

EUROPEAN ECONOMIC AREA
JOINT PARLIAMENTARY COMMITTEE

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DRAFT REPORT & DRAFT RESOLUTION

on

The implementation of EEA legislation

Co-rapporteurs: Mr Gudlaugur Thór THÓRDARSON (Independence Party, Iceland)
Ms Diana WALLIS (ALDE, UK)

*The deadline for tabling amendments to the draft
resolution has been set for*

***9 October 2006
at 17.00***

***Amendments shall be tabled in English only and sent
to the JPC secretariat:***

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I. INTRODUCTION

1. The aim of the EEA Agreement is to establish a dynamic and homogenous European Economic Area, based on common rules and equal conditions of competition. It extends the four fundamental freedoms of the Internal Market of the European Community, as well as a wide range of accompanying European Community rules and policies, to Iceland, Liechtenstein and Norway, the EFTA States that are signatories to the Agreement.

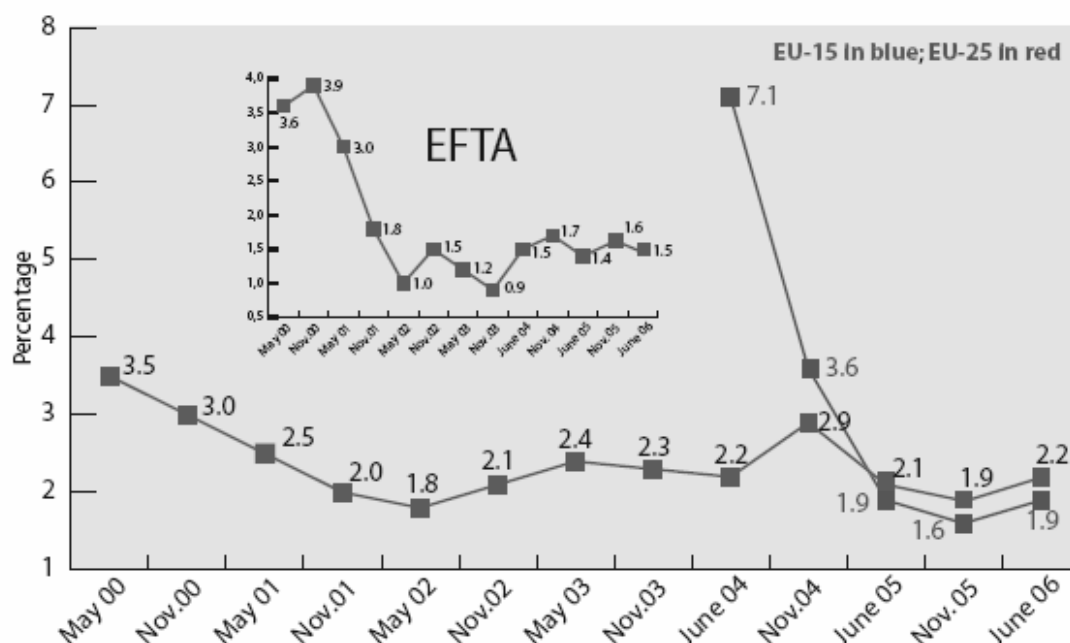
2. Two separate legal systems are employed within the EEA. On one side, the EEA Agreement applies to relations between both the EFTA and the European Community sides and between EEA EFTA States themselves. On the other side, European Community law applies to relations between the EU Member States. For the EEA to achieve its aim of homogeneity, the two legal systems must develop parallel and be applied and enforced in a uniform manner.

3. A well functioning internal market is the cornerstone of economic integration in Europe. It brings benefits such as lower prices, better services and more work opportunities. The citizens and businesses of the EEA Member States would not be able to reap these benefits unless efforts were made to implement the common rules and principles according to which the internal market functions. All Member States suffer if some Member States do not deliver. With this in mind, the co-rapporteurs intend to raise awareness of the overriding importance of a timely transposition of EEA legislation. The report, which is to a large extent based on data provided by the Internal Market Scoreboards published by the European Commission and the EFTA Surveillance Authority, is not meant to be a comprehensive analysis of the implementation of EEA legislation in the long-term but rather a quantitative comparison between the EU Member States and the EEA EFTA States at a selected moment in time. The EEA Member States obviously vary in terms of populations, size of the administration and the way in which legislation becomes part of the internal legal order and these and other factors affect the transposition process. However and irrespective of such factors, the conclusions drawn here should serve as a reminder of the importance of correct and timely transposition for a well functioning Internal Market.

4. The main legal instrument of the Internal Market is that of directives, which must be transposed into national legislation in the EEA States. Each directive provides a time limit by which transposition has to take place, but it is left up to each EEA State to choose the form and method of implementation. Figure 1 shows the transposition deficit of all EEA Member States. The transposition deficit measures how many directives containing Internal Market rules and principles that the EU and the EEA EFTA States have failed to transpose on time.

5. It is the task of the EFTA Surveillance Authority to ensure that transposition in the three EEA EFTA States takes place in a timely manner, and that the transposition measures provide for full and correct implementation of the directives in question. In carrying out its tasks, the Authority co-operates closely with the European Commission, which is entrusted with the parallel task towards the EU Member States. This co-operation helps a uniform implementation and application of the Internal Market rules and principles throughout the whole EEA.

Figure 1: EEA member States Transposition Deficits



The transposition deficit shows the percentage of Internal Market directives not yet communicated as having been transposed, in relation to the total number of Internal Market directives which should have been transposed by the deadline. As of 1 June 2006, 1620 directives and 570 regulations relate to the Internal Market as defined in the EC Treaty.

II EU MEMBER STATES AND EEA LEGISLATION

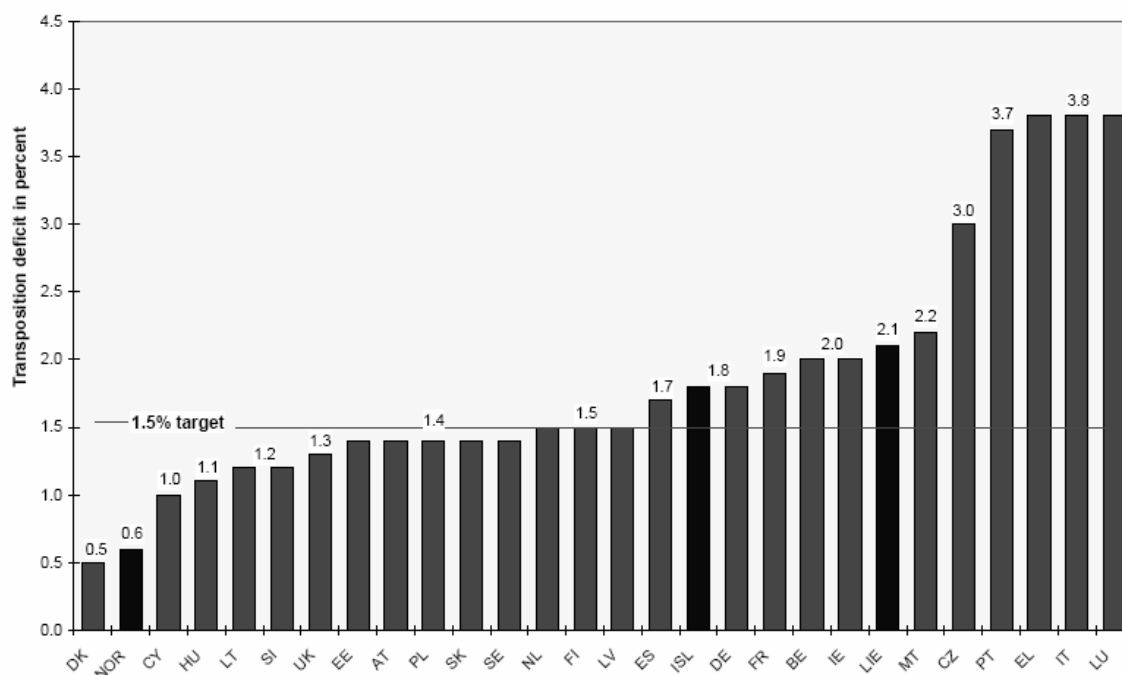
6. In the first half of 2006, the EU Member States' average transposition deficit was 1.9%. This is an increase of 0.3% since the end of 2005, when the average transposition deficit was at 1.6%, only 0.1% short of the interim 1.5% transposition deficit target and as such the best result ever achieved. The trend in recent years of a steady reduction of EU Member States' transposition deficits has therefore come to a halt as both old and new Member States' performance has slipped by 0.3% since the last Internal Market Scoreboard was published in November 2005¹. Figure 2 shows current EFTA deficit compared to the EU-25. By July 2006, the number of EU Member States who had reached the 1.5% target was down from 17 in November 2005 to 14. Denmark stands as the overall winner followed by Cyprus, Hungary, Lithuania, Slovenia and the UK.

7. Besides Denmark, only Cyprus, Austria and the UK had improved on their transposition figures since the end of 2005 and Slovenia and the Slovak Republic remained at status quo. However, 19 Member States had however increased their existing backlog. Except for Luxembourg, the performance of all the Member States that were above the 1.5% ceiling in November 2005 had slipped further. Italy, Portugal and the Czech Republic had let their performance slip by 0.5% or more. Luxembourg was still last, together with Greece, Italy and Portugal. However, Luxembourg managed to reduce its backlog considerably with 0.6% since the end of 2005. The transposition deficit of the new Member States was 1.9% compared to 2.2% for the old Member States. Out of 11 Member States that had not reached the 1.5% target, 8 were old Member States².

¹ Internal Market Scoreboard. July 2006, p. 7.

² Ibid, p. 12-15.

Figure 2: Transposition deficits in all 28 EEA Member States (February 2006)
Norway 2nd in the EEA class of 28, Iceland 17th and Liechtenstein 22nd

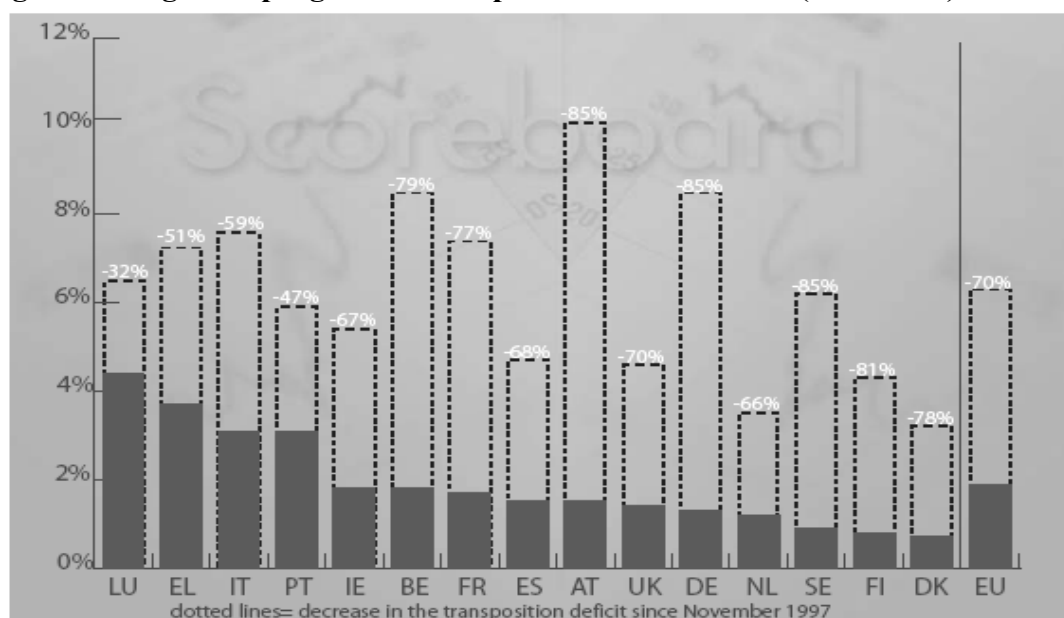


Note: EEA comparison of transposition deficits

Source EU figures: The European Commission's Internal Market Scoreboard N°15 - July 2006.

8. Figure 3 displays long-term comparison of the average transposition record. It shows an EU average reduction of 70% in transposition deficit over the last eight years. Luxembourg has made the least long-term progress, with a reduction of only 32% in transition deficit, closely followed by Portugal and Greece with a reduction of 47% and 51% respectively. The Member States with the largest reductions are Austria, Denmark and Sweden, all with an 84% reduction in transposition deficit.

Figure 3 Long-term progress of transposition deficit EU-15 (1997-2005)



9. In March 2002, the European Council set a “zero tolerance” target for Directives whose transposition is two or more years overdue. By July 2006 only 3 EU Member States, Greece, the United Kingdom and Austria, had managed to reduce the transposition deficit of long outstanding directives compared to November 2005. The Internal Market Scoreboard concluded that Luxembourg, Germany and France urgently needed to address the problem and that the situation in all the other Member States had remained unchanged or become worse. However, data revealed that on average, directives that had not been transposed on time in the EU Member States were overdue by 8 months compared to 9.2 months in November 2005. The explanation to this might be due to the transposition by some new Member States of a limited number of directives with transposition deadlines that lie in the past¹.

EU Infringement proceedings

10. The co-rapporteurs would like to recall that the Internal Market Strategy 2003-2006 called on Member States to reduce the number of infringements against them by at least 50% by 2006. Whilst the record has improved as regards the transposition of internal market directives, only five EU-15 Member States - France, Belgium, Austria, Ireland and the Netherlands - have reduced the number of infringement proceedings against them over the last three years. For the remaining EU-15 Member States more infringement cases are open against them now than in 2003. The Internal Market Scoreboard published in July 2006 notes that it is striking that some Member States transpose late and apply the Internal Market rules incorrectly. This is the case for Greece, Italy and Portugal which occupy the last positions when it comes to timely implementation of the Internal Market rules. The Scoreboard also highlights that there is cause for concern in Sweden where the number of infringement cases has increased by half over the last three years.

11. Due to a lack of a historic point of comparison for the 10 new EU Member States, the co-rapporteurs stress that figures must be treated with care. Substantial reductions in open infringement cases have been recorded as from 2004 for the Czech Republic, Malta, the Slovak Republic, Estonia, Lithuania and to a lesser extent Slovenia, compared to the end of 2005. However, high additional number of infringement cases against Poland and Cyprus, on top of an already high number, seems to suggest that there is a problem of incorrect application of internal market legislation in these Member States which needs to be addressed.

III EEA EFTA STATES AND EEA LEGISLATION

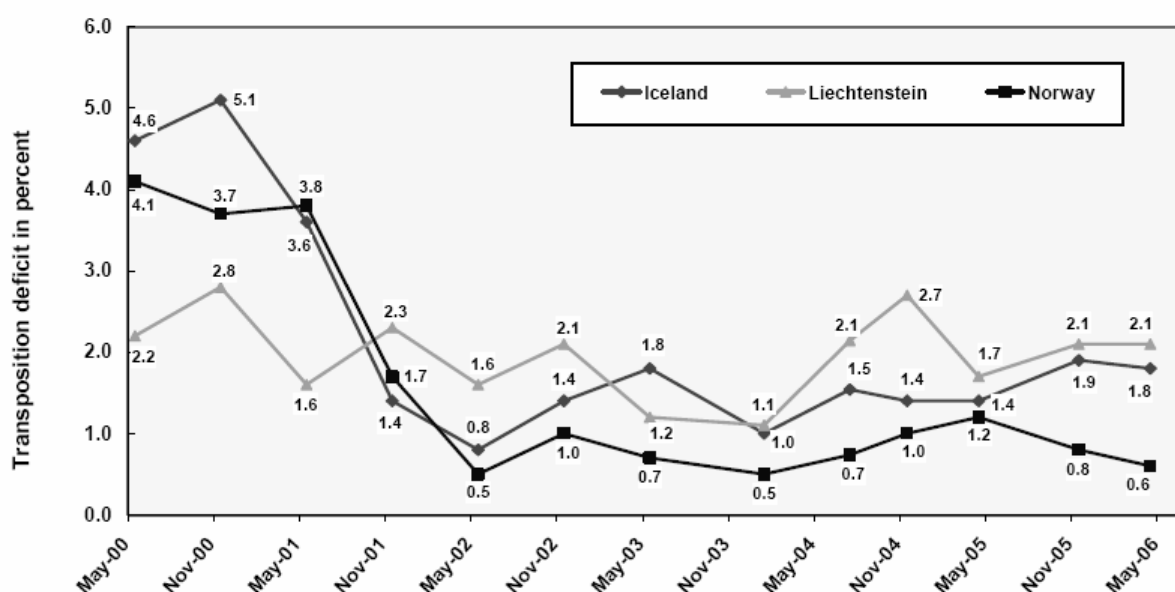
12. Efficient implementation of EEA legislation is obviously of great relevance and importance also to the three EEA EFTA States, Norway, Island and Liechtenstein, as they are equal partners in the Internal Market through the EEA Agreement.

13. When considering the EEA EFTA States *en bloc*, the transposition deficit of relevant legislation has fluctuated somewhat from year to year: As of 30 November 2004, the average EEA EFTA transposition deficit stood at 1.7%, which was the first time since 2001 that the deficit breached the interim target of 1.5 set by the European Council and endorsed by the EFTA Surveillance Authority. Six months later the situation turned positive: as of 30 April 2005, the deficit stood at 1.4%. By the end of 2005, the transposition deficit of the EFTA States increased again to 1.6%. However, by July 2006, the transposition deficit of the EFTA States improved and coincided with the interim ceiling of 1.5%.

¹ Ibid. p. 16-17.

Figure 4: EEA EFTA States Transposition Deficit

Iceland and Liechtenstein are still significantly above the 1.5% interim ceiling



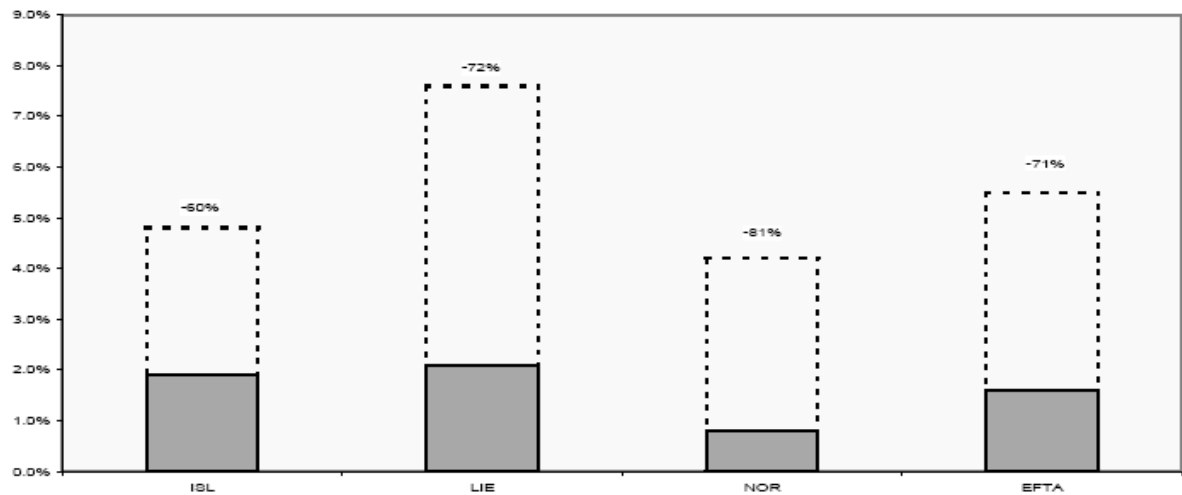
Note: Development of rates of failure to implement EEA Internal Market directives (transposition deficit) between May 2000 and May 2006.

14. In January 2005, Norway led the 28 EEA States' ranking; Iceland was fourth, while Liechtenstein had slipped from fourth to 14th place. From end of November 2005 until July 2006, Norway decreased its transposition deficit from 0.8% to 0.6%, placing it in 2nd place of the 28 EEA states, after Denmark. Iceland decreased its deficit from 1.9% to 1.8%, placing it in 17th place, compared to the 22nd place 6 months earlier, while Liechtenstein remained at a deficit of 2.1%, placing it in 22nd place, compared to the 23rd place 6 months earlier. Figure 4 above displays the evolution of EFTA transposition deficits over the past few years.

15. As was mentioned earlier, the European Council decided in 2002 on a “zero tolerance” approach for Directives whose transposition deadline was overdue by two or more years. In November 2005, the EEA EFTA States had no directives which had been outstanding for more than two years. Now, six months later, Iceland has one such “zero tolerance” Directive, i.e. the Directive adapting the “Dangerous Substances Directive” to technical progress¹. All of Norway’s non-transposed directives have a delay of less than a year, indicating that the delay is caused by slow legislative processes rather than political unwillingness to transpose directives into national law. Similarly, the majority of Iceland’s overdue directives are less than six months old. Liechtenstein has 10 directives overdue by more than a year. Of these, five concern the Electronic Communication Regulatory Package, which has not yet been fully implemented by Liechtenstein. In total the average delay for the three EEA EFTA States has gone down from 8 to 7.6 months.

¹ Internal Market Scoreboard, EFTA States. European Surveillance Authority. July 2006, p. 8. (Commission Directive 2000/33 EC of 25 April 2000 adapting to technical progress for the 27th time Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.)

Figure 5: Long term progress of transposition deficit EFTA States (1997-2005)



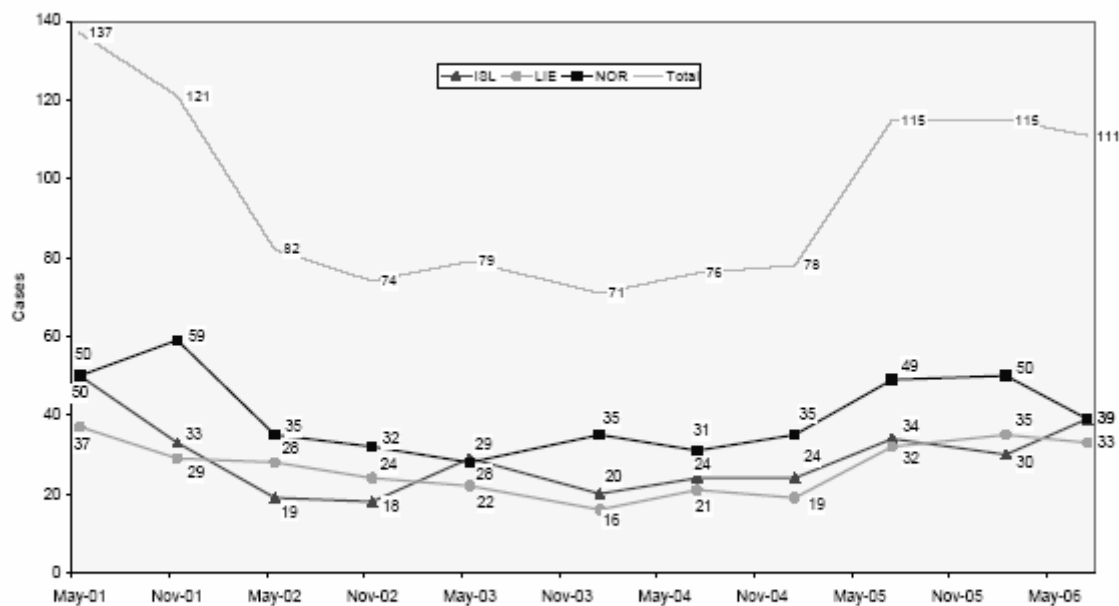
Note: Long-term comparison of transposition deficits. Change from November 1997 to November 2005.

16. Figure 5 above displays that the average EEA EFTA States transposition deficit has gone down by 71% since 1997. The average reduction for the EEA EFTA States compares to the same figure for the EU-15, which stands at 70%. When comparing the 3 EEA EFTA States, Iceland has made the least long-term progress in the 5 year period, with a reduction of 60%, followed by Liechtenstein and Norway with reductions of respectively 72% and 81% in transition deficit.

EEA EFTA Infringement proceedings

17. As can be seen in Figure 6, open infringement cases in the three EEA EFTA States have fluctuated somewhat during the period from May 2001 to May 2005, ranging from the highest number of 137 open cases in May 2001 to the lowest number of 71 open cases in January 2004.

Figure 6: Open infringement cases, long term development per EEA EFTA State



Note: Total number of open infringement proceedings against the three EFTA States.

18. In 2005, the EFTA Surveillance Authority brought eight cases before the EFTA Court, compared to only one case in 2004. And for the year 2005, the Surveillance Authority had initiated 73 formal infringement proceedings against EFTA States, bringing the total number of pending infringement cases to 123 by the end of the year.¹

19. However, in 2006 the number of infringement proceedings initiated by the Authority against the EEA EFTA States has decreased. On 30 April 2006, 111 infringement cases against the 3 EEA EFTA States were open with the Authority, compared to 155 six months earlier. Since the end of 2005, 39 cases are open against Norway, down from 50, and the equal number for Iceland, up from 30, while 33 cases are open against Liechtenstein, down from 36². This means that during a 6 month period, the number of cases against Iceland has increased by 30% and reduced against Norway and Liechtenstein by 22% and 6% respectively. By the same time, seven cases were before the EFTA Court.

20. It should be noted that there are different stages of infringement proceedings by the EFTA Surveillance Authority (ESA). ESA initiates formal infringement proceedings by sending a letter of formal notice, inviting the EEA EFTA State in question to submit observations on the matter in question within a specified time limit. If not resolved, the second step in the proceedings involves ESA delivering a reasoned opinion which defines the final position of the Authority. The ultimate proceeding is to refer the matter to the EFTA Court whose judgement is binding on the EEA EFTA State concerned.

21. Moreover, infringement cases can be divided into two categories. The first category relates to late implementation, i.e. Directives that are not transposed into the national legislation of EEA EFTA States within set time limits. The second category relates to non-conformity or incorrect application of EEA provisions, i.e. when the Authority, having acknowledged transposition of a Directive from an EEA EFTA State, concludes at a later stage that the national legislation does not fully conform to the requirements of the relevant Directive³.

22. As concerns the stage of formal infringement proceedings, all three EEA EFTA States had by July 2006 fewer new infringement cases open against them than 6 months earlier. Iceland had one less letter of formal notice open against it than six months earlier. Liechtenstein and Norway had fewer cases at both the letter of formal notice and reasoned opinion stage.

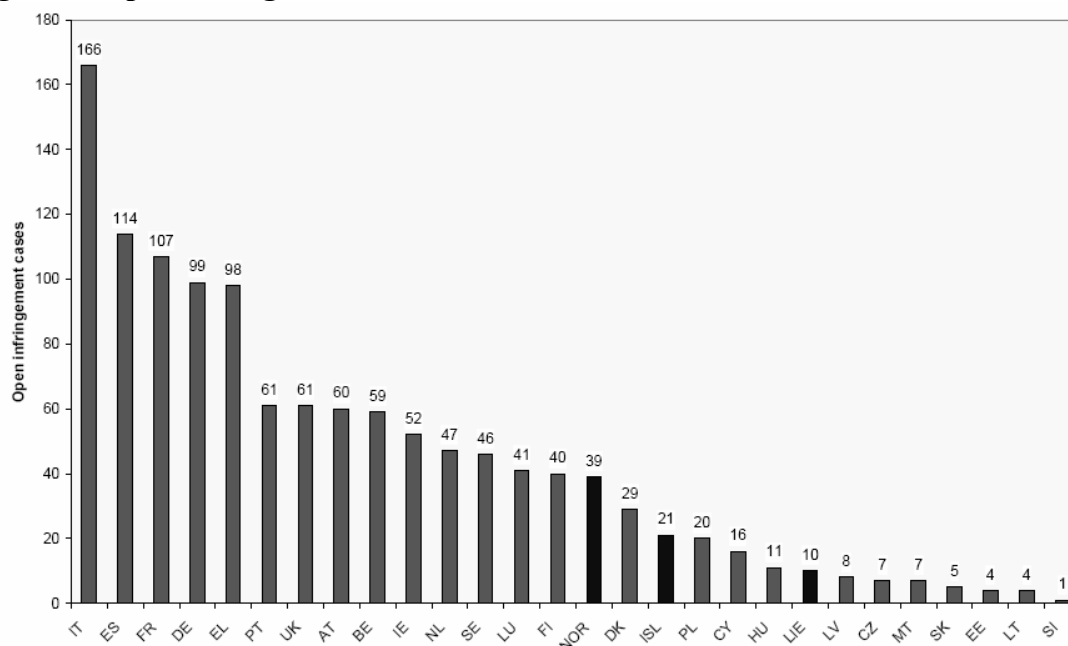
23. All in all, however, compared to the EU-15 Member States, the number of infringement proceedings against the EEA EFTA States remains low as can be seen in Figure 7.

¹ Annual report 2005. EFTA Surveillance Authority, p. 17.

² Internal Market Scoreboard. European Surveillance Authority. July 2006. p. 11.

³ Ibid. p. 12.

Figure 7: Open infringement cases in the EEA



Note: Open infringement cases due to non-conformity or incorrect application on 30 April 2006, EEA comparison.

Source EU figures: The European Commission's Internal Market Scoreboard N°15 - July 2006.

IV COMMENTARY AND COMPARISON

24. A comparison of the implementation mechanisms applicable to EU Member States and EEA EFTA States reveals several distinctions which are worthy of comment and perhaps further investigation.

25. The number of complaints to the EFTA Surveillance Authority relating to infringements of EEA law shows that citizens play a vital role in its application. The total number of complaints received in 2005 was however down by 7.5% from 2004, whereas the complaints received on the free movement of persons doubled compared to 2003. Furthermore, 90% of new complaints in 2005 were directed against Norway.¹ Citizens' complaints constitute a cost-effective and efficient tool for monitoring the application of EEA law and should be further encouraged.

26. Furthermore, a recent report by the European Parliament's legal affairs committee highlights the growing role of petitions to the European Parliament and complaints to the European Ombudsman, in particular concerning the detection of infringements.² Petitioners constitute a valuable source of information on how Community legislation works in reality. However, as their States are not members of the EU, nationals of Norway, Iceland and Liechtenstein have no corresponding right of petition or of complaint. To redress the balance,

¹ Article 109(3) of the EEA Agreement. At the end of 2005, the Authority was examining 609 cases, of which 120 were based on complaints. (Annual Report for 2005)

² Report of the Legal Affairs Committee on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (2003 and 2004), rapporteur: Mrs Frassoni, A6-0089/2006

greater involvement of EEA citizens should be urged and should not be limited to receiving and considering complaints. This clear democratic deficit of Norway, Iceland and Liechtenstein in their relation with the EU has become more pronounced since the Maastricht Treaty and the introduction of European Citizenship.

27. Following a judgment of the Court of Justice, the Commission has adopted a Communication on Article 228(2) EC (fines against Member States for continuing infringements despite a judgment to that effect by the Court of Justice).¹ It has revised its existing policy which consisted of simple penalty payments as these were considered insufficiently deterrent. The Commission will from now on² always include in its applications under Article 228 EC to the Court of Justice: (a) a penalty by day of delay in compliance after the Article 228 judgment, and (b) a lump sum penalizing the infringement from the 226 judgment. By contrast, there is no equivalent to Article 228(2) EC under EEA law. The only option left to the EFTA Surveillance Authority in the event of an EEA EFTA State not complying with a finding of infringement by the EFTA Court is simply starting the procedure over again³.

28. It has been repeatedly pointed out that the Commission and the Court of Justice suffer from an excessive case load⁴. Currently, one of the main problems with the infringement procedure under the EC Treaty is its length. The Commission often makes strategic choices as to which infringements to pursue as the number of staff affected to infringement units is often insufficient in relation to the total number of ongoing investigations. In the case of certain pieces of legislation giving rise to recurring implementation problems in many Member States, the Commission and EFTA Surveillance Authority must cooperate closely, in particular during the enforcement stage, to ensure that infringements of the same nature or of the same provisions are pursued with the same rigour throughout the EEA. Particular attention should be paid to the fact that informal negotiations between the Commission and the Member States during the pre-judicial phase should not lead to compromises which put EEA EFTA States at a comparative disadvantage.

29. Detailed rules on co-operation between the EFTA Surveillance Authority and the Commission exist and entail extensive exchanges of information and rights to comment.⁵ However practical and day to day cooperation should be further encouraged, taking as example but not being limited to the area of competition law (see for instance, the *Astra Zeneca* case in which Articles 82 EC and 54 EEA were applied in parallel)⁶.

¹ Application of Article 228 of the EC Treaty (SEC(2005)1658final); Case C-304/02 *Commission v France*, 12 July 2005, not yet published.

² There are temporal limitations, and the Commission reserves itself a margin of discretion. See: SEC(2005)1658final

³ Articles 31 and 33 of the EFTA Surveillance Authority and Court Agreement.

⁴ Court of Justice, Annual Report for 2004; statistics available at: <http://curia.eu.int/en/instit/presentationfr/rapport/stat/st04cr.pdf>

⁵ Protocols 23 and 24 to the EEA Agreement.

⁶ See Commission Press Releases IP/05/737 and IP/03/1136

DRAFT RESOLUTION

The implementation of EEA legislation

The Joint Parliamentary Committee of the European Economic Area:

- A. affirming that the EEA Agreement provides for full access of the EEA EFTA States and the EU Member States to the Internal Market,
 - B. acknowledging the importance of implementation of EEA legislation in order to establish a dynamic and homogenous European Economic Area,
 - C. noting that the Internal Market Strategy 2003-2006 is an essential element of the Lisbon Strategy,
 - D. recalling the European Council Summit of March 2002 decision on a “zero tolerance” approach for directives whose transposition deadline is overdue by 2 or more years,
 - E. acknowledging that EU Heads of State and Government have repeatedly called on Member States to improve their transposition records setting a 1.5% transposition deficit as an interim ceiling, which has been endorsed by the EFTA Surveillance Authority,
 - F. recalling that the Internal Market Strategy 2003-2006 calls on Member States to reduce the number of infringements against them by at least 50% by 2006,
- 1. recognizes the importance of establishing a dynamic and homogenous European Economic Area;
 - 2. regrets the fact that the EEA EU Member States missed the opportunity in the first six months of 2006 to go below the interim ceiling of 1.5% transposition deficit set by the Member States themselves and urges some of the old EU Member States that have increased their deficit to take urgent actions;
 - 3. welcomes the fact that the new EU Member States in general have kept their transposition deficits at a low level;
 - 4. calls for a concerted effort by all EEA Member States to implement and enforce rules effectively, correctly and on time;
 - 5. underlines the need for homogenous national implementation, and recommends that the EEA States establish training programmes for officials in their public administration to increase knowledge of procurement rules and procedures;
 - 6. expresses its regret that despite calls on Member States to reduce the number of infringements against them by at least 50% by 2006, only five EU-15 Member States have reduced the number of infringement proceedings against them over the last three years, and urges concerted efforts on behalf of all EEA Member States to resolve this trend;

7. requests consideration of potential means of involving citizens of the 3 EEA EFTA States more directly in the monitoring and enforcement processes with regard to EEA legislation;
 8. asks the Commission and the EFTA Surveillance Authority to review how they might cooperate more closely in order to ensure even enforcement across the whole of the EEA;
 9. instructs its President to forward this resolution to the EEA institutions, to the European Parliament and the EEA/EFTA Parliaments and to the European Ombudsman.
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