Reykjavík, 28 February 2025

To the President and Members of the EFTA Court

Statement of Defence

submitted pursuant to Article 107 of the Rules of Procedure of the EFTA Court by

the Government of Iceland

represented by
Mr. Hendrik Daði Jónsson, Legal Adviser, Ministry for Foreign Affairs,
and Mr. Birgir Hrafn Búason, Deputy Director General, Ministry for Foreign Affairs,
acting as Agents in

Case E-30/24

EFTA Surveillance Authority
v
Iceland

in which the EFTA Surveillance Authority requests the EFTA Court to declare that, by maintaining in force an administrative practice which precludes the transfer of the capital value of occupational pensions accrued in Iceland to the pension scheme of the European Union institutions, Iceland has failed to fulfil its obligations under Article 29(1) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and/or Article 28 of the EEA Agreement.

The Government of Iceland has the honour of lodging the following Statement of Defence.

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I. Introduction

1. By a letter dated 29 November 2024, the Registrar of the EFTA Court served the Government of Iceland the Application of the EFTA Surveillance Authority ("the Authority"), dated 26 November 2024, which was received by the Court, electronically, on that day.

2. The Authority seeks a declaration from the EFTA Court that, by maintaining in force an administrative practice which precludes the transfer of the capital value of occupational pensions in Iceland to the pension scheme of the European Union institutions ("the PSEUI"), Iceland has failed to fulfil its obligations under Article 29(1) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency[1] ("the EASA Regulation"), and/or Article 28 of the EEA Agreement.

3. In the Court's letter of 29 November 2024, the Government of Iceland was invited, with reference to Article 107 of the Rules of Procedure of the EFTA Court ("the Rules of Procedure"), to lodge a defence within two months from the date of the notification, that is by Wednesday 29 January 2025. On 5 December 2024, the Registrar of the EFTA Court informed the Government that the President of the EFTA Court had, pursuant to Article 107(3) of the Rules of the Procedure, granted an extension of the time-limit for the submission of the defence until 28 February 2025.

4. In this Statement of Defence, the Government of Iceland will demonstrate that the Application is manifestly unfounded and should be dismissed.

   (i) Firstly, Article 29(1) of the EASA Regulation does not impose an obligation on Iceland to require Icelandic occupational pension funds to execute transfers of accrued pension rights to the PSEUI.

[1] Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19.3.2008, p. 1.

(ii) Secondly, the non-implementation by Iceland of an instrument of the European Union's internal institutional law does not entail any restriction on the free movement of persons under Article 28 of the EEA Agreement.

(iii) Thirdly, the situation in Iceland which the Authority wrongly alleges to infringe the EEA Agreement does not constitute an administrative practice of the Icelandic State.

II. Pre-Litigation Procedure and Admissibility

5. The Government of Iceland recalls that, within the EFTA pillar, the good functioning of the European Economic Area through compliance with the provisions of the EEA Agreement is a joint endeavour of the EFTA States and the EFTA Surveillance Authority, harnessed through active dialogue and good cooperation.

6. In the event that the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement, it has recourse to the procedure under Article 31 of the Surveillance and Court Agreement, which may result in a Direct Action against that EFTA State before the EFTA Court. In such cases, it is incumbent upon the Authority to prove, firstly, the existence of an obligation and, secondly, that the obligation has not been fulfilled.

7. The Authority must undertake this task with due diligence and engagement with the EFTA State concerned through the pre-litigation procedure. As the case-law of the EFTA Court holds:

> *When assessing the admissibility of a claim before the Court, it must be borne in mind that the purpose of the pre-litigation procedure is to give the EFTA State concerned an opportunity, on the one hand, to comply with its obligations under EEA law and, on the other hand, to avail itself of its right to defend itself against the charges formulated by ESA. The proper conduct of that procedure constitutes an essential guarantee not only in order to protect the rights of the EFTA State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.*[2]

[2] E-13/23 *EFTA Surveillance Authority* v *The Kingdom of Norway*, judgment of 20 December 2024, para 64.

8. On that last point, it is established that "the letter of formal notice issued by ESA to the EFTA State and the reasoned opinion delivered by ESA delimit the subject-matter of the dispute, so that it cannot afterwards be extended."[3]

9. The Government of Iceland considers that the Authority has fallen short of this standard throughout the course of the pre-litigation procedure.

10. The Government recalls that it has sought to engage actively with the Authority for the duration of the pre-litigation procedure. As such, it has made efforts to understand the Authority's legal arguments and to respond to them with rebuttals and with key questions regarding the ramifications of the Authority's argumentation for other provisions of the EEA Agreement.

11. In turn, the Authority has been unwilling to extend to the Government the courtesy of responding to its legal arguments or to the questions raised. This applies both to the pre-litigation procedure and to the Application, which, in fact, wholly misrepresents the positions clearly articulated by the Government of Iceland in its exchanges with the Authority.

12. In this regard, the Government of Iceland considers it material to note that the Authority and its officials have made repeated and public statements about their interest in bringing the case to litigation. The interest expressed concerns not the actual dispute but the broader legal question which the Authority would like for the EFTA Court to clarify.

13. The Government refers here to paragraph 4 of the Application where the Authority states that "[i]n respect of the First Plea, the Court's ruling in this case will *inter alia* clarify the important point of whether a prescriptive reference [...] to an act which has not been incorporated into the EEA Agreement can, *in the particular circumstances of the case*, have EEA law consequences for the relevant EFTA State".

14. This echoes the press release issued by the Authority to publicise its adoption of the Reasoned Opinion in the case, wherein the responsible College Member of the Authority stated that the "case raises cross-cutting legal questions about how to interpret the EEA Agreement, beyond the specific complaint". He further underlined

[3] ibid para 63.

that "[i]n pursuing this matter, ESA aims to clarify these questions and thus to contribute to legal certainty more broadly".[4] It should be noted that the same responsible College Member authored a published article which drew attention to the interesting nature of the horizontal legal questions raised by the case.[5]

15. The Government of Iceland is therefore of the opinion that the present litigation constitutes an abuse of process on the part of the Authority which undermines the integrity of the Direct Action procedure before the EFTA Court. The procedure forms an integral part of the EEA Agreement's compliance mechanism and is intended to resolve genuine and specific disputes. It should not be used as a vessel to engage in legal debates of a general and academic nature.

16. Further, the Government of Iceland submits that several statements made by the Authority, in support of its First Plea in law, allege violations of provisions of the EEA Agreement which fall outside the scope of the present dispute. The pre-litigation procedure has delimited the dispute to concern Article 29(1) of the EASA Regulation and Article 28 of the EEA Agreement. As a result, the following disguised additional pleas advanced by the Authority must be dismissed as inadmissible as they are charges of violations of provisions outside the scope of the present dispute as delimited in the pre-litigation procedure:

    (i) In the Reasoned Opinion, the Authority has stated that the conduct which it attributes to the Icelandic State and which the present dispute concerns "constitutes a breach of Article 3 of the EEA Agreement". The Authority renews this statement in paragraphs 30 and 83 of the Application.

    (ii) In the Application, the third point of the first limb of the Authority's First Plea in law is that Iceland has failed to fulfil its obligations under Article 30 of the EASA Regulation.

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4 EFTA Surveillance Authority, 'Iceland in breach of EEA rules over refusal to transfer pension rights to EASA' (Press Release, 15 March 2023) <https://www.eftasurv.int/newsroom/updates/iceland-breach-eea-rules-over-refusal-transfer-pension-rights-easa>.

5 Stefan Barriga and Michael Sánchez Rydelski, 'Die EFTA-Überwachungsbehörde als Hüterin des EU-Binnenmarktrechts Mandat, aktuelle Verfahren und Herausforderungen' (2023) 44 Liechtensteinische Juristen-Zeitung 3, p. 136-142.

(iii) In the Application, the third point of the second limb of the Authority's First Plea in law is that Iceland has violated its obligations under Article 29(4) of the EASA Regulation.

III. First Plea: No Breach of Article 29(1) of the EASA Regulation

17. The Government of Iceland recalls the Reasoned Opinion in which the Authority posited that "[t]he principal question to be assessed in the present case is whether Article 29 of the EASA Regulation, as incorporated into the EEA Agreement, confers upon EFTA nationals working for EASA the right to have their occupational pensions transferred to the PSEUI." This is echoed in paragraphs 44, 56 and 59 of the Application.

18. The Government of Iceland continues to contest this posturising by the Authority.

19. On the part of the Government, there exists no uncertainty as to the fact that EASA staff members of any nationality, be they Icelanders or EEA nationals or third country nationals, are entitled to the full enjoyment of their existing rights under the EU Staff Regulations. These rights follow from the application of that instrument to them pursuant to Article 29(1) of the EASA Regulation.

20. What the Government of Iceland rejects is the Authority's argument that the incorporation of Article 29(1) of the EASA Regulation into the EEA Agreement has had the legal effect of amending the EU Staff Regulations to the degree that the rights and obligations undertaken by the parties to that instrument are additionally conferred and imposed upon Iceland, and thus enforceable as provisions of the EEA Agreement by proxy.

21. Over the course of the past six years, the Government of Iceland has consistently maintained that the Authority's novel and maximalist interpretation of Article 29(1) of the EASA Regulation is unfounded and lacks support in the provisions of the EEA Agreement, as well as established principles of treaty interpretation. While the Authority's legal arguments have undergone multiple transformations throughout the pre-litigation procedure, each iteration has served to deliver an outcome which, in the Authority's view, represents an overriding and indispensable intention of the Contracting Parties. The Authority therefore insists that its interpretation of Article

29(1) should prevail, notwithstanding its systemic inconsistencies and overall incoherence with other provisions of the EEA Agreement. The Government submits that the Authority's arguments are fundamentally flawed and must be rejected.

3.1 The Legal Significance of Non-Incorporated Acts under the EEA Agreement

22. As the Authority states in paragraph 4 of the Application, the present litigation is pursued to seek to clarify whether a reference in a provision of EEA law to an extraneous legal instrument can have "EEA legal consequences" for the EFTA States.

23. At the outset, the Government of Iceland recalls that, in harmonising among its Contracting Parties a legal framework that constitutes only a part of the body of European Union law, it is inevitable that the EEA Agreement contains references to legal instruments that are themselves not part of EEA law.

24. Hence, in the context of the present dispute, there is nothing remarkable about the fact that incorporated acts vesting competences in bodies of the European Union also make reference to the EU institutional law that governs those bodies.

25. In fact, provisions like the one at issue here have been made part of the EEA Agreement since Decision of the EEA Joint Committee No 74/1999 of 28 May 1999[6] ("JCD No 74/1999") incorporated the Regulation establishing what is now the European Medicines Agency (EMA) into Chapter XIII of Annex II to the EEA Agreement.

26. These provisions have been in force in an EEA context for over 25 years without any controversy as to their legal meaning. It is therefore perplexing that, two decades after the incorporation of the first of approximately two dozen such provisions, the EFTA Surveillance Authority for the first time began questioning an EFTA State about its compliance with one of the extraneous instruments of EU institutional law referred to therein.

27. While this horizontal legal question is neither new nor so complex as to warrant adjudication, its centrality to the Authority's First Plea necessitates further elaboration. Therefore, before addressing the specific issue of the interpretation of

[6] Decision of the EEA Joint Committee No 74/1999 of 28 May 1999 amending Protocol 37 and Annex II (Technical regulations, standards, testing and certification) to the EEA Agreement, OJ L 284, 9.11.2000, p. 65.

Article 29(1) of the EASA Regulation, the Government of Iceland will explain the Contracting Parties' understanding of the legal significance of references to non-incorporated acts in EEA law, an understanding which has already been confirmed by the EFTA Court.

28. At the outset, the Government of Iceland refers to two foundational principles of international law: *pacta sunt servanda* and State consent. The first entails that a State is bound by the obligations it has undertaken. The second affirms that a State can only be bound by the obligations it agrees to. It follows that an international obligation cannot bind a Party that has not accepted it, as is codified in Article 34 of the Vienna Convention on the Law of Treaties.[7]

29. These principles are foundational to the EEA Agreement. The Agreement in its entirety is binding on the Contracting Parties, and this includes the acts referred to in the Annexes.[8] These acts are to be made part of the internal legal orders of the Contracting Parties and their content is adapted by Protocol 1 to the Agreement to shift them from the EU to the EEA legal context. All provisions of EEA law are equally authentic in the 25 languages listed in Article 129 of the Agreement.

30. To maintain homogeneity in the European Economic Area, the Contracting Parties are to continuously amend the Annexes to include new EU legal acts within the scope of the Agreement. Such incorporation is not automatic but requires the adoption of a dedicated Decision of the EEA Joint Committee. This reflects the fact that homogeneity is an act of State consent, as the Contracting Parties have not transferred legislative powers to any institution of the European Economic Area.[9]

31. It follows that an act that has not been incorporated into an Annex to the EEA Agreement is not binding on the Contracting Parties.

32. The Authority has conceded this much,[10] but appears to consider it to be without significance. In the Letter of Formal Notice, the Authority argued that "[t]o the extent that secondary legislation, which has been made part of EEA law, requires

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7 Vienna Convention on the Law of Treaties ("VCLT") (adopted 23 May 1960, entered into force 27 January 1980) 1151 UNTS 331.

8 See: Articles 1(2) and 119 of the EEA Agreement.

9 See, *inter alia*: Protocol 35 to the EEA Agreement.

10 See: Letter of Formal Notice, Annex A.11 to the Application, p. 7; Reasoned Opinion, Annex A.13 to the Application, p. 9; Application, para 49.

an instrument of EU law, such as the EU Staff Rules [sic] to be observed, that instrument **applies fully** in the context of, and as specified by, that piece of legislation"[11] (emphasis added). In fact, the Authority has listed provisions of the EU Staff Regulations alongside actual provisions of the EEA Agreement under the heading "EEA Law" in the Letter of Formal Notice, the Reasoned Opinion and the Application.[12]

33. This argumentation gives reason to pause. How can a non-incorporated act have as much legal force as an act which the Contracting Parties have expressly agreed to incorporate? How can a non-incorporated act confer rights or impose obligations on the Contracting Parties if it is not subject to paragraph 7 of Protocol 1 to the EEA Agreement? How can a provision of such an act apply in an EEA context when it has not been authenticated in the languages listed in Article 129 of the Agreement and published in the EEA Supplement to the *Official Journal of the European Union*? If the impetus for this reasoning was homogeneity, what implications would an amendment of the referenced instrument by the European Union have on application under the EEA Agreement, which expressly precludes the transfer of the Contracting Parties' sovereign legislative competences?

34. The Government of Iceland has posed these questions to the Authority.[13] The Authority has not answered them, neither in the pre-litigation procedure nor in the Application. Presumably, the Authority is reticent because it cannot answer these questions in a manner that simultaneously delivers its desired outcome and maintains coherence with the EEA Agreement. The reason for this is that, since the entry into force of the EEA Agreement, the Contracting Parties have consistently applied an entirely opposing legal approach to provisions referring to non-incorporated acts than the one which the Authority is advocating for in the present case.

35. Indeed, such provisions in acts being considered for incorporation into the EEA Agreement are specifically flagged for individual scrutiny, in accordance with the

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11 Letter of Formal Notice, Annex A.11 to the Application, p. 7.

12 See: Letter of Formal Notice, Annex A.11 to the Application, section 3, point (14); Reasoned Opinion, Annex A.13 to the Application, p. 5, Application, section 3.1, paras 19-20.

13 See: Slides 11, 12 and 15 of the Presentation of the Government of Iceland to the Authority of 17 January 2023, Annex A.19 to the Application.

applicable rules of the Standing Committee of the EFTA States ("the EFTA Standing Committee").[14] The Working Groups which process acts for incorporation must assess whether such a provision can apply in an EEA context as such or whether it must be adapted.

36. The EFTA Standing Committee's Subcommittee V on Legal and Institutional Matters ("Subcommittee V") has issued guidance to the Working Groups on the principles relevant to that assessment:[15]

> *9. Acts referred to or contained in the Annexes or Protocols to the Agreement are binding upon the Contracting Parties and are to become part of their internal legal orders.*
>
> *10. Acts which do not appear in the Annexes or in the Protocols are not binding on the EFTA States. References to such acts in incorporated acts do not lead to an indirect incorporation of those acts into the EEA Agreement.*
>
> *11. The general principle is that a reference to a non-incorporated act does not create legal obligations outside the scope of the individual incorporated act. This includes, for example, provisions which refer to existing obligations of the EU Member States. In some cases, the provisions containing such references may not be effectively and uniformly applied by the EFTA States without relying on the provisions of non-incorporated acts or by following the procedures contained therein. This may result in the unfortunate situation where the EFTA States are either unable to adequately comply with these provisions that follow from the referred provisions or the EFTA Surveillance Authority is unable to monitor compliance. In such situations, an adaptation clarifying how that reference should be read in the context of the EEA Agreement may be appropriate.*

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14 Decision of the Standing Committee of the EFTA States No 1/2014/SC of 8 May 2014 on procedures for the incorporation of EU acts into the EEA Agreement and repealing Decision No 1/2012/SC of 30 April 2012; see also: European Free Trade Association, 'Handbook on EEA EFTA procedures for incorporating EU acts into the EEA Agreement' (2nd edn, EFTA Bulletin) <https://www.efta.int/sites/default/files/publications/bulletins/EFTA-Bulletin-October-2016-updated.pdf>.

15 Subcommittee V on Legal and Institutional Questions, 'Principles applying to references to non-incorporated acts' (Legal Note by the Secretariat, 22 September 2022) (Annex 9 to the Defence), paras 9-11.

37. The necessity of an adaptation can be determined by recourse to one question: does the provision require action by the Contracting Parties in respect of the non-incorporated act referred to?

38. If the answer is affirmative, then the Contracting Parties have a binding obligation prescribed by the EEA Agreement requiring specific performance and the relevance of the non-incorporated act may need to be addressed through adaptation. If the answer is negative, then an adaptation is not necessary unless the Contracting Parties specifically seek to have the EFTA States enjoy rights and obligations in respect of the non-incorporated instrument.

39. The standard for this assessment is whether the provision confers rights or imposes obligations within the meaning of paragraph 7 of Protocol 1 to the EEA Agreement, which reads as follows:

> *7. RIGHTS AND OBLIGATIONS*
>
> *Rights conferred and obligations imposed upon the EC Member States or their public entities, undertakings or individuals in relation to each other, shall be understood to be conferred or imposed upon Contracting Parties, the latter also being understood, as the case may be, as their competent authorities, public entities, undertakings or individuals.*

40. By way of example, Article 22(2) of Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018[16] ("the Organic Production Regulation"), which is incorporated into the EEA Agreement, confers on Member States the right to grant derogation from organic production rules under the Regulation where that Member State "has formally recognised an event as a natural disaster as referred to in Article 18(3) or Article 24(3) of Regulation (EU) No 1305/2013", which is not incorporated into the EEA Agreement. It follows that the EFTA States cannot apply the derogation under the Organic Production Regulation as it is contingent on compliance with an instrument which is not part of EEA law. The provision was therefore adapted upon incorporation into the EEA Agreement

[16] Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007, OJ L 150, 14.6.2018, p. 1.

to refer, as regards the EFTA States, "to criteria established under national law in the EFTA States."[17]

41. For comparison, Article 55 of the Organic Production Regulation governs the operation of the Organic Production Committee and makes references, for that purpose, to Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011[18], which is an instrument of EU institutional law which has not been incorporated into the EEA Agreement. While Article 55(2) and (3) explicitly states that provisions of Regulation (EU) No 182/2011 shall apply, these provisions do not confer rights or obligations on the Contracting Parties within the meaning of paragraph 7 of Protocol 1. As a result, this provision is not adapted in the case of the Organic Production Regulation nor in the case of parallel provisions in dozens of acts incorporated into the EEA Agreement.[19]

42. The logic underpinning this adaptation practice has been confirmed by the case-law of the EFTA Court, which already addressed a question concerning the EEA legal effect of non-incorporated instruments in Case E-2/23 *A Ltd* v *Finanzmarktaufsicht*.[20] The instrument in question were joint guidelines issued by the European Supervisory Authorities (ESAs), pursuant to Articles 16 of their respective founding Regulations.[21] Those provisions imposed obligations on two sets of actors: firstly,

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17 Adaptation (b) in point 54b of Chapter XII of Annex II to the EEA Agreement, introduced by Decision of the EEA Joint Committee No 31/2022 of 4 February 2022, OJ L 175, 30.6.2022, p. 49. See also: Explanatory Note, 'Incorporation of Regulation (EU) 2018/848 into the EEA Agreement (18 December 2020) (Annex 12 to the Defence).

18 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.

19 See, *inter alia*: Article 43 of Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, OJ L 169, 25.6.2019, p.1.

20 E-2/23, *A Ltd* v *Finanzmarktaufsicht*, judgment of 25 January 2024.

21 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12 ("the EBA Regulation"); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48 ("the EIOPA Regulation"); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84 ("the ESMA Regulation").

on the ESAs to adopt guidelines and, secondly, on the competent authorities of the Contracting Parties to "make every effort to comply" with them.

43. The question before the EFTA Court was whether a declaration of compliance by a competent authority had a binding effect on the courts of the Contracting Parties to the degree that they were themselves obliged to make every effect to comply with the guidelines. The EFTA Court was resolute in answering this question in the negative, stressing that legal obligations could not stem from the guidelines as they did not form part of EEA law:

> *The Joint Guidelines are not a legal act that has been incorporated into the EEA Agreement and, as such, are not binding upon the Contracting Parties pursuant to Article 7 of the EEA Agreement. Therefore, the Joint Guidelines issued by EIOPA cannot be regarded as producing binding legal effects, in and of themselves, as a matter of EEA law.*[22]

44. In light of the foregoing, the Government of Iceland submits that the legal significance of non-incorporated acts referred to in provisions of the EEA Agreement is beyond dispute. The rights and obligations of the Contracting Parties stem from the provisions of the EEA Agreement and not from extraneous instruments referred to therein. The question of whether a provision of EEA law requires action by a Contracting Party in respect of a non-incorporated instrument can be settled by recourse to paragraph 7 of Protocol 1 to the EEA Agreement. Accordingly, the Government of Iceland will proceed to address the alleged violation of Article 29(1) of the EASA Regulation.

3.2 The Legal Significance of Article 29(1) of the EASA Regulation

45. At the time of the compliance date set out in the Reasoned Opinion, the EASA Regulation was referred to in point 66n of Annex XIII to the EEA Agreement.[23]

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22 E-2/23 (n 20), para 72.

23 The EASA Regulation was repealed under the EEA Agreement by Decision of the EEA Joint Committee No 114/2023 of 28 April 2023 amending Annex II (Technical regulations, standards, testing and certification) and Annex XIII (Transport to the EEA Agreement (OJ L, 2023/2294, 9.11.2023 p. 1), which entered into force on 16 July 2024. The Government will employ the present tense when referring to the EASA Regulation throughout the Statement of Defence. For the avoidance of doubt, any reference to the EASA Regulation should be understood as referring to the way it applied when it was in force under the EEA Agreement.

46. It is undisputed that the Government of Iceland fulfilled its obligations under Article 7(a) of the EEA Agreement in respect of the Act. What is in dispute is whether, and to what extent, Article 29(1) of the EASA Regulation confers rights and imposes obligations on Iceland, its public entities, undertakings and nationals.

47. The Government of Iceland submits that Article 29(1) does neither. Rather, much like Article 55 of the Organic Production Regulation, its effect is to apply an instrument of EU institutional law, as it exists outside of the EEA Agreement, to a new body of the European Union. The Authority, however, contends that the fact that the referenced instrument prescribes rights and obligations within its area of application necessarily means that they apply as provisions of EEA law.

48. In ascertaining the legal implications of Article 29(1), the Government of Iceland refers to the peremptory norms of international law regarding treaty interpretation, as codified in Article 31(1) of the Vienna Convention on the Law of Treaties.[24] These norms hold that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

49. The settled case-law of the EFTA Court on the interpretation of EEA law is congruent with these norms, holding that: "the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part."[25]

50. This approach is also consistent with the case-law of the Court of Justice of the European Union, which holds that "the meaning and scope of terms for which [Union] law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part."[26]

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24 VCLT (n 7).

25 E-17/24 *Söderberg & Partners AS* v *Gable Insurance AG in Konkurs*, judgment of 5 February 2025, para 40.

26 C-549/07, *Friederike Wallentin-Hermann* v *Alitalia – Linee Aeree Italiane SpA*, ECLI:EU:C:2008:771, para 17. See, also: C-292/82 *Firma E. Merck* v *Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:1983:335, para 12; C-285/12 *Aboubacar Diakité* v *Commissaire général aux réfugiés et aux apatrides*, ECLI:EU:C:2014:39, para 27; C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW* v *Helena Vandersteen and Others*, ECLI:EU:C:2014:2132, para 19.

51. The Government will proceed with elaborating how Article 29(1) of the EASA Regulation should be interpreted in accordance with the applicable rules on interpretation.

3.2.1 The Ordinary Meaning of Article 29(1)

52. The ordinary meaning of the terms of Article 29(1) of the EASA Regulation is determined by consulting the text of the provision as it has been incorporated into the EEA Agreement. The Government recalls that this requires consulting, in addition to the text of the act itself, the horizontal adaptations in Protocol 1 to the Agreement, the sectoral adaptations in Annex XIII, and the specific adaptations set out in point 66n thereof.[27]

53. Article 29(1) of the EASA Regulation reads as follows:

> *The Staff Regulations of Officials of the European Communities, the Conditions of Employment of Other Servants of the European Communities and the rules adopted jointly by the institutions of the European Communities for purposes of the application of those Staff Regulations and Conditions of Employment shall apply to the staff of the Agency, without prejudice to the application of Article 39 of this Regulation to the members of the Board of Appeal.*

54. The ordinary meaning of the provision evokes a legal effect of expanding the scope of application of at least three instruments of European Union institutional law to include, in addition to their pre-existing scopes, the staff of EASA. The text does not imply that the provisions of those instruments are incorporated into the EASA Regulation, rather the staff of EASA is included in the scope of the referenced legal regime. This is consequential for any additional meaning ascribed to Article 29(1)

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[27] This follows from the introductory provision of Protocol 1 on Horizontal Adaptations which sets out that: "[t]he provisions of the acts referred to in the Annexes to the Agreement shall be applicable in accordance with the agreement and this Protocol, unless otherwise provided in the respective Annex. The specific adaptations necessary for individual acts are set out in the Annex where the act concerned is listed."
See, also: Sven Norberg et al. *EEA Law: A Commentary on the EEA Agreement* (CE Fritzes 1993), p. 78-79; European Free Trade Association, 'Adaptation texts to EU acts upon incorporation into the EEA Agreement' ("Adaptations Note") (Legal Note by the Secretariat, EFTA 2019) <https://www.efta.int/sites/default/files/publications/bulletins/efta_bulletin_legal_notes.pdf>.

by the horizontal, sectoral and specific adaptations in Protocol 1, Annex XIII and point 66n thereof.

55. While Protocol 1 applies to the EASA Regulation in its entirety, most of its provisions do not have any discernible practical relevance for the application of Article 29(1). Paragraph 7 of Protocol 1 is, nevertheless, consequential for the present legal dispute.

56. While it already follows from Article 7 of the EEA Agreement that an act referred to in an Annex is binding on the Contracting Parties and to be made part of their internal legal orders, additional adjustments are necessary to adapt the content of the acts to shift them from their previous EU context to their expanded EEA scope of application. Paragraph 7 of Protocol 1 is the indispensable additional element which transforms the rights and obligations which the provisions of an act ascribe to EU Member States, their public entities, undertakings or individuals into the rights and obligations of all EEA Contracting Parties and their corresponding entities, undertakings or individuals.

57. As Protocol 1 does not address EU institutions, agencies or bodies, other than the European Commission, specific adaptations are necessary when the rights and obligations conferred or imposed upon any such entity in respect of EU Member States are also to apply to the EFTA States.[28] In the case of EU agencies, this has been effected through standard adaptation text which ensures that any reference to EU Member States in an agency act is further understood to include the EFTA States. Adaptation (a) to the EASA Regulation served this purpose in relation to rights and obligations of EASA in respect of the EU Member States and, it follows, the EFTA States, by stating that:

> *Unless otherwise stipulated below, and notwithstanding the provisions of Protocol 1 to the Agreement, the term 'Member State(s)' contained in the*

[28] See, *inter alia*: EFTA, Adaptations Note (n 27) p. 43, 52; European Free Trade Association, 'The Two-Pillar System of the EEA Agreement: Legal Framework and Overview of Cases Raising Two-Pillar Challenges' (Legal Note by the Secretariat, EFTA 2019) <https://www.efta.int/sites/default/files/publications/bulletins/efta_bulletin_legal_notes.pdf>, p. 20-22; 'Working Paper on EU Agencies' ("Agencies Note") (Note by the Secretariat, 19 October 2022) (Annex I to the Defence), p. 18-19; EFTA Working Group on Financial Services, 'The use of the general adaptation regarding "Member States" in different areas' (Note by the Secretariat, 15 November 2019) (Annex II to the Defence), paras 10-14.

Regulation shall be understood to include, in addition to its meaning in the Regulation, the EFTA States. Paragraph 11 of Protocol 1 shall apply.

58. The Government notes that the legal effect that the adaptation is understood to have, and its underlying rationale, is explained in relevant Explanatory Notes to the Decisions of the EEA Joint Committee incorporating the Regulations on EASA into the EEA Agreement.[29]

59. The Government of Iceland submits that the above constitutes a comprehensive overview of the provisions necessary to determine the ordinary meaning of the terms of Article 29(1) of the EASA Regulation.

60. It follows from these provisions that any obligation which Article 29(1) imposes upon the EU Member States, as such or in relation to EASA, is thus also imposed upon Iceland as an EEA Contracting Party, pursuant to either Paragraph 7 of Protocol 1 to the EEA Agreement or adaptation (a) to the EASA Regulation.[30]

61. However, the Government of Iceland submits that a plain reading of Article 29(1) confirms that it neither confers rights nor imposes obligations on EU Member States, their public entities, undertakings or nationals, so as to trigger the application of Protocol 1 or adaptation (a).

62. It follows that Article 29(1) does not impose positive obligations on the EU Member States in respect of these instruments. Those obligations already exist under those instruments and are not altered by the EASA Regulation. The material change is that EASA staff become rightsholders under these instruments. This means that the staff is secured the enjoyment of the rights as they are set out in those instruments, as they have been adopted and already exist independently of the EASA Regulation.

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29 See: Explanatory Note by the Secretariat, 'Incorporation of Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency' (22 June 2004) (Annex 3 to the Defence), paras 4 to 8; Explanatory Note, 'Incorporation of the new EASA Regulation into the EEA Agreement' (7 July 2011) (Annex 4 to the Defence), p. 1; Explanatory Note, 'Incorporation into the EEA Agreement of Regulation (EU) 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency (EASA)' (31 March 2022) (Annex 5 to the Defence), p. 1.

30 For the sake of clarity, it should be noted that adaptation (a) only applies to specific references to the term Member State, in the singular or in the plural.

63. The Government of Iceland notes that the EFTA Surveillance Authority's fundamental misunderstanding concerns the conceptual distinction between an instrument *applying* and a positive obligation *to* apply it.

64. The Authority has based its argument on there being an uncertainty as to which actor is to apply the referenced instruments to the staff of EASA.[31] This leads the Authority to its unfounded conclusion that Iceland should be among the many actors who participate in applying these instruments. The Government notes that this conclusion is not based on an interpretation of Paragraph 7 of Protocol 1, to which the Authority has made no reference, but rather on what the Authority perceives would make the rights of EASA staff most effective.

65. While the Government will address the Authority's arguments on effectiveness later in the Defence, it submits that there is no uncertainty in the meaning of the terms of Article 29(1) of the EASA Regulation which would require clarification through supplementary means of interpretation.

66. In fact, any perceived uncertainty as to the meaning of Article 29(1) in the English language can be resolutely elucidated by having reference to the other equally authentic language versions of the EASA Regulation.[32] In Icelandic, the term "gilda" is used to specify that the referenced instruments apply to the staff of EASA. If the provision was instead to require the application of the rules *by* any actor, the relevant term in the Icelandic language would be "beita".[33] The Danish, German and Swedish language versions employ etymological cognates to the Icelandic term: these are "gælder", "gelten" and "gälla", respectively. The Norwegian language version specifies that the instruments "får anvendelse på" (literally, they have application to) the staff of EASA. That formulation is also employed in the Dutch

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31 Reasoned Opinion, Annex A.13 to the Application, p. 8; Application, para 34.

32 Article 129(1) of the EEA Agreement specifies that: "[t]he texts of the acts referred to in the Annexes are equally authentic in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages as published in the *Official Journal of the European Union* and shall for the authentication thereof be drawn up in the Icelandic and Norwegian languages and published in the EEA Supplement to the *Official Journal of the European Union*."

33 See, for example: adaptation (n) to the EASA Regulation in the Icelandic language as published in EEA Supplement No. 15/58 to the *Official Journal of the European Union*, 15.3.2012.

language version where the instruments "van toepassing op" the staff of EASA. The French and Spanish language versions use pronominal verbs to interlink the referenced instruments and the staff of EASA. In French, the instruments "s'appliquent au personnel de l'Agence", that is, they apply themselves to the staff of the Agency. Similarly, in Spanish, the instruments "[s]e aplicará al personal de la Agencia". It is clear from all of these language versions that no actor is entrusted with the obligation of applying the referenced instruments to the staff of EASA, but rather that these instruments are made to apply as such to the agency staff.

67. With reference to the above, the Government of Iceland submits that the ordinary meaning of the terms of Article 29(1) of the EASA Regulation, as incorporated into the EEA Agreement, is clear. The meaning is that three or more extraneous instruments of European Union law, of which the EU Staff Regulations is one, apply to the staff of EASA, in the form that they have been adopted and exist outside of the EASA Regulation. Nothing in the text of Article 29(1), nor of the other provisions of the EEA Agreement which have application to that article, entail or imply that Iceland is to undertake to apply those instruments to the staff of the agency.

68. The Government submits that this understanding is further reinforced by having recourse to supplementary means of treaty interpretation.

3.2.2 The Context of Article 29(1)

69. The Government of Iceland submits that the context in which Article 29(1) of the EASA Regulation is to be interpreted supports the understanding, that already follows from the ordinary meaning of its terms, that a reference to the application of non-incorporated acts in the EU legal order does not have the consequence of rendering those acts provisions of the EEA Agreement. That context comprises, in addition to the text of the provision itself, other provisions of the EASA Regulation referring to non-incorporated acts, as well as of other agency acts which have been incorporated into the EEA Agreement. This context is further informed by the preparatory works associated with the incorporation of these instruments into the Agreement and exchanges between the Contracting Parties about their meaning.

70. The immediate context of Article 29(1) is its placement within the structure of the EASA Regulation, namely in Section II of Chapter III thereof. Chapter III is titled "the

European Aviation Safety Agency" and Section II is titled "Internal Structure". It follows that Article 29(1) is among the provisions of the EASA Regulation which is concerned with the internal affairs and operation of EASA as an agency. Adjacent provisions in this Section of the Regulation are concerned with the legal personality and capacity of EASA, its legal liability and the location of its offices.[34] These provisions of the Regulation are distinct in their substance from the provisions of Chapters I and II, titled "Principles" and "Substantive Requirements" respectively, both of which lay down common rules in the field of civil aviation in the European Economic Area.

71. Further, the contested reference to the EU Staff Regulations in Article 29(1) is not an isolated case of a non-incorporated act being referred to in the EASA Regulation. Rather, it exists within a context of multiple other references to non-incorporated acts, namely in Articles 15(2), 29(1) and (2), 30, 58(1) and (4), 60(2), (4) and (9), 61(1), 63, and 65(1)-(7).

72. Contrary to what the Authority alleges in paragraph 60 of the Application, the Government of Iceland submits that a uniform approach must be applied to interpreting the legal significance of all these referenced instruments under the EEA Agreement.

73. The Authority has repeatedly argued that, if the Contracting Parties had intended to exclude the EFTA States from being bound by the EU Staff Regulations, they could have introduced an adaptation to that effect.[35] However, this claim directly contradicts the actual adaptation practice of the Contracting Parties in the EASA Regulation. In fact, the Contracting Parties have only introduced adaptations where their intention was for the EFTA States to have rights and obligations in respect of referenced non-incorporated instruments.

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34 See, for example: Article 28 on Legal status, location, local offices; Article 31 on Liability; and Article 32 on the Publication of documents.

35 Letter of Formal Notice, Annex A.11 to the Application, p. 8; Reasoned Opinion, Annex A.13 to the Application, p. 11; Application, para 44.

74. This is the case for the references to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001[36] ("the Public Access Regulation") in Articles 15(2) and 58(1), the Conditions of Employment of Other Servants of the European Union[37] ("the Conditions of Employment") referred to in Articles 29(1) and (4) of the Regulation, and the Protocol on Privileges and Immunities of the European Union[38] ("the Protocol on Privileges and Immunities") referred to in Article 30. These instruments are all referenced in the same manner as the EU Staff Regulations, that is, they all "apply" to either the staff of the Agency or to the Agency as such.

75. Adaptation (f) in point 66n of Annex XIII to the EEA Agreement introduces paragraph 5 of Article 15 of the EASA Regulation, which entails that the Public Access Regulation shall apply to documents of EASA regarding the EFTA States. The provision reads as follows:

> *5. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents shall, for the application of the Regulation, apply to any documents of the Agency regarding the EFTA States as well.*

76. Adaptation (m) introduces paragraph 4 of Article 29 of the EASA Regulation, which entails that the Executive Director of EASA may engage EFTA nationals under contract. The provision reads as follows:

> *4. By way of derogation from Article 12(2)(a) of the Conditions of employment of other servants of the European Union, nationals of the EFTA States enjoying*

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36 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31/05/2001, p. 43.

37 Article 29(1) refers to the former title of the Conditions of Employment which was applicable at the time of the adoption of the EASA Regulation: "Conditions of Employment of Other Servants of the European Communities". For the sake of consistency, the Government will refer to the Conditions of Employment under their current title.

38 Article 30 refers to the former title of the Protocol which was applicable at the time of the adoption of the EASA Regulation: "Protocol on the Privileges and Immunities of the European Communities annexed to the Treaties establishing the European Community and the European Atomic Energy Community". For the sake of consistency, the Government will refer to the Protocol under its current title.

their full rights as citizens may be engaged under contract by the Executive Director of the Agency.

77. Adaptation (n) adds a subparagraph into Article 30, which obliges the EFTA States to apply the Protocol on Privileges and Immunities to EASA. The provision reads as follows:

The EFTA States shall apply to the Agency and to its staff the Protocol of Privileges and Immunities of the European Union and applicable rules adopted pursuant to that Protocol.

78. All three adaptations have the effect of conferring rights and imposing obligations that would otherwise not exist. Yet, the Authority's First Plea is entirely contingent on all three adaptations being legally superfluous. This reasoning cannot hold: if the adaptations were not necessary to yield their legal results, then they would not have been introduced.

79. Thus, the fact that provisions providing for the application of the Public Access Regulation, the Conditions of Employment and the Protocol and Privileges and Immunities to EASA or EASA staff have been incorporated into the EEA Agreement does not automatically entail that the rights and obligations existing under those instruments are conferred upon all EEA Contracting Parties, their public entities, undertakings or individuals. The rights and obligations follow from adaptations (f), (m) and (n) *sine qua non*.

80. The Government notes that this understanding of the Contracting Parties of the legal effect of these adaptations and their underlying rationale is evidenced by the Explanatory Notes to the Decisions of the EEA Joint Committee incorporating the EASA Regulations into the EEA Agreement. This is also the case for the previous and subsequent versions of those adaptations in Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002[39] ("the 2002 EASA

[39] Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ L 240, 07.9.2002 ("the 2002 EASA Regulation"), p. 1.

Regulation") and in Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018[40] ("the 2018 EASA Regulation").[41]

81. The Government of Iceland further submits that the parallel provisions in other agency acts which are referred to in the Annexes to the EEA Agreement inform the context of Article 29(1) of the EASA Regulation. These are:

(i) Article 48 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002[42] referred to in points 41 of Part 7.1 of Chapter I and of Chapter II of Annex I and point 54zzzc of Chapter XII of Annex II;

(ii) Article 6 of Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002[43] referred to in point 56o of Annex XIII;

(iii) Article 75 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004[44] referred to in point 15zb of Chapter XIII of Annex II;

(iv) Article 103 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006[45] referred to in point 12zc of Chapter XV of Annex II;

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40 Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 ("the 2018 EASA Regulation"), OJ L 212, 22.8.2018, p. 1.

41 See: Explanatory Note by the Secretariat, Annex 3 to the Defence, paras 20-21.

42 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1.

43 Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency ("the EMSA Regulation"), OJ L 208, 5.8.2002, p. 1.

44 Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing a European Medicines Agency ("the EMA Regulation"), OJ L 136, 30.4.2004, p. 1.

45 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and

(v) Article 28 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009[46] referred to in point 47 of Annex IV;

(vi) Article 68 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010[47] referred to in point 31g of Annex IX;

(vii) Article 68 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010[48] referred to in point 31h of Annex IX;

(viii) Article 68 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010[49] referred to in point 31i of Annex IX;

(ix) Article 67 of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016[50] referred to in point 42f of Annex XIII;

(x) Article 95 of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018[51] referred to in point 66zb of Annex XIII;

(xi) Article 30 of Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018[52] referred to in point 5czr of Annex XI;

(xii) Article 34 of Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019[53] referred to in point 5cp of Annex XI; and,

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repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC ("the REACH Regulation"), OJ L 396, 30/12/2006, p. 1.

46 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators ("the ACER Regulation"), OJ L 211, 14.8.2009, p. 1.

47 The EBA Regulation (n 21).

48 The EIOPA Regulation (n 21).

49 The ESMA Regulation (n 21).

50 Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 ("the ERA Regulation"), OJ L 138, 26/05/2016, p. 1.

51 The 2018 EASA Regulation (n 40).

52 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 ("the BEREC Regulation"), OJ L 321, 17.12.2018, p. 1.

53 Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) ("the ENISA Regulation"), OJ L 151, 7.6.2019, p. 15.

(xiii) Article 30 of Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019[54] referred to in point 11 of Annex V.[55]

82. The Government of Iceland underscores that all these provisions have been incorporated into the EEA Agreement in a manner consistent with the incorporation of Article 29(1) of the EASA Regulation. Namely, the provisions concerning the applicability of the EU Staff Regulations and other instruments of European Union institutional law have been incorporated without being subject to specific adaptations. In the case of all of these acts, specific adaptations set out derogations from the Conditions of Employment of Other Servants of the Union, to enable the employment of EFTA State nationals within each respective agency. Finally, an adaptation has in all cases been introduced to the relevant provision applying the Protocol on Privileges and Immunities to the agency, to the effect that the obligations of EU Member States set out therein are conferred also upon the EFTA States in respect of that agency.

83. As further evidence for the legal significance of the adaptations, the Government of Iceland refers to the relevant sections of the Explanatory Notes justifying the necessity of their adoption to produce the intended legal effect.[56]

84. Further to the above, the Government submits that this understanding of the Contracting Parties, reflected in the Explanatory Notes, has also been borne to bear in written exchanges between them in relation to the incorporation of agency acts into the EEA Agreement. In particular, the Government refers to the following excerpt from a Non-Paper submitted by the Subcommittee V to the European Commission on 18 November 2022, following discussions that arose in respect of

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54 Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 ("the ELA Regulation"), OJ L 186, 11/07/2019, p. 21.

55 Regulation (EU) 2019/1149 was incorporated into Annex V by Decision of the EEA Joint Committee No 319/2023 of 8 December 2023 amending Annexes V (Free movement of workers) and VI (Social security) and Protocol 31 (On cooperation in specific fields outside the four freedoms) to the EEA Agreement, the entry into force of which is pending.

56 See: Annex 6 to the Defence which contains Explanatory Notes concerning the incorporation of the EMSA Regulation, the EMA Regulation, the REACH Regulation, the ACER Regulation, the EBA Regulation, the EIOPA Regulation, the ESMA Regulation, the ERA Regulation, the BEREC Regulation, the ENISA Regulation, and the ELA Regulation.

adaptations concerning the Protocol on Privileges and Immunities in the meeting of the EEA Joint Committee on 28 October 2022 (emphasis added):[57]

> *4. Adaptations regarding the status of Protocol 7 on the Privileges and Immunities of the European Union illustrate the above. Furthermore, the usual practice when the EU sets up Agencies is to stipulate in the founding acts of such Agencies that Protocol 7 shall apply to the Agency and its staff. As Protocol 7 is annexed to both the TEU and TFEU, the EU Member States are of course fully bound by its provisions and, consequently, obliged to apply the privileges and immunities contained therein to the relevant Agency. As the EEA EFTA States are not parties to the Protocol and the Protocol is not part of the EEA Agreement,* ***the fact that an incorporated Agency act specifies that the Protocol applies to the Agency entails no obligations for the EEA EFTA States vis -à-vis the Agency or its staff.*** *As a result, adaptations are introduced to the effect that the EEA EFTA States shall also extend the privileges and immunities to the Agency and its staff.*

85. Following the submission of the Legal Note, the Contracting Parties agreed to standardise their approach to the incorporation of such adaptation texts, along with Joint Declarations clarifying their legal significance (that is, the absence thereof) in an EU legal context.[58]

86. With reference to the above, the Government of Iceland submits that the context which informs the interpretation of Article 29(1) of the EASA Regulation reinforces the conclusion that the legal effect of extraneous instruments of Union law is merely to extend their application to new entities, not to create new rights and obligations of the Contracting Parties thereunder. Indeed, the contextual sources referred to evidence that the interpretation adopted by the EFTA Surveillance Authority in respect of Article 29(1) conflicts with the legal understanding applied by the Contracting Parties and reflected in their adaptation practice for more than

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57 'Incorporation of EASA, Cybersecurity and Cedefop Regulations into the EEA Agreement: Legal implications of adaptations concerning privileges and immunities of EU Agencies' (Non-Paper submitted by Subcommittee V) (Annex 7 to the Defence), para 4.

58 Response from the European Commission to the Non-Paper, e-mail to the EFTA Secretariat of 28 November 2022 (Annex 8 to the Defence; see also: Joint Declaration by the Contracting Parties to Decisions of the EEA Joint Committee No 22/2023 of 3 February 2023, No 27/2023 of 28 April 2023, No 28/2023 of 3 February 2023; No 109/2023 of 28 April 2023, No 114/2023 of 28 April 2023, No 319/2023 of 8 December 2023, and No 327/2023 of 8 December 2023.

two decades. The position of the EFTA Surveillance Authority cannot be held without simultaneously concluding that a number of the provisions of the EEA Agreement, introduced through specific adaptations to agency acts, are without legal effect.

87. In clear terms, the Authority is of the position that the EFTA States should be considered bound by obligations against their clearly expressed intentions and without their consent. Such an approach goes against fundamental principles of international law and should be rejected.

3.2.3 The Object and Purpose of Article 29(1)

88. The Government now turns to elaborating the object and purpose against which the incorporation of the EASA Regulation into the EEA Agreement should be interpreted. While the present dispute pertains to the EASA Regulation adopted in 2008, the terms of participation of the EFTA States in the agency were agreed upon already in the 2002 Regulation. As a result, the Government will also refer to instruments associated with the incorporation of the 2002 Regulation since they are relevant to evidence the intention of the Contracting Parties.

89. Over the course of the pre-litigation procedure, the EFTA Surveillance Authority has progressively developed a theory of the intention of the Contracting Parties in incorporating the EASA Regulation into the EEA Agreement which underpins the meaning it seeks to ascribe to Article 29(1).

90. The Authority holds that the intention of the Contracting Parties with the incorporation of the EASA Regulation into the EEA Agreement was to enable the full participation of the EFTA States in the agency. This is reflected in the specific adaptations made to that effect and in recital (4) in the preamble of Decision of the EEA Joint Committee No 163/2011[59] ("JCD No 163/2011"), which incorporated the Regulation into the EEA Agreement, and which states that the incorporation should "allow for the full participation of the EFTA States in [EASA]."

91. The Authority submits the recital as evidence of the Contracting Parties' "intention fully to involve the EFTA States **(and by extension their nationals)** in the work of

[59] Decision of the EEA Joint Committee No 163/2011 of 19 December 2011 amending Annex XIII (Transport to the EEA Agreement, OJ L 76, 15.3.2022, p. 51.

EASA" (emphasis added).[60] Indeed, the Authority has made clear that the involvement of EFTA State nationals as employees of EASA is part and parcel of what it understands the full participation of the EFTA States in the work of the agency to entail. The Government recalls, in this regard, that in its Reasoned Opinion, the Authority even went so far as to say that the purpose of the incorporation of the EASA Regulation was to "obviate" any disincentivising of "participation in the EASA by EFTA-national staff".[61]

92. The Government of Iceland submits that the Authority is correct in stating that the objective of incorporating the EASA Regulation into the EEA Agreement was *inter alia* to enable the full participation of the EFTA States in the work of EASA. That being said, the Authority's characterisation of the Contracting Parties' intent is unduly narrow and misidentifies the specific outcome they sought to achieve.

93. To understand the object and purpose of incorporating the EASA Regulation into the EEA Agreement, it is, firstly, relevant to survey all the substantive recitals in JCD No 163/2011, which together convey a unified message. These are:

> *(2) Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC has as its principal objective to establish and maintain a high uniform level of civil aviation safety within the Union.*
>
> *(3) The activities of the European Aviation Safety Agency may affect the level of civil aviation safety within the European Economic Area.*
>
> *(4) Regulation (EC) No 216/2008 should therefore be incorporated into the Agreement in order to allow for the full participation of the EFTA States in the European Aviation Safety Agency.*

60 Application, para 44.
61 Reasoned Opinion, Annex A.13 to the Application, p. 11.

94. It should be noted that these recitals mirror the corresponding recitals (2) to (4) in Decision of the EEA Joint Committee No 179/2004 of 9 December 2004,[62] which incorporated the 2002 EASA Regulation into the EEA Agreement.

95. Secondly, it is relevant to consult the recitals in the preamble of the EASA Regulation, which largely reflect corresponding recitals in the 2002 EASA Regulation. The Government recalls that, in accordance with paragraph 1 of Protocol 1 to the EEA Agreement, while the preambles of incorporated acts are "not adapted for the purposes of the Agreement", "[t]hey are relevant to the extent necessary for the proper interpretation and application, within the framework of the Agreement, of the provisions contained." The Government submits that recitals (1), (12), (15), (23), (27), and (31) to the EASA Regulation are relevant for this purpose, in particular the following excerpts thereof (emphasis added):

> *(1) A **high and uniform level of protection** of the European citizen should at all times be ensured in civil aviation, by the adoption of **common safety rules and by measures ensuring that products, persons and organisations in the Community comply with such rules** and with those adopted to protect the environment. This should **contribute to facilitating the free movement of goods, persons and organisations in the internal market.***
>
> *...*
>
> *(12) There is a need for better arrangements in all the fields covered by this Regulation so that **certain tasks currently performed at Community or national level should be carried out by a single specialised expert body** . There is, therefore, a **need within the Community's existing institutional structure and balance of powers to establish a European Aviation Safety Agency** (hereinafter referred to as the Agency) which is **independent** in relation to technical matters and has **legal, administrative and financial autonomy**. To that end, it is necessary and appropriate that it should be a Community body having legal personality and exercising the implementing powers which are conferred on it by this Regulation.*

62 Decision of the EEA Joint Committee No 179/2004 of 9 December 2004 amending Annex XIII (Transport) to the EEA Agreement, OJ L 161, 23.6.2005, p.1.

...

*(15) The **effective functioning of a Community civil aviation safety scheme** in the fields covered by this Regulation **requires strengthened cooperation** between the Commission, the Member States and the Agency to detect unsafe conditions and take remedial measures as appropriate.*

...

*(23) The Commission and the Member States should be represented within a Management Board in order t**o control effectively the functions of the Agency.** This Board should be entrusted with the necessary powers to establish the budget, verify its execution, adopt the appropriate financial rules, establish transparent working procedures for decision making by the Agency and appoint the Executive Director. [...] .*

...

*(31) It is a general objective that the transfer of functions and tasks from the Member States, **including those resulting from their cooperation through the Joint Aviation Authorities** , to the Agency should be effected efficiently, without any reduction in the current high levels of safety, and without any negative impact on certification schedules. [...].*

96. Three key things should be understood from these recitals. Firstly, the EASA Regulation pursues a high-level of aviation safety through a unified legal framework. Secondly, the attainment of that objective is considered to be better served by vesting pre-existing competences of the Commission and the Member States, including those pertaining to cooperation within the Joint Aviation Authorities ("the JAA"), in a dedicated agency within the European Union's institutional structure. Thirdly, that agency should be independent and enjoy legal, administrative and financial autonomy, but be subject to the management of the Commission and the Member States through its Management Board.

97. This echoes the broader trend of agencification within the European Union, which has accelerated since the late 1990s to cover most specialised policy fields. Integrating the growing number of EU agencies and their role in the internal market into the institutional framework of the EEA Agreement has been an acute challenge

for the Contracting Parties to address.[63] EASA was one of the first agencies which the Contracting Parties had to accommodate within the EEA Agreement, with the EFTA States being involved in conceptual discussions about its future establishment as early as 1998.[64]

98. While it was undisputed that the Regulation's substantive provisions directly concerned fields harmonised by the EEA Agreement, the concentration of *hard* and *soft* competences for the application of those rules in EASA tested the Agreement's central premise of substantive homogeneity in the absence of institutional convergence. Further, EASA was intended to subsume the role previously played by the JAA as the forum within Europe for aviation safety standard setting. As a result, the incorporation of the EASA Regulation into the EEA Agreement placed the EFTA States in a situation where competences they had previously entrusted to an international organisation of which they were members would shift to an internal organ of the European Union where their capacity to influence decision-making would *ipso facto* be diminished.

99. This was reflected in the position of the EFTA States in the negotiations for the incorporation of the 2002 EASA Regulation into the EEA Agreement. In a Memorandum submitted to the European Commission on 22 March 2004, the EFTA States stated that they considered "it essential that they retain the balance of rights and obligations enjoyed in the context of JAA as well as acknowledging the principles of the EEA Agreement and the principle of Community autonomy in decision making."[65] This underpinned the position of the EFTA States that they should be secured full participation in the agency's Management Board on equal

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63 See: Agencies Note (n 28), Annex 1 to the Application, paras 1-6; Erlend Leonhardsen, 'The EEA EFTA States and EU Agencies: Getting Along or Going Alone' (SSRN, 21 September 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663412>; Tarjei Bekkedal, 'Third State participation in EU agencies: Exploring the EEA precedent' (2019) 56(2) Common Market Law Review 381; Finn Arnesen et al., *Agreement on the European Economic Area: A Commentary* (Nomos Verlagsgesellschaft 2018) p. 11, 24, 71, 468-470, 760-761.

64 Working Group on Transport, 'EFTA Participation in the European Aviation Safety Agency' (Background Note by the Secretariat, 26 March 2001) (Annex 10 to the Defence), p. 4.

65 Standing Committee of the EFTA States, 'Memorandum on the outstanding issues relating to the incorporation of Regulation (EC) No 1592/2002 on common rule in the field of civil aviation and establishing a European Aviation Safety Agency' (Annex I to Minutes No. 1040923, 22 March 2004) (Annex 11 to the Defence), para 4.

terms as the EU Member States, including voting rights. The rationale for this position is elaborated in the following excerpt from the 2004 Memorandum:[66]

> *7. As Iceland and Norway currently have full voting rights in JAA, it is crucial that these rights are upheld for the EEA EFTA Member States in the Management Board when it adopts decisions related to administrative tasks and internal functions of the Agency, e.g. when adopting the Agency's programme of work; adopting guidelines for the allocation of certification tasks to national aviation authorities or qualified entities in agreement with the Commission; establishing procedures for making decisions by the Executive Director as referred to in Articles 43 and 44; appointing the members of the Board of Appeal pursuant to Article 32.*

100. The position of the European Commission, expressed at a meeting between the Contracting Parties on 24 March 2004, was that, "with respect to EEA EFTA participation in the EASA Management Board, the Commission could not and would not grant voting rights to non-EU Member States in a Community Agency. Although having carefully taken into account the arguments that EEA EFTA [sic] have put forward regarding Norway's and Iceland's voting rights in the Joint Aviation Authority the fact remained that EASA had now been established as a Community Agency, and as such, third country voting rights could not be accepted."[67]

101. The Government of Iceland submits that these views of the Contracting Parties, expressed and recorded in the context of the negotiations for the incorporation of the 2002 EASA Regulation, are material to interpreting the meaning of the agreement struck. This entailed: firstly, that the EFTA States would be secured full participation in EASA, without voting rights; secondly, that the EFTA States would participate in the financial contribution of the European Union to the budget of the agency; thirdly, that the EFTA States would apply the Protocol on Privileges and Immunities to the agency; and, fourthly, that EFTA nationals would be eligible for

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66 ibid., para 7.

67 Standing Committee of the EFTA States, 'Informal Consultation Meeting with the Commission on the Outstanding Issues Relating to the Incorporation of Regulation (EC) No 1592/2002 on Common Rules in the Field of Civil Aviation and Establishing a European Aviation Safety Agency' (Minutes by the Secretariat, 24 March 2004) (Annex 11 to the Defence), para 7.

employment in EASA. This has since become the standard model for the participation of the EFTA States in decentralised agencies of the European Union.[68]

102. There are no records of exchanges between the Contracting Parties that give credence to the Authority's contention that the objective of the "full participation" of the EFTA States in EASA concerned or encompassed the involvement of EFTA nationals in its work. On the contrary, the existing records make clear that the object and purpose of EASA participation concerns statecraft, i.e. to secure State participation in decision-making within bodies of the European Union whose work impacts the EFTA States.

103. Staff of EASA do not serve in a national capacity and their allegiance in carrying out their duties is to their employer, not to the State of which they are citizens. This much is clear from the EU Staff Regulations, applicable to EASA Staff, which stipulate that:

> *An official shall carry out his duties and conduct himself solely with the interests of the Union in mind. He shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union.*[69]

104. It follows that the Authority's argument, that the objective of full EFTA State participation in an agency and the eligibility of EFTA State nationals for employment therein are one and the same, is unsupported and cannot hold. Indeed, adaptations on the employability of EFTA nationals in EU agencies serve an objective that is ancillary to the primary objective of full participation. For Iceland, the objective of employability is two-fold: firstly, it strengthens an agency's competence in matters concerning Iceland and Icelandic conditions and, secondly, it enables Icelandic nationals to attain expertise relevant for future employment of such individuals in Icelandic administration. As regards the motivation of the European Union, the Government refers to records of the EFTA Secretariat from the

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68 See: section 4.2 of the Agencies Note (n 28) (Annex I to the Defence).

69 Article 11 of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45, 14.6.1962, p. 1385.

negotiations of the incorporation of the 2002 EASA Regulation which cite its agreement to the adaptation on employability on the basis that "it would be in the interest of the Agency to engage the best expertise available".[70]

3.2.4 Conclusion

105. Considering the foregoing, the Government of Iceland submits that the Authority's interpretation of Article 29(1) of the EASA Regulation is unfounded, legally incoherent and entirely unsupported by the provisions of the EEA Agreement. The text, context, and object and purpose of Article 29(1) make clear that it extends the application of a pre-existing instrument of EU institutional law to EASA staff, without prescribing any new rights or obligation for the Contracting Parties under that external instrument. The Authority's selective reliance on a single recital in JCD No 163/2011, while disregarding all other applicable sources of interpretation, to deliver the most onerous outcome possible for the Icelandic State, further belies the obligation to interpret treaties in good faith. It follows that the Authority's First Plea in law must fail.

106. The Government of Iceland will nevertheless continue to address the subsidiary arguments made by the Authority in support of its interpretation of Article 29(1).

3.3 The Effectiveness of Article 29(1)

107. The Authority has sought to invoke the principle of effectiveness to substantiate its First Plea.[71] This principle has application under the EEA Agreement, both as a general principle of public international law and more specifically as a principle of EEA law derived from Article 3 of the Agreement.[72] In the context of the implementation of an EEA act into the internal legal order of a Contracting Party, the principle of effectiveness requires that implementing rules "do not render it practically impossible or excessively difficult to exercise the rights in question".[73] The settled case-law of the EFTA Court further requires that "where a provision of

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70 Subcommittee II on Free Movement of Services and Capital, 'European Aviation Safety Agency (EASA)' (Background Note for meeting of 7 June 2001, 6 June 2001), p 3.

71 Application, paras 34, 52, 53, and 55.

72 See: Páll Hreinsson, 'General Principles' in C. Baudenbacher, *The Handbook of EEA Law* (Springer 2016), 376-378; E-2/10 *Þór Kolbeinsson* v *the Icelandic State*, judgment of 10 December 2010, para 46.

73 Arnesen et al., *Agreement on the European Economic Area: A Commentary* (n 63), p. 263-264, citing E-11/12 *Beatrix Koch and others*, judgment of 13 June 2013, para 121.

EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness".[74]

108. In this context, it is worth noting that Article 29(1) of the EASA Regulation is not open to several interpretations and there is, consequently, no need to have recourse to the principle of effectiveness for that purpose.

109. Nevertheless, the Authority has, throughout the pre-litigation procedure and in the Application, made several mutually inconsistent arguments in relation to the obligations of the Government of Iceland under the principle of effectiveness in respect of Article 29(1).

110. The Government of Iceland recalls that the Authority has, throughout the pre-litigation procedure, repeatedly mistaken the subject of the present dispute as being the application of the EU Staff Regulations to staff of EASA who are nationals of the EFTA States. This misunderstanding is still reflected in arguments made by the Authority in the Application, specifically in paragraph 44. Although misinformed, the Authority came to the correct conclusion as regards the effectiveness of Article 29(1) of the EASA Regulation in the Letter of Formal Notice and the Reasoned Opinion, when it stated:

> *On this basis, the Authority considers that any interpretation that would amount to disapplying the possibility for EFTA nationals to rely on the EU Staff Regulations as foreseen by Article 29(1), would obstruct the full effectiveness of those persons' right to be employed by the EASA on the same footing as EU nationals.*[75]

111. Indeed, for Article 29(1) to be effective, the instruments of EU institutional law referred to therein must apply to all EASA staff and be enforceable in the legal order in which EASA is constituted, which is the EU legal order.[76] The negative obligation that Iceland has undertaken with the incorporation of Article 29(1) of the EASA Regulation prohibits the Government of Iceland from taking any action which

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74 E-17/24 (n 25), para 40.

75 Reasoned Opinion, Annex A.13 to the Application, p. 9, cf. Letter of Formal Notice, Annex A. 11 to the Application, p. 7.

76 See: Article 28(1) of the EASA Regulation.

would amount to disapplying the application of the relevant EU institutional law, as it exists in the EU legal order, to any staff member of EASA of any nationality.

112. In the Application, the Authority has adopted a new theory of effectiveness to achieve its desired legal outcome. As such, the Authority now argues that "[e]ffectiveness of this provision requires: (i) having recourse to certain parts of the Staff Regulations, which effectively 'clothe' the bare bones of Article 29(1); and (ii) giving those parts effect."[77]

113. This statement encapsulates in full the feebleness of the Authority's case. The Authority is not arguing for Article 29(1) of the EASA Regulation to be interpreted so that it **retains** its effectiveness. Instead, the Authority wants Article 29(1) to be a vessel through which the EU Staff Regulations can **attain additional effect** by applying them as if they were actual provisions of the EEA Agreement.

114. Such an argument corrupts the purpose of the principle of effectiveness, which serves to protect the rights conferred by the EEA Agreement upon individuals and undertakings, not rights which the EFTA Surveillance Authority would prefer for it to entail. It follows that the Authority's arguments in this regard must be dismissed.

3.4 The Relevance of the Principle of Reciprocity

115. In support of its First Plea, the Authority has made repeated references to the principle of reciprocity under the EEA Agreement.[78] In the Reasoned Opinion, the Authority argued that an interpretation of Article 29(1) of the EASA Regulation which would not require the EFTA States to apply the EU Staff Regulations would "amount to a lop-sided arrangement with a lack of concomitant reciprocity between the EU Member States on the one hand, and the EFTA States on the other."[79] The Authority elaborated upon this in paragraph 57 of the Application where it stated *inter alia* that this would mean that "the EU and its Member States **would have granted the right** of full participation in the Agency to the EFTA States and Iceland, including the right of their/Icelandic nationals to be employed by the Agency, **without a**

77 Application, para 53.

78 Letter of Formal Notice, Annex A.11 to the Application, p. 8; Reasoned Opinion, Annex A.13. to the Application, p. 9 and 11; Application, para 57.

79 Reasoned Opinion, p. 11.

reciprocal obligation for Iceland to give effect (as the EU Member States must) to the relevant Staff Regulations" (emphasis added).[80]

116. Here, the Government of Iceland submits that the Authority mistakes the principle of reciprocity for a contrived notion of fairness in the agreements reached between the Contracting Parties.

117. The principle of reciprocity, the textual basis for which is recital 4 to the EEA Agreement, entails that rights conferred by the EEA Agreement may be invoked by EEA nationals and undertakings throughout the EEA. Thus, Article 29(1) of the EASA Regulation is a provision of the EEA Agreement which is enforceable before courts of the Contracting Parties. The EU Staff Regulations are an instrument of EU institutional law which can be enforced within the EU legal order by staff of EU institutions.

118. This principle does not curtail the capacity of the Contracting Parties to mutually agree on the form that their cooperation takes in new provisions of the EEA Agreement adopted by the EEA Joint Committee.

119. In any event, the Authority's opinion here is entirely baseless. As the Government of Iceland has already demonstrated, the creation of EASA resulted in a loss of reciprocal rights for the EFTA States in the area of European aviation safety regulation. The EFTA States sought to avert that outcome by securing full participation in EASA on the basis of reciprocal and equal rights. Ultimately, it was the European Union which did not agree to those terms on the basis that the reciprocity, which applies to rights of individuals and undertakings in the European Economic Area, could not be extended to the rights of the Contracting Parties to participation in the internal bodies of the Union.

120. It follows that the Authority's argument here, much like its argument in respect of effectiveness, relates not to a point of law, but to a point of policy. As a result, the Government of Iceland protests it as an outrageous and unjustified incursion into the domain of Iceland's foreign relations. Accordingly, the Government of Iceland

[80] Application, para 57.

calls on the Authority withdraw the allegations made in paragraph 57 of the Application.

3.5 Ramifications for Legal Certainty

121. Throughout the course of the pre-litigation procedure, the EFTA Surveillance Authority has failed to articulate a consistent legal rationale as to the legal significance of the EU Staff Regulations under the EEA Agreement.[81] The Authority's latest iteration, as outlined in the Application, is that Article 29(1) of the EASA Regulation requires Iceland to implement and apply the EU Staff Regulations "where relevant".[82]

122. In this context, the Government of Iceland stresses that the attainment of the objective of the EEA Agreement is dependent upon the existence of legal certainty. The settled case-law of the EFTA Court holds that legal certainty is a "fundamental principle of EEA law", which may be invoked by individuals, undertakings and Contracting Parties without distinction.[83] In particular, this principle requires "that rules of EEA law be clear and precise, so that interested parties can ascertain their position in situations and legal relationships governed by EEA law".[84]

123. The principle of legal certainty requires both substantive and formal clarity of legal rights and obligations. EEA law is derived from provisions of the EEA Agreement, including the acts referred to in the Annexes. Acts become binding as EEA law upon incorporation into the Agreement by a decision of the EEA Joint Committee which introduces a reference to the act, as published in the *Official Journal of the European Union*, into the relevant Annex or Protocol. The provisions of Part VII of the Agreement and Protocol 1 thereto entail that rights and obligations in those acts apply in an EEA legal context and are judicially enforceable. Every incorporated act and decision of the EEA Joint Committee is authenticated in the Agreement's 25

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81 Compare: Letter of Formal Notice, A.11. to the Application, p. 7; Reasoned Opinion, Annex A.13. to the Application, p. 9-10.

82 Application, paras 53, 56 and 59.

83 E-1/04 *Fokus Bank ASA* v *the Norwegian State, represented by Skattedirektoratet*, judgment of 23 November 2004, para 37; E-9/11 *EFTA Surveillance Authority* v *the Kingdom of Norway*, judgment of 16 July 2012, para 99; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and other*, para 163; Joined Cases E-17/10 and E-6/11 *The Principality of Liechtenstein and VTM Fundmanagement AG* v *EFTA Surveillance Authority*, para 141.

84 E-17/10 and E-6/11 (n 83), para 142.

equally authentic official languages and published in the *Official Journal of the European Union* and the EEA Supplement thereto. None of these essential legal certainty requirements are met in the case of the EU Staff Regulations, which the Authority nevertheless insists forms part of EEA law.

124. The Government of Iceland therefore submits that the Authority's argument that Iceland is obliged to apply the EU Staff Regulations "where relevant" is wholly incompatible with the principle of legal certainty. It is necessarily premised on accessible and certain rights under EU law becoming obscurely applicable under EEA law. Further, those rights would evolve dynamically within the EU legal order, as the EU Staff Regulations are progressively amended. However, as the EEA Agreement precludes the transfer of sovereign legislative competences, those rights would be static in respect of Iceland. In this regard, the Government of Iceland observes that the EU Staff Regulations have been subject to 38 alterations, including amendments and corrigenda, since the incorporation of the EASA Regulation into the EEA Agreement. It follows from all of the foregoing that the Authority's arguments must be rejected on grounds of incompatibility with the principle of legal certainty.

3.6 Connection with Fundamental Rights and *jus cogens* norms

125. Finally, the Government of Iceland will address the arguments made by the Authority that the application of EEA law is influenced by external "normative standards or rules".[85] The Authority has referred here to the United Nations Convention on the Rights of the Child,[86] a source of fundamental rights, and to the Charter of the United Nations,[87] the supreme instrument of the rules-based international order, the provisions of which constitute *jus cogens* or peremptory norms of international law.[88]

126. At the outset, and with reference to Section 3.1. above, the Government of Iceland submits that the same principles apply when a provision of EEA law requires

85 Application, para 54.

86 Convention on the Rights of the Child (adopted 20 November 1980, entered into force 2 September 1990) 1577 UNTS 3.

87 Charter of the United Nations ("UN Charter") (adopted 26 June 1945, entered into force 24 October 1945) V UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.

88 See, as regards supremacy, Article 103 of the UN Charter.

specific performance by a Contracting Party in relation to an extraneous standard as is the case for any referenced instrument of EU law. In the Authority's example, Article 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004[89] imposes obligations on EU Member States when they adopt expulsion decisions against nationals of EU Member States and EFTA States. One of those criteria is "the best interest of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989". It follows from paragraph 7 of Protocol 1 to the EEA Agreement that the obligation imposed upon the EU Member States in Article 28 of the Directive is, under the EEA Agreement, also imposed upon the EFTA States. This is the difference between Article 28 of the Directive and Article 29(1) of the EASA Regulation.

127. The fact that the reference to the Convention on the Rights of the Child was not adapted upon incorporation reflects the fact that all Contracting Parties to the EEA Agreement are themselves parties to that treaty, and thus under an obligation to respect its provisions in all their actions, including those governed by EEA law. The EFTA Court cited this fact *inter alia* when it recognised that "the best interests of the child represents a fundamental principle that forms part of the general principles of EEA law."[90]

128. The Government of Iceland submits that the EU Staff Regulations cannot be compared with the Convention on the Rights of the Child or with the UN Charter, as the Authority proposes. The EU Staff Regulations have narrow application to officials of the European Union, as opposed to the general application inherent to fundamental rights. The EU Staff Regulations are subject to regular amendment at the pleasure of the Union legislators, as opposed to the Convention on the Rights of the Child and the UN Charter which are static. Finally, the EU Staff Regulations have no wider acceptance of their legal value outside of the legal order in which

89 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

90 E-15/24 *A* v *B*, judgment of 12 December 2024, paras 52-53.

they apply, as is the case for *jus cogens* norms contained in the treaties referred to by the Authority.

129. On this last point, it is pertinent to note that, while the Authority insists that the binding effect produced by an "external standard" is "irrespective of whether the EFTA States are themselves signatories or parties to the instrument referred to",[91] this argument has only been substantiated by making reference to standards which all Contracting Parties have formally accepted as being legally binding. Indeed, the Authority's baseless claim requires the complete disregard of the principles of *pacta sunt servanda* and of State consent, inherent not only to the EEA Agreement but to treaty-making itself. It follows that the Authority's argument must fail.

IV. Second Plea: No Breach of Article 28 EEA

130. The Government of Iceland recalls paragraph 5 of the Application, wherein the Authority states that while the finding of a breach under the First Plea would "reinforce its arguments under the Second Plea, the Authority submits that Iceland's obligations under Article 28 EEA (the Second Plea) apply irrespective of whether Article 29(1) of the EASA Regulation imposes obligations on Iceland in this case". Having demonstrated that the Authority's First Plea is manifestly unfounded and must fail in its entirety, the Government will consider the Second Plea in isolation. Further, as is elaborated in Section V, since the Authority mischaracterises the situation in Iceland as an administrative practice, the Government of Iceland will assess the Second Plea on the basis of the actual situation in Iceland, which is that Icelandic law does not compel mandatory mutual pension funds to carry out transfers of pension entitlements out of Iceland.

131. The Authority argues that the situation in Iceland whereby individuals cannot transfer the capital value of their accrued pension rights in mandatory mutual pension funds to the PSEUI constitutes a restriction of the free movement of workers in violation of Article 28 of the EEA Agreement.[92] Pursuant to Article 28 of the Agreement, the Contracting Parties are to abstain from adopting measures liable to hinder or make less attractive the enjoyment of this fundamental freedom.

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91 Reasoned Opinion, Annex A.13 to the Application, p. 9.

92 Application, paras 63-64.

132. The Government of Iceland recalls that Article 28 of the EEA Agreement does not apply to employment in the public service. It further does not govern the right of EEA nationals to be employed in the institutions of the European Union, which is governed by instruments of EU institutional law, including those discussed in Section III. It is for this reason that adaptation texts must expressly provide for any right of EFTA nationals to be employed in EU agencies, as is the case with EASA.

133. Nevertheless, EEA nationals are considered "workers" when they exercise the right to free movement to take up employment for an international organisation, or an EU institution, in the territory of another Contracting Party. Iceland is thus prohibited from imposing a restriction within the meaning of Article 28 on such a worker. This applies equally to agencies in which Iceland participates, such as EASA, and those in which it does not participate, such as the European Fisheries Control Agency (EFCA). However, that does not mean that an omission by Iceland of positively implementing the rules applicable to the staff of the relevant organisation entails a restriction on the fundamental freedom prescribed by Article 28 of the EEA Agreement, especially where that freedom does not secure any right to be employed by that organisation.

134. If an obligation for Iceland to compel the transfer of entitlements from pension funds to the PSEUI could be derived from Article 28 of the EEA Agreement, the fact that this is a fundamental freedom of general application and the principle of equal treatment would necessarily require the portability of pension entitlements for all workers, not solely those who are EU officials. The cross-border enjoyment of social security rights under EEA law is governed by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004[93], which does not provide for the transferability of pension entitlements between social security systems.

135. For the avoidance of doubt, the Government of Iceland considers it pertinent to stress that the Complainant and any other staff member of EASA is, by virtue of their status of workers under EEA law, not deprived of any of their rights pursuant to Article 29 of the EEA Agreement or the provisions of Regulation (EC) No 883/2004. In accordance with those EEA law obligations, all individuals in the EEA, including

[93] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

employees of EASA, retain their accrued rights in Icelandic pension funds regardless of their place of residence.

136. The Government of Iceland therefore submits that the Authority's Second Plea is unfounded and must be dismissed.

V. The Existence of an Administrative Practice

137. As the Government of Iceland has demonstrated, the Authority's Pleas in Law must be dismissed because they are premised on a legal interpretation that is manifestly unfounded and systemically incoherent with the EEA Agreement. It follows that it is not strictly necessary to address the Authority's arguments in relation to the conduct which it alleges to breach non-existent obligations. Nevertheless, the Government of Iceland will, for the sake of completeness, also refute the Authority's allegation as regards the existence of an administrative practice in Iceland of refusing to allow the transfer of pension rights to the PSEUI.

138. The Government recalls that the Application, in its entirety, is premised on the Authority's assertion that Iceland maintains "a consistent administrative practice" refusing to allow staff members of the EASA to transfer the capital value of their "occupational pensions" accrued in Iceland to the PSEUI.[94]

139. The Government of Iceland contests this framing by the Authority and rejects as incorrect any allegation that an administrative practice to that effect is in place and practiced by Icelandic authorities.

140. An administrative practice infringing EEA law is held to exist where the conduct of an EEA State or its public entities is contrary to the obligations incumbent on that State to uphold, as set out in the provisions of the EEA Agreement. As the settled case-law of the EFTA Court holds, "even if the applicable national legislation [of an EEA State] itself complies with EEA law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes EEA law when the practice is, to some degree, of a consistent and general nature."[95]

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94 Application, para 28.

95 E-6/12 *EFTA Surveillance Authority* v *Kingdom of Norway*, judgment of 11 September 2013, para 58.

141. An administrative practice contrary to EEA law is therefore a distinct type of violation of the EEA Agreement, separate from other types of violations such as a failure to make an act referred to in an Annex to the Agreement a part of an EEA State's internal legal order, in accordance with Article 7 of the Agreement,[96] or the failure by an EEA State to take action to fulfil an obligation under a provision of the EEA Agreement,[97] or the maintenance by an EEA State of national legislation contrary to the EEA Agreement.[98]

142. While such infringements may, in theory, overlap, an infringement arising from an administrative practice requires that the conduct alleged to contradict applicable EEA obligations must be attributable to the EEA State which has undertaken to fulfil those obligations. As the EFTA Court held in its judgment in E-16/23 *EFTA Surveillance Authority* v *the Kingdom of Norway*, "the failure can be established only as a result of sufficiently documented and detailed proof of the alleged practice, **for which the EEA State concerned is answerable** " (emphasis added).[99] The Government of Iceland submits that this standard is not met in the present dispute.

143. The Authority has substantiated the existence of an administrative practice on the fact that it has received a complaint stating that "the Icelandic authorities had refused to transfer [the Complainant's] occupational pension rights which had accrued in Iceland, to the PSEUI" which was reflected by "a refusal from the Icelandic Social Insurance Administration in 2012".[100]

144. In a series of exchanges with the EFTA Surveillance Authority since 2019, the Government of Iceland has consistently accepted as factual the situation of the Complainant where he has been unable to transfer the capital value of his accrued rights in his mandatory mutual pension fund to the PSEUI. However, in spite of the Government's best efforts, the Authority has persistently mischaracterised that

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96 See, for example: E-10/24 *EFTA Surveillance Authority* v *Iceland*, judgment of 5 December 2024, para 24.

97 See, for example: E-8/11, *EFTA Surveillance Authority* v *Iceland*, judgment of 14 December 2011, para 36.

98 See, for example: E-3/00, *EFTA Surveillance Authority* v *the Kingdom of Norway*, judgment of 5 April 2001, para 43.

99 E-16/23 *EFTA Surveillance Authority* v *Kingdom of Norway*, judgment of 12 December 2024, para 36.

100 Application, para 6.

situation as constituting administrative action for which the Icelandic State is answerable.

145. As was elaborated in the Government's letter to the Authority of 13 August 2020, the Icelandic pension system consists of three pillars: (i) a tax-funded public pension; (ii) mandatory mutual pension funds; (iii) voluntary supplementary personal pension savings.

146. Of these pillars, only the first is directly administered by the Icelandic State, that is the public pensions which are under the purview of the Icelandic Social Insurance Administration. Public pensions are financed by the Icelandic Treasury and not by contributions from individuals. These pensions serve the purpose of securing a minimum income to retirement age individuals resident in Iceland. Entitlements in the public pension system are therefore determined though a means test based on an individual's actual income, including active income from their mandatory mutual pension fund. As a result, individuals do not have any accrued pension rights in the public pension system which could theoretically be transferred out of that system.

147. It follows that the Icelandic State does not directly administer any pension schemes which could hypothetically come within the purview of rights existing under the EU Staff Regulations. In fact, the Authority's Application makes clear that it pertains not to the public pension system in Iceland, but rather to system of mandatory mutual pension funds governed by Act No. 129/1997 on Mandatory Pension Insurance and the Activities of Pension Funds ("the Act").[101] The Icelandic system of mandatory mutual pension funds is privately operated and not within the competences of the Icelandic Social Insurance Administration nor of any other Icelandic authority.[102]

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101 For the avoidance of doubt, the Government considers it important to note the distinction between mandatory mutual pensions, which constitute the second pillar of the Icelandic pension system, and the concept of 'occupational pension funds' which are governed by EEA law and implemented into the Icelandic legal order by Act No. 78/2007 on Occupational retirement pension funds. As of 2025, no occupational pension funds operate in Iceland. Such funds would be considered as administering supplementary personal pension savings, within the meaning of the third pillar of the Icelandic pension system.

102 Of relevance here is the judgment of the Supreme Court of Iceland of 29 October 2015, in Case No. 115/2015, where the Court confirmed that mandatory mutual pension funds administering

148. The Act establishes a system of collective insurance among workers in the Icelandic labour market whereby they are obliged to pay set contributions into a mandatory mutual pension fund of their choosing. As stated, these pension funds are private entities governed by Icelandic law and they are collectively owned and operated by their members. The Act enumerates specific obligations for the operation of pension funds which are aimed at the security and stability of the system's collective guarantee for all insured persons. Beyond those legal obligations, pension funds are, like other private undertakings in Iceland, free and autonomous to act in any manner not otherwise prohibited by law.

149. Icelandic law places no express obligations on mandatory mutual pension funds to carry out transfers of entitlements between pension funds or reimbursements to members exiting the system. The Act does specify, for the sake of legal clarity, that pension funds may carry out such transfers of their own volition and, further, that they may reimburse the capital value of accrued entitlements to third country nationals exiting the Icelandic labour market. The decision to carry out such transactions is the prerogative of the pension fund in question. The reason for this is that a mandatory mutual pension fund constitutes the collective property of its members and is, as such, protected by the right to property under *inter alia* the Icelandic Constitution and the European Convention on Human Rights.

150. As regards the question of transferring accrued pension rights out of Iceland, the Government of Iceland observes that neither the Act nor other provisions of Icelandic law have specifically envisaged such a possibility. Such transfers are neither specifically authorised nor prohibited by Icelandic law. The reason for this is that the Icelandic system of mandatory mutual pension funds is set up as a closed system for the Icelandic labour market, as is the case for other such pension systems in the EEA.

151. With the above in mind, the Government of Iceland notes that the Complainant is in a situation where his privately-operated mandatory mutual pension fund has refused to execute a transfer, which he has requested, of the capital value of his accrued pension rights to the PSEUI. The pension fund has cited its assessment

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the savings of public employees are not administrative bodies within the meaning of the Administrative Procedures Act No. 37/1993.

that such a transfer would not be compatible with Icelandic law. That assessment is harmonious with the advice given to the complainant by the Icelandic Social Insurance Administration in 2012, which the Authority has mistaken as an administrative decision refusing to execute the transfer.

152. While the decision of the Complainant's pension fund not to authorise a transfer of accrued pension rights out of Iceland makes reference to a plausible interpretation of Icelandic law, the Government of Iceland submits that this does not make the pension fund's decision an action for which the Icelandic State is answerable. It follows that it cannot constitute an administrative practice of the Government of Iceland.

153. Contrary to what is alleged by the Authority, the Government of Iceland has in place no practice which precludes the possibility of transfers. Rather, the Government has not introduced legislation which would compel pension funds to undertake such transfers upon request. As the Government demonstrated in its submissions on the Authority's First and Second Pleas, it is under no obligation to introduce such legislation.

154. However, even if such a legal obligation existed under the EEA Agreement (*quod non*), the Application would still have to fail since it seeks a form of order that is premised on the existence of an administrative practice of the Icelandic State, which does not exist.

VI. Conclusion

155. With reference to the foregoing and for the reasons stated, the Government of Iceland submits that the Application is flagrantly and manifestly unfounded.

156. The Government of Iceland therefore requests the Court to:

1. Dismiss the Application.

2. Order the EFTA Surveillance Authority to pay the costs of these proceedings.

For the Government of Iceland,

Hendrik Daði Jónsson Birgir Hrafn Búason

Agents

Schedule of Annexes

Annex 1	Subcommittees I-IV – Working Paper on EU Agencies (Agencies' Note) – Note by the Secretariat – 19 October 2022
Annex 2	Working Group on Financial Services – The use of the general adaptation regarding Member States in different areas – Note by the Secretariat – 15 November 2019
Annex 3	Explanatory Note for the Incorporation of the 2002 EASA Regulation into the EEA Agreement – 22 June 2004
Annex 4	Explanatory Note for the Incorporation of the EASA Regulation into the EEA Agreement – 7 July 2011
Annex 5	Explanatory Note for the Incorporation of the 2018 EASA Regulation into the EEA Agreement – 31 March 2022
Annex 6	Explanatory Notes for the Incorporation of Various Agency Acts into the EEA Agreement
Annex 7	Non-Paper submitted by Subcommittee V to the European Commission on Adaptations Concerning Privileges and Immunities of EU Agencies – 18 November 2022
Annex 8	Correspondence between the European Commission and the EFTA Secretariat on the Non-Paper of Subcommittee V – 28 November 2022
Annex 9	Subcommittee V – Principles applying to references to non-incorporated acts in the EEA Agreement – Legal Note by the Secretariat – 22 September 2022
Annex 10	Working Group on Transport – EFTA Participation in the European Aviation Safety Agency – Background Note by the Secretariat – 26 March 2011
Annex 11	Standing Committee – Informal Consultation Meeting with the Commission on the Outstanding Issues Relating to the Incorporation of Regulation (EC) No 1592/2002 – Minutes by the Secretariat and Memorandum
Annex 12	Explanatory Note for the Incorporation of Regulation (EU) 2018/848 into the EEA Agreement – 18 December 2020