and to the European Commission, with a view to better coordinating the planning of their national debt issuance.

**Article 43 [Protective measures]**

1. Where differences between the exchange rules of EC Member States and EFTA States could lead persons resident in one of these States to use the freer transfer facilities within the territory of the Contracting Parties which are provided for in Article 40 in order to evade the rules of one of these States concerning the movement of capital to or from third countries, the Contracting Party concerned may take appropriate measures to overcome these difficulties.

2. If movements of capital lead to disturbances in the functioning of the capital market in any EC Member State or EFTA State, the Contracting Party concerned may take protective measures in the field of capital movements.

3. If the competent authorities of a Contracting Party make an alteration in the rate of exchange which seriously distorts conditions of competition, the other Contracting Parties may take, for a strictly limited period, the necessary measures in order to counter the consequences of such alteration.

4. Where an EC Member State or an EFTA State is in difficulties, or is seriously threatened with difficulties, as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of this Agreement, the Contracting Party concerned may take protective measures.

**I. Comparison with the TFEU; role of the EFTA Court**

1. Art. 43 is based on Art. 70(2), 73(1), 107(2) and 108 EEC. The three first were repealed by the Maastricht Treaty. Art. 108 EEC, corresponding to Art. 43(4) EEA, is now Art. 143 TFEU, applicable to Member States not participating in the euro. The substantive criteria of the latter provision, as well as of Art. 64 and 66 TFEU, for introducing restrictive measures vis-à-vis third countries are circumscribed by those of Art. 43 EEA with regard to the EFTA/EEA States. The EU is not free to introduce safeguard measures pursuant to TFEU provisions vis-à-vis the EFTA/EEA States in situations not covered by Art. 43 EEA.

2. Unlike the EEC provisions, which limited the affected Member State’s right to introduce or maintain unilaterally the measures in question by giving a role for the Commission or the Council in authorising measures or ordering the Member State to scale back or abolish measures, Arts. 43-45 EEA introduce an obligation to consult but ultimately leave final authority in the hands of the State concerned.¹

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¹ This difference between the EEA rules and the TFEU raises the question of whether the EEA capital movement provisions have direct effect in the EU legal order, see comments to Art. 40 EEA.
In Case E-3/11 Sigmarsson, this special procedure led the defendant and the Government of Iceland to argue that the EFTA Court cannot rule on the legality of measures taken under Art. 43. In their view, judicial scrutiny was limited to an assessment of whether the EFTA State concerned followed the procedures prescribed in Arts. 44 and 45. At paras. 26-31, the EFTA Court disagreed, drawing on its finding in Case E-6/01 CIBA on its competence to review the legality of decisions by the EEA Joint Committee and the essential identity of EEA and EU rules on free movement of capital. The EFTA Court did not elaborate on the fact that in CIBA, the question was the whether the Court could, in principle, review the decision-making of the EEA Joint Committee, whereas in Sigmarsson, the Court reviewed the measures taken by the Icelandic State according to an emergency clause of the Agreement.

However, at para. 50 the EFTA Court accorded the EFTA States “a wide margin of discretion, both in determining whether the conditions are fulfilled, and the choice of measures taken, as those measures in many cases concern fundamental choices of economic policy”. The Court then, at paras. 52-55, went on to make a rather traditional “four freedoms analysis” of whether the Icelandic measures were suitable and necessary for securing the objective they pursued, and whether they satisfied the principle of legal certainty. The Court probably saw proportionality and legal certainty as general principles of law that without doubt applied also to measures under Art. 43. The analysis did not really make it necessary for the Court to rely on a special margin of discretion for the State concerned in order to find the measures justified. Consequently, it did not have to elaborate on the difference that the Court probably saw between general derogations from the fundamental freedoms and special measures pursuant to Art. 43.

It would seem to follow from Sigmarsson that the EFTA Court could answer questions from national courts on whether Art. 43 measures have been retained for longer than necessary, but again leaving a wide margin of discretion for the State concerned.

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3 Case E-6/01, 9.10.2002, CIBA.
4 See comments to Art. 23 EEA.
5 See comments to Art. 40 EEA.
6 For a critical analysis, see D Guðmundsdóttir, ‘Case E-3/11 Sigmarsson v. the Central Bank of Iceland’ 49 Common Market Law Review (2012), pp. 2019-2038. Towards the end of 2016, investors brought an action against the EFTA Surveillance Authority before the EFTA Court (Case E-20/16) seeking voidance of the Surveillance Authority’s decision of 23 November 2016 closing the applicants’ complaint against Iceland concerning certain Icelandic safeguard measures still in place. The applicants claim that the Surveillance Authority has misjudged the level of discretion awarded to EEA/EFTA States by Art. 43. In April 2017, the proceedings were discontinued at the request of the applicants.
7 In the conclusions of its 45th meeting in May 2016, the EEA Council stated at point 11 that “[t]he EEA Council noted that free movement of capital is a fundamental internal market freedom and an integral part of the EEA acquis and acknowledged that restrictions can be implemented only temporarily on the basis of the provisions of Article 43 of the EEA Agreement.”

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II. Measures to counter evasion of currency exchange restriction vis-à-vis third countries

With free movement of capital within the EEA, but with each Contracting Party to the EEA Agreement remaining free to set rules concerning capital movements to and from third countries, it could happen that free movement within the EEA would be used to evade such third country rules. Art. 43(1) EEA provides for a possibility to introduce measures to prevent this.

In the EU, Art. 63 TFEU lays down free movement of capital also between EU States and third countries. In normal times, exchange restrictions with regard third countries are a thing of the past also for the EFTA States. Thus, it would seem that Art. 43(1) has little practical importance outside times of economic crises. In this context, it should be noted that under Art. 66 TFEU, it is still possible for the EU to introduce restrictions on capital movements with third countries as a safeguard measure.

III. Capital market disturbances

Art. 43(2) EEA, like the previous Art. 73(1) EEC, concerns disturbances in the functioning of the capital markets of an EEA State caused by capital movements. It follows from Case 203/80 Casati that the provision is not applicable for restrictions that are lawful according to the general principles on the right of Member States to restrict free movement in order to pursue general interest objective.8 This question is less important in an EEA context than it was in the EC. Under Art. 73(1) EEC, the Commission had to authorise measures, Member States could not introduce them on their own. In the EEA, it follows from Arts. 44 and 45 EEA that the EFTA States can introduce these measures themselves. If secrecy and urgency so requires, which presumably will most often be the case with regard to Art. 43(2), they can do so without prior consultations with their EEA partners.

In Case E-3/11 Sigmarsson, the EFTA Court accepted that Icelandic measures introduced when the financial crisis hit the country in 2008 were justified under Art. 43(2) and (4). The measures severely limited the right to movement of capital denominated in domestic currency between residents and non-residents and other foreign exchange transactions. Domestic parties that acquired foreign currency had to deposit such holdings with domestic financial undertakings within a certain time-limit.9 The Court did not go into which of the two provisions – the second or fourth paragraph of Art. 43 – that applied to each of the different national measures. In reality, the provisions overlap, both with regard to the situations to which they apply and which measures they allow.

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8 Case 203/80, 11.11.1981, Casati, para 15. See the comments to Art. 40 EEA concerning this.
9 Towards the end of 2016, Iceland eased several of the capital control measures that had been introduced in the wake of the financial crisis in 2008.
IV. Exchange rate alterations

Art. 43(3) is based on Art. 107(2) EEC and allows a Contracting Party whose markets have been hit by a serious distortion of competition by an alteration in the exchange rate made by another Contracting Party, to take measures for a strictly limited period in order to counter the consequences thereof. The EEA Agreement lacks a provision similar to that found in Art. 107(1) EEC, now Art. 142 TFEU, which stated that Each Member State should treat its policy with regard to exchange rates as a matter of common interest.10

It should be noted that Art. 1(2) of Dir. 88/361/EEC requires transfers in respect of capital movements to be made on the same exchange rate conditions as those governing payments relating to current transactions. This limits the right of a Contracting Party to alter its exchange rates in the first place.

According to Art. 43(3), a Contracting Party has to “make” an alteration in the exchange rate for counter-measures by other Contracting Parties to be justified. Alterations caused by market fluctuations can hardly be said to be “made” by the State concerned.

V. Balance of payments problems

Art. 43(4), modelled on Art. 108 EEC, concerns difficulties caused by a disequilibrium in the balance of payments. Such difficulties consist in being unable to pay for essential imports and/or being unable to service the nation’s debt. This is usually accompanied by a rapid decline in the value of the national currency as foreign investors pull out the capital that hitherto has been imported to cover current account deficits. Art. 43(3) covers such difficulties firstly when they result from an overall disequilibrium in the balance of payments. Secondly, the provision also allows measures when the disequilibrium is caused by the type of currency at the disposal of the State concerned.

The provision sets as a condition that the difficulties are liable “in particular” to jeopardize the functioning of the Agreement. It could be argued that a balance of payments crisis for one EEA Contracting Party is always bad for intra-EEA trade and thus for the functioning of the Agreement. In view of this, and the words “in particular”, this condition does not have much independent significance. In line with this, the EFTA Court, in finding the Icelandic measures after the financial crisis hit in 2008 to be in conformity with Art. 43(4) in Case E-3/11 Sigmarsson, only discussed the dire situation for the Icelandic economy.11

11 See in particular para 50 of the judgment.
VI. Relationship to emergency measures enacted pursuant to the financial supervisory regulations

According to Art. 18 of the EBA, EIOPA and ESMA Regulations, when the Council has determined the existence of an emergency situation threatening the orderly functioning and integrity of the financial markets or the stability of the financial system “in the Union”, the EU supervisory authorities may adopt individual decisions requiring the competent national authorities to take the necessary action in relation to financial institutions under their supervision. If such action is not taken, the EU supervisory authorities may themselves adopt individual decisions addressed directly to the financial institutions concerned. With regard to the EFTA States, these powers to adopt decisions directed to national authorities and, if need be, directly to national financial institutions have been vested in ESA, which shall act based on drafts from the relevant supervisory authority.

There is no EEA adaptation vesting powers identical to those of the EU Council in an EFTA organ. Thus, the powers of ESA to make decisions are triggered by the decision of the EU Council, just as they are for the EU supervisory authorities. From the point of view of sovereignty, the premise seems to be that the problem is the individual decisions made by the supervisory authorities, not the preceding determination by the Council, which in itself does not bind the States or their financial institutions to any particular cause of action. Therefore, a separate EFTA decision making procedure is needed for the former but not the latter. However, with ESA acting on the basis of drafts from the relevant EU supervisory authority, the freedom of action of the EFTA States’ own institutions is very limited in real terms. This is somewhat off-set by the right of representatives of the EFTA States and of ESA to participate on par with representatives of the EU Member States, but without the right to vote, in the organs of the EU supervisory authorities.


13 See adaptations included in the relevant decisions of the EEA Joint Committee.

14 See Bill to the Norwegian Parliament (Prop 100 S (2015-2016) at point 3.3.2.11. As ESA is vested with making decisions that will be directly binding in Norway, a decision pursuant to Art. 115 of the Norwegian Constitution on transfer of sovereign powers was necessary to authorize Norway’s acceptance of the Regulations as part of the EEA Agreement. This was the second time in Norwegian history that this provision has been employed, the first time being the original authorization to ratify the EEA Agreement in 1992.

15 The EEA adaptations foresee the possibility of disagreement between the EU supervisory authorities and ESA, with the disagreement, if not solved by the authorities themselves, going before the EEA Joint Committee according to Art. 111 EEA. The prospect of ESA’s view prevailing in such a procedure is probably rather limited.
As a geographical concept, the words “in the Union” in Art. 18 must, according to Point 8 of Protocol 1 EEA, be read to include also the EFTA States for the purposes of the Regulations forming part of the EEA Agreement. Thus, the authority of the Council to enable individual decisions to be taken extends also to a situation where only the markets of EFTA States are affected. Whether the regulations allow for action to be taken if the emergency situation affects only one State, is not clear. This is a general question, not a question that arises only with regard to the EFTA States. In reality, it is not very likely that such a crisis in one State should not also affect at least on other State – although perhaps less unlikely with regard to some of the EFTA States than within the EU.

The financial supervisory regulations are primarily concerned with micro-prudential action. Art. 43 EEA, on the other hand, is concerned with macro-economic emergencies. However, there could be situations in which both sets of rules would be applicable. This raises the question of priority of action. The sensible solution in most cases would be to let action under Art. 18 of the Regulations take precedence, leaving action under Art. 43 to function as a basis for ancillary action, if need be. This would be in line with the principles lex posterior derogat legi priori and lex specialis derogat legi generali, as well as the principle of loyal cooperation contained in Art. 3 EEA. Under EEA law there is no formal distinction between ‘primary’ and ‘secondary’ EEA law that could make the principle of lex superior derogat legi inferiori applicable as such.\(^\text{16}\)

However, one could also argue that Art. 43 EEA, by its very nature, is meant to cover actions that derogate from otherwise applicable EEA law when certain vital national interests are at stake, thus leaving the door open for EFTA States to take protective actions disregarding decisions by ESA under Art. 18. When accepting the financial supervisory regulations as part of the EEA Agreement, Iceland made a declaration in the EEA Joint Committee to this effect, “underlining that the incorporation of these Regulations and the related Regulations and Directives does not affect the wide margin of discretion that the EEA States enjoy when making fundamental choices of economic policy in the specific event of a systemic crisis, such as the financial crisis of 2008”.\(^\text{17}\)

### Article 44 [Implementation of protective measures]

The Community, on the one hand, and the EFTA States, on the other, shall apply their internal procedures, as provided for in Protocol 18, to implement the provisions of Article 43.

\(^\text{16}\) See the introductory chapter by Fredriksen on ‘EU law in and beyond the text of the Main Part of the EEA Agreement’ in Part II of this book.

\(^\text{17}\) Published on the website of the Althingi, the Icelandic Parliament, at http://www.althingi.is/altext/145/s/1674.html.