The decentralisation of enforcement of EU/EEA competition law

Karoline Hjelmtvedt
Legal Consultant at Kluge Law Firm

Anti-competitive practices; EU law; European Free Trade Association; Norway; Private enforcement

Introduction

Before proceedings to outline the main research problem, the article will briefly explain both the legal and the political background in order to provide the context of the issue at hand.

EU competition law is laid down in arts 101 and 102 of the Treaty on the Functioning of the European Union (the TFEU), which is enforced by the European Commission (the Commission), and can be challenged before the Court of Justice of the European Union (the CJEU).[1]

The rules of competition in the European Economic Area Agreement (the EEA Agreement)—arts 53 and 54 of the EEA—are equivalent to the rules laid down in the TFEU.[2] Furthermore, a similar enforcement mechanism was incorporated into the EEA Agreement under art.56 EEA.[3] The provision divides the enforcement of competition law between the two authorities—the Commission and the Surveillance Authority (the Authority) of the European Free Trade Association (the EFTA), in which the Commission has the power to enforce competition law within the EU-pillar and the Authority within the EFTA-pillar.[4] This is the so-called *two-pillar structure* of the EEA.

In light of the enforcement, Council Regulation 1/2003 (Regulation 1/2003) replaced the previous centralised enforcement system with a decentralised ex-post enforcement system.[5] This entailed that both the Commission and the national competition authorities (the NCAs) were expected to follow-up infringements of arts 101 and 102 TFEU.[6] Regulation 1/2003 includes provisions on the co-operation between the NCAs and the Commission, and also between NCAs to ensure collaboration between the applicable surveillance authorities for infringements with a cross-border element.[7]

However, Regulation 1/2003 was only partly incorporated into the EEA Agreement, which consequently led to decentralised public enforcement only in the EFTA-pillar and not in the EU-pillar or across the two pillars—which is currently the legal situation today and what can be described as the *cross-pillar problem*.[8] In short, this entails that there is no legal basis for collaboration between the surveillance authorities or the NCAs across the two pillars.

The reasoning behind such partial implementation of Regulation 1/2003 was because the Commission was of the opinion that art.56 EEA does not allow for a decentralised enforcement of arts 53 and 54 EEA, neither in the EU-pillar nor the EFTA-pillar.[9] Despite the opinions of the Commission, the enforcement of EU/EEA competition law was unilaterally decentralised within the EFTA-pillar in accordance with Regulation 1/2003.[10] This empowers their NCAs and national courts to enforce arts 53 and 54 EEA when a competition law infringement occurs in and/or between the three EFTA States (Norway, Iceland and Lichtenstein).[11] The Commission has not accepted this decentralisation within the EFTA-pillar, nor have they rejected it.[12] Regulation 1/2003 is therefore incorporated into the EEA Agreement, however without the necessary adjustments to ensure similar affects within the EFTA-pillar as within the EU.

The issue of the cross-pillar effect is highly relevant to the implementation of Directive 2014/104 (the Damages Directive).[13] This is because it is currently a risk that such act will not fully be implemented due to the lack

[1] Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C83/01 (TFEU) arts 101 and 102.
[2] Agreement of the European Economic Area [1994] OJ L03/01 (EEA Agreement) arts 53 and 54.
[3] EEA Agreement art.56.
[4] EEA Agreement art.56.
[5] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/04 (Regulation 1/2003).
[6] Regulation 1/2003.
[7] Regulation 1/2003.
[8] The Norwegian Ministry of Trade, Industry and Fisheries, Consultation Paper on the implementation of Directive 2014/104/EU into Norwegian law (2015) (Consultation Paper on the implementation of the Damages Directive), p.7, *https://www.regjeringen.no/contentassets/ec9a55f8681b4262a6157c67856c45ab/horingsnotat---forlag-til-endringer-i-konkurran-l1625139.pdf* [Accessed 5 December 2016]. The Norwegian version reads as follows: Nærings- og Fiskeridepartmentet, Forslag til endringer i konkurranseloven — gjennomføring i norsk rett av direktiv 2014/104/EU om privat håndheving av EU/EØS-konkurranseregelene. Note: The Consultation Paper relies on an extensive report prepared by Erling Hjelmeng, Ingrid Ørstavik and Eirik Østerud, '*Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU*' (2014) (available in Norwegian only), p.8.
[9] FIDE 2016 National Report for Norway (Christian Franklin, Halvard H. Fredriksen and Ingrid M.H. Barlund), *Private Enforcement and Collective Redress in European Competition* (University of Bergen and Bergen Centre of Competition Law and Economics (Beccle), 2016), p.3, *http://www.uib.no/sites/w3.uib.no/files/attachments/fide_2016_norway_final.pdf* [Accessed 5 December 2016].
[10] Consultation Paper on the implementation of the Damages Directive, p.8.
[11] Consultation Paper on the implementation of the Damages Directive, p.8.
[12] FIDE Report 2016, p.4.
[13] Council Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (The Damages Directive).

of a decentralised public enforcement of arts 53 and 54 EEA, stemming from the partial implementation of Regulation 1/2003.[14]

The Damages Directive is the first legal act regarding national procedural competition law since Regulation 1/2003.[15] It regulates the relationship between the injured party and the infringer in damage claims.[16] Hence, it aims to decentralise private procedural competition law.

In light of the implementation of the Damages Directive, the Norwegian Ministry of Trade, Industry and Fisheries in the public consultation report on the implementation of the Damages Directive indicates that they support the objective of the Directive and considers it in principle to be EEA-relevant, *provided* that the Directive will be applied cross-pillar.[17] Hence, at this point in time, the implementation seems to depend on whether the Commission and the EU Member States will accept the necessary amendments to the EEA Agreement in order to resolve the lack of decentralised public enforcement that remains unresolved from the implementation of Regulation 1/2003.[18] The Damages Directive therefore challenges the Commission's reluctance to decentralise the EEA Agreement, and questions whether the Commission has changed their minds after more than 10 years.

Importance of the topic

The research problem regarding decentralised enforcement of EU/EEA competition law in the EFTA States, in particular viewed from the perspective of Norway, was brought to my attention during my internship at the Ministry of Trade, Industry and Fisheries. The topic is given a lot of attention, as it may become a fundamental legal problem in the EEA in the near future as it may have an adverse effect on a "true EEA-wide competition policy area". Furthermore, it may have a harmful effect on the efficient and uniform enforcement of EU/EEA competition law—contrary to the principal objective of the EEA Agreement.[19] It is further evident that the present legal framework does not provide legal certainty in regard to decentralised enforcement of arts 53 and 54 EEA.[20] Furthermore, due to the lack of a cross-pillar application, exchange of information and other forms of collaboration between the EU and the EFTA NCAs has been hindered.[21] These functions are essential in order to achieve an efficient enforcement of EU/EEA competition rules at national level.

Furthermore, one may assume that it is in the interest of the EFTA States as well as the Commission to create a level playing field. Furthermore, the lack of a legally established cross-pillar co-operation among the EFTA NCAs and the EU NCAs may have an adverse effect in regards to future harmonisation of national procedural competition law. This is for the first time apparent, when the EEA Committee has still not decided upon the EEA-relevance of the Directive, two years after the Directive's implementation.[22] This may be the first step towards a widening of the gap between EU and EEA competition law. For the abovementioned reasons, the focus of this article is to assess the practical implications for Norway as an EFTA State during the implementation of the Damages Directive into the EEA Agreement; in particular, the consequences following from the lack of decentralised public enforcement stemming from the partial implementation of Regulation 1/2003, and the challenges it creates for the implementation of the Damages Directive which aims to decentralise private enforcement.

1. The current legal framework — EU/EEA competition law and the two-pillar structure of the EEA

1.1 The substantive and the procedural EU/EEA competition law

The EEA Agreement brings together the EU Member States and the EEA EFTA States, i.e. Iceland, Liechtenstein and Norway, in a single market.[23] In accordance with art.1 of the EEA Agreement, the objective is to ensure equal conditions of competition and identical procedural and substantive competition rules in all of the EEA, including the EFTA States.[24]

In conformity with such an objective, the substantive rules of competition of the EEA Agreement are equivalent to the rules laid down in the TFEU.[25] In particular, art.53 EEA corresponds with art.101 TFEU, concerning the prohibition of agreements and conducts that distort or restrict competition.[26] Furthermore, art.54 EEA mirrors art.102 TFEU, in regards to the prohibition of dominant

[14] Consultation Paper on the implementation of the Damages Directive, p.8.
[15] Vladimir Bastidas Venegas, "The Damages Directive and other Enforcement Measures in EU Competition Law" in Maria Bergström, Marios Lacovides and Magnus Strand (eds), *Harmonizing EU Competition Litigation: The New Directive and Beyond — the new directive and beyond* (Oxford: Hart Publishing, 2016).
[16] The Damages Directive.
[17] Consultation Paper on the implementation of the Damages Directive, p.14.
[18] Consultation Paper on the implementation of the Damages Directive, p.14.
[19] EEA Agreement, Preamble.
[20] Consultation Paper on the implementation of the Damages Directive. FIDE Report 2016.
[21] FIDE Report 2016, p.13.
[22] Consultation Paper on the implementation of the Damages Directive, p.3.
[23] Sven Norberg and Martin Johansson, "The History of the EEA Agreement and the First Twenty Years of its Existence" in Carl Baudenbacher (ed.), *The Handbook of EEA Law* (Springer, 2016), p.8.
[24] EEA Agreement art.1.
[25] John Lang Temple, "Competition Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), pp.523–545.
[26] TFEU art.101. EEA Agreement art.53.

firms abusing their market power.[27] Additionally, both the EFTA Court and the national courts of the EFTA States have always attempted to interpret arts 53 and 54 EEA in conformity with CJEU's interpretation of arts 101 and 102 TFEU, in order to ensure a homogenous interpretation and application of the EEA Agreement.[28]

The enforcement of arts 53 and 54 EEA, however, differs from the enforcement of arts 101 and 102 TFEU. As far as public enforcement of arts 53 and 54 EEA is concerned, it is structured under a so-called two-pillar system, in which the competences are divided between the Commission and the Authority.[29] The article will therefore briefly explain the two-pillar structure of the EEA in order to clarify how public enforcement is divided between the Commission and the Authority.

1.2 The two-pillar EEA structure

The two-pillar structure consists of an EU-pillar, an EFTA-pillar and the EEA joint bodies situated in between.[30] For the purpose of the article, it will focus on the EU- and the EFTA-pillar. The EFTA-pillar was established to mirror the EU bodies and cater the inabilities of the EFTA States as non-Member States.[31] Hence, the EFTA Court and the Authority were established in the EFTA-pillar with the purpose to interpret, apply and recognise the decisions taken pursuant to the EEA Agreement within the EFTA States, in a similar manner to the equivalent bodies in the EU-pillar.[32]

This two-pillar structure is further laid down in Protocol 1 to the EEA Agreement.[33] According to para.4(d)

> "the functions of the Commission in the context of procedures for verification or approval, information, notification or consultation and similar matter shall for the EEA EFTA States be carried out according to procedures established among them".[34]

Public enforcement of the EEA agreement is further divided between the two pillars, in which there are two authorities that share jurisdiction to apply the EEA Agreement—the Commission and the Authority.[35] Furthermore, the EFTA States have established a court of justice—the EFTA Court—which has the competence to review the Authority's decisions.[36]

Articles 55 and 56 EEA lay down the division of competences between the Commission and the Authority in regard to the enforcement of arts 53 and 54 EEA.[37] Moreover, it is specified in protocols: Protocols 23 (co-operation between the Commission and the Authority in cartel and dominance cases) and 24 (co-operation in the field of concentrations).[38] This was with the purpose to avoid parallel and conflicting decisions between the two bodies, in which both decisions will have binding effect upon the parties.[39] Despite such efforts, the division of competences becomes problematic in disputes in which the matter does not fall within just one of the two pillars but rather across the pillars.[40] The issue often arise in merger cases, for example if an EFTA company merges with an EU company.[41]

The division of competences between the Commission and the Authority, laid down in the abovementioned provisions and protocols of the EEA, are rather complex. In short, the Commission has competences to deal with cases which have an appreciable effect on trade between the EU Member States.[42] The Authority on the other hand, is entrusted with the competences to deal with cases which affect trade between the EFTA States or in cases in which the effect on trade between the EU Member States is established as non-appreciable.[43]

1.3 Regulation 1/2003 and the development towards decentralised public enforcement of EU/EEA competition law

1.3.1 Council Regulation 1/2003

Regulation 1/2003 brought about changes in regards to the enforcement of arts 101 and 102 TFEU.[44] Prior to the implementation of the Regulation, the enforcement of EU competition rules was categorised as a centralised

[27] TFEU art.102. EEA Agreement art.54.
[28] See, for example: *Posten Norge AS v EFTA Surveillance Authority* (E-15/10) [2012] 4 C.M.L.R. 29. The Norwegian Supreme Court, Rt-2012 s.1556 *Gran & Ekran*-case.
[29] EEA Agreement art.56.
[30] Georges Bauer, "Decision-making Procedure and Implementation of New Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), pp.47–51.
[31] Bauer, "Decision-making Procedure and Implementation of New Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016).
[32] Frank Buchel and Xavier Lewis, "The EFTA Surveillance Authority" in Baudenbacher (ed.), *The Handbook of EEA Law*, pp.113–138.
[33] Protocol 1 on Horizontal Adaptations to the EEA Agreement, *http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol1.pdf* [Accessed 5 December 2016].
[34] Protocol 1 on Horizontal Adaptations to the EEA Agreement, para.4(d).
[35] Buchel and Lewis, "The EFTA Surveillance Authority" in Baudenbacher (ed.), *The Handbook of EEA Law*, pp.113–138. Protocol 4 to the Surveillance and Court Authority Agreement on the functions and powers of the EFTA Surveillance Authority in the field of competition (2004), *http://www.efta.int/legal-texts/eea/protocols-to-the-agreement*. Protocol 23 on concerning the cooperation between the surveillance authorities (2005), *http://www.efta.int/legal-texts/eea/protocols-to-the-agreement* [Accessed 5 December 2016].
[36] See fn.35 above.
[37] EEA Agreement arts 55 and 56.
[38] Protocol 23 on concerning the cooperation between the surveillance authorities (2005) and Protocol 24 on cooperation in the field of control of concentrations (2004), *http://www.efta.int/legal-texts/eea/protocols-to-the-agreement* [Accessed 5 December 2016].
[39] Bauer, "Decision-making Procedure and Implementation of New Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), p.48.
[40] Bauer, "Decision-making Procedure and Implementation of New Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), p.50.
[41] Bauer, "Decision-making Procedure and Implementation of New Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), p.50.
[42] EEA Agreement arts 55 and 56.
[43] EEA Agreement arts 55 and 56.
[44] Regulation 1/2003. TFEU arts 101 and 102.

notification and enforcement system.[45] This, however, changed with Regulation 1/2003, in which the system was replaced with a decentralised ex-post enforcement system.[46] This entailed that both the Commission and the NCAs, forming the European Competition Network (the ECN), were expected to follow-up infringements of arts 101 and 102 TFEU.[47] Thus, the EU NCAs were given the power to impose sanctions, for example against cartels, where the undertakings have violated either national or EU competition law.[48]

Regulation 1/2003 was incorporated into the EEA Agreement through the Joint Committee Decision 130/2004.[49] In order to comply with the Regulation, the decision amended Annex XIV, Protocol 4 (on the establishment of a Surveillance Authority and a court of justice), Protocol 21 (on the implementation of competition rules applicable to undertakings) and Protocol 23 and 24 as outlined in section 1.2.[50]

In principle, Regulations should be incorporated in its entirety without any further exceptions.[51] However, during the incorporation of Regulation 1/2003 into the EEA Agreement, not all provisions were made fully applicable.[52] In short, this entailed that; first, the enforcement of arts 53 and 54 EEA were only decentralised in the EFTA-pillar, i.e. among the three EFTA States.[53] Secondly, several provisions were not applicable cross-pillar.[54] Thirdly, the EFTA NCAs was not accepted as formal members of the ECN.[55]

1.3.2 The Commission's position on the implementation of Regulation 1/2003

The reasoning behind such divergence was because of the Commission's position on the matter.[56] The two-pillar structure did not hinder decentralised public enforcement per se, however, the Commission was of the opinion that arts 55 and 56 EEA only entrusts the Commission and the Authority to apply arts 53 and 54 EEA.[57] Contrary to the TFEU, the EEA Agreement under art.55 EEA only establishes the competences of the two surveillance authorities, and the division of competences between these two under art.56 EEA.[58] Secondly, one may assume that the Commission's reluctance is based on the fact that the EEA Agreement requires decisions adopted pursuant to arts 53 and 54 EEA to be legally binding upon the whole of the EEA.[59] This entails that, if the enforcement of arts 53 and 54 EEA were to be decentralised, the EU and the EFTA NCAs would be given the competences to adopt decisions that are legally binding beyond their territorial jurisdiction.[60] It should however be noted that the Commission's position may have been influenced by other political and/or practical considerations, but the Commission has not expressed any other reasoning than their interpretation of arts 55 and 56 EEA.

For these reasons, the Commission seems to be of the opinion that art.55 and 56 EEA creates obstacles to the decentralisation of public enforcement in both the EU- and the EFTA-pillar.

1.3.3 An opposing position on the implementation of Regulation 1/2003

It can be argued that there is no reason why arts 55 and 56 EEA constitute a legal obstacle for decentralised public enforcement of arts 53 and 54 EEA in either of the two pillars. Protocol 21 to the EEA refers to the implementation of competition rules applicable to undertakings and empowers the EEA Joint Committee to make amendments.[61] Thus, according to the EFTA States, it is evident that Protocol 21 enables the EEA Joint Committee to decentralise public enforcement of arts 53 and 54 EEA through such amendments.[62] This is because—contrary to EU law—the EEA Agreement does not consist of "primary" and "secondary" EEA law and thus, arts 55 and 56 of the "Main Part of the EEA Agreement" do not limit the competences of the EEA

[45] Wolf Sauter, "Coherence in EU Competition Law" in *Year Book of European Law* (Oxford: Oxford University Press, 2016). Slaughter and May, "An overview of the EU competition rules - A general overview of the European competition rules applicable to cartels, abuse of dominance, forms of commercial cooperation, merger control, State aid and liberalisation" (2011), *https://www.slaughterandmay.com/media/64569/an-overview-of-the-eu-competition-rules.pdf* [Accessed 5 December 2016].
[46] See fn.45 above.
[47] Slaughter and May, "An overview of the EU competition rules - A general overview of the European competition rules applicable to cartels, abuse of dominance, forms of commercial cooperation, merger control, State aid and liberalisation" (2011), p.4.
[48] Commission working staff document, "enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues" SWD (2014) 230, p.19, *http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf* [Accessed 5 December 2016]. Regulation 1/2003.
[49] Decision of the EEA Joint Committee No.178/2004 of 3 December 2004 amending Protocol 21 and Protocol 23 EEA (2004), *http://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-20-%20English/178-2004.pdf*.
[50] Annex XIV on competition (2004), *http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex14.pdf*. Protocol 4. Protocol 23. Protocol 21 on the implementation of competition rules applicable to undertakings (2004), *http://www.efta.int/legal-texts/eea/protocols-to-the-agreement* [Accessed 5 December 2016].
[51] Páll Hreinsson, "General Principles" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), p.385.
[52] Consultation Paper on the implementation of the Damages Directive, p.17.
[53] Consultation Paper on the implementation of the Damages Directive, p.17.
[54] See for example Regulation 1/2003 arts 12 and 22. (See abovementioned EEA Protocols incorporating Regulation 1/2003).
[55] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/1 (Commission Notice ECN).
[56] FIDE Report 2016, p.3.
[57] FIDE Report 2016, p.3.
[58] EEA Agreement arts 55 and 56.
[59] EEA Agreement arts 55 and 56.
[60] Bauer, "Decision-making Procedure and Implementation of New Law" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), p.52.
[61] Protocol 1. EEA Agreement art.98.
[62] Protocol 1. EEA Agreement art.98.

Joint Committee to amend Protocol 21 to the EEA—to the extent that it contradicts such provisions.[63] Furthermore, arts 55 and 56 EEA are to be read in conjunction with Protocol 21, 23, 24 and Annex XIV to the EEA.[64] Hence, these Protocols and Annexes are amended in order to effect the provisions of the "Main Part of the Agreement", and to ensure uniformity of the competition rules in the EEA.[65] This dynamic approach illustrates that arts 55 and 56 EEA should not be an obstacle for decentralised enforcement of arts 53 and 54 EEA.

In addition, pursuant to the general principles established by the CJEU, the interpretation of the EEA Agreement should consist of a dynamic, teleological and homogenous approach.[66] As previously emphasised, the main objective of the EEA is to establish equal conditions of competition.[67] Thus, the fact that arts 55 and 56 EEA do not refer to the EFTA and the EU NCAs is not sufficient to argue that it precludes the possibility of decentralised public enforcement. It cannot be inferred from arts 55 and 56 EEA that it aims to restrict the competences of enforcement to the two current surveillance authorities. Moreover, on the basis of its objective, the EEA Agreement should be constantly read in light of new relevant EU legislation.[68] Thus, because the TFEU allows for decentralised public enforcement of arts 101 and 102 TFEU, there should be no reason why the EEA Agreement cannot open up for similar decentralisation of public enforcement.[69]

For these reasons, one can claim that the Commission failed to recognise that it would be sufficient to amend the Protocols to the Main EEA Agreement in order to give both the EFTA- and the EU NCAs the competences to enforce arts 53 and 54 EEA.

1.3.4. Decentralised public enforcement of articles 53 and 54 EEA in the EFTA-pillar

As emphasised in the previous section—despite the opinions of the Commission—one may argue that there are no legal barriers to decentralise public enforcement of arts 53 and 54 EEA in either of the two pillars. Therefore, the EFTA States unilaterally established decentralised enforcement within the EFTA-pillar and thus empowered their national courts and the NCAs to enforce arts 53 and 54 EEA.[70] This was laid down in Protocol 4 to the Surveillance and Court Agreement (the SCA).[71] The lack of any formal objection by the Commission on the decentralised enforcement of arts 53 and 54 EEA in the EFTA-pillar or in regard to the amendments to Protocol 4 SCA, have been interpreted as a tacit consent.[72]

To summarise, the main issue of the current legal framework is that Regulation 1/2003 is only partially implemented, because the Commission seemed to be of the opinion that arts 55 and 56 EEA constitute a legal obstacle to decentralise public enforcement of arts 53 and 54 EEA. Consequently, public enforcement was *only* decentralised within the EFTA-pillar and not in the EU-pillar, which entails that enforcement cannot be initiated across the two pillars, i.e. the so-called *cross-pillar problem*. The next section will further outline the practical implications of the lack of public decentralised enforcement in relation to Regulation 1/2003.

2. Practical implication due to the lack of public decentralised enforcement

The article will outline seven main practical implications that follow from the lack of public decentralised enforcement of arts 53 and 54 EEA across the EU- and the EFTA-pillars. In other words, the implications that follow do so because the provisions do not apply cross-pillar but rather separately within the EU- and the EFTA-pillars.

The first provisions addressed in the following section 2.2 are arts 12 and 22 of Regulation 1/2003. This section will outline the *general* implications that are also applicable to all the following provisions addressed and will provide an overview of the circumstances.

2.2 Articles 12 and 22 — limited competences to exchange information and carry out investigations

Article 12 of Regulation 1/2003 provides legal basis for exchange of information between the EU NCAs as well as between the Commission and the EU NCAs.[73]

Article 22 of the Regulation establishes a legal framework for the EU NCAs to carry out inspections within their own territory or conduct other fact-finding enquiries, including investigations on behalf of another

[63] Halvard H. Fredriksen, "EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), pp.95–109.
[64] Protocol 21, Protocol 23. Annex XIV.
[65] Fredriksen, "EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), pp.98–106.
[66] *EFTA Surveillance Authority v Iceland* (E-16/11) [2013] 2 C.M.L.R. 41; *Fokus Bank ASA v Norway* (E-1/04) [2005] 1 C.M.L.R. 10; *Ravintoloitsijain Liiton Kustannus Oy Kustannus Oy Restamark v Helsingin Piiritullikamari* (E-1/94) [1995] 1 C.M.L.R. 161.
[67] EEA Agreement Preamble and art.1.
[68] Fredriksen, "EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), p.99.
[69] Note: on the basis of the arguments provided above.
[70] Consultation Paper on the implementation of the Damages Directive, p.8.
[71] Protocol 4.
[72] FIDE Report 2016, p.4.
[73] Regulation 1/2003 art.12.

EU NCAs.[74] Moreover, it provides the Commission with the competences to request an EU NCAs to undertake an investigation.[75]

In light of the implementation of Regulation 1/2003, it follows from the inherent logic of the EEA Agreement and Protocol 1 concerning Horizontal Adaptation, that the EFTA NCAs and the Authority should have equivalent powers and functions within the EFTA-pillar as the Commission and the EU NCAs have within the EU-pillar.[76] Furthermore, as previously outlined, Protocol 4 SCA was amended during the implementation of Regulation 1/2003 in order to reflect exactly this, namely providing the EFTA NCAs with the competences to enforce arts 53 and 54 EEA, i.e decentralised enforcement.[77]

However, as previously established, this was only carried separately within the EFTA-pillar. Therefore, the present legal framework does not provide legal certainty in regard to decentralised public enforcement of arts 53 and 54 EEA; nor does it provide a cross-pillar application of arts 12 and 22 EEA.[78] Due to the lack of an explicit cross-pillar mechanism in Protocol 4 SCA, neither the EFTA NCAs nor the Authority is treated on equal footing with the EU NCAs and the Commission.[79] Furthermore, there is no current legal framework that allows the EFTA NCAs to provide an EU NCA with confidential information or carry out fact-finding measures, nor can they request such assistance from an EU Member State.[80] The disclosure of such information would in theory constitute a breach of confidentiality.[81]

In practice, this entails that there are no legal basis for co-operation between, for example, the Norwegian Competition Authority and the Bundeskartellamt (the German competition authority) or any other EU NCAs, whereas for example the Bundeskartellamt and the Konkurrensverket (the Swedish competition authority) may. However, the Norwegian Competition Authority may co-operate with the NCA of Iceland—as a Member State of the EFTA. Moreover, the Commission and the Authority may collaborate in a case, whereas the Norwegian Competition Authority may not co-operate with the Commission.

Although there is a lack of legal basis for cross-pillar co-operation between the EFTA NCAs and the EU NCAs, there appear to be few practical implications thus far, due to informal co-operation among the EU NCAs and the EFTA NCAs.[82] However, one may expect that the Commission will propose future harmonisation of national procedural competition rules in order to ensure a uniform application of arts 101 and 102 TFEU.[83] This was apparent in *DHL Express v AGCM*, which created momentum for the EU to take political initiative to harmonise the diverse leniency programs across the EU Member States.[84] This is already addressed in the Commission's consultation on the Competition Authorities' support system in February 2016.[85] For these reasons, it is essential to establish legal basis for cross-pillar co-operation between the EU- and the EFTA-NCAs and the surveillance authorities in order to avoid co-operation solely depending on the willingness of individual parties.

Such a cross-pillar application of arts 12 and 22 of Regulation 1/2003 must either be laid down in a separate agreement which escapes the current restrictions or provide a clear set of rules which would place the EFTA NCAs on an equal footing in regard to requesting information and accessing confidential information.[86]

2.3 Article 10 — The lack of competences to make findings of inapplicability

Article 10 of Regulation 1/2003 enables the Commission to make findings of inapplicability, i.e. consistency checks. Pursuant to this provision, the Commission may on its own initiative find that arts 101 and 102 TFEU are not applicable to an agreement, a decision by an association of undertakings or a concerted practice.[87]

Article 10 of Regulation 1/2003 does not apply cross-pillar and thus there is a need to empower the Authority to make similar findings as provided under this provision. An amendment would be necessary to secure such a cross-pillar application. A cross-pillar application would ensure that the Authority would be competent to adopt a non-applicability decision in cases in which it is the competent authority in accordance with art.56 EEA. Likewise, the Commission would be the competent authority in cases in which it is competent under art.56 EEA.[88]

[74] Regulation 1/2003 art.22.
[75] Regulation 1/2003 art.22.
[76] Protocol 1.
[77] Protocol 4. Consultation Paper on the implementation of the Damages Directive, p.8.
[78] See Consultation Paper on the implementation of the Damages Directive, p.8 (due to the lack of cross-pillar application this have an effect for arts 12 and 22 among others).
[79] Based on an analysis of arts 12 and 22 of the Regulation. Not implemented into Protocol 4—compared to Regulation 1/2003.
[80] See fn.79 above.
[81] See fn.79 above.
[82] Note: at least nothing contrary is reported so far.
[83] Note: based on previous developments and in line with other similar areas of law.
[84] *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del mercato* (C-428/14) EU:C:2016:27; [2016] 4 C.M.L.R. 17.
[85] "DHL Italy: European Court issues key judgment on overlapping leniency procedures", Kluwer Competition Law Blog, February 2016, *http://kluwercompetitionlawblog.com/2016/02/18/dhl-italy-european-court-issues-key-judgment-on-overlapping-leniency-procedures/* [Accessed 5 December 2016]. DG Competition, "Communications 2016", March 10 2016, *http://ec.europa.eu/competition/* [Accessed 5 December 2016].
[86] Regulation 1/2003 arts 12 and 22.
[87] Regulation 1/2003 art.10.
[88] Based on a comparison of art.10 of Regulation 1/2003, art.56 of the EEA and Protocol 4.

2.4 Article 11(3) and (4) — The lack of cross-pillar notifications

Article 11(3) and (4) of Regulation 1/2003 enables the EU NCAs, when acting under arts 101 and 102 TFEU, to inform the Commission in writing before or without delay after commencing the first formal investigative measure.[89] This information may also be made available to the NCAs of the other Member States.[90]

In light of the provision, due to the lack of a legal basis for cross-pillar notifications, the EFTA NCAs are placed at a disadvantage. Because the provision does not apply cross-pillar, co-operation in relation to notifications and information is only regulated between the Commission and the EU NCAs.[91] Thus, theoretically, the information cannot be transmitted across the NCAs of the two pillars.

A cross-pillar application of art.11(3) and (4) would imply that co-operation mechanisms are regulated between the following parties: (i) the Commission and the EFTA NCAs; (ii) the Authority and the EU NCAs; (iii) the EFTA NCAs and the EU NCAs.[92] Therefore, a cross-pillar application of art.11(3) would imply that both the EFTA NCAs and the EU NCAs, when acting under arts 53 and 54 EEA, would inform both the Commission and the Authority when they initiate investigative measures.[93] Furthermore, a cross-pillar application of art.11(4) would imply that both the EFTA NCAs and the EU NCAs would inform both the Commission and the Authority no later than 30 days when adopting a decision under arts 53 and 54 EEA.[94] In addition, it would imply that the NCAs would exchange information when necessary, independently of which sides of the pillar they are situated.

2.5 Article 11(6) — No "claw-back" mechanism

Pursuant to art.11(6) of Regulation 1/2003, the Commission may initiate a proceeding and relieve the EU NCAs of their competences to apply arts 101 and 102 TFEU.[95]

Although there are legal basis for decentralised public enforcement of arts 53 and 54 EEA in the EFTA-pillar, there are still legal uncertainties in regards to the division of competences between the Commission and the Authority. Protocol 4 SCA implies that the EFTA NCAs may enforce arts 53 and 54 EEA, both in cases in which the Commission is competent and where the Authority is competent under art.56 EEA.[96] The issue is therefore that the Commission does not have an explicit right to intervene and enforce arts 53 and 54 EEA in the EFTA-pillar.[97] As a consequence, Protocol 4 SCA can be said to be in conflict with art.56 EEA and Regulation 1/2003.[98] In theory this is not an issue, seeing as there is no hierarchical relationship between primary and secondary sources; however, in practice this will create uncertainty as to which is the competent authority.

For these reasons, a cross-pillar application of art.11(6) of Regulation 1/2003 would require a clear set of rules dividing the competences. Amendments should ensure that the Commission may intervene and enforce arts 53 and 54 EEA in cases in which the Commission is established as the competent authority pursuant to art.56 EEA.[99] This enables the case to be reallocated from the EFTA NCAs to the Commission. Furthermore, this would imply that the EU NCAs would be relieved of their competences to apply arts 53 and 54 EEA when the Authority initiate proceedings.[100] Likewise, the EFTA NCAs would be relieved of their competences to apply similar provisions when the Commission is acting pursuant to art.56 EEA.[101]

The unclear division of competences deviates from the two-pillar structure and further weakens the efficiency of the procedural EU/EEA competition law.

2.6 Article 15 — No written or oral submissions across the two pillars

Pursuant to art.15(3) of Regulation 1/2003 the EU NCAs and the Commission may submit written or oral observations to the national courts of the EU Member States on issues relating to the application of arts 101 and 102 TFEU.[102]

Under the current legal framework, only the Authority may submit written observations, i.e amicus curia to national courts of the EFTA States where the consistent application of arts 53 and 54 EEA so requires and vice versa. Likewise, the Commission may only submit amicus curia observations to national EU courts on the consistent application of arts 101 and 102 TFEU pursuant to art.15(3) of Regulation 1/2003.[103]

[89] Regulation 1/2003 art.11(3) and (4).
[90] Regulation 1/2003 art.11(3) and (4).
[91] Regulation 1/2003 arts 10, 11, 12, 22, etc.
[92] Based on a comparison of competences provided by Regulation 1/2003 and Protocol 4.
[93] Regulation 1/2003 art.11(3).
[94] Regulation 1/2003 art.11(4).
[95] Regulation 1/2003 art.11(6).
[96] EEA Agreement art.56 and Protocol 4.
[97] Note: Due to the lack of a cross-pillar application.
[98] Note: the Main Part of the EEA Agreement may conflict with the Protocols, Annexes and Adaptation texts to the EEA and vice versa—there is no difference between primary and secondary EEA sources. See Fredriksen, "EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols" in Baudenbacher (ed.), *The Handbook of EEA Law* (2016), pp.98–106.
[99] Based on an analysis of art.56 EEA and a comparison between arts 12 and 22 of Regulation 1/2003 and Protocol 4 on the current division of competences.
[100] Based on an analysis of art.56 EEA and a comparison between arts 12 and 22 of Regulation 1/2003 and Protocol 4 on the current division of competences.
[101] Based on an analysis of art.56 EEA and a comparison between arts 12 and 22 of Regulation 1/2003 and Protocol 4 on the current division of competences.
[102] Regulation 1/2003 art.15(3).
[103] Regulation 1/2003 art.15(3).

A cross-pillar application of art.15(3) would imply that the Commission and the EU NCAs may submit written observations to the national courts of the EFTA States on issues relating to the application of arts 53 and 54 EEA.[104] Moreover, it would imply that the EFTA NCAs and the Authority may submit written submission to the national courts of the EU Member States on issues relating to the application of similar provisions.[105]

A cross-pillar application would also be necessary for art.15(1) and (2) of Regulation 1/2003.[106] Similarly, to the abovementioned solutions, co-operation in regard to transmitting information, opinions or judgments, should include the involvement of national courts and the competent NCAs on both sides of the pillars.

2.7 Limited participation in the ECN

The ECN only concerns the application of arts 101 and 102 of the TFEU and not the application of arts 53 and 54 EEA.[107] As the general principle, a fully decentralised public enforcement of arts 53 and 54 EEA is a prerequisite for a full membership and participation in the ECN.[108] Nevertheless, the participation of the EFTA NCAs and the Authority in the meetings of the ECN is regulated under art.1(a) of Protocol 23 to the EEA Agreement.[109] The provision allows the EFTA NCAs and the Authority to participate in policy discussions within the ECN concerning exchange of information under arts 101 and 102 TFEU.[110] Under such current legal framework there is no legal basis that permits the EU NCAs or the Commission to exchange information concerning the enforcement of arts 101 and 102 TFEU to the EFTA NCAs or the Authority. Any such exchange of information would theoretically constitute a breach of confidentiality on their behalf.

2.8 Potential future implications (speculative)

It is difficult to provide a clear answer on what the consequences might be if the cross-pillar problem remains unresolved; however, there are three scenarios that are particularly likely to occur based on the abovementioned findings.

First, diverse legal provisions for enforcement over time might have an effect on the material competition rules in the EEA Agreement. For example, it is not unrealistic that future directives on sanctions, which will not be incorporated into the EEA Agreement as long as the provisions are not applied cross-pillar, may lead enforcement bodies of the EFTA to come to different conclusions when making decisions concerning remedies than would apply if the cases were brought before enforcement bodies of the EU.[111]

Secondly, one can imagine that an increased heterogeneity of enforcement may result in the CJEU and the EFTA Court no longer expecting that the material in arts 53 and 54 EEA should be identical to arts 101 and 102 TFEU. This is evident in other areas of law.[112] Moreover, there might not be any reason why arts 10 and 11 of the Norwegian Competition Law Act should continue to be interpreted in line with arts 53 and 54 EEA or arts 101 and 102 TFEU.[113]

Thirdly, which may be more far-fetched, it has been underlying practice that the national courts of the EFTA States and the EFTA Court have interpreted competition law in line with the Commission and the CJEU, in particular on the basis of the homogeneity principle under art.6 EEA.[114] These practices may change due to the widening gap between EU and EEA/EFTA competition law.

One example that may illustrate these implications is *DHL Express v AGCM*, which shows that in areas where the rules are not sufficiently harmonised, the outcome of the case may vary depending on which authority or court that decided upon the case.[115] The CJEU found that there is no guarantee that being granted leniency or immunity in a cartel investigation by the Commission leads to the same treatment in national investigations or vice versa.[116] Hence, this illustrates that there is a great risk of unequal treatment and outcome, depending on the competent authority, and further illustrates the necessity of a "true EEA-wide competition policy area" across both pillars.

To conclude this section, due to the partial implementation of Regulation 1/2003, there is a lack of legal basis for the EFTA NCAs and the Authority to co-operate with the EU NCAs and the Commission. In particular, in terms of requesting information, accessing confidential information in fact-finding investigations, submitting amicus curia and notifications and so forth. The next section will examine how these implications effect the possible implementation of the Damages Directive.

[104] Similar provisions and application would apply for EFTA States—art.15(3) of Regulation 1/2003.
[105] Similar provisions and application would apply for EFTA States—art.15(3) of Regulation 1/2003.
[106] Regulation 1/2003 art.15(1), (2).
[107] Commission Notice ECN, para.1.
[108] Commission Notice ECN, paras 2 and 3.
[109] Protocol 23, art.1(a).
[110] Protocol 23, art.1(a).
[111] This is apparent for example in *DHL Express* [2016] 4 C.M.L.R. 17.
[112] For example for sanctions and merger regulations. Olav Kolstad and Jan Magne Juuhl-Langseth, *The Practioner's Guide to Norwegian Competition law* (Akademika Forlag, 2014).
[113] The (Norwegian) Competition Law Act (Lov om konkurranserett) (LOV-2004-03-05-12) arts 10 and 11, *https://lovdata.no/dokument/NL/lov/2004-03-05-12* [Accessed 5 December 2016].
[114] EEA Agreement art.6. See, for example *Posten Norge AS v EFTA Surveillance Authority* (E-15/10) [2012] 4 C.M.L.R. 29. The Norwegian Supreme Court, Rt-2012 s.1556 *Gran & Ekran*-case.
[115] *DHL Express* [2016] 4 C.M.L.R. 17.
[116] *DHL Express* [2016] 4 C.M.L.R. 17.

3. Practical implications in relation to decentralisation of private enforcement

The lack of cross-pillar decentralised public enforcement of arts 53 and 54 EEA is highly relevant to the implementation of the Damages Directive. It is currently a risk that such act will not fully be implemented due to the lack of decentralised public enforcement.[117] The introduction of the Damages Directive therefore brought back the discussion concerning the Commission's interpretation of arts 55 and 56 EEA and thus challenges the Commission's reluctance to decentralise the EEA Agreement. The focus of this section is to examine the issues relating to the possible implementation of the Damages Directive, and the practical implications that may follow.

The following section will define the notion of private enforcement and briefly outline why the decentralisation of private enforcement differs from the decentralisation of public enforcement.

3.1 Private enforcement

As previously outlined in section 2, the difficulties concerning public enforcement of EEA competition rules do not limit the ability of private parties to enforce arts 53 and 54 EEA before national courts.[118] Similarly to arts 101 and 102 TFEU, arts 53 and 54 EEA confer rights upon private parties.[119] Moreover, although the EU law principle of direct effect is not applicable to the EEA Agreement, arts 53 and 54 EEA are incorporated into the national law of the EFTA States.[120] In particular, arts 53 and 54 EEA are incorporated into arts 10 and 11 of the Norwegian Competition Law Act.[121] Thus, private parties can bring a claim before national courts of the EFTA States regardless of the limitation of Regulation 1/2003.

In light of the above, decentralisation of private enforcement does not per se encounter similar difficulties as the decentralisation of public enforcement. As previously emphasised, it is likely that the EFTA States as well as the Commission will be reluctant to implement the Damages Directive before the issue regarding public enforcement is resolved, as the implementation would be rather meaningless without a cross-pillar effect. Furthermore, the lack of co-operation between the Authority/EFTA NCAs and the Commission/EU NCAs, may have a spill-over effect and may for example hinder the ability of private parties to access evidence necessary to file a claim for damages.[122] In particular, this is evident in cases which have a cross-border element and require co-operation across the two pillars.[123] This will further be addressed below.

3.2 The Damages Directive and decentralised private enforcement of EU/EEA competition law

The willingness of the EFTA States to implement the Damages Directive into the EEA Agreement seems to a large extent depend on whether it will be applied cross-pillar.[124] The implementation of the Damages Directive is therefore inherently linked to the lack of cross-pillar application of Regulation 1/2003 and the lack of public decentralised enforcement of arts 53 and 54 EEA across the EFTA- and the EU-pillar.

From the perspective of this analysis, it seems that there are currently two possible alternatives when it comes to the implementation of the Directive: (i) to partially implement the Damages Directive without a full cross-pillar effect, which does not require any amendments regarding Regulation 1/2003 or; (ii) to ensure Regulation 1/2003 is applied cross-pillar before fully implementing the Damages Directive with the necessary cross-pillar effect. The two alternatives will briefly be assessed below.

3.2.1 A partial (incomplete) implementation of the Damages Directive

First, one alternative is to partially implement the Damages Directive, which consequently will result in a lack of a cross-pillar application—similarly to Regulation 1/2003. This alternative however is an unlikely one, seeing as the Norwegian Ministry's Consultation Paper suggests that the government is willing to use the Damages Directive as leverage to ensure a full cross-pillar effect.[125] Furthermore, many of the provisions of the Damages Directive assume and build upon the notion that the enforcement occurs at national level, not only by the Commission or the Authority—as stipulated under arts 55 and 56 EEA.[126] Thus, a partial implementation of the Damages Directive would be rather meaningless seeing as many of the provisions depend on the decentralised public enforcement.[127] For these reasons, it seems rather

[117] Consultation Paper on the implementation of the Damages Directive, p.14.
[118] FIDE Report 2016, p.5.
[119] Finn Arnesen et al., *EØS-rett* (EEA Law), 3rd edn (Universitetsforlaget 2011), p.62.
[120] Peter-Christian Müller-Graff, "EEA Agreement and EC law: A Comparison in Scope and Content" in Peter Christian Müller-Graff and Erling Selvig (eds), *The European Economic Area — Norway's Basic Status in the Legal Construction of Europe* (Berliner Wissenschafts-Verlag, 1997). *EFTA Surveillance Authority v Iceland* (E-11/15) [2015] EFTA Ct. Rep. 418.
[121] The (Norwegian) Competition Law Act arts 10 and 11.
[122] FIDE Report 2016, p.5.
[123] See, for example *Re Zwartveld* (C-2/88 Imm) [1990] E.C.R. I-3365; [1990] 3 C.M.L.R. 457 at [17].
[124] The Norwegian Ministry of Trade, Industry and Fisheries expressed reluctance on behalf of Norway in Consultation Paper on the implementation of the Damages Directive, p.14.
[125] FIDE Report 2016, p.5. Consultation Paper on the implementation of the Damages Directive, p.14.
[126] FIDE Report 2016, p.8. Erling Hjelmeng et al. "Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU" (Master thesis on behalf of the Ministry, University of Oslo 2014) (The English version reads: Study on the legal questions in relation to the implementation of the Directive 2014/104/EU into Norwegian law) (2014), p.15, *https://www.regjeringen.no/contentassets/41ab189abd6340fe98e65204269c55fc/utredning-gjennomforing-av-direktivet-om-privat-handhevelse-av-konkurransereglene-i-norsk-rett.pdf* [Accessed 5 December 2016]. For example arts 6, 9(2) and 10(4) of the Damages Directive.
[127] See fn.126 above.

evident that if the Damages Directive is implemented into the EEA Agreement, it will imply that the EU and the EEA competition rules are enforcement equally, i.e. cross-pillar.

3.2.2 Necessary amendments in relation to Regulation 1/2003 before fully implementing the Damages Directive

A second option is to first make the necessary amendments in regard to Regulation 1/2003 before fully implementing the Damages Directive with a cross-pillar effect. Such an alternative would first require—as previously outlined in section 1.2.3—the EEA Joint Committee to decentralise public enforcement of arts 53 and 54 EEA through amendments pursuant to art.98 EEA.[128] Secondly, it would require the provisions of Regulation 1/2003—as outlined in sections 2.2–2.8—to apply across the two pillars. However, this would imply that the Commission changes their position in regard to public decentralisation of the EEA Agreement. The second step under this second alternative would be to fully implement the Damages Directive into the EEA Agreement and further incorporate it into national law of the EFTA States. If one were to assume that the issues in regard to Regulation 1/2003 were to be resolved and public enforcement of arts 53 and 54 EEA was decentralised, only minor amendments would be necessary in order to fully implement the Damages Directive.[129] This would first and foremost require certain provisions to be applied cross-pillar—as outlined in section 3.4 below.

3.3 Cross-pillar application of the Damages Directive

3.3.1 Article 6 — Disclosure of evidence included in the file of competition authorities

Pursuant to art.6 of the Damages Directive, the enforcement bodies of the EU-pillar should have the right to order the disclosure of evidence.

A cross-pillar application of art.6 of the Damages Directive would imply that national courts of the EU Member States may order disclosure of evidence included in the file of an EFTA NCAs and the Authority.[130] Likewise, national courts of the EFTA States may order disclosure included in the file of an EU NCAs and the Commission.[131]

Without a cross-pillar application of such provision, the EFTA NCAs and the Authority would again be placed at a disadvantage in which they would not have the right to order disclosure of evidence from the EU NCAs or the Commission, but only from the other EFTA NCAs. This may further have an adverse effect on their investigations.

3.3.2 Article 9(2) — The effect of national decisions

Article 9(2) is one of the reasons why one could argue that there is reluctance to implement the Damages Directive without a cross-pillar application. The second paragraph of art.9 stipulates that a final decision of a NCAs or a court in another EU Member States can be presented as prima facie evidence in an action for damages.[132]

A cross-pillar application of art.9(2) would imply that final decisions by the EFTA NCAs under arts 53 and 54 EEA would serve as prima facie evidence in an action for damages before national courts of an EU Member State.[133] Similarly, final decisions of the EU NCAs under arts 101 and 102 TFEU and arts 53 and 54 EEA would serve as a prima facie evidence before courts of the EFTA States.[134]

3.3.3 Article 10(4) — Limitation periods

The provision of art.10(4) stipulates that the limitation period is suspended or interrupted when a NCA takes actions, i.e. initiating proceedings and/or investigations.[135]

A cross-pillar application would imply that the limitation period for bringing an action for damages before national courts of the EU Member States would be suspended and/or interrupted if an EFTA NCA or the Authority initiates an action for the purpose of investigation or proceedings—insofar as it relates to the action for damages.[136] Similarly, the limitation period to bring an action for damages before national courts of the EFTA States would also be suspended and/or interrupted if an EU NCAs or the Commission initiates investigations or proceedings in regard to an infringement of competition law—insofar as it relates to the action for damages.[137]

[128] EEA Agreement art.98.
[129] Based on the analysis of Hjelmeng et al., "Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU" (2014) and Consultation Paper on the implementation of the Damages Directive.
[130] Note: Similarly to art.6(1) of the Damages Directive. The Damages Directive is not implemented and therefore there are no equivalent provisions yet. Based on the analysis of Hjelmeng et al., "Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU" (2014) and Consultation Paper on the implementation of the Damages Directive, pp.47–65.
[131] See fn.130 above.
[132] Damages Directive art.9(2).
[133] Note: Similar provision and application would be applicable for the EFTA state—art.9(2) of the Damages Directive. Based on the analysis of Hjelmeng et al., "Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU" (2014), and Consultation Paper on the implementation of the Damages Directive, pp.74–80.
[134] See fn.133 above.
[135] Damages Directive art.10(4).
[136] Note: Similar provision and application would be applicable for the EFTA States—art.10(4) of the Damages Directive. Based on the analysis of Hjelmeng et al., "Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU" (2014), and Consultation Paper on the implementation of the Damages Directive, pp.80–92.
[137] See fn.136 above.

To conclude this section, the practical implications in regard to the Damages Directive are not yet apparent, seeing as the deadline for its implementation is just coming to an end. However, in any event, the implementations of the abovementioned provisions are dependent on a cross-pillar application, both of Regulation 1/2003 and the Damages Directive.

4. Strategies to enhance the process of decentralised enforcement across the pillars in relation to both Regulation 1/2003 and the Damages Directive

This section will briefly outline some possible strategies for Norway and the other EFTA States to initiate in order to enhance the process of decentralised public and private enforcement of arts 53 and 54 EEA across the two pillars.

4.1 The current situation

As previously emphasised, the Damages Directive is a good opportunity to get the Commission to turn on the question whether of the EEA Agreement allows decentralised enforcement. One may argue that the situation has changed significantly, partly because it is now important for the Commission to have the Damages Directive implemented throughout the EEA, and partly because the authorities of the EFTA States have proven to contribute to the ECN network.

Furthermore, one may argue that a non-implementation of the Damages Directive may create a precedent effect on later harmonisation measures. It is rather unclear how other bodies within the Commission are looking at the issue. Particularly important is the uncertainty of whether the Legal Services or the Commission's diplomatic services will have legal or political objections to the various technical adjustments to the EEA Agreement, which are necessary in order to achieve a full cross-pillar effect of Regulation 1/2003.[138] It is a complicated and technical legal question, which requires willingness from the Commission and the other EU Member States.

4.2 Current and future strategies

4.2.1 Co-ordinate the EFTA States and other relevant parties

First and foremost, it is essential to co-ordinate the different parties of the EFTA-pillar as well as within Norway, in order to ensure a common understanding of the issues at hand. One may argue that the technical and legal difficulties, and the fact that the consequences of failure lie far ahead, may create barriers to mobilise interest.

4.2.2 Participate proactively in the ECN

It is important for the EFTA States to participate proactively in the ECN, in efforts to implement the Damages Directive, in order to show the Commission that Norway and the other EFTA States are attractive parties in the "European competition family". This should include both technical and political communication with the Commission, surveillance authorities and NCAs.

4.2.3 Inform about the potential harm of failure

Another aim should be to clarify and emphasise the potential harm of failure, and to further emphasise that the next step towards decentralised enforcement lies with the Commission. Furthermore, it should be noted that if the Commission does not contribute to ensuring decentralised enforcement of EEA rules, the Directive will either be unbalanced or without meaning. Consequently, the EFTA States might not consider the Directive non-EEA relevant. This in turn will establish a negative precedent for future secondary legislation, which will have no place in the EEA Agreement. This may lead to heterogeneity within the field of EU/EEA competition law, and may result in the EEA Agreement being rendered ineffective as the EFTA States are "left behind".

4.2.4 Enhance its political attention

The most important and probably the most effective measure at this stage is to bring the issues up at the political level both among the EFTA States and at the EU level. This is in order to bring about internal clarifications between the various organs of the Commission and the EU/EEA Member States. To achieve this, it is necessary to enhance its political attention. Furthermore, the aim should be to ensure that the issue is known and understood at national level of the EU, in particular in the Nordic states, and in large and influential states, such as France and Germany.

Conclusion

To conclude, the main issue of the current legal framework is the partial implementation of Regulation 1/2003. The reasoning behind such partial implementation was because the Commission was of the opinion that arts 55 and 56 EEA constitutes a legal obstacle to decentralise public enforcement of arts 53 and 54 EEA.[139] Consequently, public enforcement of arts 53 and 54 EEA was *not* decentralised in the EU-pillar. Nevertheless, because the EFTA States seemed to be of a different opinion, they unilaterally decentralised public enforcement within the EFTA-pillar and thus empowered their national courts and the NCAs to enforce arts 53 and

[138] The amendments laid down in the Consultation Paper on the implementation of the Damages Directive.
[139] Consultation Paper on the implementation of the Damages Directive, p.8.

54 EEA.[140] The lack of any formal objections by the Commission might possibly be interpreted as a tacit consent.[141]

Subsequently, there is no existing legal framework that allows for decentralised public enforcement of arts 53 and 54 EEA across the EU- and the EFTA-pillar, i.e. the so-called *cross-pillar problem* discussed throughout the article. In other words, this entails that there is no legal basis for the EFTA NCAs and the Authority to collaborate with the EU NCAs and the Commission.

This was further apparent when assessing the particular provisions of Regulation 1/2003, and the practical implications that follow because its provisions do not apply cross-pillar but rather separately within the EU- and the EFTA-pillar.[142] This implies—as outlined in sections 2.2 to 2.8—limitations in regard to requesting information, accessing confidential information in fact-finding investigations, participating in the ECN, submitting amicus curia and notifications, in cases with a cross-pillar element.[143] In general, the lack of a cross-pillar decentralised public enforcement of arts 53 and 54 EEA has an adverse effect on collaboration in competition law cases between: (i) the Commission and the EFTA NCAs; (ii) the Authority and the EU NCAs; (iii) the EFTA NCAs and the EU NCAs.

In other words, this entails that there are no legal basis for co-operation between for example the Norwegian Competition Authority and Bundeskartellamt (the German competition authority) or any other EU NCAs, whereas for example the Bundeskartellamt and the Konkurrensverket (the Swedish competition authority) may. However, the Norwegian Competition Authority may co-operate with the NCA of Iceland—as a Member State of the EFTA. Moreover, the Commission and the Authority may collaborate in a case, whereas the Norwegian Competition Authority may not co-operate with the Commission.

Furthermore, the lack of cross-pillar decentralised *public* enforcement is highly relevant to the implementation of the Damages Directive. As outlined in section 3.2, decentralisation of *private* enforcement does not per se encounter similar difficulties as decentralisation of *public* enforcement. Nevertheless, the implementation of the Damages Directive is inherently linked to the lack of decentralised public enforcement of arts 53 and 54 EEA for two particular reasons. First, because there is reason to believe that insofar as public enforcement is not decentralised, the EFTA States are reluctant to categorise the Damages Directive as EEA-relevant and implement it thereof.[144] Secondly, there is an unavoidable spill-over effect from the lack of decentralised public enforcement. For example, it is doubtful that the national courts or the NCAs of the EFTA States can request access in private matters when this is not an option for public enforcement.

Therefore, a non cross-pillar application of the Damages Directive will most likely have similar practical implications to the ones outlined for public enforcement in section 2. Collaboration between the surveillance authorities and the NCAs on opposite sides of the pillar will also be limited for private enforcement. This was further apparent when assessing the particular provisions of the Damages Directive in section 3.4, i.e. the limited ability to: disclose evidence; for final decisions by one competent authority to serve as prima facie evidence before another competent authority in another Member State; and to avoid parallel ongoing investigations.[145]

However, the practical implications in relation to the Damages Directive are not yet apparent seeing as the deadline for its implementation is just coming to an end. In any event, however, in order to avoid a widening gap between EU and EEA competition law, a cross-pillar application of both Regulation 1/2003 and the Damages Directive is necessary. At this point in time, it appears that the decentralisation of public *and* private enforcement of arts 53 and 54 EEA are mutually dependent.

[140] Protocol 4.
[141] FIDE Report 2016, p.4.
[142] See sections 2.2–2.8.
[143] Regulation 1/2003 arts 10, 11(3), (4), (6), 12, 15, 22. (See assessments under sections 2.2–2.8.)
[144] Consultation Paper on the implementation of the Damages Directive, p.14.
[145] Damages Directive arts 6, 9(2) and 10(4). (See assessments under section 3.4.)