The Agreement on the European Economic Area (EEA)

A Guide to the Free Movement of Goods and Competition Rules

THÉRÈSE BLANCHET

Legal Officer EFTA Secretariat

RISTO PHPPONEN

Legal Officer EFTA Secretariat

MARIA WESTMAN-CLÉMENT

Legal Officer EFTA Court

CLARENDON PRESS · OXFORD 1994

CONTENTS

I. INTRODUCTION	1
1. GENERAL	1
1.1 Why the EEA Agreement?	1
1.2 EEA negotiations	2
1.3 Ratification process	3
1.4 The EEA Agreement in perspective	4
2. EEA INSTITUTIONS	4
3. SUBSTANTIVE RULES OF THE	
EEA AGREEMENT	5
3.1 General	5
3.2 Product coverage and rules of origin	6
3.3 Technical barriers to trade	6
3.4 Intellectual property	7
3.5 Product liability	8
3.6 Public procurement	8
3.7 Competition rules	9
3.8 State monopolies and public undertakings	10
3.9 State aid	10
3.10 The situation of Switzerland	11
II. STRUCTURE, OBJECTIVES, AND	
FUNCTIONING OF THE EEA AGREEMENT	12
1. STRUCTURE OF THE EEA AGREEMENT	12
2. OBJECTIVES OF THE AGREEMENT AND	
MEANS TO ACHIEVE THEM	13
2.1 Objectives of the EEA Agreement (Article 1 (1))2.2 Means to attain the objectives of the EEA Agreement	13
(Article 1 (2))	14
2.2.1 The four freedoms	15
2.2.2 Horizontal provisions relevant to the four freedoms	
and co-operation outside the four freedoms	17
2.3 Reduction of economic and social disparities between regions	18

3. GENERAL PROVISIONS OF THE EEA	19
3.1 Notion of 'Contracting Parties' and territorial scope of the Agreement (Articles 2 (c) and 126)	19
3.2 Scope and limitations (Article 118, 120, 121, and 123) 3.3 Principle of loyalty and general non-discrimination provision	20
(Articles 3 and 4)	20
3.4 Legal effects of EC acts listed in the annexes to the Agreement (Article 7)	21
4. INTEGRATION OF THE ACQUIS COMMUNAUTAIRE IN THE AGREEMENT	22
4.1 The legislative technique used 4.2 Protocol 1 and other adaptations to EC acts	22
4.2.1 Protocol 1 on horizontal adaptations	23
4.2.2 Sectoral adaptations	24 25
4.2.3 Specific adaptations	25
4.2.3 Specific adaptations	-3
5. INSTITUTIONAL SOLUTIONS	27
5.1 Common EEA institutions	27
5.1.1 EEA Council (Articles 89 et seq.)	27
5.1.2 EEA Joint Committee (Articles 92 et seq.)	27
5.1.3 EEA Joint Parliamentary Committee and co-operation between economic and social partners (Articles 95 and	
96)	28
5.2 New EFTA institutions	28
5.2.1 EFTA Surveillance Authority	29
5.2.2 EFTA Court	30
5.2.3 Standing Committee of the EFTA States	32
6. DECISION-SHAPING AND	
DECISION-MAKING PROCEDURES	33
6.1 Decision-shaping	33
6.2 Decision-making	33
7. UNIFORM SURVEILLANCE, JUDICIAL	
MECHANISM, AND DISPUTE SETTLEMENT	35
7.1 Uniform interpretation	35
7.2 Uniform surveillance	37
7.3 Dispute settlement	38
7.4 General safeguard measures	28

Contents	xi
8. IMPLEMENTATION OF THE EEA	
AGREEMENT	39
PRODUCT COVERAGE AND RULES OF ORIGIN	41
I. PRODUCT COVERAGE	42
1.1 Paragraph 2: originating products	42
1.2 Paragraph 3: categories of products	43
1.2.1 Subparagraph (a): industrial products	44
1.2.2 Subparagraph (b): processed agricultural products	45
1.3 Special arrangements as regards agricultural products and	
fish and other marine products	46
1.3.1 Agricultural products	47
1.3.2 Fish and other marine products	48
1.4 Coal and steel products	49
2. PRICE COMPENSATION ARRANGEMENTS	49
3. RULES OF ORIGIN	52

III.	PRODUCT COVERAGE AND RULES OF ORIGIN	41
	1. PRODUCT COVERAGE	42
	1.1 Paragraph 2: originating products	42
	1.2 Paragraph 3: categories of products	43
	1.2.1 Subparagraph (a): industrial products	44
	1.2.2 Subparagraph (b): processed agricultural products	45
	1.3 Special arrangements as regards agricultural products and	
	fish and other marine products	46
	1.3.1 Agricultural products	47
	1.3.2 Fish and other marine products	48
	1.4 Coal and steel products	49
	2. PRICE COMPENSATION ARRANGEMENTS	49
	3. RULES OF ORIGIN	52
	3.1 Definition of originating products and full cumulation	53
	3.1.1 Wholly obtained products	53
	3.1.2 Sufficiently worked or processed products	53
	3.2 General tolerance rule	56
	3.3 Specific tolerance rules for textiles	56
	3.4 Territorial requirements	57
	3.5 Prohibition of drawback and exemption	58
	3.6 Simplification of evidence of origin	59
	3.6.1 EUR.1 movement certificate	59
	3.6.2 Invoice declaration	59
	3.6.3 Supplier's declaration	60
	3.7 Issues related to third countries	60
IV.	TECHNICAL BARRIERS TO TRADE	63
	1. HARMONIZATION OF NATIONAL LAWS	63
	1.1 Technical regulations, standards, testing, and certification	63
	1.1.1 Optional or full harmonization directives	64
	1.2 Derogations, transitional periods, and other special solutions	
	for the EFTA countries	65
	1.2.1 Motor vehicles/motorcycles	65
	1.2.2 Measuring instruments	65

1.2.3 Foodstuffs	66
1.2.4 Medicinal products	66
1.2.5 Fertilizers	66
1.2.6 Dangerous substances (chemicals)	66
1.2.7 Toys	67
1.2.8 Construction products	67
	
2. MUTUAL RECOGNITION	68
2.1 Measures having equivalent effect to quantitative restrictions	68
2.1.1 What are 'measures having equivalent effect'?	69
2.1.1.1 Price controls	69
2.1.1.2 Rules concerning the production, designation, and	
marketing of products	70
2.1.1.3 Buy-national policies	71
2.1.1.4 Duplication of tests, inspections, and administrative	
practices	72
2.1.2 The Cassis de Dijon case-law	72
2.1.2.1 Case 120/78: Cassis de Dijon	72
2.1.2.2 Communication from the Commission concerning	
the consequences of the Cassis de Dijon judgment	74
2.1.2.3 Mandatory requirements2.2 Measures having equivalent effect to quantitative restrictions	75
justified under Article 13 EEA	76
2.2.1 The notion of public morality	76 76
2.2.2 The notion of public policy and public security	77
2.2.3 The protection of health and life of humans, animals,	"
or plants	77
2.3 Articles 11–13 in relation to other provisions of the EEA	,,
Agreement	78
1-0.00.00.00.00	•
3. THE INFORMATION PROCEDURE ON DRAFT	
TECHNICAL REGULATIONS	7 9
3.1 Notifications	80
3.2 Comments, detailed opinions, and triggering of standstills	80
3.3 Questions of non-validity of national regulations not notified	81
3.5 Questions of non-variation of national regulations not notified	01
4. THE NEW APPROACH TO TECHNICAL	
HARMONIZATION AND STANDARDS	82
4.1 The new approach directives	83
4.1.1 The concept of 'placing on the market'	83
4.1.2 The concept of 'putting into service'	84

Contents	xiii
4.1.3 The concept of 'manufacturer' and 'authorized	
representative'	85
4.2 Standardization work	85
4.2.1 Presumption of conformity	86
4.2.2 Voting rules: a threat to a homogeneous EEA?	. 87
5. CONFORMITY ASSESSMENT AND THE CE	
MARK	87
5.1 Global approach	87
5.2 Notified bodies	88
5.3 CE mark	88
5.3.1 Use of the CE mark by non-EEA countries	90
6. MARKET CONTROL AND GENERAL	
PRODUCT SAFETY	90
6.1 Market control	90
6.1.1 Safeguard measures	91
6.1.2 The rapid exchange of information system	92
6.2 General product safety	93
6.2.1 Objectives and scope of the Directive	93
6.2.2 Notification procedures and emergency situations	94
V. INTELLECTUAL PROPERTY	96
1. GENERAL ASPECTS OF INTELLECTUAL	
PROPERTY RIGHTS	96
I.I The concept	07
1.2 The branches	97 97
1.2.1 Industrial and commercial property	97 98
1.2.2 Copyright	99
1.2.3 Other rights	99
1.3 Rights granted, enforcement, and registration systems	99
1.3.1 Exclusive rights	99
1.3.2 Enforcement	100
1.3.3 Registration	100
1.4 Purpose of IPRs	100
1.5 Limitations to IPRs	101
1.5.1 Statutory limitations	101
1.5.2 Case-law limitations	102
1.6 International conventions in the field of IPRs	102
1.6.1 Industrial property	102
1.6.2 Copyright	104

2. THE JURISPRUDENCE OF THE EUROPEAN	
COURT OF JUSTICE CONCERNING IPRs	105
2.1 The issue: IPRs versus EEC Treaty objectives	105
2.2 The Court case-law on Article 222 EEC and on the existence	
and exercise of IPRs	106
2.3 The Court case-law applying the competition rules to IPRs	
(Articles 85 and 86 EEC)	107
2.3.1 Application of Article 85 (1) EEC	107
2.3.2 Application of Article 86 EEC	108
2.3.3 Limits on the use of the competition rules	109
2.4 The Court case-law applying the rules on free movement of goods to IPRs (Articles 30 to 36 EEC, the EC-wide	
exhaustion principle)	109
2.4.1 The Deutsche Grammophon case	110
2.4.2 The EC-wide exhaustion principle: contents and limits	111
2.4.2.1 Contents	111
2.4.2.2 Limits	112
2.4.2.3 Structure of the Court's reasoning	115
2.4.2.4 Codification of the Community exhaustion rule in	
the EC secondary legislation	116
2.4.2.5 The particular issue of compulsory licensing	116
3. INTELLECTUAL PROPERTY PROVISIONS IN	
THE EEA	117
a - Article (a) FEA	118
3.1 Article 65 (2) EEA 3.2 Protocol 28 EEA	
	119
3.2.1 Substance of the protection (Article 1) 3.2.2 Exhaustion of rights (Article 2)	120
3.2.2.1 The drafting of Article 2	121 122
3.2.2.2 Consequences of the introduction of an EEA-wide	122
exhaustion rule in the EFTA States	122
3.2.3 Participation of EFTA States in EC-wide measures for	122
the protection of IPRs (Articles 3 and 8)	124
3.2.3.1 Community Patent Agreement (Article 3)	126
3.2.3.2 Other EC-wide measures (Article 8)	127
3.2.4 Adherence to different international conventions and	,
reference to the results of the GATT-TRIPs	
negotiations (Articles 5 and 6)	127
3.2.5 Relations with third countries and activities in	,
international fora (Articles 4 and 7)	128
3.2.5.1 Extension of the semiconductor protection to persons	
from third countries (Article 4)	128

Contents	xv
3.2.5.2 International fora and agreements (Article 7)	129
3.3 Annex XVII	130
3.3.1 Acquis communautaire included in the original Annex XVII	130
3.3.2 Subsequent and pending acquis communautaire	131
4. INTELLECTUAL PROPERTY PROVISIONS OF THE EC AND EFTA AGREEMENTS WITH CENTRAL AND EASTERN EUROPEAN	
COUNTRIES	132
VI. PRODUCT LIABILITY	135
1. COUNCIL DIRECTIVE 85/374/EEC	135
1.1 Strict liability	136
1.2 Defences for the producer	136
2. THE IMPORTER'S LIABILITY	137
2.1 Imports into the EEA	137
2.2 Intra-EEA trade	137
VII. PUBLIC PROCUREMENT	139
1. THE SUBSTANTIVE RULES	139
1.1 Scope of application	141
1.2 Thresholds	143
1.3 Tender award procedures	143
1.4 Technical specifications	144
1.5 Publication and advertising	144
1.6 Criteria for the selection of candidates or tenders	146
1.7 Criteria for the award of contracts	146
2. PROCEDURAL RULES	148
2.1 Enforcement at national level	148
2.2 Enforcement at EEA level	149
VIII. COMPETITION	151
I. WHERE TO FIND THE EEA COMPETITION	152

2. OBJECTIVE AND INTERPRETATION OF THE EEA	
COMPETITION RULES	153
2.1 Objective of the EEA competition rules	153
2.2 Interpretation of the EEA competition rules	153
3. SUBSTANTIVE COMPETITION RULES	154
3.1 Primary rules	154
3.1.1 Article 53 EEA (restrictive practices)	154
3.1.1.1 Adaptations for EEA purposes	154
3.1.1.2 Prohibition under Article 85 (1) EEC/53 (1) EEA	155
3.1.1.3 Nullity under Article 85(2) EEC/53(2) EEA	161
3.1.1.4 Exemptions under Article 85 (3) EEC/53 (3) EEA	161
3.1.2 Article 54 EEA (abuse of dominant position)	163
3.1.2.1 Adaptations for EEA purposes	163
3.1.2.2 Prohibition under Article 86 EEC/54 EEA	164
3.1.3 Article 57 EEA (merger control)	168
3.1.3.1 Adaptations for EEA purposes	169
3.1.3.2 The Merger Regulation in general	169
3.1.3.3 Mergers incompatible under Article 2 (3) of	
Regulation 4064/89 and Article 57 (1) EEA	171
3.1.4 Protocol 25 EEA (coal and steel)	172
3.1.4.1 Adaptations for EEA purposes	173
3.1.4.2 Conditions of application of Articles 65 and 66	
ECSC/1 and 2 Protocol 25 EEA	174
3.2 Secondary legislation	175
3.2.1 Adaptations for EEA purposes	175
3.2.2 The new EC legislation (adopted after 31 July 1991)	178
4. PARTICULAR ASPECTS OF THE EEA	
SUBSTANTIVE COMPETITION RULES	179
4.1 Consequences in the field of competition of the limited	
product coverage of the EEA Agreement	179
4.2 The particular case of fisheries (Protocol 9 EEA)	180
4.3 Anti-dumping measures in the EEA (Article 26 EEA)	180
4.4 Jurisdiction over undertakings located outside the EC/EEA	181
5. ENFORCEMENT BODIES AND	
ATTRIBUTION OF CASES	183
5.1 The 'two pillar' system	183
5.1.1 Two enforcement bodies and the 'one-stop shop'	
principle	183

Contents	xvi
5.1.2 Attribution of cases	184
5.1.2.1 Article 53 EEA cases	186
5.1.2.2 Article 54 EEA cases	187
5.1.2.3 Merger cases	187
6. PROCEDURAL RULES	188
6.1 Procedures for cases falling under Articles 53 and 54 EEA	190
6.1.1 Applications and notifications	190
6.1.2 Complaints and ex officio procedures	192
6.1.3 Forms and language to be used	192
6.1.4 The different procedural steps	193
6.1.4.1 Fact-finding procedures	194
6.1.4.2 Formal initiation of procedure	196
6.1.4.3 Hearing of the parties and third persons	197
6.1.4.4 Liaison with the States	199
6.1.4.5 Decision	199
6.2 Merger control	201
6.2.1 Notifications, forms, and language	202
6.2.2 The different procedural steps	202
6.2.3 Rights of individual States	204
6.3 Coal and steel	205
6.4 Transitional rules	205
6.4.1 Article 53 cases	205
6.4.1.1 New agreements	205
6.4.1.2 Existing agreements	205
6.4.2 Merger cases	207
6.4.3 Coal and steel	207
7. COOPERATION BETWEEN THE TWO	
SURVEILLANCE AUTHORITIES	207
7.1 General principles of co-operation	207
7.2 Co-operation in Article 53/54 cases	208
7.2.1 Mutual information and consultation during the	
different stages of the procedure	208
7.2.2 Transmission of cases	208
7.2.3 Mutual administrative assistance in fact-finding	200
7.3 Co-operation in merger cases	209
7.3.1 Information and consultation	209
7.3.2 Transmission of cases	210
7.3.3 Administrative assistance in fact-finding	210
7.4 Enforcement of decisions of the surveillance authorities	210
7.4 Emoleculent of decisions of the surfernance authorities	210

	8. HARMONIZING EFFECTS OF THE EEA COMPETITION RULES AND POSSIBLE FUTURE DEVELOPMENTS IN A WIDER	
	CONTEXT	211
IX.	STATE MONOPOLIES AND PUBLIC UNDERTAKINGS	212
÷	I. STATE MONOPOLIES OF A COMMERCIAL CHARACTER	212
	1.1 The EEA obligations (Article 16 EEA)1.2 Interpretation given to Article 37 EEC by the ECJ and the	212
	Commission	214
	1.2.1 Objective of Article 37 EEC	215
	1.2.2 Definition and scope of Article 37 EEC	215
	1.2.3 Exclusive rights and adjustments required	216
	1.2.4 The procedure applicable for enforcing Article 37 EEC	220
	1.2.5 The monitoring of adjusted monopolies	221
	2. PUBLIC UNDERTAKINGS	222
	2.1 The EEA obligations (Article 59 EEA)	222
	2.2 Interpretation given to Article 90 EEC by the ECJ and the	
	Commission	222
	2.3 Use by the Commission of the legislative powers granted to	
	it by Article 90 (3) EEC	225
	2.4 Examples of application of Article 90 (1) EEC to specific	,
	cases	226
	2.5 Features of Article 90 (3) decisions and the procedure	225
	applied by the Commission when taking such decisions	227
X.	STATE AID	228
	1. IMPORTANCE OF THE STATE AID RULES IN	
	THE EEA CONTEXT	228
	2. SUBSTANTIVE STATE AID RULES	230
	2.1 Article 61 EEA	230
	2.2 Secondary legislation	232
	2.2.1 General issues related to Annex XV EEA	232
	2.2.2 Regional aid	233
	2.2.3 Aid to shipbuilding	235
	2.2.4 Steel sector	226

Contents	xix
3. PROCEDURAL RULES	237
3.1 General issues	237
3.2 Notification of new aid measures	237
3.3 Decisions following the notification of proposed aid measures 3.3.1 Clearance of a proposed aid measure without opening	238
a formal procedure	238
3.3.2 Opening of a formal procedure	239
3.3.3 Final decision 3.4 Unlawful aid	239
3.5 Existing aid	240
3.6 Judicial review	240
3.0 Judiciai Teview	241
4. CO-OPERATION BETWEEN THE TWO	
SURVEILLANCE BODIES	242
5. SPECIFIC ISSUES	242
5.1 Product coverage	242
5.1.1 Fisheries sector	243
5.1.2 Processed agricultural products and forestry	243
5.2 Article 64 (1) EEA	244
5.3 Importance of common State aid rules for the EC and EFTA as regards their relations with Central and Eastern	
European countries	244
XI. THE SITUATION OF SWITZERLAND	246
1. SWITZERLAND AND EUROPEAN	
INTEGRATION	246
1.1 Brief history of EC-Switzerland relations	246
1.2 Eurolex1.3 The referendum of 6 December 1992 and its consequences	247
for the EEA	247
1.4 Swisslex	249
2. THE 'SWISS INTERNAL MARKET'	249
3. CURRENT RELATIONS WITH THE	
COMMUNITY	250
3.1 Rules of origin	252
3.2 Processed agricultural products	254
3.3 Technical barriers to trade	254

3.4 Public procurement	255
3.5 Product liability	255
3.6 Intellectual property	256
4. SOME WORDS ABOUT LIECHTENSTEIN	256
ANNEXES	
Annexe A: Excerpts of Relevant Parts of the EEA Agreement and of	
the ESA/Court Agreement	258
Annexe B: Table of Correspondence between EEA and EC	
Provisions	368
Annexe C: Example of Application of the Reference Technique	372
Annexe D: Organigrams and Addresses of the EFTA Institutions	384
Annexe E: List of HS Chapters Excluded from the Scope of the	
EEA Agreement (Chapters 1–24)	387
Annexe F: ECJ Cases under Articles 30 to 36 EEC with Short	
Descriptions	389
Annexe G: International Conventions in the Fields of Industrial	
Property and Copyright	417
Annexe H: Excerpts of Relevant Cases in the Field of Intellectual	•
Property	423
Annexe I: Provisions Concerning Exhaustion in the Different	-
Existing or Draft EC Legislation	430
Annexe J: International Exhaustion in EC and EFTA Countries	434
Table of Legislation	441
Table of Cases (numerical)	455
Table of Cases (alphabetical)	464
Bibliography	476
Glossary	481
Index	485