EFTA Surveillance Authority
Rue Belliard, 35
B-1040 Brussels
Belgium

MINISTRY FOR
FOREIGN AFFAIRS
Rauðarárstígur 25, 105 Reykjavík, Iceland
Tel: 354-545 9900, fax: 354-562 2373
external@utn.stjr.is, www.mfa.is

Reykjavík, 21 April 2020
Ref: UTN19020246/89.F.310
NH/brj

Subject: Case No 71655, Iceland's implementation of Protocol 35 of the EEA Agreement

This letter is drafted during an unprecedented crisis caused by the COVID19 pandemic, with the attendant strains on the Icelandic administration.

Reference is made to the letter of formal notice of the Surveillance Authority of 13 December 2017 and to discussions in the context of the package meeting and in Brussels, as well as subsequent letters of 14 February and 13 April 2018 regarding deadlines and the letter of 18 December 2018 from the Ministry for Foreign Affairs to the Authority.

Following receipt of the Authority's LFN, the Ministry instigated a range of actions. As the Authority was informed, the Ministry established a working group to analyse arguments put forward by the Authority in its LFN on the need to review Article 3 of the Icelandic legislation implementing the EEA Agreement, hereinafter referred to as Act No. 2/1993. The working group presented its preliminary findings to the Ministry on 3 August 2018. Furthermore, the Minister for Foreign Affairs, partly at the request of the Parliament, appointed a working group to write a report on Iceland and the EEA, which was delivered in September of 2019. In addition, the Ministry has requested and received special legal advice on this matter, all of which have been the subject of examination in recent weeks and months.

In its letter of 18 December 2018, the Ministry reiterated its commitment to proposing amendments to the relevant EEA implementing legislation in order to ensure that it fully reflects the obligations undertaken by Iceland under the EEA Agreement, if proved necessary. The Government also observes the importance of proportionality and objectivity as well as the broader context in the assessment of member states' fulfilment of their obligations under the EEA Agreement. It should be noted that the protection of citizens and economic operators has been guaranteed by all branches of the Icelandic state during the entire life span of the EEA Agreement, including through the implementation of EEA obligations embodied in Article 3 of Act No. 2/1993..

As the EEA EFTA Prime Ministers stated in their declaration on the occasion of the 25th anniversary of the EEA, the EEA Agreement has for 25 years ensured individuals and companies equality, a strong legal basis and predictability. The Icelandic Government and broader administration appreciate that this can only function with a homogenous application and interpretation of EEA rules. This has been clear from the day Article 3 of Act No. 2/1993 came into effect.

However, it should be noted that the aforementioned working group on EEA Cooperation referred to the constitutional disputes in its concluding remarks:

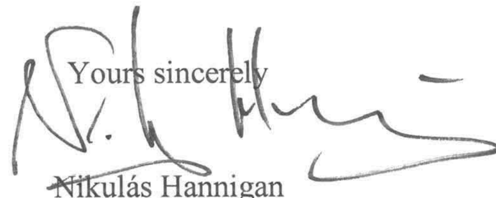
"Constitutional disputes relating to the EEA membership need to be brought to a conclusion, either by recognising that the membership has achieved a constitutional status like other unwritten constitutional rules or by inserting a provision on the membership in the Constitution."

It is the view of the Ministry that although the above does not refer specifically to Iceland's obligations under Protocol 35 EEA, it can be argued that, given the nature of Protocol 35, a broader perspective than merely examining Article 3 of Act No. 2/1993, is needed when addressing the issue at hand.

Keeping this in mind and the present circumstances of the administration due to the Covid-19 pandemic, the Ministry would ask the Authority to remain understanding of the complexity of the situation.

In conclusion, allow me to reiterate that the Government is in agreement that homogenous application and interpretation of EEA rules is essential to ensuring the rights of individuals and economic operators derived from the EEA Agreement.

Yours sincerely



Nikulás Hannigan
Director General for External Trade and Economic Affairs

EFTA Surveillance Authority
Rue Belliard, 35
B-1040 Brussels
Belgium

MINISTRY FOR
FOREIGN AFFAIRS

Rauðarárstígur 25, 105 Reykjavík, Iceland
Tel: 354-545 9900, fax: 354-562 2373
external@utn.stjr.is, www.mfa.is

Reykjavík, 3 July 2020
Ref: UTN19020246/89.F.310
NH/þra

Subject: Case No 71655, Iceland's implementation of Protocol 35 to the EEA Agreement

Reference is made to the letter of formal notice (LFN) of the EFTA Surveillance Authority of 13 December 2017 concerning Iceland's implementation of Protocol 35 to the EEA Agreement (Case No: 880792, Decision No: 212/17/COL) and subsequent correspondence regarding the matter, including the letter of the Ministry, dated 21 April 2020, and discussions in the context of the online package meeting in May 2020.

At the package meeting, the Ministry informed the Authority that the Minister for Foreign Affairs and International Development Cooperation, given the extreme sensitivity of Protocol 35 and related issues, had proposed to the Government that the matter be carried forward through consultations at the inter-ministry level and that a letter outlining the Government's position would be sent to the Authority in the near future. As a follow-up to that meeting, the Ministry would therefore like to communicate the following to the Authority.

The current Article 3 of Icelandic Act No 2/1993 on the European Economic Area has remained unamended since the Act entered into force in 1993. For a period of over 20 years the EFTA Surveillance Authority made no comment. It is evident that the EEA Agreement has functioned well in Iceland over this period despite an alleged deficiency in the implementation of Protocol 35 into Icelandic law. It would be difficult to maintain that the functioning of the EEA Agreement has been any less satisfactory in Iceland than in other EEA Contracting Parties. Indeed, the Icelandic Authorities are concerned by unevenness in the application and interpretation of EEA rules by the EEA Contracting Parties in general and consider that there would be grounds for a more comprehensive review of this issue.

In light of the fact that the EFTA Surveillance Authority chose not to intervene on Article 3 of Act No 2/1993 for most of the time the EEA Agreement has been in force, it can be inferred that subsequent jurisprudence in Iceland is the sole motivation behind the Authority's intervention and its decision to issue an LFN in December 2017. This is not surprising, given that jurisprudence in Iceland, as in other countries, is constantly evolving, sometimes in

unforeseen directions. It seems clear from the course of events that the Authority saw no deficiency in the implementation of Protocol 35 through Article 3 until the Icelandic Supreme Court appeared to change its jurisprudence in relation to the priority of legislation based on EEA law and other legislation.

The comments of the Authority as expressed in the LFN and subsequent communications have been given serious and detailed consideration by the Government. Indeed, the Government has already undertaken a range of actions to evaluate the arguments put forth by the Authority regarding the implementation of Protocol 35.

The constitutional setup in Iceland differs from the other EEA EFTA States. This explains the path chosen in Iceland regarding the implementation of Protocol 35 when the EEA Agreement entered into force. The interplay between the Icelandic constitution, its bearing on the transfer of powers, discussions around amendments to the Constitution, the evolution of Icelandic jurisprudence and the method of implementation of Protocol 35 into Icelandic law requires further elucidation. Indeed, the comments on the matter from the Authority and the subsequent work undertaken under the auspices of the Government since the letter of the Authority was received, provide grounds for giving deeper consideration to whether amending primary law is sufficient, even if the conclusion by the Government were to follow the recommendations of the Authority. The instigation of a further study of this matter is without prejudice to the position of Iceland on the Authority's conclusions it is LFN.

It is also interesting in this regard to note the recent ruling by the German Federal Constitutional Court of 5 May 2020, regarding the European Central Bank's PSPP programme and the Judgment of the Court of Justice of the European Union in Case C-493/17 *Weiss* of 11 December 2018. The fact that a constitutional court of an EU Member State is at odds with the Court of Justice of the European Union, presumably on grounds of the German Constitution, highlights the complexity of this area – and that it is not only an Icelandic issue.

The Government of Iceland considers the good functioning of the EEA Agreement as a key policy priority. The recently released report of the Working Group on EEA co-operation, published on 1 October 2019, details the good functioning of the Agreement since its entry into force, as well as the transformational, beneficial effects on Icelandic society and the economy over this period.

The Government appreciates the understanding the Authority has shown so far regarding the sensitivity and complexity of this case. The Government of Iceland remains committed to the good functioning of the EEA Agreement and the homogenous application and interpretation of EEA rules.

Yours sincerely

Nikulás Hannigan
Director General for External Trade and Economic Affairs

EFTA Surveillance Authority
Rue Belliard, 35
B-1040 Brussels
Belgium

MINISTRY FOR
FOREIGN AFFAIRS
Rauðarárstígur 25, 105 Reykjavík, Iceland
Tel: 354-545 9900, fax: 354-562 2373
external@utn.stjr.is, www.mfa.is

Reykjavík, 10 September 2020
Ref: UTN19020246/89.F.310
NH/þra

Reference is made to the letter of formal notice (LFN) of the EFTA Surveillance Authority ("the Authority") of 13 December 2017 concerning Iceland's implementation of Protocol 35 to the EEA Agreement (Case No: 880792, Decision No: 212/17/COL) to the letter of the Ministry of 3 July 2020 and previous correspondence regarding the matter.

The Ministry's letter of 3 July last drew the attention of the Authority to the fact that for a period of over 20 years the Authority had made no comment on Iceland's implementation of Protocol 35 and that it could from this be inferred that subsequent jurisprudence in Iceland was the sole motivation behind the Authority's intervention and its decision to issue an LFN in December 2017.

The Ministry also observed that it would be difficult to maintain that the functioning of the EEA Agreement has been any less satisfactory in Iceland than in other EEA Contracting Parties.

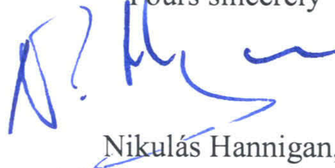
The Ministry drew attention to the complex interplay between the Icelandic constitution, its bearing on the transfer of powers, discussions around amendments to the Constitution, the evolution of Icelandic jurisprudence and the method of implementation of Protocol 35 into Icelandic law. Indeed, this and issues raised by a number of commentators provide grounds for giving deeper consideration to whether amending primary law is sufficient, even if the conclusion by the Government were to follow the recommendations of the Authority.

Finally, the Ministry referred to the ruling by the German Federal Constitutional Court of 5 May 2020, regarding the European Central Bank's PSPP programme and the Judgment of the Court of Justice of the European Union in Case C-493/17 *Weiss* of 11 December 2018. Although this ruling concerns several issues unrelated to the implementation of Protocol 35, there is nevertheless an underlying issue concerning the priority of national constitutions vis-á-vis EU/EEA law.

In the light of this ruling and while uncertainty exists on these issues across the EEA, it is the view of the Icelandic Government that it is premature to table amendments to Icelandic law in line with the comments delivered by the Authority in its LFN. This should not be

interpreted as a final position on the comments and considerations put forward by the Authority. The Icelandic Government reserves the right to arrive at a final position and to inform the Authority in the light of developments. The Icelandic Government assumes that the Authority under these circumstances will defer further measures in regard to Protocol 35 until the issues emerging from the above ruling have been clarified within the EEA area.

Yours sincerely



Nikulás Hannigan,
Director General for External Trade and Economic Affairs

MINISTRY FOR
FOREIGN AFFAIRS
Rauðarárstígur 25, 105 Reykjavík, Iceland
Tel: 354-545 9900, fax: 354-562 2373
external@utn.stjr.is, www.mfa.is

EFTA Surveillance Authority
Bente Angell-Hansen,
President
Rue Belliard, 35
B-1040 Brussels
Belgium

Reykjavík, 30 April 2021
Ref: UTN19020246/89.F.310
NH/BM

Response of the Government of Iceland

to a reasoned opinion delivered by the EFTA Surveillance Authority on 30 September 2020, concerning the implementation of Protocol 35 EEA in Iceland

1. Introduction

1. Reference is made to the reasoned opinion of the EFTA Surveillance Authority ("the Authority") of 30 September 2020, concerning the alleged failure of Iceland to fulfil its obligations under Protocol 35 to the EEA Agreement and Article 3 of the EEA Agreement (Case No: 71655, Decision No: 002/20/COL), and previous correspondence regarding the matter between the Authority and the Government of Iceland ("the Government").

2. Firstly, the Government reiterates that homogeneous application and interpretation of EEA rules is essential to ensuring the rights of individuals and economic operators derived from the EEA Agreement. Iceland has always been fully committed to its obligations under the EEA Agreement. It should be noted that the protection of citizens and economic operators has been guaranteed by all branches of the Icelandic state during the entire life span of the EEA Agreement, including through the implementation of EEA obligations embodied in Article 3 of Act No. 2/1993 on the European Economic Area ("the EEA Act"), which implements Protocol 35 EEA.

3. Secondly, the Government reaffirms the importance of proportionality and objectivity as well as a broader context in the assessment of Iceland's fulfilment of its obligations under the EEA Agreement. Given the nature of Protocol 35 EEA, a broader perspective than merely examining Article 3 of the EEA Act, is needed when addressing the issue at hand. This is especially important if the question of individual legal protection is in the

foreground. Therefore, the analysis must relate to the whole system of the protection of the rights of individuals and economic operators as it works in practice.

4. Thirdly, it should be noted that for more than two decades the Authority had no objections to the implementation of Protocol 35 in Icelandic law or the legal situation that has existed in Iceland since the EEA Act was passed by the Icelandic Parliament (Alþingi) on 13 January 1993 and entered into force on 1 January 1994. According to Article 2(1) of the EEA Act the main text of the EEA Agreement was adopted as national law in Iceland in its entirety and Protocol 35 EEA was implemented with Article 3 of the EEA Act. On 11 April 2012, almost 20 years after the adoption of the EEA Act, the Authority sent a request for information concerning the implementation of Protocol 35 to the EEA Agreement into the Icelandic national legal order. More than five years later, on 13 December 2017, the Authority opened infringement proceedings on its own motion, as there was apparently no complaint. The case has formally been pending since 2017 and discussed at meetings with the Authority on regular basis until the reasoned opinion was delivered on 30 September 2020. This timeframe alone indicates that Iceland´s compliance with EEA law cannot be viewed as a significant problem. The Government also notes that it is somewhat striking that after all this time, the Authority would bring an "own initiative case", implying that this is a normal course of action.

2. The Authority´s reasoned opinion of 30 September 2020

5. In its reasoned opinion of 30 September 2020, the Authority concludes that Article 3 of the Icelandic EEA Act does alone not fulfil the obligations under Protocol 35 EEA. The reason given is that Article 3 does not, by its wording, require that implemented EEA rules should prevail if and when in conflict with other national rules, as prescribed in Protocol 35 EEA. According to the Authority, the insufficient wording of Article 3 of the EEA Act has been confirmed by the case law of the Supreme Court of Iceland. The Authority refers to particular cases of the Supreme Court to illustrate that the Court has either refrained from making a reference to Article 3 of the EEA Act, while concluding that national rules cannot be set aside/disregarded, or explicitly stated that Article 3 EEA is a mere rule of interpretation, which cannot secure the priority of implemented EEA legislation.

6. Consequently, it is the Authority's view that Article 3 of the EEA Act, as interpreted and applied by the Supreme Court of Iceland, does not adequately implement the sole Article of Protocol 35 EEA, as it does not ensure that unconditional and sufficiently precise implemented EEA law prevails over conflicting national provisions. The Authority considers that Iceland has, therefore, failed to take the appropriate measures to ensure fulfilment of its obligations arising out of the EEA Agreement. According to the Authority, this alleged failure leads to the situation where individuals and economic operators cannot rely on their rights derived from the EEA Agreement.

7. Pursuant to Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement" – SCA), the Authority required Iceland to take the measures necessary to comply with the reasoned opinion within three months of the receipt of the reasoned opinion. It should be noted that the Government requested an extension of the time limit to reply to the Authority. The Authority accepted the request and the current deadline to reply is 30 April 2021.

3. Iceland´s assessment

3.1. Introduction

8. As the Authority implies in its reasoned opinion, Iceland should amend its national law to include a more decisive statute to the effect that implemented EEA rules prevail in case of conflict between EEA rules that have been implemented into national law and other statutory provisions of national law.

9. The Government hereby reveals that the Icelandic legislator (Alþingi) has not enacted such amendment. The primary reason is that Article 3 of the Icelandic EEA Act fulfils Iceland´s obligations under the EEA Agreement and that a more decisive statute on the priority effect of implemented EEA rules would require a constitutional amendment. The Government objects to any further infringement proceedings against Iceland regarding this matter and urges the Authority to refrain from further actions.

3.2. A provision on the priority effect of implemented EEA rules in Iceland would require a constitutional amendment

3.2.1. The incorporation of Protocol 35 EEA in the EFTA States

10. During the negotiations of the EEA Agreement, the European Communities ("EC"), which later were incorporated into the European Union ("EU"), demanded a commitment from the EFTA States, that would ensure primacy of EEA rules, reflecting the *principle of supremacy* or *direct effect* under EU law. The EFTA States could not accept this as it was particularly important for Iceland and the other dualistic EFTA States at the time, namely Finland, Norway, and Sweden, that the Agreement would not demand a transfer of legislative powers to the EC or EEA institutions. The result of the negotiations was that EEA law does not contain a principle of supremacy equal to the one in EU law and it does not demand that EU legal norms become enforceable as EEA law. They only become forceable by the courts in the EFTA States after implementation as national law. This mirrors a fundamental difference between EEA law and EU law. However, to ensure effectiveness of EEA rules within the EFTA States, the contracting parties agreed on Protocol 35, safeguarding *homogeneity* without transfer of legislative powers.

11. Protocol 35 on the implementation of EEA rules states:

> „Whereas this Agreement aims at achieving a homogeneous European Economic Area, based on common rules, without requiring any Contracting Party to transfer legislative powers to any institution of the European Economic Area; and
>
> Whereas this consequently will have to be achieved through national procedures;
>
> ***Sole Article***
> For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."

12. The fact that Protocol 35 is not a part of the main text of the EEA Agreement illustrates that the outcome was merely a compromise. In contrast to the main text of the EEA Agreement and the legislative acts referred to in the Annexes to the Agreement, the dualistic EFTA

States were not obligated to adopt the protocols as national law. The wording of Protocol 35 is also not decisive and thus open for interpretation. It does, for example, not stipulate how the EFTA States should ensure its commitments stated therein. The EFTA States were therefore in their right to implement the provisions in the manner envisaged by their constitutional laws and internal legal order. As the EEA Agreement does not prescribe any transfer of legislative powers, the EFTA States had wide discretion to fulfil the requirements of the Protocol in such a manner as to conform as possible to EC law.[1]

13. It must also be noted that the undertaking assumed under Protocol 35 does not extend to every provision of the main part of the EEA Agreement. It relates only to those provisions that are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts.[2] As the EFTA Court has stated, this is the case when the provision in question is "unconditional and sufficiently precise."[3]

14. In Iceland, Protocol 35 EEA was implemented with Article 3 of the Icelandic EEA Act No 2/1993. The article reads as follows:

> *"Skýra skal lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja."*
>
> The unofficial English translation reads as: "Statutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein".

15. In Norway, the protocol was implemented with Article 2 of the Norwegian Act No 209/1992 ("EØS-Loven"). The article reads as follows:

> *„Bestemmelser i lov som tjener til å oppfylle Norges forpliktelser etter avtalen, skal i tilfelle konflikt gå foran andre bestemmelser som regulerer samme forhold. Tilsvarende gjelder dersom en forskrift som tjener til å oppfylle Norges forpliktelser etter avtalen, er i konflikt med en annen forskrift, eller kommer i konflikt med en senere lov."*
>
> The English translation reads as: "Provisions of law that serve to fulfill Norway's obligations under the agreement shall, in the event of conflict, take precedence over other provisions regulating the same conditions. The same applies if a regulation that serves to fulfill Norway's obligations under the agreement is in conflict with another regulation, or conflicts with a later law."

16. For the sake of completeness, the Government adds that Norway´s solution resembles the solution Sweden had chosen at the time. When the EEA Agreement entered into force on 1 January 1994, Sweden was a Contracting Party on the EFTA side.[4] As Sweden moved to

---

[1] *See e.g.* Stefán Már Stefánsson: *The EEA Agreement and its adoption into Icelandic law.* Oslo 1997, p. 36-37. *See also Judgment of the opinion no. 1/91 of the EC Court of Justice*, para 20: „[...] the EEA is to be stablished on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institution which it sets up."

[2] *See* Marthe Kristine Fjeld Dystland, Fredrik Bøckman Finstad and Ida Sørebro, The implementation Requirements, in: Arnesen and Others, *Agreement on the European Economic Area – A Commentary* 2018, p. 263

[3] Case E-1/01 Hörður Einarsson v The Icelandic State, [2002] EFTA Ct. Rep. 1.

[4] In Sweden, Protocol 35 EEA was implemented through Article 5 of Act No. 1317/1992 on the European Economic Area, which reads as follows: *"Föreskrifter i denna lag eller annan lag som meddelats till uppfyllande av Sveriges förpliktelser enligt EES-avtalet skall tilämpas utan hinder av vad som annars föreskrivs i lag. Motsvarande skall gälla också i förhållandet mellan föreskrifter i annan författning än lag."* The English translation reads as: „Regulations in this law or other law that have been notified in order to fulfill Sweden's obligations under the EEA Agreement shall be applied without prejudice to what is otherwise prescribed by law. The same shall also apply in the relationship between regulations in a constitution other than law".

the EU pillar after only one year of membership in the EFTA pillar, the provision has hardly become relevant.

17. As far as Liechtenstein is concerned, it should be noted that according to the sole article of Protocol 35 EEA, the EFTA States are only obliged to introduce a statutory provision to the effect that EEA rules prevail in cases of possible conflicts between implemented EEA rules and other statutory provisions if this is "necessary". Since Liechtenstein is a monistic country, the adoption of such a provision was not required.

3.2.2. Article 3 of the EEA Act fulfilled Iceland's obligations under the EEA Agreement

18. The Icelandic Constitution has no provision on the transfer or delegation of state power to international or supranational bodies. In this regard, the Icelandic Constitution differs significantly from constitutions of many other EEA States, including the constitution of Denmark, an EU State, and Norway, an EFTA State.[5] Neither does the Icelandic Constitution contemplate that national legislation, which is based on international commitments such as those of the EEA Agreement, may, by reason of this alone, acquire a higher status than other ordinary legislation.

19. The decision of Iceland to ratify the EEA Agreement in 1992, and the subsequent adoption of the EEA Act in 1993, therefore raised serious constitutional questions whether transfer of state powers is permitted under the Constitution. Prior to Iceland's ratification of the EEA Agreement, the membership of Iceland was heavily debated within the country, both in public and among experts. Because of this uncertainty, the Government commissioned a committee of experts to address the issue of constitutionality. Among these experts was Mr. Þór Vilhjálmsson who at the time was a Supreme Court Judge and later became Judge and President of the EFTA Court.

20. The experts concluded *inter alia* that Protocol 35 did not include a transfer of legislative powers and that the wording of Article 3 of the EEA Act fulfilled Iceland's obligations under the EEA Agreement.[6] As the experts stated, in (unofficial) English translation:

> "Article 3 of the EEA Act, presented before Althingi, states: "Statutes and regulations shall be interpreted, in so far as appropriate, in conformity with the EEA Agreement and the rules laid down therein."
>
> This means that the obligation imposed on the Contracting Parties under Protocol 35 has been fulfilled. Under the obligation, Icelandic laws shall be interpreted in accordance with rules of international law, as far as possible, on grounds of legal interpretation rules of Icelandic law.
>
> Consequently, in light of the above, it is our opinion that the Protocol does not impose the transfer of legislative power, and that Article 3 of the Act fulfils its contractual obligations.
>
> However, if legislation is not in conformity with obligations pursuant to the Agreement this may instigate reactions based on the Agreement"(emphasis added.)[7]

---

[5] *See* Article 20 of the Constitution of Denmark and Article 115 of the Constitution of Norway.

[6] *See* the Report of the Committee appointed by the Minister of Foreign Affairs on the Constitution and the EEA Agreement, 6 July 1992. It is under Annex I, þskj. 30, 29. mál. Available on Althingi's website: https://www.althingi.is/altext/116/s/0030.html

[7] The original Icelandic text reads: „Í 3. gr. lagafrumvarpsins um EES, sem lagt hefur verið fyrir Alþingi, segir: „Skýra skal lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja." Með þessu er þeirri skyldu fullnægt, sem bókun 35 leggur samningsaðilum á herðar. Skyldan felur í sér að íslensk lög beri að skýra til samræmis við þjóðréttarreglur, eftir því sem unnt er, á grundvelli lögskýringarreglna íslensks réttar. Við teljum því, samkvæmt því sem nú hefur verið rakið, að ekki felist afsal

21. Partly based on this premise, a constitutional amendment was not needed for Iceland to become a part of the EEA. Concurrently, it was not possible to proceed any further within the framework imposed by the Icelandic Constitution.[8] It should also not be overlooked that by implementing Protocol 35 through a rule which on paper obliges the administration and the courts to interpret the law in accordance with EEA law, Iceland's accession to the EEA was politically made much easier. One may even say that without the solution presented in Article 3 of the EEA Act, Iceland would have had difficulties accepting the EEA Agreement. This constitutional and political sensitivity must be kept in mind when Article 3 of the EEA Act is reviewed.

22. As the Authority refers to in its reasoned opinion (para 36), the issue of hierarchic placing of EEA law in the Icelandic legal system was addressed in the preparatory works (explanatory notes) to the EEA Act. Here, the Government highlights that explanatory notes that accompany Icelandic legal acts have a significant weight as recognised instruments when interpretating provisions of Icelandic laws and they are frequently of high value for judicial interpretation. In the preparatory works of the EEA Act, it is stated that Article 3 of the EEA Act entails, *inter aila*, that implemented EEA rules would be considered a special provision in relation to incompatible subsequent legislation in order to consider them as remaining in force in cases of possible conflict, unless the legislator specifically says otherwise. This was found to be necessary to ensure a uniform interpretation of the provision of the EEA Agreement. It is also emphasized in the preparatory works that Article 3 of the EEA Act does not encompass transfer of legislative power.[9] In its reasoned opinion the Authority does, however, not mention a later paragraph in the same preparatory document, which in English reads as:

> "The words "in so far as appropriate" limit the explanatory rule of the Article in two ways. On the one hand, the explanatory rule only applies to laws that may be in contravention to the EEA Agreement. On the other hand, it is reiterated that the rule is limited by the Constitution, i.e., Althingi must not restrict itself regarding future legislation"(emphasis added.)[10]

lagasetningarvalds í bókuninni og að 3. gr. lagafrumvarpsins fullnægi samningsskyldum samkvæmt henni. Ef lagasetning verður hins vegar ekki í samræmi við skuldbindingar samkvæmt samningnum getur það kallað á viðbrögð samkvæmt honum." *See* the Report of the Committee appointed by the Minister of Foreign Affairs on the Constitution and the EEA Agreement, 6 July 1992. It is under Annex I, þskj. 30, 29. mál. Available on Althingi´s website: https://www.althingi.is/altext/116/s/0030.html

[8] *See* Markús Sigurbjörnsson: 'To Refer or Not to Refer?', EFTA Court (ed), The EEA and The EFTA Court: Decentred Integration (Hart Publishing Limited 2014), p. 102-103.

[9] The original text reads: „*Í 3. gr. felst m.a. að innlend lög sem eiga stoð í EES-samningnum verði jafnan túlkuð sem sérreglur laga gagnvart ósamræmanlegum yngri lögum, að því leyti að yngri lög víki þeim ekki ef þau stangast á, nema löggjafinn taki það sérstaklega fram. Þetta er nauðsynlegt til þess að tryggja samræmi í reglunum á Evrópska efnahagssvæðinu. Í bókun 35 er og skýrt tekið fram að þessi skýringarregla skuli ekki hafa í för með sér framsal á löggjafarvaldi og er 3. gr. við það miðuð.*" As translated in English: "Article 3 entails, inter alia, that national laws that are based on the EEA Agreement shall as a rule be interpreted as special provisions in relation to incompatible subsequent legislation, so that, in the event of possible conflict, the more recent laws shall not prevail over them, unless the legislator specifically states otherwise. This is necessary to ensure consistency in the rules throughout the European Economic Area. Protocol 35 also states clearly that this explanatory rule shall not encompass a transfer of legislative power and Article 3 is based on this principle."
See Frumvarp til laga um Evrópska efnahagssvæðið, available here: https://www.althingi.is/altext/116/s/0001.html

[10] The original text reads: *Orðin „að svo miklu leyti sem við á" takmarka skýringarreglu greinarinnar með tvennum hætti. Annars vegar tekur skýringarreglan aðeins til laga sem kunna að fara í bága við EES-samninginn. Hins vegar er hnykkt á að hún takmarkast af stjórnarskrá, þ.e. Alþingi getur ekki bundið sjálft sig varðandi framtíðarlagasetningu." See* Frumvarp til laga um Evrópska efnahagssvæðið,
available here: https://www.althingi.is/altext/116/s/0001.html

23. This refers to the fact that the Icelandic Constitution does not envisage the problem of conflict among provisions of ordinary legislation to be solved by other means than the application of recognised principles of legal interpretation and does not concede to the legislator a power or margin for giving specific ordinary statute once and for all a status of priority over other ordinary laws.[11]

3.2.3. A more decisive statute would not change the hierarchy of norms

24. In previous correspondence with the Authority on this matter, the Ministry of Foreign Affairs has on behalf of the Government, reiterated its commitment to proposing to the Parliament amendments to the Icelandic EEA Act to ensure that it fully reflects the obligations undertaken by Iceland under the EEA Agreement, if provided necessary.[12] Potential solutions could be to amend Article 3 of the EEA Act so that the provision reflects more decisively the content of the preparatory works discussed above, or to adopt a provision more akin to Article 2 of EØS-Loven in Norway.

25. However, even if the Icelandic Parliament would enact a more decisive statute to the effect that implemented EEA rules prevail, like Article 2 of EØS-Loven in Norway, it would not guarantee a change in the hierarchy of norms. The fact is that implemented EEA rules would nevertheless have the same status as national legislation. This is simply because the Icelandic Parliament does not have the power to enact a provision which takes effect to override any future enactment, since such a rule would impose restriction on the Parliament's power of law making.[13]

26. The Government points out that hierarchic placing of statutes under the Icelandic constitutional framework is comparable to that of Norway. In practice later statutory provisions could still prevail in Norway, despite of Article 2 of EØS-Loven, because of the constitutional principles of *lex superior derogate legi inferiori* and *lex posterior derogate legi priori*. Accordingly, the Norwegian solution does not ensure the application of EEA obligation in face of an express and subsequent contrary national legislation.[14] Nevertheless, the Authority seems to consider the implementation of the EEA primacy principle in Norway to be sufficient. This follows from the fact that to date no infringement proceedings have been initiated against Norway. Thus, questions arise as to why the Authority has decided to solely focus on Iceland in this respect.

3.2.4. The Authority cannot require a constitutional amendment

27. Under the negotiations of the EEA Agreement the EC recognised that Protocol 35 was only significant in that it imposed the duty of enacting ordinary legislation on the matter there covered. It did for example not prejudice the right of the national legislature to later enact

[11] *See* Markús Sigurbjörnsson: 'To Refer or Not to Refer?', EFTA Court (ed), The EEA and The EFTA Court: Decentred Integration (Hart Publishing Limited 2014), p. 102-103.
[12] *See e.g.* Letters of the Ministry of Foreign Affairs to the EFTA Surveillance Authority on 18 December 2018 and 21 April 2020.
[13] *See* Markús Sigurbjörnsson: 'To Refer or Not to Refer?', EFTA Court (ed), The EEA and The EFTA Court: Decentred Integration (Hart Publishing Limited 2014), p. 103.
[14] *See* Henrik Bull (1994) „The EEA Agreement and Norwegian Law", European Business Law Review, No. 12, pp. 291-296. *See also* Ólafur Ísberg Hannesson: „Part II: Giving effect to EEA law – the role of the Icelandic national courts and the EFTA Court in the European Judicial Dialogue". *The Authority of European law: Exploring primacy of EU law and effect of EEA law from European and Icelandic perspectives* (Bókaútgáfan Codex 2012), p. 172.

legislation providing otherwise than prescribed in the sole article.[15] Consequently, the EFTA States were in their right to implement Protocol 35 EEA in the manner envisaged by their constitutional laws. A different conclusion would have meant a transfer of legislative power that is not envisaged in Protocol 35.[16]

28. The Government posits that it falls outside of the mandate of the Authority to initiate infringement proceedings against Iceland on this matter. According to Article 5(1)(a) of the Surveillance and Court Agreement, the Authority shall ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement. It follows from the above considerations that the only way to alter the legal situation in Iceland, regarding the implementation of Protocol 35, is to amend the Icelandic Constitution. In other words, the question of how EEA obligations are to be ranked in competition with other legislative acts primarily exists as a matter of national constitutional law.

29. As stated in previous correspondence with the Authority, a working group on the EEA Cooperation that the Ministry of Foreign Affairs established in 2018 to analyse the arguments put forward by the Authority in its letter of formal notice of 13 December 2017, referred especially to these constitutional disputes in its concluding remarks, namely:

> "Constitutional disputes relating to the EEA membership need to be brought to a conclusion, either by recognising that the membership has achieved a constitutional status like other unwritten constitutional rules or by inserting a provision on the membership in the Constitution."

30. The Government emphasizes that this constitutional dispute needs to be solved domestically. The EEA Agreement, the Surveillance and Court Agreement, or other recognized instruments of EEA or international law, do not encompass the Authority or the EFTA Court with a mandate to require a constitutional amendment in Iceland or the other EFTA States.

3.3. Existing uncertainty concerning the priority of national constitutions *vis-á-vis* EU and EEA law

31. Even if a consensus would be reached in Iceland to amend the Constitution in order to give implemented EEA Acts once and for all a status of priority over other ordinary laws, it is premature to table such amendment due to uncertainty concerning the priority of national constitutions *vis-á-vis* EU and EEA law. For the same reason it would be ill advised by the Authority to continue its infringement proceedings against Iceland in the case at hand.

32. From the perspective of EU law, it must be noted, that while the primacy of EU law is generally considered to be fundamental to the EU´s legal order, it has also been met with resistance within the Union and even defiance. This is especially true when it comes to issues related to national constitutions of the Member States.[17] Although the ECJ has never explicitly renounced the absolute primacy of EU law, it has nevertheless granted EU Member State´s courts flexibility in the application of EU law, changed its own

[15] *See* Henrik Bull: "EØS-avtalen, litt om avtalens struktur og om principperne for gjennomføring i norsk rett". Lov og Rett (1992), pp. 600-601

[16] *See* Stefán Már Stefánsson: *The EEA Agreement and its adoption into Icelandic law*. Oslo (1997), p. 37.

[17] *See e.g.* Danish Supreme Court, Case 15/2014, UfR 2017.824H, 6 Dec 2016 (*Ajos*).

jurisprudence to consider serious concerns of Member States′ apex courts and accommodated domestic fundamental values.[18]

33. To this day, the jurisprudence of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht - BVerfG*) has proven to be the central reference point regarding Member States′ resistance against the idea of an absolute primacy of EU law. Therefore, it is vital to consider the consequences of *Weiss*-judgment of the Federal Constitutional Court of Germany, which the Government has referred to in its previous correspondence with the Authority. Although the ruling concerns several issues unrelated to the implementation of Protocol 35, there is nevertheless an underlying issue concerning the priority of national constitutions *vis-á-vis* EU/EEA law.

34. On 5 May 2020, the Second Senate of the Federal Constitutional Court in *Weiss* (2 BvR 859/15) declared both the ECJ's Weiss judgment (C-493/17) and several decisions of the European Central Bank (ECB) on the 2015 Public Sector Purchase Programme ("PSPP") *ultra vires* and inapplicable in Germany.[19] Legally, the ruling did not affect the validity of the ECJ's judgment, and it did not overturn the ECB's decisions. Formally, the judgment was addressed to the Federal Government and the German Bundestag as well as (indirectly) to the Deutsche Bundesbank. The latter was ordered, subject to a grace period of three months, to not participate in the PSPP anymore and to wind down purchases made in the past, unless by that time "the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the PSPP are not disproportionate to the economic and fiscal policy effects resulting from the programme".[20]

35. As was to be expected, the ECB took the view that it would abide by ECJ's judgment, arguing that it is only accountable to the European Parliament and subject to the jurisdiction of the ECJ. It therefore refused to adopt a new decision with regard to the PSPP, but it took steps to demonstrate the proportionate character of the PSPP by disclosing relevant documents, in particular to the Federal Government, which may share them with the *Bundestag*. The President of the *Bundesbank* played a mediatory role. It thus appears that the ECB has formally held on to its position but has made it clear that it "is now using a reinforced proportionality-based reasoning in its debates".[21] The *Bundesbank* was allowed to continue its participation in the PSPP and in late June, the *Bundestag*, the Federal Government and the *Bundesbank* found that the requirements of the Federal Constitutional Court's ruling were met.

36. Still, because the Federal Constitutional Court claimed that a new decision must be taken by the ECB, the matter remains in limbo. In other words, it cannot be said that the conflict has been resolved. The plaintiff in the first *Weiss* case is preparing a renewed action before

---

[18] *See* Niels Petersen and Konstantin Chatziathanasiou: „Primacy′s Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law", the European Parliament (2021), available here:
https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf

[19] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237, http://www.bverfg.de/e/rs20200505_2bvr085915en.html

[20] *See also Dolores Utrilla*, "Insight: 'Three months after *Weiss: Was nun*?'", EU Law Live, article of 5 August 2020, available here: https://eulawlive.com/three-months-after-weiss-was-nun/

[21] *Dolores Utrilla*, loc. cit.

the Federal Constitutional Court.[22] Nevertheless, the precedent of the judgment of 5 May 2020 continues to exist under German law.

37. In a recent paper, commissioned by the European Parliament, on the legal consequences of the *Weiss*-judgment of the Federal Constitutional Court, it is recommended that the Authority´s sister authority—the European Commission—should initiate infringement proceedings against Germany to "make the violation of EU law salient and put indirect pressure on the Federal Constitutional Court to end its unlawful conduct."[23] However, to the Government's knowledge, the European Commission—has not initiated infringement proceedings against Germany.

38. It is not only the German *Weiss*-judgment that has created uncertainty concerning the priority of national constitutions *vis-á-vis* EU law and the constitutional identity of EU member states. Even more important, in this regard, is a recent decision by the French administrative supreme court (*Conseil d'État*) of 21 April 2021.[24] The case regards the power of the French Government to mandate the collection of personal connection data to internet providers and telecommunication operators in violation of EU's e-privacy directive. The ECJ had previously considered that this practice was not only violating the directive but also violating the EU's Charter of Fundamental Rights,[25] which has the same legal status as the EU treaties. Despite the ECJ´s ruling, the decision of the *Conseil d'État* will allow the French Government to continue its surveillance program, objecting to the ECJ´s ruling on constitutional grounds. The *Conseil d'État* recalls that the French Constitution remains the supreme norm within the French national legal system and, consequently, it must ensure that the application of EU law, as specified by the ECJ, does not in practice jeopardize French constitutional requirements which are not guaranteed in an equivalent manner by EU law. Given the stakes at hand the potential interference by the European Commission could be key. Now however, the Commission has not implied whether it will trigger an infringement proceeding against France.

3.3.1. Implications regarding the infringement procedures against Iceland

39. The lack of interference by the European Commission against Germany and France for violating the EU principles of *direct effect* and *primacy* is of a significant relevance to the present case. As the implications of these judgments for the principle of primacy remains to be solved within the EU-pillar, the Authority should refrain from any infringement proceedings against Iceland on the implementation of Protocol 35.

40. Here, it must be noted that the Authority has a duty to cooperate with the European Commission to pursue the general aim of homogeneity in interpretation and application of EEA law. This includes a duty to exchange information and consult on specific cases,

---

[22] *See Freiburger Professor will Europäischer Zentralbank klare Grenzen setzen, Badische Zeitung*, article of 5 August 2020, available here: https://www.badische-zeitung.de/nachrichten/wirtschaft/der-ezb-die-grenzen-aufzeigen--190657709.html

[23] Niels Petersen and Konstantin Chatziathanasiou: „Primacy´s Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law", the European Parliament (2021), p. 10, available here: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf

[24] The decision of the *Conseil d'État* of 21 April 2021 is available here: https://www.conseil-etat.fr/actualites/actualites/donnees-de-connexion-le-conseil-d-etat-concilie-le-respect-du-droit-de-l-union-europeenne-et-l-efficacite-de-la-lutte-contre-le-terrorisme-et-la

[25] *See* Joined Cases of the CJEU C-511/18, C-512/18 and C-520/18 of 6 October 2020.

surveillance policy etc. This is stipulated in various provisions of the EEA Agreement, most prominently under Article 109(2) of the Agreement.[26] It is also reaffirmed in Article 5(2)(c) of the Surveillance and Court Agreement.[27] The Government posits that this duty to cooperate with the commission includes *inter alia* that the actions of the Authority must be consistent and proportional to the actions of the Commission.

41. It must also be kept in mind that according to the case law of the EFTA Court, the EEA Agreement is a *sui generis* international treaty that has created a distinct legal order of its own. The EFTA Court has noted:

> "The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law."[28]

42. The less extensive depth of integration is expressed, *inter alia*, in the fact that the EU law principles of *direct effect* and *primacy* have not been incorporated into EEA law. In other words, the primacy of EEA rules as stipulated in the Sole Article of Protocol 35 is "less far-reaching" than the said principles of EU law.

43. Since the European Commission has not decided to initiate infringement proceedings against Germany or France, the Government posits that the Authority cannot proceed with its infringement proceedings against Iceland in the present case. Such an interference would be incompatible with the Authority´s duty to ensure homogeneity as well as inconsistent and disproportional in the light of the less extensive depth of integration under the EEA Agreement.

3.4. The Authority did not object to the implementation of Protocol 35 EEA in Iceland for more than two decades

3.4.1. General

44. As stated above, the EFTA States were in their right to implement Protocol 35 EEA in the manner envisaged by their constitutional laws. In Iceland this resulted in Article 3 of the Icelandic EEA Act. The Authority had no objections to this solution, or the regime created by the provision for almost a quarter of a century. Moreover, no Contracting Party to the EEA Agreement has objected the implementation of Protocol 35 in Iceland. Thus, the Government contends that the Authority has accepted the regime and is therefore precluded from claiming that Iceland has not sufficiently implemented Protocol 35 EEA. There are multiple legal bases that support the Government's position. The main ones will briefly be dealt with in the following.

---

[26] Article 109(2) of the EEA Agreement reads: „In order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases."

[27] Article 5(2)(c) of the Surveillance and Court Agreement reads: [To this end, the EFTA Surveillance Authority shall:] (c) carry out cooperation, exchange of information and consultations with the Commission of the European Communities as provided for in this Agreement and the EEA Agreement;

[28] Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, [1998] EFTA Ct. Rep. 95, paragraph 59.

3.4.2. *Forfeiture*

45. The institute of forfeiture, a manifestation of *venire contra factum proprium* (contradictory conduct), was developed in private law. According to European case law, the maxim *nemo potest venire contra factum proprium*, also known as *venire contra factum proprium non valet* means that a person may not dispute what he has previously accepted.[29] A party that has not voluntarily raised a right to which it believes to be entitled under the law for a certain time is precluded from asserting that right against another party.

46. Forfeiture has found its way from civil jurisprudence into administrative law. In academic literature, it was said that even if one speaks of the application of a general legal principle or the like, the adoption of forfeiture in administrative law is to be understood as an analogy to judicial rules of private law.[30]

47. In European administrative law, forfeiture is related to the *principle of protection of legitimate expectations*, which in turn is a consequence of the *principle of good faith*. Here, too, forfeiture is a sub-case of *venire contra factum proprium*. In this respect, reference should, for example, be made to the case law of the German Federal Administrative Court.[31] Furthermore, the ECJ has recognised the protection of legitimate expectations as a legal principle of EU law. It is closely linked to the principle of legal certainty.[32]

48. The question thus arises whether the passivity of the Authority has triggered legitimate expectations in Iceland. There are two prerequisites for this: From an objective point of view, the granting of legitimate expectations depends on two conditions: Objectively, the protection of legitimate expectations depends on the conduct of a Community institution that gives rise to trust. This is presently given by the non-activity of the Authority, as the Government could infer from ESA's inactivity a (tacit) approval of Icelandic law. Subjectively, the trust must also be recognisable to an outsider. This means that Iceland must not itself have acted in a manner that precludes reliance. This condition is also fulfilled. Iceland has never acted that way. Finally, the subsequent disappointment of the alleged trust through the impairment of the acquired legal position must not have been foreseeable for the person concerned. In the Government's view, this is also to be assumed.[33]

49. The Government posits that after almost a quarter of a century, Iceland is entitled to have and invoke legitimate expectations. In this regard, it is not only irrelevant that the manner of implementation of Protocol 35 EEA has in the past given rise to discussion. Precisely because there has been a continuous discourse on this, and the Authority has nevertheless

---

[29] Case T-435/17 *Grendene, SA v EUIPO*, EU:T:2018:596, paragraph 33, and case law cited: judgments of 22 April 2016, *Ireland and Aughinish Alumina* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraph 192, and of 6 April 2017, *Regione autonoma della Sardegna* v *Commission*, T-219/14, EU:T:2017:266, paragraph 63; *see also*, to that effect, order of 13 February 2014, *Marszałkowski* v *OHIM*, C-177/13 P, not published, EU:C:2014:183, paragraph 73.

[30] Heinrich de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht* (The Applicability of Private Law Provisions in Administrative Law), Habilitation Thesis Erlangen-Nuremberg, Tübingen 1999, 248.

[31] *See e.g.,* the judgment of 27 January 2010 - 7 A 8.09, available here: https://datenbank.nwb.de/Dokument/Anzeigen/361135/

[32] *See e.g.,* Jürgen Schwarze, *Europäisches Verwaltungsrecht* (European Administrative Law), 2. Auflage, Baden-Baden 2005, 921; Thomas von Danwitz, Europäisches Verwaltungsrecht (European Administrative Law), Heidelberg 2008, 218.

[33] Schwarze, loc. cit, 922 et seq. and case law cited.

chosen to remain inactive over such a prolonged period, the Authority must be held to its passivity all the more.

3.4.3. Abuse of rights

50. The ECJ has developed the *prohibition of abuse of rights* and the EFTA Court has transposed it into EEA law.[34] The prohibition concerns the question of whether an interpretation or application of law based on a formally existing right should be corrected with recourse to standards such as good faith, morality, justice, or purposiveness. The prohibition of abuse of rights applies in private law and in public law. *Venire contra factum proprium* (contradictory conduct) is a case of abuse of rights.

51. The Academic Office of the German Parliament, *Bundestag,* has rightly stated that among the general principles of law applicable in international law as well as in national legal orders is the notion that a claim may become abusive due to the passage of time.[35] The Government posits that same must apply in EU and EEA law.

3.4.4. Acquiescence and Estoppel

52. In international law, the notion of acquiescence – from the Latin *quiescere* (to be still) – describes a tacit conduct that legally binds an actor even without his or her express will.[36] The concept contains basic elements of unopposed acceptance and a non-negligible time lapse.[37] Acquiescence is a general principle of international law and in European law, it has a firm place in trademark law.[38] From the perspective of homogeneity, there can be no doubt that this principle must also apply in EEA law. And it is equally clear that its scope of application cannot be limited to IP law.

53. The Government furthermore underlines that the principle of acquiescence overlaps with the prohibition of abuse of rights.[39]

54. According to the principle of estoppel, a state must allow its actions or omissions to be held against it. The notion that a contradiction between past and present conduct cannot be afforded legal protection originates from Anglo-Saxon law and international law.[40] Estoppel

---

[34] *See* Cases E-15/11 *Arcade Drilling AS v Staten v/Skatt Vest*, [2012] EFTA Ct. Rep. 676, paragraphs 87 et seqq.; E-3/13 and E-20/13 *Fred. Olsen and Others v the Norwegian State*, [2014] EFTA Ct. Rep. 400, paragraph 49; E-15/16 *Yara International ASA v the Norwegian Government*, [2017] EFTA Ct. Rep. 434, paragraph 49. *See also* Páll Hreinsson, „General Principles“, in The Handbook of EEA Law, 2016, 349 et seqq., 379 et seqq.

[35] *See Deutscher Bundestag, Zu den völkerrechtlichen Grundlagen und Grenzen kriegsbedingter Reparationen unter besonderer Berücksichtigung des griechisch-deutschen Verhältnisses*, 2016, WD 2 - 3000 - 041/13, available here: https://www.bundestag.de/resource/blob/415628/b9c2381f1dd0065ac01ccba2ce1f3261/WD-2-041-13-pdf-data.pdf

[36] Nuno Sérgio Marques Antunes, Acquiescence, Max Planck Encyclopedia of Public International Law, 2006.

[37] *See* HLS Pilac, Part II – „What We Mean By Silence“, available here: https://pilac.law.harvard.edu/quantum-of-silence-paper-and-annex//part-ii-what-we-mean-by-silence#:~:text=What%20We%20Mean%20By%20Silence,-In%20international%20law&text=As%20noted%20in%20the%20introduction%2C%20by%20%E2%80%9Csilence%E2%80%9D%20we%20mean,communication%20of%20a%20legal%20position.

[38] *See e.g.* Fredrik Öhrström, Acquiescence and Laches as Defence to Infringement Claims in Swedish Patent Law, Thesis, University of Stockholm, Faculty of Law, 2017, 29 et seq., 38, and case law cited.

[39] Öhrström, loc. cit., 30 et seqq.

[40] *See e.g.,* T. Leigh Anenson, The Triumph of Equity: Equitable Estoppel in Modern Litigation, 27 Rev. Litig. 377 et seqq. (2008).

may be invoked if previous conduct has created a reliance on the part of the partner that is worthy of protection.

55. Estoppel is thus the international law variant of the general prohibition of *venire contra factum proprium.*

56. It has been said that acquiescence is a unilateral act (tacit acceptance which the other party may interpret as consent). Estoppel, on the other hand, would not be a unilateral act. Here, the underlying rationale is said to be preclusion. Estoppel is a tool that prevents the beneficiary from exercising a right that effectively exists.[41]

57. This differentiation is correct in the Government's view. Even of the Authority would in principle have the right to proceed as it has done, it would be precluded from doing so in the present case.

58. Estoppel has been recognised as a general principle by the EU courts, but with a rather narrow scope. Reference may be made to Case T-471/11 *Éditions Odile Jacob SAS v Commission*, where the General Court held at paragraph 52:

> "Lastly, and in any event, in Union law the principle of estoppel, on which Lagardère relies, merely refers to the fact that it is not possible for a party to contest before the appellate court a factual or procedural element recognised before the court of first instance and included in the record of the hearing before that court (*Nijs* v *Court of Auditors*, C-495/06 P, ECR-SC, EU:C:2007:644, paragraphs 52 to 56, and *Kronoply* v *Commission*, C-117/09 P, EU:C:2010:370, paragraph 44)."[42]

59. In the Government's view, this is not a compelling reason not to rely on the basic idea of estoppel together with the other principles in question in the present case. It has been rightly observed that in international law, the principle of estoppel (as the principle of acquiescence) has "rarely formed the basis of a judgment alone".[43]*Common Basis: Good Faith*

60. The common basis of all these correction mechanisms—forfeiture, legitimate expectations, abuse of rights, acquiescence, estoppel—is the *principle of good faith*, which is codified in Article 3 EEA Agreement and which also binds the Authority. That the Authority must act in good faith is a general principle of EEA law. On this point, reference may be made to the debate concerning ESA's sister authority, the European Commission, in the context of the Brexit negotiations.[44]

3.4.5. *Conclusion*

61. It follows from the above considerations that the Authorities infringement action is time bared and therefore precluded.

[41] Andreas Kulick, About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Tribunals, EJIL 2016, 107 et seqq., with reference to case law of the ICJ.
[42] EU:T:2014:739.
[43] Nathalie Holvik, Silence is consent. Acquiescence and Estoppel in International Law, VT 2018, RV102A Rättsvetenskaplig magisterkurs med examensarbete, 15 högskolepoäng, 26.
[44] Oliver Garner: „True (Bad) Faith 2020? Part One: The Commission Infringement Action against the United Kingdom for breach of the Withdrawal Agreement". Available here: https://europeanlawblog.eu/2020/10/08/true-bad-faith-2020-part-one-the-commission-infringement-action-against-the-united-kingdom-for-breach-of-the-withdrawal-agreement/

3.5. The Authority's assessment of Icelandic case law goes too far

62. Surely, the Authority has implied that the insufficiency of Article 3 of the EEA Act did not become apparent until the Icelandic Supreme Court issued its judgments in the cases referred to in the reasoned opinion. However, the Government considers that the Authority draws too broad conclusions from these judgments and that it fails to acknowledge a fundamental aspect of Icelandic procedural law and jurisprudence.

63. As the Authority rightly observes in its reasoned opinion (paragraph 77), the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts. In its reasoned opinion the Authority concludes that Article 3 of the EEA Act as interpreted by the Supreme Court of Iceland does not adequately implement the sole Article of Protocol 35, as it does not ensure that unconditional and sufficiently precise implemented EEA law prevails over conflicting national provisions. This assessment of Icelandic case law is in fact the main premise of the Authority's assertion of the insufficient implementation of Protocol 35 EEA in Iceland.

64. The Government posits, on the other hand, that it is impossible to draw clear and unambiguous conclusions from the case law of the Supreme Court to the effect that Iceland has failed to fulfil its obligations under the EEA Agreement.

65. Firstly, the Authority appears to underestimate the fact that the Icelandic Supreme Court concluded in the *Case No 477/2002, Hörður Einarsson v the Icelandic State*, of 15 May 2003 that implemented EEA rules should prevail over another national provision. Although the *lex posterior* doctrine could certainly have been applied to reach the same conclusion, as the Authority points out, it can also be argued that the Supreme Court demonstrated that it is capable of interpreting Article 3 of the EEA more in line with the preparatory works that accompanied the EEA Act.

66. Secondly, the Authority's summary of case law seems to be limited. It does, for example, not mention *Supreme Court Case No 11/2000, Akureyrarbær v kærunefnd jafnréttismála vegna Ragnhildar Vigfúsdóttur,* of 31 May 2000, *Case No 437/2008, Flugstoðir ohf. gegn Hlimari Friðriki Foss*, of 6 May 2009 nor *Case No 38/2019 Kjörís ehf. gegn Emmessís ehf.* of 27 November 2019. In these cases the Supreme Court applied Article 3 of the EEA Act to give judicial effect to EEA law and prove the content of domestic law. Accordingly, the Supreme Court has applied Article 3 of the EEA Act to a greater extent than presupposed in the preparatory works of the EEA Act. This fact needs to be taken into consideration and more judgments must be scrutinized.

67. Thirdly, it seems that the Authority does not consider the fact that Icelandic courts are restricted by how parties present their case before court. It is a longstanding principle of Icelandic civil procedure that the parties to a court case have a full custody of their cause of action, and this includes, *inter alia*, which claims are made, what reasons are put forward in support for the claims and what the court is supposed to decide on. This principle is called *"málsforræðisreglan"* in Icelandic. Due to the principle, Icelandic courts do not have a discretion to go outside the scope of the case as presented by the parties. This applies to the lower courts as well as to the Supreme Court. As the Authority's assessment does not examine how the parties of each case presented their claims or how Article 3 of the EEA Act or Article 3 of the EEA Agreement were substantiated, conclusions will hardly be drawn from these judgments.

68. Finally, the Authority appears to consider Icelandic case law as static but does not consider its continuous evolvement. Even if the interpretation of the Icelandic Supreme Court would be an embodiment of Iceland´s flawed implementation of Protocol 35 EEA, as the Authority suggests, it is not impossible that the Supreme Court simply evolves its interpretation over time and with a change in the composition of the court. Thus, an interference by the Parliament or a constitutional amendment would not be necessary. Here, it must be noted that the composition of the Supreme Court has indeed changed significantly during the last few years. Moreover, a new court level was introduced in Iceland on 1 January 2018, replacing the former two tiers with a three-tier system. The new Court of Appeal (Landsréttur) is a court of second instance, situated between the district courts and the Supreme Court. The introduction of the Court of Appeal was part of a major restructuring of the Icelandic justice system. These changes to the judicial system have reinforce the role of the Supreme Court of Iceland in setting precedents in jurisprudence. It should also be noted that the Supreme Court has not issued a judgment regarding a conflict between an EEA rule, implemented into Icelandic law, and other statutory provision of national law since this restructuring of the system took effect.

3.6. Inconsistency of the Authority's Modus Operandi

69. If the Authority decides to proceed with the infringement proceedings against Iceland, despite the above considerations, the Government considers such intervention to be inadvisable and contrary to general principles of EEA and international law.

3.6.1. Introduction

70. General principles of EU law are unwritten maxims that are based on the constitutional traditions common to the Member States insofar as they fit in with the structure and objectives of the Union.[45] Several such maxims have been codified over time, but others remain uncodified. According to recognised literature on this subject the *general principles of EU law* are the following:[46] Equality, proportionality, legal certainty, protection of legitimate expectations, right to judicial protection, rights of the defence, transparency and access to documents, abuse of rights, effective remedies in national courts and principles governing liability in damages. Originally, EU fundamental rights were also uncodified general principles but now they are laid down in the EU Charter of Fundamental Rights.

71. The EFTA Court has, for its part, recognised *general principles of EEA law*. They were in most cases deduced from EU law. But there are also genuine principles of EEA law, such as homogeneity and reciprocity.

---

[45] Case 4-73, *J. Nold, Kohlen- und Baustoffgrosshandlung v Commission*, EU:C:1974:51.

[46] *See e.g.* Makis Tridimas: *General Principles of EU Law*, 3rd ed., 2017.

72. In particular, the EFTA Court has recognized the principles of state liability[47], legal certainty[48], proportionality[49], prohibition of abuse of rights[50], protection of legitimate expectations[51], good administration[52], effectiveness and equivalence[53] as well as the precautionary principle[54]. The principles of loyalty[55] and equivalence are both written and unwritten.

73. As discussed above, the principles of direct effect and primacy are not part of EEA law. On the other hand, state liability is a principle of EEA law. It was recognised by the EFTA Court in Case E-7/97 *Erla María Sveinbjörnsdóttir v Government of Iceland* and accepted by the Supreme Courts of all EEA/EFTA States. The EFTA Court has, moreover, acknowledged the existence of EEA fundamental rights, such as the right to freedom of expression[56], the right to a fair hearing within reasonable time[57], the right to family life[58] and the negative freedom of coalition.[59]

3.6.2. The principle of consistency in EU law

74. Article 7 of the Treaty on the Functioning of the European Union ("TFEU"), which was inserted by the 2007 Lisbon Treaty, reads as follows:

> "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

75. Consistency means contradiction-freeness, stability, harmony.[60] It is recognised in academic literature that the principle of consistency (*i.e.*, according to the view held here, contradiction-free decision-making) is a general instruction for good, which itself is a horizontal general principle of Union law.[61]

---

[47] Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, [1998] EFTA Ct. Rep. 95, paragraphs 60 et seqq.

[48] Case E-1/04 *Fokus Bank* ASA v The Norwegian State, [2004] EFTA Ct. Rep. 11, paragraph 37; Case E-9/11 EFTA Surveillance Authority v Norway (*Regulated Markets*), [2012] EFTA Ct. Rep. 442, paragraph 99.

[49] Case E-2/06 EFTA Surveillance Authority v Norway, [2007] EFTA Ct. Rep. 164, paragraphs 82 et seqq.

[50] See Cases E-15/11 *Arcade Drilling AS v Staten v/Skatt Vest*, [2012] EFTA Ct. Rep. 676, paragraphs 87 et seqq.; E-3/13 and E-20/13 *Fred. Olsen and Others v the Norwegian State*, [2014] EFTA Ct. Rep. 400, paragraph 49; E-15/16 *Yara International ASA v the Norwegian Government*, [2017] EFTA Ct. Rep. 434, paragraph 49.

[51] *See e.g.*, Joined Cases E-17/10 and E-6/11 *VTM Fundmanagement AG v EFTA Surveillance Authority*, [2012] EFTA Ct. Rep 114, paragraphs 134 et seqq.

[52] Joined Cases E-10/11 and E-11/11, *Hurtigruten and Norway v. ESA*, [2012] EFTA Ct. Rep 758, paragraphs 305 et seqq.

[53] Case E-2/10 *Þór Kolbeinsson v the Icelandic State*, [2009-2010] EFTA Ct. Rep. 234, paragraphs 46 to 49.

[54] Cases E-3/00 *EFTA Surveillance Authority v Norway (Kellogg's)*, [2000-2001] EFTA Ct. Rep. 73, paragraphs 25 et seqq.; Pedicel, loc. cit., paragraphs 59 et seqq.

[55] Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf.*, [2012] EFTA Ct. Rep. 592, paragraph 58.

[56] Case E-8/97 *TV 1000 Sverige AB v The Norwegian Government represented by the Royal Ministry of Cultural Affairs*, [1998] EFTA Ct. Rep. 68.

[57] Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, [2012] EFTA Ct. Rep. 246.

[58] Case E-4/11 *Arnulf Clauder*, [2011] EFTA Ct. Rep. 216, paragraph 35; E-28/15 *Yankuba Jabbi v The Norwegian Government*, [2016] EFTA Ct. Rep. 575, paragraph 81.

[59] Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*, [2016] EFTA Ct. Rep. 240, paragraph 123.

[60] The French version of the provision speaks of "*cohérence*", the German version of "*Kohärenz*". The term "*coherence*" also exists in English. One may assume that consistency and coherence are synonyms.

[61] *Angelos Dimopoulos*, EU Foreign Investment Law, 2011, 4.1.3.1.; *Eberhard Schmidt-Assmann*, Kohärenz und Konsistenz des Verwaltungsrechtsschutzes, Tübingen 2015, 92.

76. The principle of consistency even applies to the European courts.[62] It must therefore also be relevant for the actions of an institution such as the Authority.

77. The Government believes that the principle of consistency already existed before its explicit codification in Article 7 TFEU.[63] Without consistency, no legal order, whether national or international can function. Article 7 TFEU, thus, merely expressed a matter of course. In fact, the ECJ has from the outset emphasised the importance of this maxim.[64]

78. Consistency is of particular significance in the context of the protection of individual rights.[65] The need for coherent interpretation of EU law is one of the rationales of the EU preliminary ruling procedure. This is a matter of course which is usually not discussed.

79. Consistency is furthermore referred to in Articles 256 (2) and (3) and 121 TFEU, and the coherence of the Union legal order is mentioned in Article 349 TFEU. Consistency also has points of intersection and overlap with many other general principles of law, such as: Rule of law[66], loyalty[67], legal certainty[68], prohibition of abuse of rights, efficiency[69], proportionality.[70] Coherence of the system of legal protection established by the Treaty is said to be of particular significance.[71] For the sake of completeness, reference should also be made to Article 10(1) of the "European Code of Good Administrative Behaviour" issued by the European Ombudsman.[72] Under the title *"Legitimate expectations, consistency, and advice"*, the following is, inter alia, stated:

> "The official shall be consistent in his or her own administrative behaviour as well as with the administrative action of the institution."

---

[62] C.N.K. Franklin, The burgeoning principle of consistency in EU law, 30 Yearbook of European Law 42, 52, 59 (2011); Thomas Horsley, Reflections on the role of the Court of Justice as the 'motor' of European integration: legal limits to judicial lawmaking, 50 Common Market Law Review 931, 949–950 (2013); Ester Herlin-Karnell/Theodore Konstadinides, The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration, published online by Cambridge University Press, 27 October 2017.

[63] *Francesca Ippolito/Maria Eugenia Bartoloni/Massimo Condinanzi*, Introduction, in: Francesca Ippolito/Maria Eugenia Bartoloni/Massimo Condinanzi, Ed., The EU and the Proliferation Principles of Integration Principles under the Lisbon Treaty, 2018.

[64] *See* Cases 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452, paragraph 17; C-221/88 *European Coal and Steel Community v Acciaierie e Ferriere Busseni SpA (in liquidation)*, EU:C:1990:84, paragraph 16; C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, EU:C:1991:65, paragraph 18; C-362/14 *Schrems*, EU:C:2015:650, paragraph 62; C-72/15 *The Queen, on the application of: PJSC Rosneft Oil Company, formerly OJSC Rosneft Oil Company v Her Majesty's Treasury, Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, EU:C:2017:236.

[65] Ulrike Schuster, *Das Kohärenzprinzip in der Europäischen Union*, 2016, 155 et seqq.

[66] *Schmidt-Assmann*, loc. cit., 92; *Ilaria Vianello*, The Rule of Law as a Relational Principle Structuring the Union's Action Towards its External Partners, in: Marise Cremona, Ed., Structural Principles in EU External Relations Law, 2018, 228 et seqq.

[67] *Schmidt-Assmann*, loc. cit., 92.

[68] *Schmidt-Assmann*, loc cit., 92.

[69] *Philipp Dahm*, Entwicklungsverwaltungsrecht, 2012, 259 et seqq.; *Schmidt-Assmann*, loc. cit., 92.

[70] *Angelos Dimopoulos*, EU Foreign Investment Law, 2011, 4.1.3.1.

[71] *Schmidt-Assmann*, loc. cit., 93.

[72] The European Code of Good Administrative Behaviour, available here: https://www.ombudsman.europa.eu/en/publication/en/3510

3.6.3. An unwritten principle of consistency in EEA law

80. The Government posits that the principle of consistency must also be deemed to constitute a general principle of EEA law. On one hand, this follows from the principle of homogeneity. On the other hand, the maxim of consistency undoubtedly also exists in the legal systems of the EEA EFTA States. The principle of consistency even underlies the constitutional traditions of all constitutional states. According to the Venice Commission of the Council of Europe, Stability and consistency of law is an element of the rule of law. The Venice Commission emphasises the importance of a consistent application of the law.[73]

81. Having said that, the Government admits that a supervisory body such as the Authority must have broad discretion in formulating its policies and setting its priorities. However, there can be no serious doubt that the decision to open infringement proceedings against Iceland because of alleged non-implementation of Protocol 35 EEA is a fundamental policy decision that is subject to the requirement of consistency.

3.6.4. The principle of good administration

82. The Authority must also act in accordance with the principle of good administration. Here, the Government refers for example to the opinion of Advocate General *Juliane Kokott* in Case C-109/10 P *Solvay v Commission*. In her opinion she stated in connection with the right to access to documents that "in accordance with the principle of good administration, the Commission has an obligation to ensure the file's proper management and safe storage. Proper management of the file includes not least the production of a meaningful index to be used for the purposes of granting access to the file at a later date".[74] The same must apply to the Authority under the principles of homogeneity and reciprocity. The EFTA Court has implicitly recognised this in the *Hurtigruten* cases.[75]

3.7. A comprehensive analysis of the system in the whole EFTA Pillar is needed

83. Under the EEA Agreement, individuals and economic operators must be able to enforce their rights derived from the EEA Agreement. The EFTA Court stated in Case E-10/14 *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden* that the EEA Agreement has created a market by linking the markets of the EEA EFTA States with the single market of the EU. The EFTA Court added:

> "The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies [...] at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices"[76]

---

[73] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Venice, 11-12 March 2016, available here:
https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

[74] Opinion of Advocate General *Juliane Kokott* in Case C-109/10 P *Solvay SA v European Commission*, EU:C:2011:256, paragraph 194.

[75] Joined Cases E-10/11 and E-11/11, *Hurtigruten and Norway v. ESA*, [2012] EFTA Ct. Rep 758, paragraphs 305 et seqq.

[76] Case E-10/14 – *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden* [2014] EFTA Ct. Rep. 1364, paragraph 64.

84. The Government observes that other market actors include workers, consumers, dealers, and investors. Private plaintiffs who defend their subjective rights also contribute to the realisation of the objective legal order. The EFTA Court held in Case E-14/11 *DB Schenker I* in the context of the question whether access to documents in the possession of ESA should be granted to potential follow-on plaintiffs:

> "However, specific policy considerations arise in requests for access to documents as part of follow-on damages cases brought before national courts concerning Articles 53 and 54 EEA. The private enforcement of these provisions ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA [...]. ESA's and the Commission's view that follow-on damages claims in competition law cases only serve the purpose of defending the plaintiff's private interests cannot be maintained. While pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers."[77]

85. This statement is of general significance. The EFTA Court has thereby recognised that a private plaintiff, while pursuing his or her own interests, also acts to the benefit of the overall (EEA) legal order.[78]

86. However, if the question of individual legal protection is in the foreground, the Authority cannot limit itself to an isolated analysis of one element of the system, namely Article 3 of the Icelandic EEA law. The analysis must relate to the whole system of the protection of the rights of individuals and economic operators as it works in practice. Moreover, the analysis cannot be restricted to whether an EFTA State has correctly implemented Protocol 35 EEA on paper. The decisive factor is what has become of this implementation in real life, especially for the citizens and economic operators from both EEA pillars. In this context, the Government also recalls the constitutional sensitivity of Iceland's accession to the EEA, discussed above.

3.8. Iceland has demonstrated loyalty to the EEA Agreement

3.8.1. Introduction

87. Citizens and economic operators can defend their rights under the EEA Agreement in two ways: either by lodging a complaint with the Authority or by bringing an action before a national court and asking for a reference to the EFTA Court. In the present context, the second option is in the focus. The advisory opinion procedure is mainly concerned with two questions: *first*, access to the EFTA Court, and *second*, whether the opinions of the EFTA Court are implemented loyally in the EFTA State concerned.

88. Article 34 of the Surveillance and Court Agreement ("SAC") reads:

> "The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

[77] Case E-14/11 *DB Schenker v EFTA Surveillance Authority*, [2012] EFTA Ct. Rep. 1178, paragraph 132.
[78] *See* from a comparative law perspective *Hannah L. Buxbaum,* The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation, 26 Yale J. Int'l L. (2001).

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law."

89. None of the current EEA EFTA States has made use of the possibility of paragraph 3 of Article 34 SCA[79]. Under Icelandic law, however, a reference decision of a lower court may be appealed.

3.8.2. Icelandic Courts do well in the EFTA Pillar internal comparison

90. The factual numbers show that Icelandic citizens and economic operators have a broad access to the EFTA Court. For example, between 1994 and 2020 the district courts of Iceland made 27 references to the EFTA Court and the Supreme Court of Iceland made 7 references.[80] During the same period, Norwegian district and appeals courts made 67 references and the Supreme Court made 10 references. When evaluating these numbers, it must also be considered that Norway has 15 times more inhabitants than Iceland. The loyalty of Icelandic courts to the EEA Agreement is therefore not less than it is in Norway, irrespective of how Protocol 35 has been implemented in the two states. Moreover, the Liechtenstein lower courts made 26 references to the EFTA Court and the three courts of last resort made 10 references. Liechtenstein has less than 40,000 inhabitants.

91. Between 17 December 2002 and 5 June 2015, the Norwegian Supreme Court did not refer a single case to the EFTA Court. This resulted in the main beneficiaries of the EEA Agreement, citizens, and economic operators, being denied access to the EFTA Court. This attitude of the Supreme Court may also explain the reluctance of lower courts in Norway to refer cases to the EFTA Court.

92. The compilation of the Icelandic case law, which the Authority has made in its reasoned opinion, shows that the rejection of applications for a reference by Icelandic courts to the EFTA Court has always been reasoned. It may be debatable whether the reasoning is convincing in each individual case, but to have a statement of reasons is a value in itself. It is an indispensable element of legal development because it makes a scholarly and political debate and thereby also criticism possible.

93. Furthermore, the Government stresses that it were Icelandic courts that gave the EFTA Court the opportunity to clarify the issues of state liability, primacy and direct effect—which are central to the protection of individuals and economic operators—in the landmark cases of *Sveinbjörnsdóttir*[81], *Einarsson*[82], *Karlsson*[83], and *Kolbeinsson.*[84] Without these

[79] Only Austria made use of this clause; see former EFTA Court Judge *Kurt Herndl, Der EFTA-Gerichtshof und Österreich – ein Beispiel für nützliche Zusammenarbeit?*, Afmælisrit *Þórs Vilhjálmssonar*, 247 et seqq.

[80] *See* Cases E-5/98 *Fagtún ehf v Byggingarnefnd Borgarholtsskóla, Government of Iceland, City of Reykjavík and Municipality of Mosfellsbær*; E-6/07 *HOB vín ehf. v Faxaflóahafnir sf.*; E-17/11 *Aresbank SA v Landsbankinn hf.,Fjármálaráðuneytið and the Icelandic State*; E-15/12 *Jan Anfinn Wahl v the Icelandic State*; E-22/13 *Íslandsbanki hf. v Gunnar V. Engilbertsson*; E-26/13 *The Icelandic State v Atli Gunnarsson*; E-29/15 *Sorpa bs. v The Icelandic Competition Authority (Samkeppniseftirlitið).*

[81] Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*, [1998] EFTA Ct. Rep. 95.

[82] Case E-1/01 *Hörður Einarsson v The Icelandic State*, [2002] EFTA Ct. Rep. 1.

[83] Case E-4/01 *Karl K. Karlsson hf. v The Icelandic State*, [2002] EFTA Ct. Rep. 240.

[84] Case E-2/10 *Þór Kolbeinsson v the Icelandic State*, [2009-2010] EFTA Ct. Rep. 234.

references, the EFTA Court would not have had initially the opportunity to settle crucial questions on the relationship between EEA law and the legal orders of the EFTA States.

3.8.3. Compliance with the EFTA Court's rulings

94. Surprisingly, neither in its Letter of Formal Notice nor in the Reasoned Opinion does the Authority address the second aspect of the protection of individual rights under Article 34 SCA, *i.e.* the extent to which national courts (and legislatures) follow the EFTA Court's advisory opinions. In fact, the purpose of the advisory opinion procedure to ensure homogeneity within the EEA can only be achieved if the EFTA Court's decisions are complied with.

95. It should be noted that pronouncements of the EFTA Court are considered "advisory" according to the letter of Article 34 SCA. Their respect, thus, seems to be voluntary. It is, however, undisputed that a national court refusing to follow the EFTA Court may put its Member State in a situation of infringement of the Agreement.[85] Icelandic legal doctrine therefore concludes that although the EFTA Court's pronouncements under Article 34 SCA are not binding on the national court in the strict sense, they have authority. It was recognised in Iceland that in the discussion about the nature of advisory opinions account must be taken of the duty of loyalty under Article 3 EEA.[86] This is in line with the case law of the EFTA Court.[87]

96. The Government submits that Icelandic courts faithfully implement the advisory opinions of the EFTA Court. It is true that the Supreme Court has taken the position that these decisions are only advisory, so that it must itself check whether they are convincing.[88] In view of the wording of Article 34(1) SCA, there is no objection to this. However, the opinions of the EFTA Court are not only important in theory but also in practice.

3.9. Public interest

97. In European administrative law the protection of legitimate expectations and legal certainty are not absolute. They must be balanced with other principles, in particular with the lawfulness of the administration and the public interest in the enforcement EU law.[89]

98. Against the assertion that the Authority has lost its right of action due to *the passage of time* and a *violation of the principle of consistency*, it could be asserted that the EEA law principle of primacy, as enshrined in Protocol 35, is an indispensable basis of the EEA Agreement

[85] *See* already the later EFTA Court Judge and Justice of the Norwegian Supreme Court *Henrik Bull*, The EEA Agreement and Norwegian Law, E.B.L.Rev. 1994, 291 et seqq.

[86] *Skúli Magnússon,* Efficient Judicial Protection of EEA Rights in the EFTA Pillar – Different Role for the National Judge?, in: EFTA Court., Ed., The EEA and the EFTA Court: Decentered Integration, Hart, Oxford/Portland Oregon 2015, 117 et seqq.; Id., Icelandic Courts, in: Baudenbacher, Ed., The Handbook of EEA Law, Springer, 2016, 277 et seqq.; Id., The Authority of the EFTA Court, in: Baudenbacher, Ed., The Fundamental Principles of EEA Law: EEA-ities, Springer, 2017, 139 et seqq.; *Margrét Einarsdóttir,* Advisory Opinions of the EFTA Court - real effects in the Icelandic legal system, Tímarit lögfræðinga, 2/2012 133 et seqq.

[87] Cases E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf.*, [2012] EFTA Ct. Rep. 592, paragraph 58; E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson*, [2013] EFTA Ct. Rep. 136, paragraph 60.

[88] Supreme Court case 169/1998 *Fagtún ehf. gegn byggingarnefnd Borgarholtsskóla íslenska ríkinu Reykjavíkurborg og Mosfellsbæ.*

[89] *See e.g. Thomas von Danwitz, Europäisches Verwaltungsrecht* (European Administrative Law), Heidelberg 2008, 218 and case law cited.

without whose correct implementation the Agreement cannot function properly. Therefore, despite the long time that has passed since 1 January 1994 and despite the inconsistency of the Authority's behaviour, the latter's infringement action cannot be barred.

99. In fact, the recognition of a legitimate expectation may depend on the public interest not being more important. In other words, as a matter of principle, a concrete balancing must be made between the legitimate expectations of the party concerned on the one hand and the public interest on the other. The ECJ has recognised this in parallel to the legal situation in certain EU Member States.[90]

100. At this point, the Government once more emphasises that the record of the Icelandic courts and of the Icelandic State within the EFTA pillar is quite respectable both with regard to the number of cases referred by the courts and to compliance with the EFTA Court's rulings.

101. On balance, the Government believes that it should be left to the Icelandic courts to change their jurisprudence insofar as they are problematic in the Authority's view.

4. Conclusions

102. Protocol 35 EEA was a compromise with the aim to ensure homogeneity without the transfer of legislative powers. The sensitive nature of the protocol, including the Sole Article, is displayed in the fact that these provisions are not included in the main text of the EEA Agreement. The wording of Protocol 35 is also indecisive and open for interpretation. Moreover, it does not stipulate how the EFTA States should ensure its obligations stated therein. Therefore, the EFTA States enjoyed a wide discretion to implement the protocol in the manner envisaged by their constitutional laws and internal legal orders.

103. When Iceland became a member to the EEA the wording of Article 3 of the EEA Act was considered to fulfil Iceland´s obligations under the EEA Agreement. It is also impossible to proceed any further within the framework imposed by the Icelandic Constitution. A more decisive statute on the priority effect of implemented EEA rules would require a constitutional amendment. Thus, the question of how EEA rules are to be ranked in competition with other legislative acts primarily exists as a matter of national constitutional law. Consequently, the matter needs to be solved domestically, without an interference by the Authority or the EFTA Court.

104. The Government also reiterates the existing uncertainty concerning the priority effect of national constitutions *vis-á-vis* EU and EEA law, especially in the light of the *Weiss*-judgment of the Federal Constitutional Court of Germany of 5 May 2020 and the ruling of the French *Conseil d'État* on 21 April 2021. As the European Commission has not initiated infringement proceedings against Germany or France, the Authority should refrain from doing so against Iceland in the present case.

105. It is also incomprehensible to require Iceland to change its legislation – or Constitution – after 27 years of EEA membership. Here, it should be noted that the Authority had no objections to Iceland´s implementation of Protocol 35 for almost a quarter of a century.

[90] *See e.g. Beatrice Weber-Dürler, Vertrauensschutz im öffentlichen Recht,* (Protection of legitimate expectations in public law), Basel/Frankfurt 1983, 112 et seqq.

Thus, the Government posits that the Authority has accepted the regime and is precluded from taking the matter any further.

106. In the Government's view the Authority draws too broad conclusions from the case law of the Supreme Court of Iceland. For example, the Authority fails to acknowledge fundamental aspects of Icelandic procedural law, jurisprudence as well as the recent restructuring of the Icelandic judicial system.

107. Finally, the Government posits that the decision of the Authority to open infringement proceedings against Iceland on the matter in question is a fundamental policy decision that is subject to *inter alia* the principles of consistency and good administration. Furthermore, an analysis of the whole system of the protection of rights is needed and it cannot be restricted to weather an EFTA State has correctly implemented Protocol 35 on paper. In this regard, a due consideration must be taken to the fact that Iceland has from the outset demonstrated loyalty to the EEA Agreement and that the Icelandic courts do well in the EFTA Pillar internal comparison.

108. Considering all the above, the Authority should refrain from pursuing the infringement proceedings against Iceland.

109. The Government reserves the right to submit further arguments or considerations at a later stage.

Yours sincerely

Nikulás Hannigan

Director General
External Trade