



BAUDENBACHER KVERNBERG
LAWYERS & ADVISORS
ZURICH | OSLO | STAVANGER | BRUSSELS

Bahnhofstrasse 100
8001 Zurich, Switzerland
+41 (0)44 562 70 27

Camilla Colletts vei 4
0258 Oslo, Norway
+47 (0)95 24 12 12

Eiganesveien 87
4009 Stavanger, Norway
+47 (0)2 535 77 28

Place Stéphanie,
Avenue Louise 65
1050 Brussels, Belgium
+32 (0)2 535 77 28

info@b-k.law

baudenbacher-kvernberg.law



DR. LAURA MELUSINE BAUDENBACHER
Admitted in Switzerland and Belgium

PROF. DR. DR. CARL BAUDENBACHER
Not admitted to practice in Switzerland

BJORN KVERNBERG
Admitted in Norway

PROF. DR. DR. MADAS ANDENAS
Admitted in Norway and England & Wales

Professor Dr. iur. Dr. rer. pol. h.c. Carl Baudenbacher
Partner
Door Tenant Monckton Chambers, London
Visiting Professor London School of Economics
President of the EFTA Court 2003-2017
Full Professor emeritus University of St. Gallen (Switzerland)

8 May 2024

Provisions of the EEA-Agreement on the production and processing of agricultural products

I. Facts

II. Mandate

III. The exemption for agriculture

1. General

2. Article 8 paragraph 3 EEA

3. Position of the EEA/EFTA State Governments

4. Result

IV. EFTA Court case law

1. EFTA Court E-4/04 *Pedichel*

a. Findings

b. Methodological remarks



2. E-1/16 *Synnove Finden*

a. Facts

b. Findings

3. EFTA Court E-17/15 *Ferskar kjötvörur*

V. EFTA Surveillance Authority practice

VI. European Commission practice

1. Participation in EFTA Court *Synnove Finden*

2. Merger decision *Norgesgruppen/Axfood/Eurocash*

VII. Icelandic raw meat case in particular

VIII. Academic literature

IX. Health and food regulations

X. Conclusions

I. Facts

1. Icelandic agriculture was hitherto subject to national competition law with the exception of a certain exemption for dairy producers since 2004. However, on 27 March 2024, the Icelandic Parliament (*Althingi*) passed Act No. 30/2024 amending the Agricultural Products Act No. 99/1993.

2. The sponsors of the legislation emphasised that there are numerous exceptions to competition law in favour of agriculture in the law of other European countries. The Act created certain exemptions from the provisions of the Competition Act for organisations of producers of agricultural products for mergers and cooperations. It aims in particular at enabling meat processing companies in the agricultural sector to join forces, enter into a labour-sharing agreements and work together to keep costs down. There is, however, no exception to Section 11 of the Competition Act, which prohibits the abuse of a dominant market position.

3. The Icelandic Competition Authority and certain other stakeholders, including large importers of meat, have taken a critical stance towards the new law. After the adoption of the Act, a public debate started on, among other things, the status of the Act in view of the fact that Iceland is a Contracting Party to the Agreement on the European Economic Area.

II. Mandate

4. The Federation of Agricultural Enterprises (SAFL) has asked me to prepare an opinion analysing the principles of the EEA Agreement on **agricultural production and processing** and the extent to which the EEA Agreement applies to these activities.

III. The exemption for agriculture

1. General

5. The goal of the EEA Agreement is to extend the EU internal market to the participating EFTA States and to give citizens and economic operators from those EFTA States privileged access to this market. At the same time, the participating EFTA states must open their markets to citizens and economic operators from the EU. The EEA Agreement has therefore created a **market** in which the same rules apply in principle. In other words, the EEA is supposed to be a homogeneous space.

In Case E-10/14 *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden*, the EFTA Court held:

„The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings.”¹

6. However, the EEA Agreement does not cover the EU common policies in the fields of the customs union, commercial policy, foreign and security policy, justice and home affairs (although the EFTA countries are members of the Schengen area), direct and indirect taxation (although the fundamental freedoms and the state aid rules apply), economic and monetary union, and the **agricultural and fisheries policy**.

2. Article 8 paragraph 3 EEA

7. Article 8 paragraph 3 EEA states:

„1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.

2. Unless otherwise specified, Articles 10 to 15, 19, 20 and 25 to 27 shall apply only to products originating in the Contracting Parties.

3. Unless otherwise specified, the provisions of this Agreement shall apply only to:

¹ [2014] EFTA Ct. Rep. 1364, paragraph 64. See with regard to the market approach already *Knut Almestad*, Reflections on the postal services directive and the EEA review. In: Baudenbacher C (ed) *Judicial protection in the European economic area: international conference by the EFTA Court on 17 June 2011*. German Law Publishers, Stuttgart, 77ff., 81 f.; also *Carl Baudenbacher*, *The Norwegian Concept of “Room for Manoeuvre”: A Nail in the EEA’s Coffin*, *Liber Amicorum for Mads Andenas*, Springer 2024, 125 ff.

(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System,² excluding the products listed in Protocol 2;

(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.”

3. Position of the EEA/EFTA State Governments

8. The **Icelandic Government** stated in EFTA Court Case E-17/15 *Ferskar Kjöttvörur* that it has always been of the view

„that the agricultural system falls in its entirety outside the scope of the EEA Agreement”³.

9. In a state aid case, which is at the moment pending before the EFTA Surveillance Authority, the **Norwegian Government** took the view that agricultural production falls outside the scope of the EEA Agreement.⁴

10. Switzerland co-negotiated the EEA Agreement and signed it on 2 May 1992. However, following a negative referendum on 6 December 1992, it was not in a position to ratify it. The dispatch of the **Swiss Federal Council** (Government) of 18 May 1992 states succinctly on page 139:

„Die Landwirtschaft wurde, wie bereits im Freihandelsabkommen vom 22. Juli 1972 (FHA), grundsätzlich aus dem EWR ausgeklammert (Artikel 8 EWR-Abkommen).”

² It should be noted here that live animals fall under Chapter 1 and meat and meat offal fall under Chapter 2.

³ Report for the Hearing, point 45.

⁴ See paragraph 50 in the EFTA Surveillance Authority letter, dated 20 March 2024, *infra*, V.: „Therefore, the Norwegian Authorities consider investment aid for agricultural production facilities to be inseparately linked to the production of livestock, and therefore outside the scope of the EEA Agreement.“

„Agriculture is, as in the Free Trade Agreement of 22 July 1972 (FTA), in principle excluded from the EEA (Art. 8 EEA Agreement).“⁵

11. Agriculture plays a major role in Swiss politics. That the Federal Council contented itself with such a brief statement can only be explained by the fact that it assumed that the legal situation was crystal-clear.

4. Result

12. The fact that agriculture is excluded from the EEA Agreement is of central importance for the participating EFTA states. That the Common Agricultural Policy does not have to be adopted in the EEA is an important reason - among other reasons - for Iceland and Norway not to join the EU.⁶

IV. EFTA Court case law

1. EFTA Court E-4/04 *Pedicel*

a. Findings

13. In this case, the EFTA Court held on 25 February 2002:

„The Court notes that the scope of the EEA Agreement differs from the EC Treaty with regard to its coverage of agricultural and fishery products. The EEA Agreement takes the approach of excluding the bulk of agricultural products from its product coverage. [...]“⁷

⁵ [BBl 1992 IV 1 - Botschaft zur Genehmigung des Ab... | Fedlex \(admin.ch\)](#) [BBl 1992 IV 1 - Botschaft zur Genehmigung des Ab... | Fedlex \(admin.ch\)](#), 7.23, unofficial translation.

⁶ *Hansueli Schöchli* «Konflikt Schweiz - EU: Wäre bei einem Scheitern der Verhandlungen der EWR eine valable Alternative?» in *NZZ – Neue Zürcher Zeitung*, 03 November 2023 available [here](#).

⁷ *Case E-4/04 Pedicel SA v Sosial- og helsedirektoratet*, [2005] EFTA Ct. Rep. 1, paragraph 24; see concerning this judgment, e.g., *Finn Arnesen*, Homogeneity and disparity, *Festschrift for Christoph Vedder*, 2017, 257, 258 f.

„A main category of products listed in Chapters 1 to 24 of the Harmonized System are agricultural products (including wine). The underlying reason for excluding these products from the general scope of the EEA Agreement must be that the Contracting Parties wished to maintain the freedom to decide on their respective regulations unaffected by the rules contained in the EEA Agreement unless otherwise specified.“⁸

b. Methodological remarks

14. Like its big sister court, the ECJ, the EFTA Court has also occasionally felt compelled to update the written EEA law by means of dynamic interpretation. Probably the most important examples concern the recognition of EEA state liability in Case E-9/97 *Erla María Sveinbjörnsdóttir v The Government of Iceland* (known in Iceland as the *Erla María* case)⁹ and of EEA fundamental rights in Case E-8/97 *TV 1000 AB v The Norwegian Government represented by the Royal Ministry of Cultural Affairs*¹⁰.

15. In the area of agriculture, on the other hand, the EFTA Court has expressly **ruled out any dynamic interpretation**. In Case E-4/04 *Pedidel AS v Sosial- og helsedirektoratet*, judgment of 25 February 2005, it stated the following in connection with wine, also an agricultural product:

„The Contracting Parties are pursuing the objective of creating a dynamic and homogeneous European Economic Area. This fundamental goal, which is laid down, inter alia, in the fourth and fifteenth recitals of the Preamble to the EEA Agreement, may make a **dynamic interpretation** of EEA law necessary. That is, however, not so with regard to Article 8(3) EEA.“¹¹

16. Any re-writing of the law through interpretation is therefore excluded.

⁸ Paragraph 25.

⁹ [1998] EFTA Ct. Rep. 95; see, e.g., *Carl Baudenbacher*, If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court's Sveinbjörnsdóttir Ruling, *Chicago Journal of International Law*: Vol. 10: No. 1, Article 14, available [here](#).

¹⁰ [1998] EFTA Ct. Rep. 68.

¹¹ Paragraph 28, emphasis added.

2. E-1/16 *Synnøve Finden*¹²

a. Facts

17. The Norwegian regulation of 29 June 2007 No. 832 on price compensation for milk provided, among other things, for special delivery **aid** for Q-dairies for the delivery of liquid milk products. *Synnøve Finden AS* produced solid milk products in Norway. In September 2014, *Synnøve Finden* informed the Ministry of Agriculture and Food about its plans for future production of yoghurt and drinking milk and requested confirmation of the framework conditions for such production. In particular, *Synnøve Finden* referred to the special delivery aid granted to Q-dairies. The Ministry replied that there was no intention to extend the circle of beneficiaries of the aid. *Synnøve Finden* brought an action against the Norwegian Government before the Oslo District Court. It demanded that the provision of the regulation in question providing for the special delivery aid be declared invalid. In the alternative, *Synnøve Finden* claimed that this provision constituted unauthorised state aid. Oslo District Court referred questions to the EFTA Court.

b. Findings

18. The EFTA Court held, in relevant parts:

„As for the free movement of goods between the Contracting Parties, it follows from Article 8(3) EEA that the provisions of the Agreement do not apply, unless otherwise specified, to products falling outside Chapters 25 to 97 of the Harmonized System or to products not specified in Protocol 3. The reason for excluding certain goods from the scope of the EEA Agreement is that the Contracting Parties wished to maintain freedom to decide on their respective regulations for these products unaffected by the rules contained in the EEA Agreement (see *Pedice* [...], paragraphs 24 and 25).”¹³

„Article 8(3) EEA provides that products that are not covered by points (a) or (b) fall outside the scope of application of ‘the provisions of this Agreement’.

¹² E-1/16 *Synnøve Finden AS v Staten v/Landbruks- og matdepartementet*, [2016] EFTA Ct. Rep. 931.

¹³ Paragraph 56.

This indicates that the Contracting Parties intended, unless otherwise specified, for those products to be outside the scope of the EEA Agreement and **not only outside the scope of the rules on free movement of goods**. Accordingly, for any EEA rule to apply to such products, a specific legal basis in EEA law is required.”¹⁴

3. EFTA Court E-17/15 *Ferskar kjötvörur*

19. In this judgment of 1 February 2016, the EFTA Court concluded that **raw beef** falls outside the scope of the EEA Agreement. It held:

„Article 8 (3) (a) limits free movement to products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System (“Harmonized System”), unless otherwise provided for in the EEA Agreement. As raw bovine meat does not fall within the said chapters of the Harmonized System, it falls **outside the scope of the EEA Agreement**, unless otherwise provided for in the Agreement.”¹⁵

V. EFTA Surveillance Authority practice

20. On 20 March 2024, ESA informed Norway that, following a complaint, it has provisionally examined measures concerning the Norwegian wood industry and that it has doubts as to whether the measures constitute **State aid** within the meaning of Article 61(1) of the EEA Agreement. In the event that the measures do constitute State aid, ESA also doubts that they are compatible with the functioning of the EEA Agreement. ESA has therefore decided to initiate a formal investigation procedure pursuant to Article 1(2) of Part I of Protocol 3. In paragraphs 59 to 65 of a letter sent to the Norwegian authorities, ESA stated:

„(59) The Contracting Parties have, by virtue of Article 8(3) of the EEA Agreement, retained the freedom to decide on their respective regulations for certain products, unaffected by the rules of the EEA Agreement. This freedom

¹⁴ Paragraph 57, emphasis added.

¹⁵ Paragraph 43, emphasis added.

extends to State aid inseparably linked to the trade in products that fall outside the scope of the EEA Agreement.

(60) The first paragraph of Section 3(1)(c) of the Agricultural Investment Regulation provides the basis for financial support to investments in permanent agricultural production facilities. Agricultural production facilities are buildings for the production of livestock, which are encompassed by Chapter 1 of the HS concerning the product group of live animals. The sole purpose of these production facilities is to produce products that fall **outside the product scope** of the EEA Agreement. Consequently, aid pursuant to the first paragraph of Section 3(1)(c) of the Regulation supports investments that are arguably inseparably linked to trade in products that are excluded from the product scope of the EEA Agreement. Therefore, aid pursuant to the first paragraph of Section 3(1)(c) may fall outside the scope of the EEA Agreement, insofar it is inseparably linked to trade in products that are excluded from the product scope of the EEA Agreement.

(61) The second paragraph of Section 3(1)(c) of the Agricultural Investment Regulation provides the basis for additional financial support for the relevant investment in the agricultural production facility provided that wood is used as building material. This additional financial support is, according to the Norwegian authorities, an incentive for farmers to invest in environmentally friendly building materials. At the same time, aid pursuant to the second paragraph is, like aid pursuant to the first paragraph, supporting investments in facilities that are being used to produce livestock, which are products that fall **outside the scope of the EEA Agreement**.

(62) However, aid pursuant to the second paragraph of Section 3(1)(c) differs from the general aid pursuant to the first paragraph. The additional aid pursues external policy objectives, environmental policy goals, within the agricultural sector. Moreover, the additional aid has potential indirect beneficiaries within the wood industry, which produce and supply wood products that fall within the product scope of the EEA Agreement (48). In this context, ESA has doubts as to whether the additional aid is inseparably linked to the **production of livestock**.

(63) In this regard, it is necessary to revisit the purpose of excluding certain products from the EEA Agreement pursuant to its Article 8(3). The purpose is, as confirmed by the EFTA Court, to maintain the freedom of the Contracting Parties to decide on their respective regulations for these products **unaffected by the rules contained in the EEA Agreement.**

(64) ESA's preliminary view is that a freedom to regulate certain products necessarily includes a certain freedom to pursue both intrinsic and extrinsic policy objectives when deciding on the respective regulation. In other words, pursuing environmental objectives within the production of livestock, may, to a certain extent, fall within the Contracting Parties' discretion to regulate the **production of livestock.**

(65) However, in the present case, the additional aid pursuant to Section 3(1)(c) of the Agricultural Investment Regulation pursues external policy objectives by effectively favouring a specific sector of the economy which is included in the product scope of the EEA Agreement. It is unclear whether such a measure falls within the **States' discretion to regulate the production of livestock.** Therefore, ESA has doubts as to whether the additional aid is inseparably linked to the production of livestock and invites the Norwegian authorities to provide their views on the matter."¹⁶

21. It must be concluded from the above that ESA considers that the production of meat products generally falls outside the scope of the EEA-Agreement, and hence also not only its state aid, but also its **competition rules**, and that it is within the competence of the Contracting Parties to **regulate the production of livestock.** It should be noted here that ESA's main concern in this case is whether the additional aid in question benefits products (wood as per Chapter 44 of the Nomenclature) that do fall within the product coverage of the EEA Agreement. That does, however, not change the main principle regarding the competence of the Contracting Parties to regulate production of livestock.

¹⁶ Letter of the EFTA Surveillance Authority to Norway in Case no. 86657, dated 20 March 2024. Available [here](#). Emphases added.

VI. European Commission

1. Participation in EFTA Court *Synnove Finden*

22. The European Commission presented observations in Case E-1/16 *Synnove Finden* under Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure. It stated:

„The Commission takes the view that, as the EEA Agreement is limited in terms of product scope, as specified in Article 8(3) thereof, State aid rules apply only to the products which are covered by Protocol 3. This appears to be confirmed by the EEA State aid rules themselves. First, the Chapter on State aid does not contain any rules determining its scope of application. In contrast, Article 21 EEA on customs matters makes specific provision on product scope. Second, the adaptations provided for in point 1ea(a) and point 1j(j) of Annex XV to the Agreement appear to support a limited scope of application of the State aid rules. Thus, according to the Commission, in light of the wording of Article 8(3) EEA as well as the logic and the aim of the EEA Agreement, it appears that State aid rules apply only to the products specified in Article 8(3) EEA.”¹⁷

2. Merger decision *Norgesgruppen/Axfood/Eurocash*

23. The European Commission referred to the EFTA Court’s *Synnove Finden* judgment in the merger Case M.8468 - *NORGESGRUPPEN / AXFOOD / EUROCASH*.¹⁸

24. In *Synnove Finden*, the problem arose that aid applied both to products that fell outside the scope of the EEA Agreement and to products that fell within that scope. Since all products were marketed together, the measure benefited both products within and outside the scope of the Agreement.

¹⁷ Paragraph 54 of the judgment.

¹⁸ European Commission Case M.8468 - *Norgesgruppen/Axfood/Eurocash* of 16 August 2017 on paragraph 10 (cited below), available [here](#).

25. The EFTA Court held:

„In those circumstances, the proper functioning of EEA State aid law requires that an aid scheme, such as that provided for in the third paragraph of Section 8 of the PE Regulation must, as a whole, be notified to ESA in accordance with Article 1(3) of Part I of Protocol 3 SCA, provided that the referring court, having regard to all the facts before it and the guidance provided by the Court, finds that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between EEA States, that it confers a selective advantage on the beneficiary and that it distorts or threatens to distort competition. This will enable ESA to assess, to the extent that the distribution aid is governed by EEA State aid rules, whether the aid scheme is compatible with the functioning of the EEA Agreement.”¹⁹

26. In *Norgesgruppen*, the concentration concerned the distribution of daily consumer goods mainly to Norwegian consumers. According to the merger rules of the EEA Agreement, the European Commission had competence as regards Norway. The Commission wrote:

„(8) [...] Article 8(3)(a) of the EEA Agreement states that products falling within Chapters 1 to 24 of the Harmonised Commodity Description and Coding System ('Combined Nomenclature') are **not covered by the EEA Agreement**, unless such products are listed in Protocol 3 of the said Agreement. Products listed in Chapter 1 to 24 that are not covered by the EEA agreement include in particular meat, fish and seafood, milk and dairy products, eggs, fruit and vegetables, coffee and tea, flour and pastry sugar and cocoa, edible oils, beverages, alcohol and tobacco. Some food products are listed in Protocol 3 and fall therefore within the scope of the EEA agreement such as inter alia sugar and confectionary, pasta, ice cream and mineral water.

(9) Products in the 'non-food' category are included in chapter 25 – 97 of the Nomenclature, and thus fall within the scope of the EEA Agreement and the Commission's jurisdiction. This includes in particular clothes, tableware, electric equipment and batteries, office accessories, domestic appliances, paper

¹⁹ Paragraph 63.

and plastic foils, textiles, cleaning products, papers, magazines and books, audio-visual equipment, child care and toys hygiene and sanitary products.

(10) The concentration thus affects distribution of consumer goods which are **within and or outside the scope of the EEA agreement**. In cases involving both products falling within and outside the scope of the EEA-agreement, the proper functioning of the EEA mergers rules requires that the **entire transaction** has to be notified to the competition authority competent to deal with the case under EEA Agreement, namely in the present case to the Commission.”²⁰

27. On that crucial point, the Commission referred to paragraph 63 of the EFTA Court’s *Synnove Finden* judgment by analogy.²¹

VII. Icelandic raw meat case in particular²²

28. The Icelandic raw meat dispute concerned the applicability of EEA law under Article 8 to certain agricultural products that normally fall outside the scope of the EEA Agreement. The importer of 83 kg of raw meat from Denmark was not prepared to deep freeze the meat as required by Icelandic law. The matter ended before the Reykjavík District Court which referred questions to the EFTA Court. The Icelandic Government argued that since the EU’s agricultural system was completely outside the scope of the EEA Agreement, Iceland had the right to maintain safety measures. The provision of the deep-freezing aimed at the protection of livestock and public health. The EFTA Court confirmed that raw beef does not fall under Chapters 25-97 HS. It therefore falls outside the scope of the agreement, **unless otherwise provided for in the agreement**.

29. However, the latter was precisely the case. The EFTA Court mentioned that Article 17 EEA stipulates that provisions concerning veterinary and phytosanitary matters are laid down in Annex I, the largest of all the Annexes to the EEA

²⁰ Loc. cit.

²¹ Paragraphs 8 ff., emphases added.

²² See already supra, IV. 2.

Agreement.²³ Directive 89/662/EEC is in fact also located there. The EFTA Court ruled that the Contracting Parties are required under Art. 19(2) EEA to endeavour to achieve a continuous **liberalisation of trade** in agricultural goods. The Directive was therefore fully applicable in Iceland. The Contracting Parties had thus agreed to extend the scope of the agreement and this extension limited Iceland's discretion to restrict trade in goods. Therefore, the Court held that the scope of the agreement, as set out in Art. 8 EEA, did not mean that Iceland had discretion to impose such rules.

30. University of Oslo Professor *Finn Arnesen* has described the function of Annex I with the following words:

„Even though the EEA Agreement does not reflect the EU's common agricultural policy and fisheries policy, and in spite of the limitations that follow from Art. 8(3) EEA, it does by way of Annex I regulate a number of issues relating to food and feed safety, animal welfare and trade in live animals, plants, as well as in agricultural and fish products.”²⁴

31. I may add to this that **production and processing** of agricultural goods such as raw meat are nevertheless outside the scope of application of the EEA.

32. Although the Icelandic raw meat case primarily concerns the compatibility of the Icelandic measures in question with Directive 89/662/EEC, the judgment is of general importance in the context of Article 8 EEA. It shows that the limits of Article 8 EEA do not supersede agreements to the contrary, regardless of whether this is laid down in other provisions or expressly agreed.²⁵

²³ For the sake of order, I add that Annex I does not apply in Liechtenstein. The issues dealt with in this Annex are regulated in a Supplementary Agreement between the EU, Switzerland and Liechtenstein under which Liechtenstein is monitored by Swiss authorities (<https://www.fedlex.admin.ch/eli/cc/2002/323/de>).

²⁴ Article 19, in: Arnesen/Fredriksen/Graver/Mestad/Vedder, eds., Agreement on the European Economic Area. A Commentary, 2018, paragraph 9.

²⁵ See *Gunnar Thor Pétursson*, Article 8, in: Arnesen/Fredriksen/Graver/Mestad/Vedder, eds., Agreement on the European Economic Area. A Commentary, 2018, paragraphs 31-33.

VIII. Academic literature

33. Even before the EEA Agreement came into force, the former Swedish EFTA Court Judge *Sven Norberg*, one of the most important fathers of the EEA Agreement, wrote in his commentary published in 1993 with four co-authors:

„It is important to note that, unless otherwise specified in the Agreement, Article 8(3) EEA limits the material scope of application of the EEA Agreement. This would seem to mean, for example, that while the **competition and State aid rules** in the EC are applicable with regard to all kinds of products, the corresponding rules of the EEA Agreement are not applicable to those products which have been lawfully excluded from the general scope of application as defined in Article 8(3) EEA.”²⁶

34. For the sake of completeness, I add that in the European legal order, competition law and state aid law are two sides of the same coin. This applies to EU law as well as EEA law.

35. The approach of the EFTA Court in *Synnove Finden* has also met with approval. *Peter Christian Müller-Graff*, professor emeritus at the University of Heidelberg and a specialist in EEA law, has stated that it is clear from the wording of Article 8(3) of the EEA Agreement that the limited scope applies not only to the free movement of agricultural products, but to the entire EEA Agreement, including the competition rules and the rules on competition and State aid:

„From the explicit wording of Article 8(3)(a) EEA, which refers exclusively to Chapters 25 to 97 of the HS, it can be concluded that products falling under the other Chapters of the HS (animal products, animal fats, foodstuffs, etc.) are not covered. Also the clear wording of Article 8(3) EEA, „unless otherwise specified, the provisions of the Agreement shall apply to“, indicates that this

²⁶ *Norberg/Hökborg/Johansson/Eliasson/Dedichen*, *The European Economic Area. EEA Law. A Commentary on the EEA Agreement*, Stockholm 1993, 318, emphasis added.

limited product coverage relates not only to the free movement of goods, but to the entire EEA, hence also to **competition and State aid rules**.²⁷

IX. Health and food regulations

36. Article 8(3) EEA provides that the provisions of the agreement shall not apply to agricultural production unless expressly provided otherwise. Such provisions may be included in the Protocols or Annexes.

37. This primarily concerns health and food standards. Such provisions were at issue in EFTA Court Case E-17/15 *Ferskar Kjöttvörur*²⁸. Of course, this also applies to the processing of other meat products such as lamb, chicken and pork products. Such health regulations are, however, of specific nature and do not limit the competence of the Contracting Parties to enact their own competition rules or exemptions thereof for products that fall outside the scope of the EEA Agreement.

X. Conclusions

38. There are differences between the EU internal market and its extension to the EEA. The EU common policies are in principle excluded from EEA law. The EEA/EFTA states have retained their sovereignty in these areas. One of the exceptions concerns the common agricultural policy.²⁹

39. The exception concerning the production and processing of agricultural products is to be found in Part III of the EEA Agreement on the free movement of goods. However, it is not limited to this fundamental freedom. Article 8(3) EEA contains a general exception to the applicability of EEA law for agricultural production and processing and thus also of **competition and state aid law**.

40. This follows from the case law of the EFTA Court and the practice of ESA and the European Commission and is also recognised by academic literature. The exception

²⁷ *Peter-Christian Müller-Graff*, Free Movement of Goods, in Carl Baudenbacher (editor), *The Handbook of EEA law*, Springer 2016, 418, emphasis added.

²⁸ *Supra*, IV. 2. and VII.

²⁹ See regarding the EU's Common Agricultural Policy, e.g., [here](#).

for the production and the processing of agricultural goods such as raw meat, can also not be restricted by dynamic interpretation. As far as can be seen, there is no controversy on this. Iceland therefore has the right to determine its policy on the production and processing of agricultural products independently of the provisions of the EEA Agreement, including with respect to exemptions from competition rules. This entails that Iceland is not bound by the exceptions from competition rules currently in place in the European Union when formulating its own exceptions from competition rules for agriculture products that fall outside Article 8(3) EEA.

A handwritten signature in black ink, appearing to read 'A. Hansen'.