

Carl Baudenbacher *Editor*

# The Handbook of EEA Law

 Springer

# The Handbook of EEA Law



Carl Baudenbacher  
Editor

# The Handbook of EEA Law

 Springer

*Editor*  
Carl Baudenbacher  
EFTA Court  
Luxembourg City  
Luxembourg

ISBN 978-3-319-24341-2                      ISBN 978-3-319-24343-6 (eBook)  
DOI 10.1007/978-3-319-24343-6

Library of Congress Control Number: 2015957128

Springer Cham Heidelberg New York Dordrecht London  
© Springer International Publishing Switzerland 2016

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media  
([www.springer.com](http://www.springer.com))

# Preface

There are few monographs on the law of the European Economic Area. This Handbook seeks to rectify this situation by comprehensively addressing the breadth of law encompassed by the EEA Agreement for the benefit of practitioners, legal scholars and students alike. The extension of the European Union's Single Market by the Agreement on the European Economic Area, in 1994, was a singular achievement. The Agreement binds 31 countries: the 28 EU Member States and 3 EFTA countries, Iceland, Liechtenstein and Norway. This Handbook may prove to be a source on which to teach a course on litigation before national courts and the EFTA Court. Moreover, students may find it approachable and absorbing. Primarily, however, this work is intended to give practitioners and legal scholars a real understanding of the subject matter of the EEA Agreement, its nuances and the role it plays in the national legal orders of Iceland, Liechtenstein and Norway. Strong focus is put on the jurisprudence of the two EEA courts and in particular that of the EFTA Court. The book is divided into 12 parts and each chapter has been written by a judge, noted practitioner or eminent academic in their respective fields from across the EEA and beyond.

Part I introduces the main features of the EEA Agreement and sets the Agreement into its historical context.

Part II—Genesis of EEA Law—provides an overview of the decision-making procedure in the European Economic Area, from the creation of EU law to incorporation into the EEA Agreement and implementation in the EEA/EFTA States. It also tackles the consequences that may occur if no agreement can be reached on the incorporation of an EU legal act into the EEA legal order and the consequences of a failure to unanimously agree in the EEA Joint Committee on the incorporation of an EU act.

Part III—Institutions and Procedure—describes the organs of the EFTA pillar of the EEA: the EFTA Surveillance Authority and the EFTA Court. The first President of ESA, Knut Almestad, aptly called these two institutions 'the quintessence of the EEA Agreement'. The part illustrates in detail the relationship between the two-sister EEA judicial institutions: the EFTA Court and the Court of Justice of

the European Union, in terms of the judicial dialogue between the judges and advocates general, and the cross-pollination of jurisprudence. It goes on to consider the EEA enforcement system.

Parts IV–VI look at the EEA from the ground up. The EFTA pillar is considered from the perspective of the national authorities, national courts and practising Bars of Iceland, Liechtenstein and Norway.

Parts VII–XII comprehensively address the material breadth of the EEA Agreement. Part VII focuses on the general principles and the general prohibition of discrimination on grounds of nationality, while Part VIII addresses the fundamental freedoms. Part IX considers competition law, a core element of the EEA single market, from both the Brussels and a national perspective, State aid, public procurement law and the twin principles of transparency and openness and their prime application in the form of access to documents. Part X moves on to further areas of economic law by focussing on financial services, gambling, intellectual property and tax law as well as mutual administrative and legal assistance. Part XI addresses the law of natural and economic resources and the Handbook closes in Part XII with an examination of social protection and public health.

I would like to thank the contributors for their efforts in distilling their expert knowledge into their respective chapters. Particularly, I would like to extend a special thanks to my Legal Secretary, Michael-James Clifton, LL.B. (EU), LL.M. Adv., Barrister, who not only co-authored the chapter on access to documents, but also coordinated the publication of the handbook on my behalf, proof-read and revised each chapter and liaised with both the publishers and fellow contributors and ensured the book's timely production.

Luxembourg City, Luxembourg  
20 November 2015

Carl Baudenbacher

# Abbreviations

AA	Agreement Adjusting Certain Agreements between the EFTA States
AAA	Ankara Association Agreement
CFP	Common Fisheries Policy
Commission	European Commission
Court of Justice	Court of Justice of the European Union
EASA	European Aviation Safety Agency
EBA	European Banking Authority
EC	European Communities
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
ECJ RoP	Rules of Procedure of the Court of Justice of the European Union
ECSC	European Coal and Steel Community
EEA	European Economic Area/EEA Agreement
EEAS	European External Action Service
EEC	European Economic Community
EES	European Economic Space
EEZ	Exclusive Economic Zone
EFTA/EEA States	Iceland, Liechtenstein, and Norway
e.i.f.	Entry into force
EIOPA	European Insurance and Occupational Pensions Authority
EMU	Economic and Monetary Union
ESA	EFTA Surveillance Authority
ESMA	European Securities and Markets Authority
Euratom	European Atomic Energy Community
Eurostat	Statistical Office of the European Union



EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
HS	International Convention on the Harmonized Commodity and Coding System
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IP	Intellectual Property
JCD	Joint Committee Decision
MFN	Most Favoured Nation
MoU	Memorandum of Understanding
NCA	National competition authority
NIMIC	National IMI (Internal Market Information) Coordinator
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
RoP	Rules of Procedure of the EFTA Court
SCA	Agreement between the EFTA State on the Establishment of a Surveillance Authority and a Court of Justice
SEC	United States' Securities and Exchange Division
SME	Small and medium sized enterprise
TAA	Transitional Arrangements for a period after the Accession of certain EFTA States to the European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UCITS	Undertakings for collective investment in transferable securities
UNCLOS	United Nations Convention on the Law of the Sea
VAT	Value Added Tax
WTO	World Trade Organization
ZPO	Zivilprozessordnung (Liechtenstein Civil Proceedings Act)

# Content Overview

<b>Part I History and Main Features of the EEA Agreement</b>	
<b>The History of the EEA Agreement and the First Twenty Years of Its Existence . . . . .</b>	<b>3</b>
Sven Norberg and Martin Johansson	
<b>Part II Genesis of EEA Law</b>	
<b>Decision-Making Procedure and Implementation of New Law . . . . .</b>	<b>45</b>
Georges Baur	
<b>Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures . . . . .</b>	<b>69</b>
Georges Baur	
<b>The Notion of ‘Opting Out’ . . . . .</b>	<b>85</b>
Knut Almestad	
<b>EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols . . . . .</b>	<b>95</b>
Halvard Haukeland Fredriksen	
<b>Part III Institutions and Procedure</b>	
<b>The EFTA Surveillance Authority . . . . .</b>	<b>113</b>
Frank Büchel and Xavier Lewis	
<b>The EFTA Court: Structure and Tasks . . . . .</b>	<b>139</b>
Carl Baudenbacher	
<b>The Relationship Between the EFTA Court and the Court of Justice of the European Union . . . . .</b>	<b>179</b>
Carl Baudenbacher	

<b>Dispute Resolution Under the EEA Agreement</b> . . . . .	195
Christa Tobler	
<b>Part IV National Authorities in the EFTA Pillar</b>	
<b>Attorney General of Norway</b> . . . . .	211
Pål Wennerås	
<b>Attorney General of Iceland</b> . . . . .	225
Einar Karl Hallvarðsson	
<b>Liechtenstein EEA Coordination Unit</b> . . . . .	241
Andrea Entner-Koch and Thomas Bischof	
<b>Part V National Courts in the EFTA Pillar</b>	
<b>Norwegian Courts</b> . . . . .	257
Thomas Christian Poulsen	
<b>Icelandic Courts</b> . . . . .	277
Skúli Magnússon	
<b>Liechtenstein Courts</b> . . . . .	293
Wilhelm Ungerank	
<b>Part VI The Practicing Bar in the EFTA Pillar</b>	
<b>Norwegian Bar</b> . . . . .	309
Thomas Nordby and Kristoffer Nerland	
<b>Icelandic Bar</b> . . . . .	319
Stefán Geir Thórisson	
<b>Liechtenstein Chamber of Lawyers</b> . . . . .	331
Mario Frick	
<b>Part VII General Principles and Prohibition of Discrimination on Grounds of Nationality</b>	
<b>General Principles</b> . . . . .	349
Páll Hreinsson	
<b>General Prohibition of Discrimination on Grounds of Nationality</b> . . . . .	391
Halvard Haukeland Fredriksen	
<b>Part VIII The Fundamental Freedoms</b>	
<b>Free Movement of Goods</b> . . . . .	415
Peter-Christian Müller-Graff	

<b>Right of Establishment and Freedom to Provide and Receive Services</b> . . . . .	437
Philipp Speitler	
<b>Free Movement of Persons</b> . . . . .	473
Kjartan Bjarni Björgvinsson	
<b>Free Movement of Capital</b> . . . . .	501
Per Christiansen	
<b>Part IX Competition Law and Related Matters</b>	
<b>Competition Law: The Brussels Perspective</b> . . . . .	523
John Temple Lang	
<b>Competition Law: A National Perspective</b> . . . . .	547
Siri Teigum	
<b>State Aid</b> . . . . .	575
Michael Sánchez Rydelski	
<b>Public Procurement</b> . . . . .	605
Magnus Schmauch	
<b>The Principles of Transparency and Openness, and Access to Documents</b> . . . . .	625
Romina Polley and Michael-James Clifton	
<b>Part X Further Areas of Economic Law</b>	
<b>Financial Services Law</b> . . . . .	659
Francesco A. Schurr and Johannes Gasser	
<b>Gambling Law</b> . . . . .	687
Simon Planzer	
<b>Intellectual Property Law</b> . . . . .	703
Ole-Andreas Rognstad	
<b>Tax Law</b> . . . . .	721
Richard Lyal	
<b>Mutual Administrative and Legal Assistance</b> . . . . .	749
Andreas Batliner and Heinz Konzett	
<b>Part XI Law of Natural and Economic Resources</b>	
<b>Natural Resources</b> . . . . .	763
Knut Almestad	
<b>Energy Law</b> . . . . .	773
Dirk Buschle and Birgitte Jourdan-Andersen	

**Part XII Social Protection and Public Health**

**Social Policy Law** . . . . . 809  
Catherine Barnard

**The Precautionary Principle** . . . . . 839  
Alberto Alemanno

**Index** . . . . . 853

# Contents

## Part I History and Main Features of the EEA Agreement

<b>The History of the EEA Agreement and the First Twenty Years of Its Existence . . . . .</b>	<b>3</b>
Sven Norberg and Martin Johansson	
1 The Development of the EFTA–EU Relationship . . . . .	4
1.1 Introduction . . . . .	4
1.2 Discussions on Economic Cooperation Within the OEEC . . . . .	5
1.3 The Creation of the European Communities . . . . .	6
1.4 The Creation of the European Free Trade Association . . . . .	8
1.5 Attempts to Create a Single European Market . . . . .	11
1.6 The Free Trade Agreements . . . . .	14
1.7 The Luxembourg Declaration on the EES . . . . .	15
1.8 The Luxembourg Follow-Up . . . . .	17
1.9 The Delors Initiative . . . . .	21
1.10 The EEA Negotiations . . . . .	26
1.11 The EEA Agreement Concluded . . . . .	31
1.12 Final Comment on the Conclusion of the EEA Agreement . . . . .	31
2 Some Developments Since the Entry into Force of the EEA Agreement on 1 January 1994 . . . . .	32
2.1 Changes in Composition on the EFTA Side . . . . .	32
2.2 The Situation of Switzerland . . . . .	34
2.3 The Application of the EEA Agreement: Dynamism and Homogeneity in Practice . . . . .	35
3 The Future of the EEA . . . . .	41
References . . . . .	42

## Part II Genesis of EEA Law

<b>Decision-Making Procedure and Implementation of New Law . . . . .</b>	<b>45</b>
Georges Baur	
1 Introduction . . . . .	45
1.1 General Remarks . . . . .	45
1.2 Two-Pillar System . . . . .	47
1.3 Homogeneity . . . . .	51
1.4 The Role of the EFTA Secretariat . . . . .	53
2 Decision-Making Process . . . . .	53
2.1 The Notion of EEA Relevance . . . . .	53
2.2 Decision Shaping . . . . .	56
2.3 Exemptions, Derogations and Adaptations . . . . .	57
2.4 Procedure Prior to Adoption of Decisions by the Standing Committee . . . . .	60
2.5 Preparation of a JCD . . . . .	61
2.6 Constitutional Requirements and Entry into Force of JCDs . . . . .	63
3 Some Remarks on National Implementation . . . . .	66
4 Conclusion . . . . .	67
References . . . . .	67

<b>Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures . . . . .</b>	<b>69</b>
--	-----------

Georges Baur	
1 Introduction . . . . .	69
2 Failure to Reach Agreement on the Amendment of an Annex . . . . .	70
2.1 Duty of Consultation Between the Contracting Parties . . . . .	70
2.2 Possible Suspension of Part of an Annex to the EEA . . . . .	71
2.3 Practical Examples . . . . .	73
3 Safeguard Measures . . . . .	74
3.1 General Safeguard Measures . . . . .	74
3.2 Sector-Specific Safeguard Measures . . . . .	76
3.3 A Disputed Case: Fisheries . . . . .	80
4 Conclusion . . . . .	82
References . . . . .	83

<b>The Notion of ‘Opting Out’ . . . . .</b>	<b>85</b>
---	-----------

Knut Almestad	
1 The Historical Context . . . . .	85
2 The Basic Premises of the Discussion . . . . .	86
3 The Duty of the Contracting Parties to Include New Relevant Legislation . . . . .	87
4 The Question of Relevance . . . . .	89
4.1 The Material Scope of the Agreement . . . . .	89
4.2 The Territorial Scope of the Agreement . . . . .	90

5 Possible Institutional or Constitutional Restraints . . . . . 92  
 5.1 On the EU Side . . . . . 92  
 5.2 In the EEA/EFTA States . . . . . 92  
 6 Summing Up . . . . . 94  
 Reference . . . . . 94

**EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols . . . . . 95**

Halvard Haukeland Fredriksen  
 1 The Architecture of the EEA Agreement . . . . . 95  
 2 The Substantive Rules of the Main Agreement: An Overview . . . . . 96  
 3 The Substantive Rules in the Protocols and Annexes: An Overview . . . . . 97  
 4 The Relationship Between the Main Agreement and Its Protocols and Annexes . . . . . 98  
 4.1 Article 119 EEA . . . . . 98  
 4.2 The Existence of Derogations in the Annexes from Provisions of the EEA Main Agreement . . . . . 99  
 4.3 The Lack of Judicial Review of the Validity of the Decisions of the EEA Joint Committee to Amend the Agreement . . . . . 99  
 4.4 Article 98 EEA on the Competence of the EEA Joint Committee . . . . . 100  
 4.5 The EU Law Perspective: Another Kind of Primary and Secondary EEA Law? . . . . . 101  
 4.6 The Case-Law of the EFTA Court . . . . . 102  
 4.7 Hierarchy or Homogeneity? . . . . . 104  
 4.8 Conclusion . . . . . 106  
 5 On the Need to Supplement the Application of Norms Found in the Protocols and Annexes with Those of the Main Agreement . . . . . 106  
 6 The EEA Main Agreement and EEA-Relevant Secondary EU Law Not Yet Incorporated into the EEA . . . . . 108  
 References . . . . . 109

**Part III Institutions and Procedure**

**The EFTA Surveillance Authority . . . . . 113**

Frank Büchel and Xavier Lewis  
 1 Institutional Structure of ESA . . . . . 113  
 1.1 Establishment . . . . . 113  
 1.2 Structure, Organisation and Appointment . . . . . 115  
 2 Competence . . . . . 117  
 2.1 Internal Market . . . . . 117  
 2.2 State Aid and Competition . . . . . 121



- 3 Power to Adopt Remedies . . . . . 125
  - 3.1 To Take Measures, Issue Guidelines . . . . . 125
  - 3.2 To Fine . . . . . 125
- 4 Mandate and Procedure . . . . . 127
  - 4.1 Outline of Procedure . . . . . 127
  - 4.2 Timeliness . . . . . 131
  - 4.3 Discretion . . . . . 133
- 5 ESA and Other EEA and EU Institutions . . . . . 134
- 6 ESA and the Courts . . . . . 134
  - 6.1 EFTA Court . . . . . 134
  - 6.2 EU Courts . . . . . 135
- References . . . . . 138
- The EFTA Court: Structure and Tasks . . . . . 139**
- Carl Baudenbacher
- 1 The EFTA Court . . . . . 139
  - 1.1 Nomination, Appointment and Re-appointment  
of Judges . . . . . 140
  - 1.2 Composition of the Court . . . . . 141
  - 1.3 Secrecy of the Vote . . . . . 144
  - 1.4 Organisation of the Court . . . . . 144
  - 1.5 Homogeneity and Reciprocity . . . . . 145
  - 1.6 Types of Procedure and Access to the Court . . . . . 149
  - 1.7 Third Parties’ Rights . . . . . 170
  - 1.8 Language Regime . . . . . 172
  - 1.9 Methods of Interpretation . . . . . 172
  - 1.10 Judicial Style . . . . . 173
  - 1.11 Economics . . . . . 174
  - 1.12 Transparency . . . . . 175
- References . . . . . 175
- The Relationship Between the EFTA Court and the Court of Justice  
of the European Union . . . . . 179**
- Carl Baudenbacher
- 1 The Relationship Between the EFTA Court and the ECJ . . . . . 179
  - 1.1 The Lugano Convention as the Precursor . . . . . 180
  - 1.2 EEA Law on the Books . . . . . 182
  - 1.3 EEA Law in Action . . . . . 183
  - 1.4 ECJ Going First . . . . . 184
  - 1.5 EFTA Court Going First . . . . . 187
  - 1.6 The Role of ECJ Advocates General . . . . . 190
  - 1.7 Judicial Conflict . . . . . 190
  - 1.8 Conclusions . . . . . 192
- References . . . . . 193

**Dispute Resolution Under the EEA Agreement** . . . . . 195

Christa Tobler

1 Introduction . . . . . 195

2 Dispute Resolution Under Article 111 EEA . . . . . 197

    2.1 The Technical-Diplomatic Element: The Role of the EEA Joint Committee . . . . . 197

    2.2 The Judicial Element: The Role of the ECJ . . . . . 198

    2.3 The Political Element: Unilateral Remedies . . . . . 200

    2.4 The Element of Alternative Dispute Resolution: Arbitration . . . . . 201

3 Comparison with the Legal Regimes Between the EU and Selected Non-EU Member States . . . . . 202

    3.1 Turkey . . . . . 202

    3.2 Switzerland . . . . . 204

4 Conclusion . . . . . 205

References . . . . . 206

**Part IV National Authorities in the EFTA Pillar**

**Attorney General of Norway** . . . . . 211

Pål Wennerås

1 Introduction . . . . . 211

2 The Attorney General and Litigation Before the EFTA Court . . . . . 212

3 Preliminary References from National Courts . . . . . 212

    3.1 Competence to Refer . . . . . 212

    3.2 Division of Competence and Judicial Dialogue . . . . . 213

    3.3 The Procedure Before the EFTA Court . . . . . 215

4 Material Issues . . . . . 216

    4.1 Homogeneity . . . . . 216

    4.2 Restrictions and Discrimination . . . . . 217

    4.3 Mandatory Requirements . . . . . 218

    4.4 The Proportionality Principle . . . . . 219

5 The Judicial System and the ECHR . . . . . 221

6 Final Remarks . . . . . 222

Reference . . . . . 223

**Attorney General of Iceland** . . . . . 225

Einar Karl Hallvarðsson

1 The Office of the Attorney-General . . . . . 225

2 Role with Regard to the EEA Agreement . . . . . 226

3 Policy with Regard to the EEA Agreement . . . . . 227

4 Experiences and Cases . . . . . 230

5 The Icelandic Appeal System . . . . . 237

Reference . . . . . 239

**Liechtenstein EEA Coordination Unit . . . . . 241**  
 Andrea Entner-Koch and Thomas Bischof

- 1 Role of the EEA Coordination Unit . . . . . 241
- 2 Policy with Regard to the EEA Agreement . . . . . 242
- 3 Experiences with the EEA . . . . . 243
- 4 EFTA Court Cases . . . . . 243
  - 4.1 Discrimination . . . . . 244
  - 4.2 Freedom of Establishment . . . . . 245
  - 4.3 Freedom to Provide Services . . . . . 247
  - 4.4 Free Movement of Capital . . . . . 248
  - 4.5 State Aid . . . . . 248
  - 4.6 Jurisprudence on Secondary Legislation . . . . . 249
  - 4.7 Compliance with Judgments . . . . . 251
- 5 Cases of the Court of Justice of the European Union . . . . . 251
  - 5.1 Free Movement of Capital . . . . . 252
  - 5.2 Supplementary Protection Certificates . . . . . 252

**Part V National Courts in the EFTA Pillar**

**Norwegian Courts . . . . . 257**  
 Thomas Christian Poulsen

- 1 The Norwegian Court System . . . . . 257
  - 1.1 Organisation of the Courts . . . . . 257
  - 1.2 Appeals . . . . . 258
- 2 Advisory Opinion Procedure Under Norwegian Procedural Law . . . . . 258
  - 2.1 Legal Basis . . . . . 258
  - 2.2 Which Bodies May Refer? . . . . . 259
  - 2.3 Procedure for Making a Referral . . . . . 262
  - 2.4 When (at which Stage) May a Referral Be Made? . . . . . 263
  - 2.5 When (in which Situations) Should a Referral Be Made? . . . . . 263
  - 2.6 Must the Parties Be Heard before a Request Is Made? . . . . . 265
  - 2.7 Possibility to Appeal a Decision to Refer or Not to Refer? . . . . . 265
  - 2.8 Effect of an Advisory Opinion . . . . . 265
- 3 Experiences . . . . . 267
  - 3.1 Effect and Application of the EFTA Court’s Advisory Opinions . . . . . 267
  - 3.2 Number of Referrals . . . . . 270
- References . . . . . 274

<b>Icelandic Courts</b> . . . . .	277
Skúli Magnússon	
1 The Icelandic Judicial System . . . . .	277
1.1 Outline of the Procedures . . . . .	279
1.2 Appeals . . . . .	281
1.3 Power to Refer in Terms of Article 34 SCA . . . . .	282
2 Referral Proceedings Under Icelandic Law . . . . .	282
2.1 Legal Basis for Referral . . . . .	282
2.2 Relevance of EEA Law: Icelandic Case-Law . . . . .	283
2.3 The Procedure for Making a Referral . . . . .	287
2.4 The Appeal System . . . . .	288
2.5 Binding Character of an Advisory Opinion . . . . .	289
2.6 Costs and Legal Aid . . . . .	290
2.7 Assessing Icelandic Case-Law . . . . .	291
References . . . . .	292
<b>Liechtenstein Courts</b> . . . . .	293
Wilhelm Ungerank	
1 The Liechtenstein Court System . . . . .	293
1.1 Liechtenstein Courts . . . . .	293
1.2 Appeal System . . . . .	295
1.3 Authority of Referral in Terms of Article 34 SCA . . . . .	296
2 Referral Proceedings under Liechtenstein Law . . . . .	298
2.1 Liechtenstein Procedural Law . . . . .	298
2.2 Right of Courts of the First Instance to Request Advisory Opinions . . . . .	298
2.3 Form of the Request . . . . .	299
2.4 Right of the Parties to Be Heard . . . . .	299
2.5 No Procedural Claim to Obtain an Opinion . . . . .	300
2.6 Finality of an Order to Submit a Request . . . . .	301
2.7 Binding Character of the Opinion . . . . .	302
2.8 Legal Aid . . . . .	302
2.9 Particular Decisions under Liechtenstein Procedural Law . . . . .	303
3 Experience . . . . .	304
4 List of the Requests by Liechtenstein Courts for an Advisory Opinion . . . . .	305

## Part VI The Practicing Bar in the EFTA Pillar

<b>Norwegian Bar</b> . . . . .	309
Thomas Nordby and Kristoffer Nerland	
1 Introduction . . . . .	309
2 EEA Law Education in Norwegian Universities . . . . .	310
2.1 The University of Bergen . . . . .	311
2.2 The University of Oslo . . . . .	311
2.3 The University of Tromsø . . . . .	311
3 EEA Law Education and the Norwegian Bar Examination . . . . .	312
4 The EEA Legal Method Compared to Traditional Legal Methods in Norwegian Law . . . . .	312
4.1 EEA Law: The Objectives and the Contracting Parties’ Intentions . . . . .	313
4.2 The Different Legal Methods . . . . .	313
5 The Application of EEA Law in Norway . . . . .	314
5.1 The Authorities and Administration . . . . .	315
5.2 The Courts . . . . .	315
6 The EFTA Surveillance Authority: An Attorney’s View . . . . .	316
7 The EFTA Court: An Attorney’s View . . . . .	317
References . . . . .	318
<b>Icelandic Bar</b> . . . . .	319
Stefán Geir Thórisson	
1 Introduction . . . . .	319
2 EEA Law Education in Icelandic Universities . . . . .	321
2.1 The University of Iceland . . . . .	321
2.2 Reykjavík University . . . . .	321
2.3 Bifröst University . . . . .	322
2.4 Akureyri University . . . . .	322
3 EEA Law and the Icelandic Bar Examination . . . . .	323
4 The EEA Legal Method Compared to Traditional Icelandic Legal Methods . . . . .	323
4.1 EEA Law: The Objectives and the Contracting Parties’ Intentions . . . . .	323
4.2 International Law and the Traditional Icelandic Legal Method . . . . .	324
5 The Application of EEA Law in Iceland . . . . .	325
5.1 The Authorities and Administration . . . . .	326
5.2 The Courts . . . . .	326
6 The EFTA Surveillance Authority: An Attorney’s View . . . . .	329
7 The EFTA Court: An Attorney’s View . . . . .	330

**Liechtenstein Chamber of Lawyers** . . . . . 331

Mario Frick

1 Introduction . . . . . 332

    1.1 From Closure to Controlled Opening . . . . . 332

    1.2 Impact on the Design of the Lawyers Act . . . . . 332

2 Relevant Law for the Work of Lawyers . . . . . 333

    2.1 Transposition of EEA Law . . . . . 334

    2.2 Authorisation . . . . . 334

    2.3 Relative Monopoly of Legal Services and Disciplinary Law . . . . . 335

    2.4 Organisation of Legal Activity . . . . . 335

    2.5 Professional Secrecy: Attorney-Client Privilege and Anti-money-laundering . . . . . 336

    2.6 Role of the Chamber of Lawyers . . . . . 337

    2.7 Rules of Procedure of the Chamber of Lawyers and Professional Guidelines . . . . . 338

    2.8 Actions Brought Before the EFTA Court . . . . . 339

3 EFTA Court: Case-Law . . . . . 339

    3.1 Case E-6/13 *Metacom AG* . . . . . 339

    3.2 Case E-10/04 *Paolo Piazza v. Paul Schurte AG* . . . . . 340

    3.3 Case E 1/07: *Criminal Proceedings Against A* . . . . . 341

4 Opportunities? . . . . . 342

5 Experiences . . . . . 342

References . . . . . 345

**Part VII General Principles and Prohibition of Discrimination on Grounds of Nationality**

**General Principles** . . . . . 349

Páll Hreinsson

1 Introduction . . . . . 349

2 The Principles of Homogeneity and Reciprocity . . . . . 350

3 The Source of Other General Principles in EEA Law . . . . . 355

4 The Principle of Loyalty . . . . . 357

5 The Principle of Equality . . . . . 360

6 The Principle of Proportionality . . . . . 363

    6.1 Introduction . . . . . 363

    6.2 Is the Measure Suitable to Achieve the Desired End? . . . . . 363

    6.3 Is the Measure Necessary to Achieve the Desired End? . . . . . 366

    6.4 Is the Burden Imposed on the Individual by the Measure Excessive in Relation to the Objective Sought? . . . . . 370

7 The Principles of Legal Certainty and the Protection of Legitimate Expectations . . . . . 371

8 Principles Derived from Fundamental Rights . . . . . 374

9 The Principle of Effectiveness . . . . . 376

- 10 The Precautionary Principle . . . . . 378
- 11 The Principle of Prohibition of Abuse of EEA Law . . . . . 379
- 12 State Liability for Breach of EEA Law . . . . . 381
- 13 Direct Effect and Primacy . . . . . 383
  - 13.1 Introduction . . . . . 383
  - 13.2 EEA Measures Intended to Ensure That EEA Rules  
Are Made Part of the Internal Legal Order . . . . . 384
  - 13.3 EEA Measures Intended to Ensure the Prevalence of  
Implemented EEA Rules . . . . . 385
  - 13.4 When Does a Regulation and Directive Gain Effect  
Under the EEA Agreement? . . . . . 386
  - 13.5 What Is the Effect of an EEA Rule That Has Not Been  
Implemented into Domestic Law Either Temporarily  
or by Mistake? . . . . . 387
- 14 Conclusions . . . . . 388
- References . . . . . 388

**General Prohibition of Discrimination on Grounds of Nationality . . . . . 391**

Halvard Haukeland Fredriksen

- 1 Introduction . . . . . 391
- 2 Relationship to the EU Law Right to Equal Treatment  
Irrespective of Nationality . . . . . 393
- 3 Scope of Application *Ratione Materiae* . . . . . 395
- 4 Applicability of Article 4 EEA to Wholly Internal Situations . . . . . 397
- 5 Applicability of Article 4 EEA to EEA Nationals Who Are  
Neither Economically Active Nor Economically Self-Sufficient . . . . . 398
- 6 Applicability of Article 4 EEA to Nationals and Economic  
Operators from Third Countries . . . . . 402
- 7 Relationship with Specific Provisions of EEA Law Prohibiting  
Discrimination . . . . . 404
- 8 The Subjects of the Prohibition . . . . . 405
- 9 Concept of Discrimination . . . . . 406
- 10 Derogations and Justifications . . . . . 408
- 11 Legal Consequences of Violations of Article 4 EEA . . . . . 409
- References . . . . . 410

**Part VIII The Fundamental Freedoms**

**Free Movement of Goods . . . . . 415**

Peter-Christian Müller-Graff

- 1 Function and System of the Free Movement of Goods in the EEA . . . . . 415
- 2 Product Coverage as a Specific EEA-Law Problem  
(Agricultural and Fish Products) . . . . . 417
  - 2.1 General Rules of Product Coverage . . . . . 417
  - 2.2 Specific Rules on Agriculture and Fishery . . . . . 418

2.3	Specific Rules on Coal and Steel Products . . . . .	419
2.4	Specific Rules on Origin . . . . .	420
3	Other Rules Relating to the Free Movement of Goods . . . . .	421
4	Restrictions of the Free Movement of Goods . . . . .	422
4.1	Customs Duties . . . . .	422
4.2	Internal Taxation . . . . .	424
4.3	Quantitative Restrictions and Measures Having Equivalent Effects on Imports . . . . .	426
4.4	Quantitative Restrictions on Exports (Article 12 EEA) . . . . .	428
4.5	Justification of Quantitative Restrictions and Measures Having Equivalent Effect (Article 13 EEA) . . . . .	429
4.6	State Monopolies (Article 16 EEA) . . . . .	430
5	Cooperation in Customs Related Matters and Trade Facilitation . . . . .	432
6	Relationship to Other Rules in the EEA . . . . .	433
	References . . . . .	434
	<b>Right of Establishment and Freedom to Provide and Receive Services . . .</b>	<b>437</b>
	Philipp Speitler	
1	Introduction . . . . .	437
2	Relevant EEA Law . . . . .	438
2.1	Hierarchy of Norms and Relationship Between the Fundamental Freedoms . . . . .	439
2.2	EEA Agreement . . . . .	442
2.3	Protocols and Annexes . . . . .	444
2.4	Focus on: The Common Feature of Mutual Recognition of Professional Qualifications (Articles 30, 35, 39 EEA and Annex VII) . . . . .	448
2.5	The Exemption of Activities Connected with the Exercise of Official Authority (Articles 32, 39 EEA) . . . . .	452
3	The Right of Establishment . . . . .	452
3.1	Right Holders . . . . .	454
3.2	Rights . . . . .	455
3.3	Discrimination and Restriction . . . . .	460
4	The Freedom to Provide and Receives Services . . . . .	462
4.1	Right Holders . . . . .	464
4.2	Rights of Service Providers and Recipients . . . . .	465
5	Justification Grounds and Proportionality . . . . .	467
6	Conclusions . . . . .	470
	References . . . . .	470
	<b>Free Movement of Persons . . . . .</b>	<b>473</b>
	Kjartan Bjarni Björgvinsson	
1	Introduction . . . . .	473
2	Workers . . . . .	474
2.1	The Concept of ‘Worker’ . . . . .	474
2.2	First Time Work-Seekers . . . . .	477



- 2.3 Workers Out of Employment . . . . . 478
- 2.4 Workers in Public Service . . . . . 480
- 3 Self-Employed Persons . . . . . 481
- 4 Persons Providing Services . . . . . 482
- 5 Directive 2004/38 and the Rights of Economically Inactive  
EEA Nationals . . . . . 483
  - 5.1 Introduction . . . . . 483
  - 5.2 Right to Exit, Entry and Short-Term Residence . . . . . 484
  - 5.3 Right to Long-Term Residence . . . . . 485
  - 5.4 Students . . . . . 487
  - 5.5 Right to Permanent Residence . . . . . 488
  - 5.6 The Rights of Family Members . . . . . 489
- 6 The Need for Cross-Border Activity . . . . . 490
  - 6.1 Articles 28 and 31 EEA . . . . . 490
  - 6.2 Directive 2004/38/EC . . . . . 491
- 7 What Entities Are Bound by Free Movement Obligations? . . . . . 492
- 8 Rights of Persons Taking Advantage of Free Movement  
Under the EEA Agreement . . . . . 493
- 9 Justified Restrictions . . . . . 498
- References . . . . . 500

**Free Movement of Capital . . . . . 501**

Per Christiansen

- 1 Introduction . . . . . 501
- 2 Treaties and Legislation . . . . . 504
  - 2.1 The Main EEA Rules . . . . . 504
  - 2.2 EEA Safeguard Measures . . . . . 506
  - 2.3 Safeguard Procedures . . . . . 508
  - 2.4 EEA/EFTA States and Third Countries . . . . . 509
  - 2.5 Economic and Monetary Policy Cooperation . . . . . 510
  - 2.6 The Main EU Rules . . . . . 510
  - 2.7 EU and Third Countries . . . . . 511
  - 2.8 A Legal Gap . . . . . 511
- 3 Surveillance Practice and Case-Law . . . . . 512
  - 3.1 Surveillance Practice . . . . . 512
  - 3.2 Case-Law . . . . . 514
- 4 A Note on Taxation . . . . . 519

**Part IX Competition Law and Related Matters**

**Competition Law: The Brussels Perspective . . . . . 523**

John Temple Lang

- 1 Introduction . . . . . 523
- 2 Judicial Review . . . . . 527
- 3 Restrictive Agreements in the Case-Law of the EFTA Court . . . . . 528
- 4 State Monopolies . . . . . 530

5	The <i>Posten Norge</i> Judgment . . . . .	532
6	Legal and Economic Concepts . . . . .	534
7	The Practice of the EFTA Surveillance Authority: The <i>Color Line</i> Case . . . . .	535
8	Private Claims for Compensation for Breach of EEA Competition Rules . . . . .	536
9	Competition Law and Regulatory Regimes . . . . .	537
10	Professional Independence of Lawyers . . . . .	538
11	Homogeneity and Innovation . . . . .	539
12	Conclusions . . . . .	542
	References . . . . .	544
	<b>Competition Law: A National Perspective . . . . .</b>	<b>547</b>
	Siri Teigum	
1	Legal Framework . . . . .	547
	1.1 Application of EEA Competition Rules in the EFTA States . . .	547
	1.2 Jurisdiction in Competition Matters . . . . .	548
2	The Competition Authorities of the EFTA States . . . . .	550
	2.1 Overview . . . . .	550
	2.2 Liechtenstein . . . . .	550
	2.3 Iceland . . . . .	550
	2.4 Norway . . . . .	551
3	Cooperation Between ESA and the National Competition Authorities of the EFTA States . . . . .	551
	3.1 Overview . . . . .	551
	3.2 Mechanisms for Allocation and Assistance . . . . .	552
	3.3 Use of EEA Competition Rules . . . . .	554
	3.4 Advisory Committee . . . . .	555
	3.5 Functioning of the Cooperation in Practice . . . . .	556
4	Cooperation Between the Competition Authorities of the Nordic Countries . . . . .	557
5	Cooperation Between ESA and the Courts of the EEA/EFTA States . . .	557
	5.1 Overview . . . . .	557
	5.2 Conformity . . . . .	558
	5.3 Requests by National Courts for Advisory Opinions by the EFTA Court . . . . .	558
	5.4 Request by National Courts for Opinions of ESA . . . . .	559
	5.5 Amicus Curiae . . . . .	559
	5.6 Transfer of Information . . . . .	560
	5.7 Assistance of ESA . . . . .	561
	5.8 Functioning of the Cooperation in Practice . . . . .	561
6	National Competition Provisions of the EEA/EFTA States . . . . .	562
	6.1 Overview . . . . .	562
	6.2 Liechtenstein . . . . .	562
	6.3 Iceland . . . . .	562
	6.4 Norway . . . . .	564

7	EEA Competition Provisions in Practice . . . . .	568
7.1	Norwegian Competition Authorities' Application of the Competition Provisions in the EEA Agreement in Practice . . . .	568
7.2	The Norwegian Courts' Application of the Competition Provisions in the EEA Agreement in Practice . . . . .	569
7.3	Cooperation Between ESA and <i>Konkurransetilsynet</i> in Practice . . . . .	573
	References . . . . .	573
	<b>State Aid</b> . . . . .	575
	Michael Sánchez Rydelski	
1	Introduction . . . . .	575
2	ESA's State Aid Practice and Policy . . . . .	576
2.1	State Aid Within the Meaning of Article 61(1) EEA . . . . .	577
2.2	Compatibility Assessment . . . . .	584
2.3	State Aid Procedure . . . . .	589
2.4	Co-operation with the Commission . . . . .	591
2.5	Limits to ESA's Competence: State Aid to Fisheries . . . . .	592
3	Case-Law of the EFTA Court . . . . .	592
3.1	Admissibility . . . . .	593
3.2	Reviewability of ESA's Actions . . . . .	594
3.3	Suspension of ESA's Decisions . . . . .	595
3.4	Reasoning of ESA's Decisions . . . . .	595
3.5	Level of ESA's Assessment . . . . .	596
3.6	Selectivity in Relation to Regional and Taxation Measures . . . . .	597
3.7	Services of General Economic Interest . . . . .	598
3.8	Failure to Open a Formal Investigation . . . . .	599
3.9	Non-compliance with Appropriate Measures and Existing Versus New Aid . . . . .	600
3.10	Enforcement of ESA's Decisions . . . . .	601
3.11	Recovery of Aid and Legitimate Expectations . . . . .	602
4	Conclusion . . . . .	603
	References . . . . .	603
	<b>Public Procurement</b> . . . . .	605
	Magnus Schmauch	
1	Introduction . . . . .	605
2	Surveillance in the Field of Public Procurement . . . . .	606
2.1	The EEA and SCA Agreements . . . . .	606
2.2	Protocol 2 SCA . . . . .	608
2.3	Procedures Relating to Directive 2004/18/EC . . . . .	608
2.4	Procedures Relating to Directive 2004/17/EC . . . . .	612
3	Conciliation Procedure . . . . .	616

4 Enforcement Before National Courts and Authorities . . . . . 618  
 4.1 Enforcement Directives . . . . . 618  
 4.2 Directive 89/665/EEC and Directive 92/13/EEC  
 in the EEA . . . . . 618  
 4.3 National Review Procedures . . . . . 619  
 Reference . . . . . 624

**The Principles of Transparency and Openness,  
 and Access to Documents . . . . . 625**

Romina Polley and Michael-James Clifton  
 1 The Principles of Transparency and Openness . . . . . 625  
 2 Making Use of the Right: Strategic, and Tactical Uses . . . . . 626  
 2.1 Public Accountability . . . . . 626  
 2.2 Private Enforcement of Competition Law . . . . . 627  
 3 Relevant Access to Documents Regimes . . . . . 628  
 4 Applying the Rules on Access to Documents: A Practical Guide . . . . . 630  
 4.1 Scope: Who May Make a Request . . . . . 631  
 4.2 What Is a Document? . . . . . 631  
 4.3 Making an Application for Access to Documents . . . . . 632  
 4.4 Time-Limits and Processing of Applications . . . . . 633  
 4.5 Access . . . . . 635  
 4.6 ESA’s Reasoning (Exceptions) . . . . . 636  
 5 Challenge Before the Court . . . . . 650  
 5.1 Costs . . . . . 650  
 6 Transparency: Beyond Access to Documents . . . . . 650  
 6.1 Transparency and Openness of the Courts . . . . . 651  
 6.2 *Zwartveld* Procedure . . . . . 652  
 6.3 Future Developments . . . . . 653  
 7 Conclusions . . . . . 655  
 References . . . . . 656

**Part X Further Areas of Economic Law**

**Financial Services Law . . . . . 659**

Francesco A. Schurr and Johannes Gasser  
 1 Introduction . . . . . 659  
 2 EEA Financial Services Legislation . . . . . 659  
 2.1 The UCITS IV Directive . . . . . 660  
 2.2 MiFID . . . . . 665  
 2.3 The Third Anti-money Laundering Directive . . . . . 668  
 2.4 Other . . . . . 671  
 3 Analysis of the Case-Law of the EFTA Court . . . . . 671  
 3.1 Introduction to the Decision-Making of the EFTA Court  
 in the Field of Financial Law . . . . . 671  
 3.2 Ground-Breaking New Findings on Legal and Economic  
 Issues of Financial Crises and on Moral Hazards in *Icesave* . . . . . 672

- 3.3 ‘Comply or Explain’ and ‘Lost in Translation’:  
The Two Main Chapters in the Saga of *Irish Bank* . . . . . 675
- 3.4 Consumer Issues in the Field of Life Assurances  
in ‘Safe Hands’ of the EFTA Court: The *Swiss Life* Case . . . . . 678
- 3.5 Conclusion . . . . . 680
- 4 Practice of the EFTA Surveillance Authority . . . . . 680
- References . . . . . 685
- Gambling Law** . . . . . 687
- Simon Planzer
- 1 Introduction . . . . . 687
- 2 Present State of EEA Primary and Secondary Law . . . . . 687
- 3 EEA Case-Law . . . . . 690
  - 3.1 *Gaming Machines* . . . . . 690
  - 3.2 *Ladbrokes* . . . . . 691
  - 3.3 *Casino Admiral AG v. Wolfgang Egger* . . . . . 693
  - 3.4 *Norwegian Lottery* . . . . . 695
- 4 Account of the EFTA Court’s Contribution . . . . . 695
  - 4.1 Homogeneity and the Role of Case-Law . . . . . 695
  - 4.2 Peculiar Nature of Games of Chance and Margin  
of Appreciation . . . . . 696
  - 4.3 Public Morality and Inconsistencies . . . . . 698
  - 4.4 ECJ: From Carte Blanche to Stricter Review . . . . . 699
- References . . . . . 701
- Intellectual Property Law** . . . . . 703
- Ole-Andreas Rognstad
- 1 Introduction . . . . . 703
- 2 Parallel Imports of Trademarked Goods from Third Countries  
(*Maglite* and *L’Oreal*) . . . . . 705
- 3 Co-branding of Parallel Imported Pharmaceuticals: *Paranova* . . . . . 713
- 4 ‘Accessory Exhaustion’ (*Astra*) . . . . . 717
- 5 Conclusion . . . . . 719
- References . . . . . 720
- Tax Law** . . . . . 721
- Richard Lyal
- 1 Indirect Taxation . . . . . 723
- 2 Direct Taxation . . . . . 730
  - 2.1 Free Movement of Capital: Outbound Dividends . . . . . 733
  - 2.2 Exit Taxation . . . . . 735
  - 2.3 Free Movement of Economically Inactive Persons . . . . . 738
  - 2.4 Cross-Border Company Taxation . . . . . 741
  - 2.5 Controlled Foreign Company Rules . . . . . 743

- 2.6 Cross-Border Company Reorganisation . . . . . 745
- 2.7 Other Direct Tax Issues . . . . . 746
- 3 Conclusion . . . . . 747
- Reference . . . . . 748
- Mutual Administrative and Legal Assistance . . . . . 749**
- Andreas Batliner and Heinz Konzett
- 1 Mutual Administrative and Legal Assistance . . . . . 750
- 2 The Boundary Between Administrative and Legal Assistance . . . . . 751
- 3 Legal Assistance . . . . . 751
  - 3.1 European Convention on Mutual Assistance in Criminal Matters . . . . . 752
  - 3.2 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime . . . . . 753
  - 3.3 Schengen . . . . . 753
- 4 Administrative Assistance . . . . . 753
  - 4.1 Administrative Assistance in Tax Matters . . . . . 753
  - 4.2 Administrative Assistance Relating to the Financial Market . . . . . 754
  - 4.3 New Developments in Administrative Assistance in European Financial Market Supervision . . . . . 757
- References . . . . . 760

**Part XI Law of Natural and Economic Resources**

- Natural Resources . . . . . 763**
- Knut Almestad
- 1 The Historic Background . . . . . 763
- 2 The General Rules as Interpreted by the Courts . . . . . 764
- 3 Public Ownership to Natural Resources . . . . . 766
- 4 The Territorial Scope of the EEA Agreement . . . . . 768
- 5 The Particular Situation of the Fisheries Sector . . . . . 770
- Energy Law . . . . . 773**
- Dirk Buschle and Birgitte Jourdan-Andersen
- 1 Introduction: The Evolution of EU Energy Policy and Law . . . . . 773
  - 1.1 The Creation of an Internal Market . . . . . 774
  - 1.2 Sustainability . . . . . 777
  - 1.3 Security of Supply . . . . . 779
  - 1.4 The Energy Union . . . . . 780
- 2 Energy Sectors and Markets in the EEA . . . . . 780
  - 2.1 Iceland . . . . . 780
  - 2.2 Liechtenstein . . . . . 781
  - 2.3 Norway . . . . . 782
- 3 EEA Energy Law in Substance . . . . . 783
  - 3.1 The Internal Market Rules in the EEA . . . . . 783
  - 3.2 Sustainability . . . . . 786
  - 3.3 Security of Supply . . . . . 788