during the first half of 2021, ESA carried out remote audits in Iceland and Norway to evaluate the official controls on residues and contaminants in live animals and animal products. In September, ESA carried out its first onsite verification as part of an audit since March 2020.

#### **RESIDUES AND CONTAMINANTS IN LIVE ANIMALS AND ANIMAL PRODUCTS**

The planning process for residue monitoring plans is well established, and a comprehensive selection of data from several official sources contributes to this process. The plans are cascaded throughout the relevant competent authorities in Iceland and Norway. Sampling is, in most cases, spread throughout the year, and the final targeting of animals for sampling on farms and in slaughterhouses is left to the discretion of local staff.

All sectors responsible for the distribution and the use of veterinary medicinal products (VMPs) are subject to official controls, and the division of responsibilities for undertaking such controls are well defined between the relevant competent authorities. In 2021, official controls identified delays in reporting VMP use by some veterinary practitioners. Consequently, staff did not always have access to all the relevant information when selecting animals for residue sampling in slaughterhouses.

Surveillance with regard to the detection of illegal administration of prohibited substances or abusive administration of approved substances, or regarding compliance with maximum residue limits (MRLs), could be further strengthened in certain instances by reviewing the sampling strategy. For example, this could include the choice of sampling matrices, location of sampling events, types of animals delivered to slaughterhouses and unannounced sampling visits.

#### **PLANT PROTECTION PRODUCTS, PESTICIDE RESIDUES AND SUSTAINABLE USE OF PESTICIDES**

ESA in 2020 initiated a control project to assess the situation in Iceland, Norway and Liechtenstein with regard to plant protection products (PPPs), pesticide residues and the sustainable use of pesticides.

There are three key acts relevant to PPPs: the Pesticide Residue Regulation (Regulation (EC) No 396/2005), the PPP Regulation (Regulation (EC) No 1107/2009) on the placing on the market of PPPs, and the SUD (Directive 2009/128/EC) on the sustainable use of pesticides. While all three legal acts are applicable to Iceland and Norway, only the PPP Regulation and the SUD Directive apply to Liechtenstein. Given the different legal frameworks, the scope of ESA's control projects for PPPs differs between the EEA EFTA States.

In 2021, ESA conducted onsite audits in Iceland and Norway, finding weaknesses in both states, despite the fact that they have both established a control system.

Iceland and Norway have an appropriate framework for the training and certification of professional users of PPPs and an authorisation regime for PPPs. However, the controls on the marketing and use of PPPs cannot ensure that only authorised PPPs are used in line with the current authorisation. The presence of obsolete and non-authorised PPPs in storage on farms increases the risk of these products being used, which can pose a risk to human health and to the environment.

In Norway, deficiencies regarding risk and evidence-based controls, enforcement and follow-up of non-compliance significantly undermine the efficiency and effectiveness of the control system. For example, farmers' statements are not always verified by inspectors, and the planning of controls does not consistently take into account cases of non-compliance identified during previous controls. Furthermore, the competent authority has not implemented control verification procedures that detect these issues, limiting its ability to improve the control system.

In Iceland, the competent authorities for controlling the professional use of PPPs have not been clearly designated, and consequently no controls are carried out

Furthermore, the efficiency and effectiveness of the controls are significantly compromised by the low performance of the pesticide residue laboratory and the long waiting time for test results.

#### **ANIMAL WELFARE AT SLAUGHTER**

Iceland and Norway have both implemented the relevant EEA legislation, and have included national rules requiring the mandatory stunning of animals subject to particular methods of slaughter prescribed by religious rites.

In relation to the application of the rules, ESA observed examples of both satisfactory and unsatisfactory follow-up and enforcement actions. Neither of the states take into account all identified risks in their risk-based planning of official controls on animal welfare at the time of killing, and insufficient control verification procedures limit the opportunities for the competent authorities themselves to identify weaknesses and make improvements to the official control system.

#### **VERIFICATION OF CORRECTIVE ACTIONS IMPLEMENTED BY ICELAND AND NORWAY**

ESA systematically follows up all open recommendations, and engages in continuous communication with Iceland and Norway to monitor progress on the implementation of corrective actions following audits. In 2021, ESA took formal decisions regarding open recommendations in both Iceland and Norway.

On 29 September, ESA sent a letter of formal notice (Decision No 229/21/COL) to Norway regarding two open recommendations addressing the incorrect application of certain requirements concerning official controls of consignments in transit and/or transshipment, and the customs-approved treatment or use of consignments from third countries.

On 20 October, by Decision No 244/21/COL, ESA brought Iceland before the EFTA Court due to limited progress in relation to official controls and the disposal of animal by-products. Despite Iceland having acknowledged the absence of official controls and the inadequacy of its current disposal system, it has yet to confirm that the relevant controls will be put in place, or that the necessary changes will be made to the disposal system.





## FROM CLIMATE CHANGE TO FINANCE

Following the restructuring of the Internal Market Affairs Directorate in summer 2021, a new unit was created to exploit synergies across sectors, such as Energy, Environment and Climate change, Financial Services and Public Procurement (ENFIP), where the incorporation of an ever-increasing number of legislative acts have entrusted corresponding new tasks and powers on ESA under the EFTA pillar.

Besides regular enforcement activities, the ENFIP unit cooperate closely with several EU agencies and is responsible for adopting formal opinions and binding decisions which may directly affect market participants and national competent authorities in the EEA EFTA States.

### CLIMATE CHANGE

Climate change has risen to become a key priority for ESA, in line with the ongoing transition towards a greener economy. ESA in 2021 completed a range of tasks related to the Effort Sharing Regulation (Regulation (EU) 2018/842) and the Land Use, Land-Use Change and Forestry (LULUCF) Regulation (Regulation (EU) 2018/841). These acts were incorporated into the EEA Agreement following an agreement in 2019 between Iceland, Norway and the EU to deepen their cooperation on climate change (EEA Joint Committee Decision No 269/2019).

The acts concern the reduction of greenhouse gas

(GHG) emissions from a range of sectors that do not fall under the scope of the European Emissions Trading System (ETS), including transport, buildings, waste management, agriculture, and emissions and removals from the land and forestry sectors.

The Effort Sharing Regulation defines the maximum levels that Iceland and Norway can emit each year in these sectors. In July 2021, ESA set the annual emissions allocations for Iceland and Norway for 2021 to 2030 (Decision No 204/21/COL). In preparing its decision and calculating the annual emissions allocations, ESA worked in close consultation with Iceland, Norway and the European Commission. The preparatory work included a comprehensive review in 2020 of the States' GHG emissions, coordinated by the European Environment Agency.

In October 2021, ESA published its first annual report on the progress made by Iceland and Norway towards reaching their climate goals under the Effort Sharing Regulation and the LULUCF Regulation.

In the context of the ETS (Directive 2003/87/EC as amended), which sets a limit on the permitted GHG emissions from industry and aviation, 2021 marked the start of the fourth phase of emissions trading. ESA has collaborated closely with the European Commission in the preparations for the fourth phase of the ETS. In 2021 ESA approved the National Implementation Measures provided by the EEA EFTA States for phase four of the ETS, reflecting stationary installations that may be granted emissions allowances according to harmonised rules across the EEA (College Decision 013/21/COL). In addition, due to changes in the scope of the ETS for airlines, ESA reviewed the number of allowances allocated to airlines (College Decision 231/21/COL).

### CARBON CAPTURE AND STORAGE IN NORWAY AND ICELAND

Both Iceland and Norway intend to contribute to climate-change mitigation through carbon capture and storage (CCS), with two projects being developed: respectively the CarbFix and the Northern Light projects. ESA in 2020 gave the go-ahead for state aid to be provided to Norway's Northern Light project.

Under the CCS Directive (2009/31/EC), entities

involved in such projects have to apply for a storage permit from the national competent authorities. As part of the authorisation process, ESA is tasked with reviewing the draft storage permit(s), and can issue an opinion on compliance with the requirements contained in the CCS Directive. In anticipation of the upcoming storage permits for the CarbFix and Northern Light projects, ESA in 2021 concluded a contract with a consultancy firm to assist it with the technical and geological aspects of the review procedure.

### ENERGY

In 2021, ESA continued to follow up on the implementation of the Third Energy Package, which entered into force in the EEA EFTA States in October 2019. This package aims to strengthen the internal market for energy. In accordance with the two-pillar structure of the EEA Agreement, ESA cooperates with the Agency for the Cooperation of Energy Regulators (ACER) when ESA takes decisions on matters involving one or more of the EEA EFTA States. Such decisions include the terms and conditions or methodologies under the network codes.

ESA also prepared to deliver an opinion on the certification of the Norwegian transmission system operator, Statnett, to ensure compliance with the unbundling rules of the Third Energy Package.

### MINING WASTE IN NORWAY

In 2021, following an examination of management of mining waste in Norway, ESA took action against Norway with regard to its implementation of the Mining Waste Directive (2006/21/EC). In October, it issued a Pre-Article 31 letter to Norway, expressing its preliminary views that the Norwegian legal framework and administrative practices were not aligned as far as the Directive was concerned.

ESA also established a framework assessment to examine whether the current Norwegian practice of allowing the disposal of mining waste – including chemicals of concern – into Norwegian fjords fully complies with the requirements set out in EEA law for water, especially Directive 2000/60/EC. In the second half of 2021, ESA began to implement the framework



assessment, initiating a data-gathering phase. This included engaging with various key stakeholders and establishing agreements with relevant experts. As a follow-up to this, ESA were planning to issue a public notice inviting all stakeholders to provide relevant data on the issues.

#### FISH-FARM LICENSING IN ICELAND

In December 2021, ESA sent Iceland a letter of formal notice regarding Icelandic fish-farm licensing. In ESA's view, Iceland's current legal framework and policies do not comply with EEA law and in particular requirements under Directive 2011/92/EU concerning environmental impact assessments.

ESA has concerns that, under the current Icelandic legal framework, the Icelandic authorities are able to issue certain fish-farm licences without any valid environmental impact assessment having been conducted. ESA also draws attention to past Icelandic legislative instruments that appear to have been adopted to circumvent EEA rules regarding environmental impact assessments. ESA will in 2022 be following up on the issue with the Icelandic authorities.

#### ESA REVIEWS LACK OF COMPETITION IN WASTE MANAGEMENT SERVICES

In December 2021, ESA sent a letter of formal notice to Norway in relation to the compliance of arrangements for certain municipal waste management services with EEA public procurement law. The letter is the first step in formal infringement proceedings, and is the result of a complaint concerning a number of arrangements with inter-municipal waste management companies that were entered into without any competition. Generally, when public bodies purchase services, they are required to

allow the market to compete for the contract. However, there are various ways in which public bodies can work together to ensure the provision of services without having to conduct a competitive process. After a thorough investigation, ESA concluded that the majority of the arrangements referred to in the complaint were in line with public procurement law, but that in one instance the conditions for exemption from competitive tendering had not been met.

ESA considers the case to be important to ensure that public authorities understand and respect the requirements that have to be complied with when establishing arrangements with other public bodies that do not need to be exposed to competition.

Once the Norwegian Government responds to the letter, it is likely that a dialogue will take place between Norway and ESA before any further formal steps are considered.

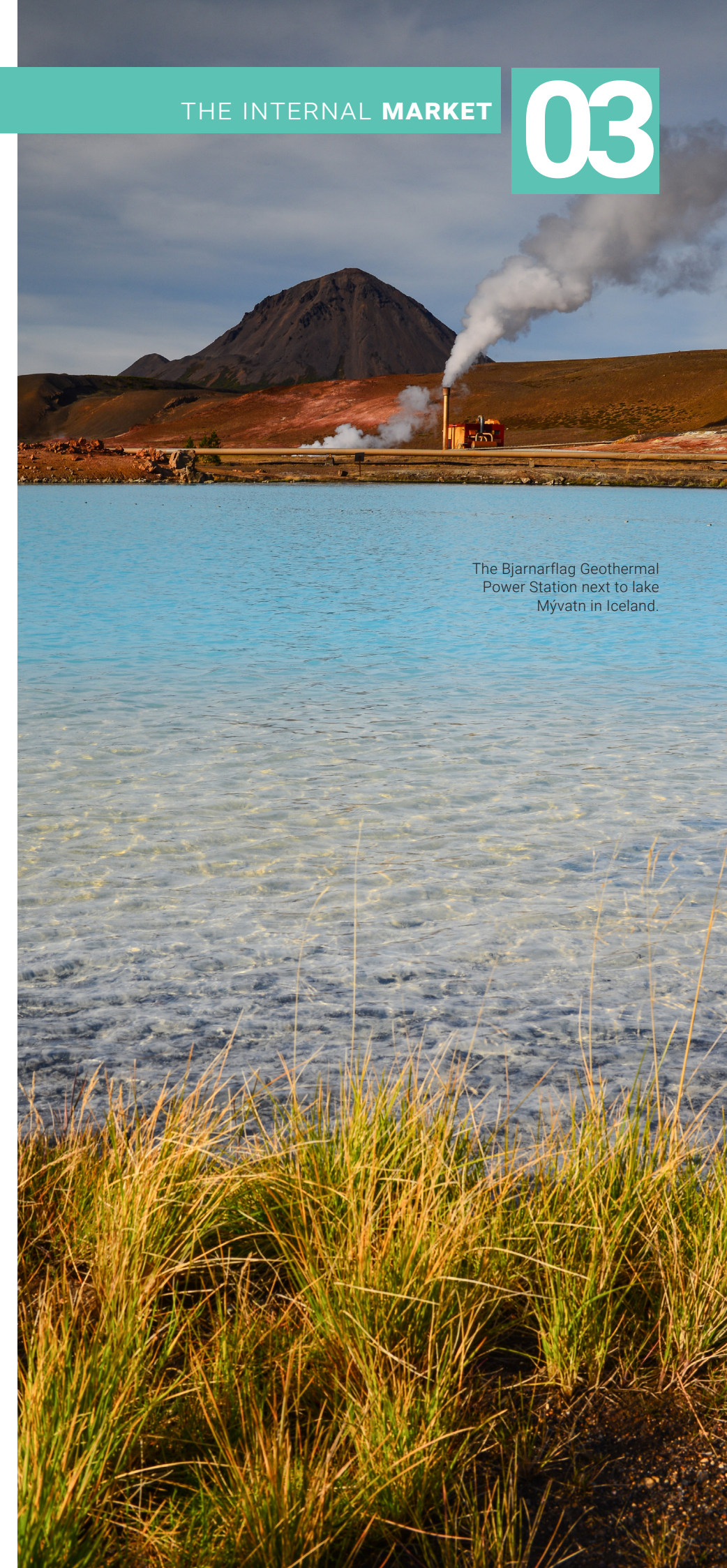
#### FINANCIAL SERVICES AND ANTI-MONEY LAUNDERING

In July 2021, ESA issued a package of reasoned opinions to Iceland, asking the state to bring its financial services sector into line with EEA law. The reasoned opinions concern a range of detailed measures related to banking and securities services that Iceland needs to implement. This is to ensure that the same rules are in place across the EEA.

To ensure uniform surveillance and application of rules in the single market for financial services, ESA continued its close cooperation with the three EU financial supervisory authorities – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) – at both technical and board level.

ESA strengthened its cooperation with the EBA in the area of anti-money laundering and countering the financing of terrorism (AML/CFT). The organisation participated in a targeted review of AML/CFT supervision of the banking sector in one of the EEA EFTA States, organised by the EBA. This was a comprehensive full-week review that tested the consistent and effective application of EEA law and AML/CFT guidelines. It focused on the national competent authority's approach to supervision and how it has operationalised the supervisory approach set out in EEA law. Other key considerations were the collaboration between different supervisors and cooperation with stakeholders at the national and European level.

AML/CFT implementation reviews are qualitative assessments of competent authorities' approaches to the AML/CFT supervision of banks across the EEA. The aim of the reviews is to identify good practices and challenges faced at the internal market level, and to work with competent authorities to strengthen AML/CFT supervision across the EEA.



The Bjarnarflag Geothermal Power Station next to lake Mývatn in Iceland.



## STATE AID IN 2021

State aid is the provision of public support to commercial activities. It can take many forms, for example cash grants, tax breaks or favourable loans. As a rule, the EEA Agreement prohibits state aid to prevent negative effects on trade and competition, but exceptions are made for purposes such as environmental protection, regional support and research, innovation and development. The substantive state aid rules in the EEA Agreement are broadly equivalent to those that apply across the European Union.

ESA enforces the general prohibition on state aid that applies to Iceland, Liechtenstein and Norway. It is also ESA's role to decide how exceptions to the prohibition are applied.

2021 was another exceptional year in the field of state aid. As in 2020, the state aid team prioritised support measures aimed at addressing the negative economic impact brought about by the COVID-19 pandemic. Environmental aid measures were the other key priority in 2021.

ESA adopted 48 decisions on substance cases and a further five on revised guidelines. Although 32 of ESA's decisions concerned COVID-19 support measures, 16 were important non-COVID decisions. A total of 50 state aid cases were pending at the end of 2021. These figures include pre-notification discussions, notifications, formal investigations, existing aid reviews, reviews of unlawful aid (mostly complaints), and monitoring and guidelines cases. No own-initiative cases were opened by ESA in the

field of state aid in 2021.

Due to the increased caseload following the outbreak of the COVID-19 pandemic, ESA was unable to prioritise the handling of complaint cases in 2020. Therefore, at the beginning of 2021, ESA had a total of 24 pending complaints. However, with additional temporary resources and a reduction in the number of COVID-19 measures, ESA was able to reduce its backlog in 2021. By the end of 2021, the state aid team had managed to bring the number of pending complaints down to 14.

**FARICE INVESTMENT AID FOR SUBMARINE CABLE**

On 26 March, ESA [approved](#) EUR 50 million in investment aid to Farice, a telecommunications service provider, to facilitate the installation of a submarine cable between Iceland and mainland Europe.

There are currently only two submarine cables between Iceland and Europe. These ensure connectivity between Iceland and the rest of the world, and are vital to the Icelandic economy. Due to its geographical location and the prevalence of natural disasters in Iceland, the current system of two cables is considered fraught with risk. Therefore, the primary objective of the investment aid to Farice is to enhance security and reduce the vulnerability of international connectivity to and from Iceland by installing a third submarine cable.

On 9 July, the EFTA Court received an application for the annulment of ESA's decision, submitted by the Icelandic telecommunications company Sýn hf. In its application, Sýn seeks the annulment of the approval

decision on two grounds. First, that ESA failed to open a formal investigation procedure; and second, that ESA failed to fulfil its obligations to adequately state its reasons for approval of the aid.

\* An oral hearing was held at the EFTA Court on 10 February 2022. On 1 June 2022, the EFTA Court annulled ESA's decision. The Court noted that ESA is obliged to initiate the formal investigation procedure if it is unable to overcome all doubts or difficulties concerning the measure.

**COVID-19**

The COVID-19 pandemic continued to have a significant impact on the economies of the EFTA States in 2021. In response, the EFTA States introduced numerous support measures for citizens and businesses to address the adverse effects of the pandemic.

State aid rules allow the EFTA States to grant support to remedy serious disturbances to their economies. In 2020, the European Commission adopted a Temporary Framework to enable the EU Member States to support their economies during the pandemic. This Temporary Framework has been amended and prolonged six times. ESA applies the conditions set out in the Temporary Framework when assessing the compatibility of state aid granted by the EEA EFTA States under Article 61(3)(b) of the EEA Agreement.

A sign displays COVID-19 distance-recommendations at a hiking trail in Iceland.





The majority of the COVID-19 support measures approved by ESA in 2021 were designed to fit under – and comply with – the conditions set out in the Temporary Framework. This marked a considerable change from the year before, where a large part of the COVID-19 measures that ESA assessed were notified directly on the basis of the EEA Agreement.

ESA adopted a number of decisions approving new support schemes for businesses. However, the majority of ESA’s decisions in 2021 with regard to COVID-19 support measures concerned prolongations, renewals and amendments of schemes that had initially been approved in 2020.

ESA adopted a total of 32 COVID-19 state aid decisions in 2021. Many of these were particularly time-sensitive and required ESA to adopt decisions soon after receiving a formal notification. Through a dedicated COVID-19 state aid task force and strong cooperation with the EEA EFTA States, ESA managed to adopt its decisions in a timely manner, ensuring that the economies in the EEA EFTA States were able to obtain the support required without any undue delays.

### ENVIRONMENTAL AID

Environmental protection continued to be an important part of ESA’s state aid work in 2021. In assessing such aid measures, ESA relied on the EEA Agreement directly, or on ESA’s [Guidelines on State Aid for Environmental Protection and Energy 2014-2020](#) (EEAG).

As an example of environmental aid measures assessed directly by ESA under the EEA Agreement, Iceland notified [tax measures](#) in favour of emission-friendly vehicles to encourage environmentally friendly travel. ESA also approved Norway’s aid for [dedicated alternative fuels infrastructure 2021-2025](#). This aid scheme aims to facilitate the development of zero/low-emission vehicles, vessels and other machinery and infrastructure using alternative fuels in Norway by incentivising investment in dedicated alternative fuels infrastructure.

Under the EEAG, ESA [approved](#) NOK 219 million (EUR 21.73 million) in Norwegian state aid for the purchase of two zero-emission hydrogen vessels being developed under the Topeka Natstruten project. The project is

expected to pave the way for an emission-free maritime sector.

### ICELANDIC EMISSION-FRIENDLY VEHICLES SCHEME

ESA approved an Icelandic aid scheme consisting of several measures granting tax incentives in favour of emission-friendly vehicles (EFVs). The scheme grants tax incentives for the purchase of a range of vehicles powered by electricity, hydrogen or methane/methanol. This includes buses, motorbikes, plug-in hybrid electric vehicles, bicycles, electric bicycles and light electric motorbikes.

In recent years, the transport sector has been one of the highest emitters of greenhouse gases (GHGs) in Iceland. By encouraging not only passenger vehicles, but also other types of environmentally friendly alternative modes of transport such as bicycles, the Icelandic authorities aim to reverse this trend.

ESA approved the scheme retroactively from 2012. It will run until 31 December 2023, with an expected average annual budget of ISK 5.3 billion (approximately EUR 35.91 million) from 2021 to 2023.

### TOPEKA NATSTRUTEN

ESA approved NOK 219 million (EUR 21.73 million) for the purchase of two zero-emission hydrogen vessels developed under the Topeka Natstruten project, which aims to become an important milestone in the transition to a more environmentally friendly Norwegian maritime sector.

The vessels will operate on Norway’s west coast to transport cargo and contribute to the diffusion of liquid hydrogen as a ready-to-use fuel. Powered by a combination of a 1 000 kWh battery and specialised hydrogen fuel cells, the vessels will not emit any GHGs.

The aid was granted by Enova, a state enterprise tasked with promoting climate-friendly energy consumption and production through its Eco-Inn scheme, which was [approved by ESA in 2016](#). The scheme was launched to protect the environment by promoting investments in eco-innovation. However, since the support for the Topeka Natstruten project exceeded a certain monetary threshold set out in the scheme, it had to be notified and approved by ESA.

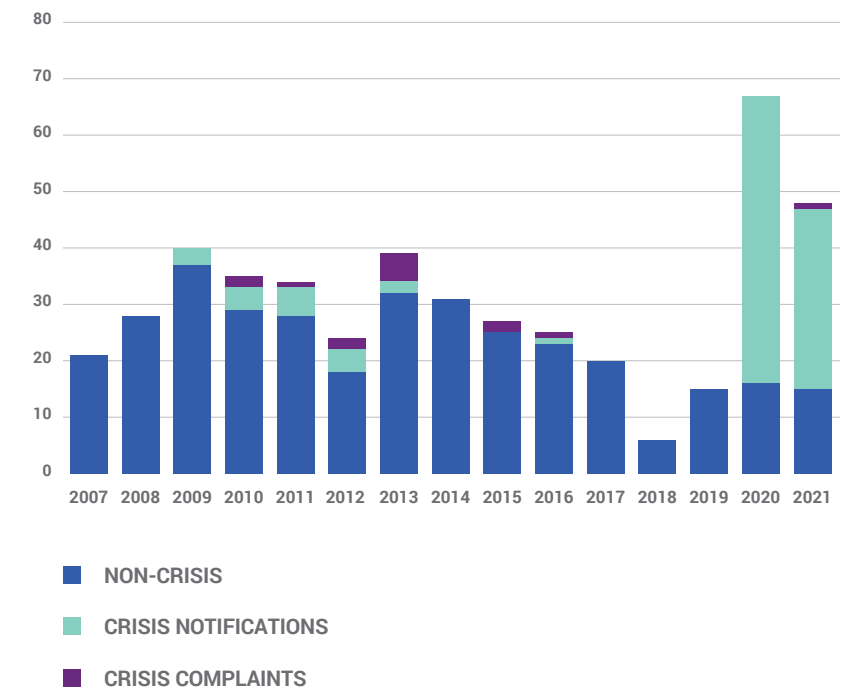
### GUIDELINES

State aid guidelines provide the EFTA States with guidance on the interpretation and application of state aid rules. When the Commission adopts state aid guidelines, ESA is obligated to adopt corresponding guidelines. The purpose is to maintain equal conditions of competition in the EEA as a whole. Therefore, prior to adopting new guidelines, ESA always consults both the Commission and the EFTA States. There are no legal requirements with regard to the method for adopting guidelines.

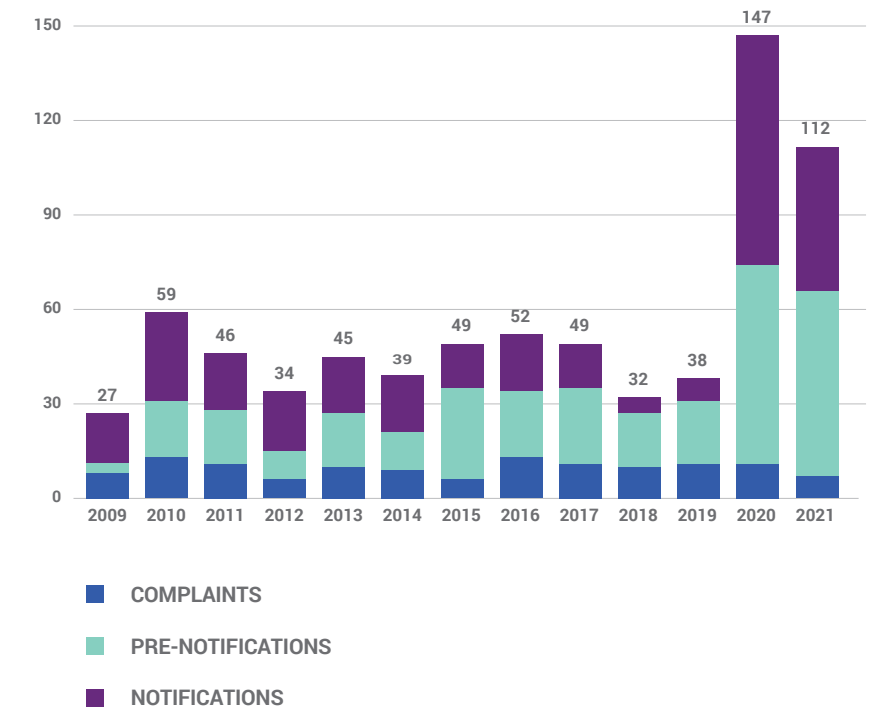
ESA has traditionally adopted an “EFTA-ised” version of the guidelines adopted by the Commission. The EFTA-isation process means that ESA adapts the guidelines to the EFTA pillar by meticulously replacing words or removing irrelevant statements or references. EFTA-isation does not result in substantive changes to the guidelines, but requires considerable resources on ESA’s side.

The Commission continues to revise a significant number of guidelines. Following consultation with the EFTA States, in autumn 2021 ESA decided on a new “by reference” approach for the adoption of such guidelines. This involves a decision adopting the guidelines that have been adopted or revised by the Commission, listing the commonly applicable adaptations made by ESA, and clarifying that the guidelines

### DECISIONS 2007–2021

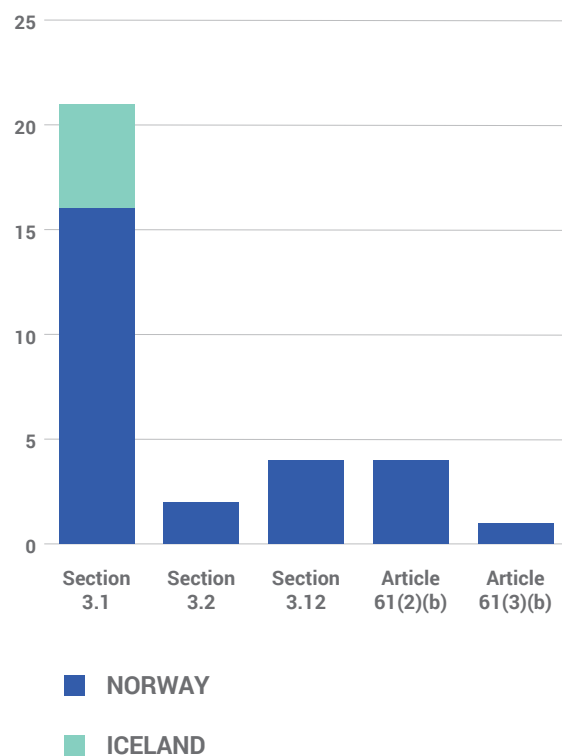


### (PRE-) NOTIFICATIONS AND COMPLAINTS RECEIVED 2009-2020





## COVID-19 DECISIONS BREAKDOWN



will be applied by ESA with these – and other relevant – adaptations. The consultation process between the EEA EFTA States and the Commission is then maintained. This new “by reference” approach allows ESA to meet its deadlines relating to the corresponding adoption of guidelines, and also reduces the workload and streamlines the overall process. In 2021, ESA successfully adopted three sets of state aid guidelines based on the new approach:

[Guidelines for important projects of common European interest \(IPCEI\)](#)

[Guidelines on state aid to promote risk finance investments](#)

[Guidelines on short-term export credit insurance](#)

## REGIONAL AID GUIDELINES

On 1 December, ESA adopted its new Regional Aid Guidelines (RAG), which set out the conditions under

which notifiable regional aid may be considered compatible with the functioning of the EEA Agreement. They also set out criteria for identifying areas that fulfil the compatibility conditions under Article 61(3)(a) and Article 61(3)(c) EEA, the so-called “a” and “c” areas.

The areas that the EEA EFTA States wish to designate as “a” or “c” areas must be identified in a regional aid map, to be notified by each state to ESA as a single regional aid map applicable until 31 December 2027. ESA approved the Norwegian and Icelandic regional aid maps by Decision Nos 276/21/COL and 51/22/COL respectively.

By Decision No 300/21/COL, ESA approved the Norwegian scheme on regionally differentiated social security contributions 2022-2027. This scheme is one of the largest aid schemes in Norway and aims to reduce or prevent depopulation in very sparsely populated areas in Norway.

## NO AID MEASURES

Pursuant to Article 61(1) EEA, a measure constitutes state aid if the following conditions are cumulatively fulfilled: the measure i) is granted by the state or through state resources; ii) confers a selective economic advantage on the beneficiary; and iii) is liable to affect trade between contracting parties and to distort competition. Consequently, if at least one of those conditions is not met, a measure does not amount to state aid.

Every year ESA handles a number of cases where it is argued that the measure in question does not constitute state aid. These can be either complaint cases, where the relevant EEA EFTA State argues that the measure subject to the complaint does not constitute state aid, or pre-notifications and notifications submitted for reasons of legal certainty by the EEA EFTA States.

In 2021, ESA adopted three “no aid” decisions, two of which concerned complaints about Icelandic measures: first, the Icelandic State’s support for [University summer courses](#); and second, [alleged aid to Landsbankinn and Íslandsbanki](#). The third resulted from a notification for reasons of legal certainty from Norway, and concerned

the [State financing of the Ocean Space Centre in Trondheim](#).

Finally, following pre-notification contacts, in December ESA sent a so-called “comfort letter” to Norway concerning the [compensation scheme for the ban on fur farming in Norway](#).

## OCEAN SPACE CENTRE

ESA assessed whether state funding of the construction of the Ocean Space Centre (OSC) amounted to state aid. The OSC is a hub for marine and maritime research, with its main facilities based in Trondheim, Norway.

ESA decided that the notified state funding fell outside state aid rules entirely. ESA reached this conclusion because the primary activities of the OSC are non-economic research and education, and its economic activities remain purely ancillary. This was the first time that ESA applied the rules on ancillary economic activities set out in its [2014 guidelines](#) on state aid for research and development and innovation.

ESA notes that Norway committed to conducting annual reviews of the OSC’s economic activities. Should the economic activities exceed 20% of the OSC’s overall annual capacity, public funding benefiting these activities is to be returned to the state.

## ALLEGED AID TO LANDSBANKINN AND ÍSLANDSBANKI

ESA assessed a complaint from Arion Banki (a privately owned bank operating in Iceland), alleging that the Icelandic State was granting advantages to Iceland’s two state-owned banks – Landsbankinn and Íslandsbanki



An artist's impression of the planned Ocean Space Centre in Trondheim.

– by accepting standards not available to other market participants.

Arion Banki argued that by not requiring the two state-owned banks to generate a rate of return on equity (ROE) – a measure of a company’s annual return (net income) divided by the value of its total shareholders’ equity – in line with market standards, the state was affording a benefit to the state-owned banks that was equal to state aid.

On 17 November 2021, ESA closed the complaint case, having found no indications that the ROE ratio required for Landsbankinn and Íslandsbanki by Icelandic State Financial Investments (ISFI) – the state’s holding company for financial undertakings – deviated from the target ROEs established for privately owned financial institutions in the EEA. Additionally, ESA found that there was no reason to doubt that ISFI operated independently from the Ministry of Finance and Economic Affairs.



## COMPETITION LAW IN 2021

ESA is tasked with ensuring that businesses operating in the EEA EFTA States comply with EEA competition law. ESA's Competition and State Aid Department has similar investigative powers to those of the European Commission's Directorate-General for Competition. [EEA competition rules](#), which mirror EU competition rules, prohibit anti-competitive coordination between companies, such as agreeing to fix prices or to carve up markets. They also prohibit dominant companies from abusing their market power to exclude competitors or exploit customers.

The purpose of competition rules is to safeguard healthy competition between companies. Fair competition helps to keep prices down and spurs companies to innovate, which means that consumers can enjoy affordable and higher-quality products and services.

Competition policy is part of a broad regulatory and enforcement toolbox to ensure that markets work to the benefit of European consumers. By keeping markets open and competitive, and ensuring a level playing field, competition policy helps achieve wider priorities and objectives, such as the "greening" and digitalisation of the EEA economy. Antitrust enforcement ensures that partnerships between companies, for example in the area of sustainability-enhancing initiatives, bring benefits without leading to harmful cartels or anti-competitive agreements that limit product availability or inflate prices.

### TELECOMS: COMPETITION ENFORCEMENT IN THE TELENOR CASE

On 29 June 2020, ESA adopted a [decision](#) imposing a fine on Telenor, the Norwegian telecoms incumbent, of approximately EUR 112 million, the highest antitrust fine in ESA's history. ESA concluded that Telenor had abused its market dominance by imposing a "margin squeeze" between its wholesale and retail prices. A margin squeeze is an example of "exclusionary" conduct that serves to undermine or weaken competitors, and is thus also detrimental to consumers. Telenor's actions resulted in rivals making a loss when selling residential mobile roadband services on tablets and laptops in Norway from 2008 to the end of 2012, as they did not have their own nationwide mobile network and were reliant on

### Tell ESA about competition concerns

ESA encourages citizens and undertakings to inform it about suspected infringements of EEA competition rules in Iceland, Liechtenstein and Norway. This information can be submitted on an anonymous basis. More information on how to report a suspected infringement or make a formal complaint can be found on ESA's [website](#).

Telenor's dominant mobile network (see ESA's [2020 Annual Report](#) for more details). On 28 August 2020, Telenor lodged an appeal against this decision before the EFTA Court ([Case E-12/20](#)). Following the exchange of several written pleadings, the oral hearing took place on 29 June 2021. The EFTA Court rendered its [judgment](#) on 5 May 2022 dismissing Telenor's application in its entirety and upholding ESA's decision and fine in full.

### REGULATORY GUIDANCE ON BROADBAND MARKETS IN ICELAND

Following pre-notification discussions held throughout the summer of 2021, ESA sent detailed [policy guidance](#) to the Electronic Communications Office of Iceland (ECOI) in October 2021 regarding its assessment of local competitive developments in wholesale broadband markets in Iceland. ESA expressed concerns regarding the extent to which ECOI's assessment provided sufficient insight into the degree of variation in competition conditions in certain municipalities in Iceland, particularly around the city of Reykjavik. ESA explained that some of the filtering criteria used by ECOI for assessing geographic variations in competition may not be appropriate to accurately reflect the extent of competitive developments in certain municipalities. These policy comments were issued as part of ESA's supervisory role under the [EEA consultation mechanism for electronic communications services](#). Preserving effective



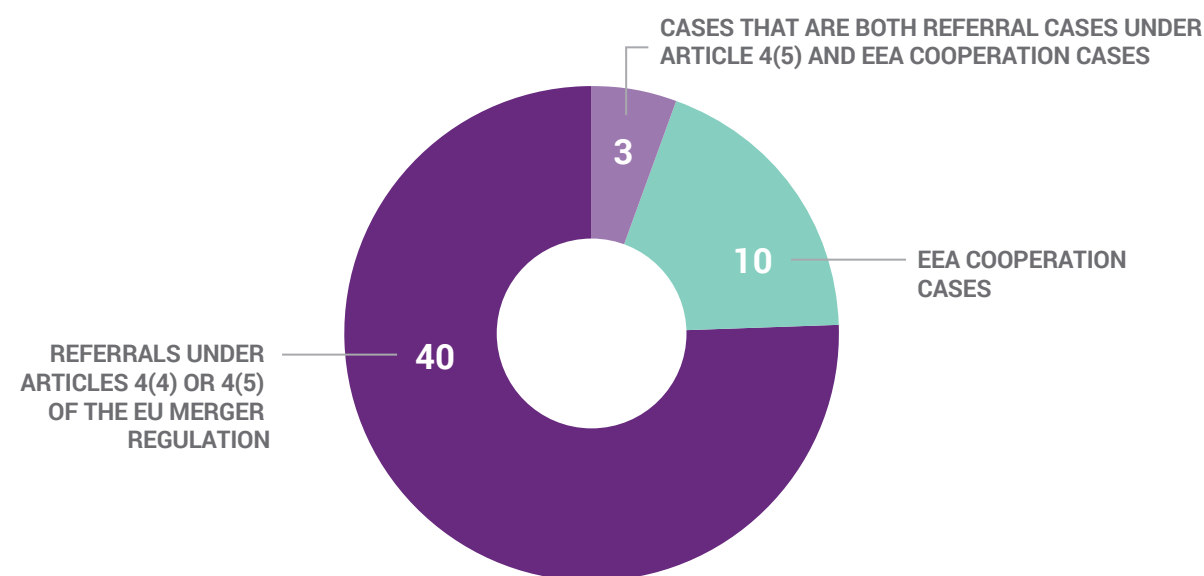
competition enforcement during the COVID-19 crisis. In 2020, the COVID-19 pandemic made it more difficult for competition enforcers to carry out parts of their work at full speed. Some of ESA's tasks, such as conducting unannounced inspections, could not be done entirely online. In this respect, the pandemic made it difficult in practice for ESA, the Commission and the national competition authorities (NCAs) to undertake their activities in EEA EFTA States.

In 2021, however, NCAs increasingly resumed their normal investigative activities. It is now more important than ever to keep markets working both effectively and fairly during challenging economic times. Hence, European competition enforcers found ways to resume routine investigative activities, including making unannounced inspections, whilst fully respecting public safety measures still in place.

**COOPERATION WITH THE EUROPEAN COMMISSION**

ESA shares jurisdiction with the Commission for applying EEA competition rules, and has forged a solid partnership through years of shared policy and case experience.

**MERGER COOPERATION AND REFERRALS CASES 2021**



Competition rules in the EEA Agreement are anchored in the "one-stop-shop" principle, meaning that either the Commission or ESA has the competence to handle any given case. However, robust mechanisms are rooted within the EEA framework to ensure that both authorities communicate regularly on their respective cases.

Through these communication channels, ESA is kept closely informed of important developments in cases being handled by the Commission (both antitrust and merger), and has the opportunity to make its voice heard in those concerning the territory of the EEA EFTA States. This is essential because the outcomes of cases dealt with by the Commission can have a considerable impact on markets and market players in the EEA EFTA States.

The figure below shows that the Commission has applied the EEA Agreement to the large majority of its antitrust cases in recent years ("cooperation cases"). This illustrates the importance of having formal cooperation mechanisms in place between the two authorities.

The next chart shows further the number of merger cases where information was transmitted by the Commission to ESA in 2021. The majority of the cases

**Guidance on sustainability and digital innovation initiatives**

ESA stands ready to respond to companies' requests for guidance to provide legal certainty under the EEA competition rules, including where companies contemplate potentially novel agreements to pursue sustainability objectives or new forms of cooperation in the area of innovation in digital markets. In some instances, ESA may also consider adopting decisions finding that competition rules are not applicable to certain initiatives, where these are in the public interest.

are requests for referral between EU Member States and the Commission. In 2021, a total of 13 cases were cooperation cases under Article 2 of [Protocol 24 to the EEA Agreement](#), indicating that they could have a certain impact on the EEA EFTA States.

The figure below shows the total number of prohibitions and conditional clearances of mergers by the Commission, as well as the significant share of those cases that were deemed to be cooperation cases under Protocol 24 EEA between 2016 and 2021.

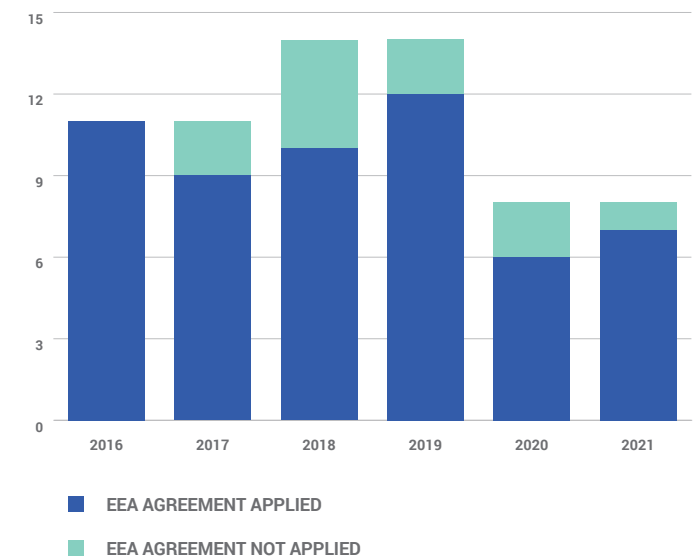
**EUROPEAN COMPETITION NETWORK (ECN)**

ESA and the NCAs in the EEA EFTA States are part of the ECN community, which includes the European Commission and the NCAs in the EU Member States. The ECN framework ensures an open and continuous dialogue between enforcers across the EU and the EEA on competition policy and experience. It is a key instrument in supporting effective and consistent application of competition law across the EEA.

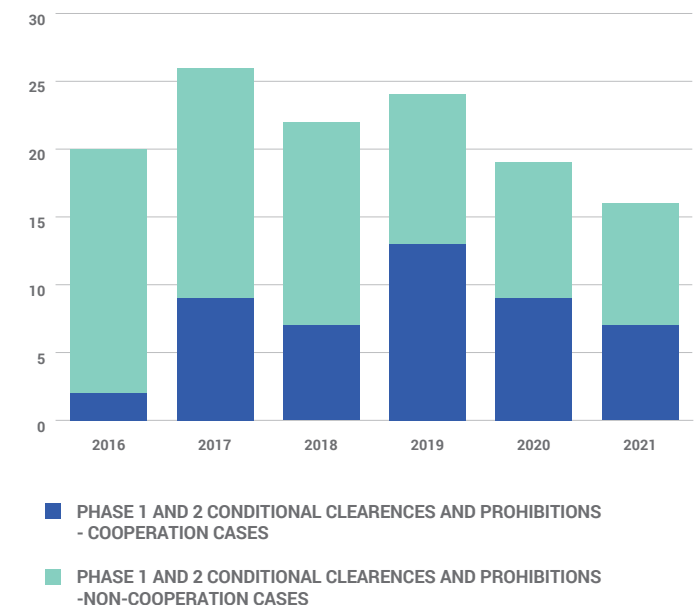
**COOPERATION WITH THE EFTA NATIONAL COMPETITION AUTHORITIES (NCAS)**

NCAs and courts in the EEA EFTA States apply Articles 53 and 54 of the EEA Agreement – in parallel to their equivalent national competition rules – in cases where there is an effect on EEA trade. To ensure coherent and

THE EUROPEAN COMMISSION ANTITRUST/CARTEL DECISIONS

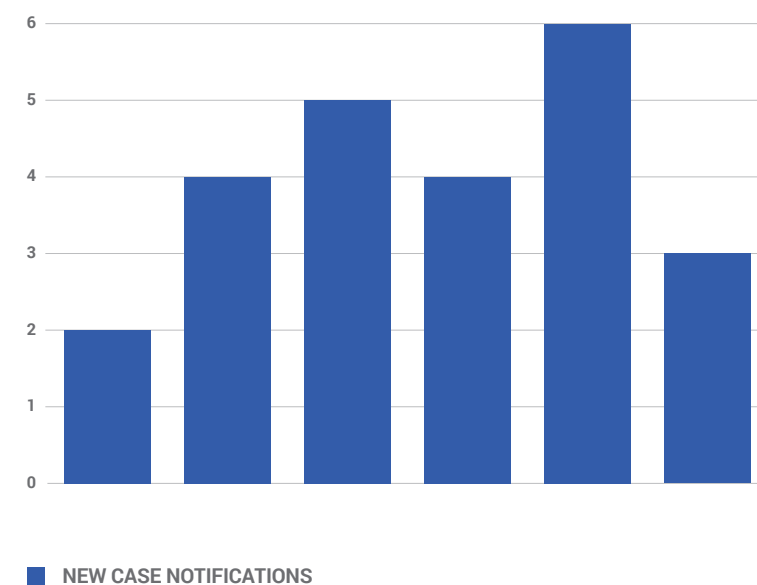


THE EUROPEAN COMMISSION'S MERGER INTERVENTIONS





NEW CASE NOTIFICATIONS FROM EFTA NCAs



## REMEMBER ESA WHEN SUBMITTING LENIENCY APPLICATION UNDER EEA LAW

Did you know that applying for leniency with the national competition authority (NCA) in Norway or Iceland cannot provide full legal certainty for your company or your client if Article 53 of the EEA Agreement is applicable in addition to the national competition law of that country? This is because ESA or the Commission will also have jurisdiction on the application of Article 53 EEA to the conduct concerned. Should ESA or the Commission decide to initiate proceedings, they would even relieve the NCA of its competence to apply Article 53 EEA.

So, to fully protect your position, do not forget to also submit an application with ESA or the Commission when you approach the NCA in Iceland or Norway.

More information on ESA's leniency programme and on how to apply for leniency can be found on [ESA's website](#)

## UPDATING THE EUROPEAN COMPETITION TOOLBOX

The year 2021 was also a period of intense activity on a set of important guidance instruments underpinning the European competition enforcement toolbox.

The Commission published evaluation reports on the [Market Definition Notice](#) and the [Motor Vehicle Block Exemption Regulation](#), and launched public consultations on draft guidance for [Collective bargaining agreements for self-employed](#) and the draft revised [Block Exemption Regulation on Vertical Agreements and Vertical Guidelines](#). It also published an impact assessment and a further consultation on the draft revised [Block Exemption Regulations on R&D and Specialisation and the Guidelines on Horizontal Cooperation Agreements](#), including an

efficient application of these provisions, ESA's activities in the field of competition are coordinated with those of the NCAs.

When acting under Article 53 or 54 EEA, the NCAs in the EEA EFTA States inform ESA of any new investigations. Sharing background information early on helps to identify the most appropriate authority to deal with a given case.

The number of new EEA competition cases reported by the EFTA NCAs in recent years can be seen in the figure below.

Before adopting a decision requiring an infringement to be brought to an end under Article 53 or 54 EEA, or accepting commitments from companies involved in an investigation, NCAs in the EEA EFTA States must submit a draft decision to ESA. To ensure that competition rules are applied consistently throughout the EEA, a final decision may only be adopted after ESA has been given the opportunity to comment.

ESA and the NCAs in the EEA EFTA States also communicate informally throughout the duration of a case.

Difficulties in meeting in person during the pandemic led ESA and the EFTA NCAs to re-think how they cooperate. An updated EFTA Competition Network Programme was launched in 2021, which was adapted to the new improved online meeting environment.

The EFTA Competition Network Programme broadly comprises three main areas of cooperation: 1) annual management meetings to discuss high-level policy issues; 2) working group or expert-level meetings on technical or case-specific issues; and 3) collective training opportunities, for example lunch seminars (with guest speakers) and newcomer training initiatives.



## ARTICLE 22 EUMR AND ILLUMINA/GRAIL

The case of Illumina's proposed acquisition of GRAIL ([Case COMP/M.10188](#)) demonstrates how ESA fulfils a pivotal role in the functioning of the merger review system in the EEA.

Illumina is a global genomics company based in the United States. Its proposed acquisition of GRAIL, a customer of Illumina with nascent cancer detection technology, did not initially require notification in any EU or EEA State, or to the Commission. However, the case became the first of its kind under the Commission's [new policy](#) of encouraging case referrals to the Commission under Article 22 of the EU Merger Regulation (EUMR) ([Council Regulation \(EC\) No 139/2004](#)), even in situations where there is no national duty to notify.

Article 22 EUMR allows the EU NCAs to request that the Commission review a particular concentration, if that concentration affects trade between the EU Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. This provision has not been used a great deal, but the Commission has decided to encourage more such referrals to be able to review some concentrations that would otherwise fall outside the jurisdiction of merger control in the EU. ESA has been actively involved in shaping the policy change and working with the Commission and the ECN to draft guidelines for the application of the rules.

Illumina/GRAIL is the first case to which the new policy has been applied. Through the EEA Agreement and ESA's facilitating role, the Icelandic and Norwegian NCAs joined the French referral of the case to the Commission, ensuring that the Commission assesses all effects of the concentration in Norway and Iceland, as well as how any potential remedies affect competition in these countries.

In addition to actively facilitating the case referral and providing support to the Commission and NCAs in this process, ESA intervened in [Case T-227/21 Illumina v Commission](#).



## IN FOCUS: COOPERATION WITH COURTS

To safeguard the coherent application of EEA law, ESA assists the courts in cases involving EEA competition rules and equivalent national provisions. National courts and appeal tribunals in the EEA EFTA States may request guidance from ESA on the interpretation and application of EEA competition rules. ESA, acting on its own initiative, may also submit observations in an *amicus curiae* (advisory) role to the courts and tribunals of the EEA EFTA States, where this is required for the coherent application of Article 53 or 54 EEA. Similarly, ESA can provide observations to the European courts in Luxembourg, namely the EFTA Court, the Court of Justice of the European Union (CJEU) and the General Court. ESA does this in practice with regard to select competition cases of EEA interest.

On 9 September 2021, ESA participated in the oral hearing before the CJEU in Case [C-377/20 Servizio Elettrico Nazionale and Others](#). This case concerns a reference by the Italian Council of State for a preliminary ruling on a series of important questions about the aim and scope of application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) in the context of the liberalisation of the market for the retail supply of electricity in Italy. These questions go to the heart of the abuse of dominance concept, such as the objective nature of the concept of abuse and “competition on the merits”, the relevance of the “as-

efficient competitor test” for non-pricing conduct, and the threshold for anti-competitive effects.

In its ruling of 12 May 2022, the CJEU confirmed that the capacity to produce a (potentially) restrictive effect on the relevant market is the essential factor in identifying whether a given practice by a dominant firm is abusive. It may be consistent with competition on the merits for a dominant operator to adopt practices aimed at retaining its customers. However, the dominant firm should not use means available to it merely on account of its former monopolist status and which, for that reason, cannot be replicated by as-efficient competitors.

On 11 November 2021, the CJEU handed down its judgment in Case [C-819/19 Stichting Cartel](#) on a request for a preliminary ruling concerning the transport sector. The case raised the issue of the competence of the national courts of an EU Member State to apply EU and EEA competition rules directly to the aviation sector, and to establish infringements of those rules, even if they occurred before the entry into force of [Council Regulation \(EC\) No 1/2003](#) in that sector.

In 2020, ESA had submitted its view that parties injured by infringements of Article 101 TFEU and Article 53 EEA should be able to rely directly on those competition rules before the national courts of EU Member States, including for periods where no implementing regulation was in place and only the transitional regimes of Articles 104 and 105 TFEU and Article 55 EEA applied. In January 2021, ESA participated

in the oral hearing of the case before the CJEU, arguing again for the direct effect of the relevant EU and EEA competition rules in proceedings before the national courts of EU Member States.

In its judgment of 11 November, the CJEU ruled clearly in favour of direct applicability of Article 101 TFEU and Article 53 EEA before the national courts of EU Member States, even during the transitional period. The CJEU took into account the fact that the Commission had not adopted any decision against the cartel members during this period, as well as the fact that Regulation (EC) No 1/2003 did not contain any provisions requiring the “provisional validity” of certain agreements, as had been the case under the old Regulation No 17. The CJEU confirmed that Article 53 EEA was in essence identical to Article 101 TFEU and must therefore be interpreted in the same way as the latter. It thus creates rights for individuals, which must be protected by national courts in the EU Member States. The CJEU also found that the absence of a provision equivalent to Article 104 TFEU in the EEA Agreement was not a sufficient basis for calling that conclusion into question. This is because Article 104 TFEU relates to the implementation of competition rules by NCAs, and therefore does not affect the jurisdiction enjoyed by EU national courts by virtue of the direct effect of Article 101 TFEU.

A view of Kirchberg, Luxembourg, the home of the EFTA Court and the Court of Justice of the European Union.





## LEGAL AND EXECUTIVE AFFAIRS IN 2021

The Legal and Executive Affairs (LEA) department is ESA's legal service. LEA provides legal advice, reviews all ESA decisions and represents ESA in court. LEA supports the College and the wider organisation in communicating, formulating and coordinating ESA policy.

LEA is responsible for bringing cases against the EEA EFTA States in the [EFTA Court](#), should they fail to fulfil their obligations under EEA law, as set out in ESA's formal infringement procedures. Upon request, the EFTA Court advises national courts in the EEA EFTA States on the interpretation of EEA law by delivering advisory opinions. The Court also hears applications brought by companies and individuals to review the lawfulness of decisions taken by ESA that affect them directly.

ESA participates in all cases before the EFTA Court, as well as in cases before the EU Courts that are likely to have an impact on EEA law.

Where it may be of assistance, ESA also participates as a third party in proceedings before the national courts of the EEA EFTA States, the General Court of the European Union (GCEU), the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

### MAIN ACTIVITIES IN 2021

ESA's litigation work in 2021 covered social security, state aid, commercial agents and tax deductibility of interest payments. ESA also made submissions defending its

decision to impose a EUR 112 million fine on Telenor ASA and Telenor Norge AS for abusing their dominant position in the Norwegian telecommunications sector.

ESA also participated in cases concerning social security, competition and state aid before the CJEU.

### PROCEDURE: HOW ESA WORKS TO UPHOLD EEA LAW

#### Direct actions

A direct action is the final step of a formal infringement procedure against an EFTA State. Before taking the EFTA State to court, ESA informs the State of its views in a series of informal and formal steps. The State can then put forward its arguments or resolve the situation by complying with EEA law within the applicable deadline. Matters are generally resolved before the court stage through the dialogue involved in the formal infringement procedure. Should dialogue not suffice to resolve the matter, it remains possible for ESA to pursue the court option.

ESA can bring an action before the EFTA Court against an EEA EFTA State for non-implementation of a directive or non-incorporation of a regulation into the national legal order. This occurs when an EFTA State has breached its EEA law obligations by overrunning the binding deadlines set out in this regard by at least a year.

ESA can also bring an action before the EFTA Court in substantive cases, for instance if it identifies a situation where national rules deprive businesses or citizens of their EEA rights. The EFTA Court can likewise resolve disagreements between ESA and the EEA EFTA States on

the interpretation of EEA law.

ESA did not bring any direct action cases before the EFTA Court in 2021, nor did it deliver in any direct action cases regarding non-incorporation or non-implementation of EEA legislation.

In 2021, the EFTA Court handed down one judgment in a substantive direct action case regarding nationality and residence requirements for persons in certain managerial roles within companies incorporated in Norway. The EFTA Court partially upheld ESA's application, finding that certain provisions in Norwegian company law infringed Article 31 EEA on the freedom of establishment.

### REFERRALS FROM NATIONAL COURTS

When a national court has a case before it that depends on the interpretation or application of EEA law, the national court judge has the option of referring a question to the EFTA Court. The EFTA Court then delivers an advisory opinion setting out its interpretation of EEA law. ESA participates in the proceedings of these cases by submitting written and oral arguments to the Court.

In 2021, the Court received four requests for advisory opinions on a wide range of questions from the national courts. Case E-01/21 *ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK* concerned the applicability of Liechtenstein social security law to





an undertaking with its registered office in Liechtenstein. In Case E-02/21 *Norep AS v Haugen Gruppen AS* regarding commercial agents, the Court ruled on the interpretation of the term “negotiate” within the meaning of the Commercial Agents Directive. Case E-03/21 *PRA Group Europe AS v Staten v/Skatteetaten* raised questions about interest limitation rules and the impact of rules on group contributions, and Case E-05/21 *Anna Bryndís Einarsdóttir v The Icelandic Treasury* concerned the relevance of income in other EEA States for the calculation of payments in connection with maternity and paternity leave.

In 2021, the EFTA Court delivered 16 advisory opinions.

The majority of these cases (11) concerned the free movement of people. Three cases concerned family rights in the context of EEA law: Case E-01/20 *Kerim v The Norwegian Government* regarding marriages of convenience, Case E-02/20 *The Norwegian Government v L* concerning the expulsion and exclusion of an EEA national, and Case E-16/20 *Q and others v The Norwegian Government, represented by The Immigration Appeals Board* concerning a child’s independent right of residence. Three cases regarded the recognition of professional qualifications: Case E-03/20 *The Norwegian Government v Anniken Jenny Lindberg*, Case E-04/20 *Tor-Arne Martinez Haugland and others v The Norwegian Government*, and Case E-17/20 *Zvonimir Cogelja v The Directorate of Health*. Four cases concerned social security: Case E-08/20 *Criminal proceedings against N*, Case E-13/20 *O v Labour and Welfare Directorate*, Case E-15/20 *Criminal proceedings against P*, and Case E-01/21 *ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK*. Finally, one case concerned workers’ rights: Case E-11/20 *Eyjólfur Orri Sverrisson* on the notion of “working time”.

The remaining five advisory opinions delivered by the Court concerned commercial matters: Case E-05/20 *SMA SA and Société Mutuelle d’Assurance du Batiment et des Travaux Publics v Finanzmarktaufsicht* on the liability of a supervisory body, Case E-07/20 *Criminal proceedings against M & X AG* regarding medicinal products, Case E-10/20 *ADCADA Immobilien AG PCC in Konkurs v Finanzmarktaufsicht* on the obligation to publish a

prospectus, Case E-14/20 *Liti-Link AG v LGT Bank* regarding the provision of information on inducements for investment services, and Case E-02/21 *Norep AS v Haugen Gruppen AS* on commercial agents.

### REVIEW OF ESA DECISIONS

Parties affected by a decision taken by ESA can seek annulment of the decision before the EFTA Court. ESA and the applicant then submit written observations, and the Court rules on the validity of the decision.

In Decision No 070/20/COL on Case E-12/20 *Telenor ASA and Telenor Norge AS*, ESA fined Telenor EUR 112 million for abusing its dominant position in the Norwegian telecommunications sector. The application filed by Telenor against ESA for the annulment of this decision continued during the course of 2021 with an oral hearing in the EFTA Court.

One application was filed against a decision of ESA in the EFTA Court in 2021. In Case E-4/21 *SÝN hf. v EFTA Surveillance Authority*, the applicants sought annulment of ESA’s Decision No 023/21/COL, in which ESA found that state aid awarded to Farice ehf. for investment in a third submarine cable in Iceland was compatible with the EEA Agreement.

### COSTS CASES

The EFTA Court is empowered to determine the level of costs to be awarded to a successful party in a case brought before it. No costs applications were brought before – or decided by – the Court in 2021.

### THE CJEU AND GCEU

The Court of Justice of the European Union (CJEU) has jurisdiction in the field of EU law to interpret EU legislation. Since many EU law instruments are incorporated into EEA law, ESA participates in cases before the EU courts that are likely to have a particular impact on EEA law and its future development.

ESA can participate in CJEU cases in the following ways: in a preliminary reference where a national court of an EU Member State asks the CJEU to interpret EU law, ESA may make written or oral submissions if the subject matter of the proceedings is in an area covered by the EEA Agreement. In other cases, ESA may ask



The exceptional situation brought by COVID-19 called for exceptional solutions at ESA.

to intervene in support of one of the parties under the conditions laid down in Article 40(3) of the Statute of the Court of Justice, including seeking to intervene in direct action cases brought by the Commission against EU Member States.

In 2021, ESA was involved in four cases before the CJEU. ESA submitted observations in two cases: Case C-328/20 *Commission v Austria* concerning social security, and Case C-465/20 *P Commission v Ireland and Apple Sales International and Apple Operations Europe* regarding a Commission state aid decision. ESA successfully sought leave to intervene in Case C-376/20 *P Commission v CK Telecoms UK Investments* concerning a Commission decision in a merger case, and participated in the oral hearing in Case C-377/20 *Servizio Elettrico Nazionale and Others* raising questions about the abuse of a dominant market position.

The CJEU handed down judgments in two cases in

2021 in which ESA had been involved. Case C-308/19 *Whiteland Import Export* concerned rules on the limitation period for fining, and Case C-819/19 *Stichting Cartel* concerned the direct effect of breaches of competition law.

ESA was also involved in one case pending before the General Court of the European Union (GCEU): Case T-227/21 *Illumina v Commission* concerned a Commission decision in a merger case. ESA also applied to intervene in Cases T-726/20 *Grupa Azoty S.A. and Others v Commission* and Case T-741/20 *Advansa Manufacturing GmbH and Others v Commission*, before the GCEU dismissed these two cases as inadmissible.

In 2021, the GCEU handed down one judgment in a case in which ESA had been involved: Case T-612/17 *Google v Commission* concerned a Commission finding of anti-competitive behaviour, which was appealed to the CJEU as Case C-48/22 P.





### NATIONAL COURTS AND TRIBUNALS

Even when ESA is not a party to a particular case in the national courts, it may be able to offer an insight into EEA law that has a bearing on the issues to be decided. Accordingly, certain national courts can permit ESA to submit *amicus curiae* briefs where these may be of assistance.

In 2021, the Icelandic Supreme Court delivered its judgment in Case 42/2019 *ICA v Byko & Norvik*, in which ESA had participated in a hearing for the first time in Iceland as an *amicus curiae*. ESA's submissions centred around the effect on trade, which was confirmed in the Court's ruling.

### Access to documents

Anyone can request to view documents from ESA. Documents are normally made publicly available upon request, though ESA may refuse disclosure in certain circumstances. Once a document has been disclosed, it is uploaded to ESA's website on the [public document database](#). In 2021, ESA received 112 access to documents requests. Should you wish to obtain access to ESA's documents you can review [ESA's rules on access to documents](#) and send a request by email to [registry@eftasurv.int](mailto:registry@eftasurv.int)

## LINKS TO ESA'S COURT CASES IN 2021

### CASES PENDING BEFORE THE COURTS IN 2021

#### Substance cases:

[E-01/21 – ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK\\*](#)  
[E-02/21 – Norep AS v Haugen Gruppen AS\\*](#)  
[E-03/21 – PRA Group Europe AS v Staten v/Skatteetaten](#)  
[E-05/21 – Anna Bryndís Einarsdóttir v the Icelandic Treasury](#)

#### Review of ESA's decisions:

[E-12/20 – Telenor ASA and Telenor Norge AS v EFTA Surveillance Authority](#)  
[E-04/21 – SÝN hf. v EFTA Surveillance Authority](#)

#### CJEU and GCEU cases:

[C-328/20 – Commission v Austria](#)  
[C-376/20 P – Commission v CK Telecoms UK Investments](#)  
[C-377/20 – Servizio Elettrico Nazionale and Others](#)  
[C-465/20 P – Commission v Ireland and Others](#)  
[T-227/21 – Illumina v Commission](#)

\* These cases also reached judgment in 2021 (see below)

### JUDGMENTS DELIVERED IN 2021

#### Substance cases:

[E-01/20 – Kerim v The Norwegian Government](#)  
[E-02/20 – The Norwegian Government v L](#)  
[E-03/20 – The Norwegian Government v Anniken Jenny Lindberg](#)  
[E-04/20 – Tor-Arne Martinez Haugland and others v The Norwegian Government](#)  
[E-05/20 – SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics v Finanzmarktaufsicht](#)  
[E-07/20 – Criminal Proceedings against M & X AG](#)  
[E-08/20 – Criminal Proceedings against N](#)  
[E-10/20 – ADCADA Immobilien AG PCC in Konkurs v Finanzmarktaufsicht](#)  
[E-11/20 – Eyjólfur Orri Sverrisson v The Icelandic State](#)  
[E-13/20 – O v Arbeids- og velferdsdirektoratet](#)  
[E-14/20 – Liti-Link AG v LGT Bank AG](#)  
[E-15/20 – Criminal Proceedings against P](#)  
[E-16/20 – Q and others v The Norwegian Government, represented by The Immigration Appeals Board](#)  
[E-17/20 – Zvonimir Cogelja v The Directorate of Health](#)  
[E-01/21 – ISTM International Shipping & Trucking Management GmbH v AHV-IV-FAK](#)  
[E-02/21 – Norep AS v Haugen Gruppen AS](#)

#### Direct actions:

[Kingdom of Norway](#)

#### CJEU and GCEU cases:

[T-612/17 – Google v Commission](#)  
[C-308/19 – Whiteland Import Export](#)  
[C-819/19 – Stichting Cartel](#)  
[T-726/20 Grupa Azoty S.A. and Others v Commission \(Order of Inadmissibility\)](#)  
[T-741/20 Advansa Manufacturing GmbH and Others v Commission \(Order of Inadmissibility\)](#)

#### National courts:

[42/2019 – ICA v Byko & Norvik](#)



## GLOSSARY OF TERMS

**Agreement on the European Economic Area (EEA Agreement)** – An agreement that entered into force in 1994 guaranteeing equal rights and obligations within the Internal Market for individuals and economic operators in the European Economic Area.

**Case** – An assessment of the implementation, or application, of EEA law, or tasks executed for the purpose of fulfilling ESA's obligations under EEA law, registered before and during the year. Such cases do not necessarily lead to the initiation of infringement proceedings or the opening of a formal investigation.

**Complaints** – Cases where ESA examines information received from economic operators or individuals regarding measures or practices in the EEA EFTA States that are not considered to be in conformity with EEA rules.

**EEA EFTA States** – The three EEA EFTA States that are signatories to the EEA Agreement: Iceland, Liechtenstein and Norway.

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

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

**EFTA States** – The four members of the European Free Trade Association: Iceland, Liechtenstein, Norway and Switzerland.

**EFTA Surveillance Authority (ESA)** – The organisation set up to ensure that the three EEA EFTA States fulfil their legal obligations as stated in the EEA Agreement.

**European Economic Area (EEA)** – An area of economic cooperation consisting of the 27 EU Member States and three of the four EFTA States: Iceland, Liechtenstein and Norway. Switzerland is not part of the EEA. Inside the EEA, the rights and obligations established by the Internal Market of the EU are expanded to include the participating EEA EFTA States.

**European Free Trade Association (EFTA)** – An inter-governmental organisation set up for the promotion of free trade and economic integration to the benefit of its four members: Iceland, Liechtenstein, Norway and Switzerland.

**Management tasks** – Cases opened on the basis of an obligation on ESA deriving from the EEA Agreement directly, or from secondary legislation, such as eCOM notifications and draft technical regulations.

**Notifications** – State aid measures, draft technical regulations and telecommunications market notifications that are submitted to ESA by the EEA EFTA States for examination or approval.

**Own-initiative cases** – These cases are opened by ESA at its own instigation, and include the non-implementation of directives, the non-incorporation of regulations for Iceland and Norway, and the examination of the implementation and application of EEA law. Food safety and transport inspections are also covered by own-initiative cases.

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