All GBER aid must be transparent. That is, it must be possible to calculate precisely the gross grant equivalent of the aid \textit{ex ante} without any need to undertake a risk assessment (Art. 5).

Each individual aid award exceeding EUR 500,000 must be published on a comprehensive state aid website, along with other details of the aid (Art. 9).

Whereas GBER aid is exempted from the notification requirement, the States shall transmit to the Commission/ESA \textit{summary information} about each aid measure in the standardised format laid down in Annex II to the Regulation, together with a link providing access to the full text of the aid measure, within 20 working days following its entry into force (Art. 11(a)).

In 2017, the Commission adopted Reg. (EU) 2017/1084, which further extends the GBER.\textsuperscript{12} Notably, the GBER can now be used for aid to ports and regional airports, and the scope for regional operating aid under the GBER is expanded. It is expected that this new Regulation will be incorporated into the EEA Agreement by the end of 2017.

**Article 64 [Dispute resolution]**

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion.

Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

Art. 64 adds on to Art. 62(2), and is another \textit{expression of the homogeneity principle} in EEA law, dealing specifically with \textit{uniform surveillance} in the

field of state aid, and providing for a mechanism to deal with any lack of homogeneity in this respect.

Art. 64 was added after the ECJ’s Opinion 1/91 on the EEA Agreement. The immediate background would seem to have been the dispute between the EU (EEC/EC) and Austria that led to Case T-115/94 Opel Austria. The Council had, just days before the entry into force of the EEA Agreement, adopted a Regulation withdrawing tariff concessions and introducing a duty on certain gearboxes produced in Austria, allegedly with state aid that was not justified. The producer challenged the Regulation before the (then) Court of First Instance (and won).

Art. 64 provides a mechanism for dealing with situations where the Commission or ESA believes the other surveillance authority’s practice under Arts. 61 and 62 may result in a distortion of competition within the EEA. Such situations may arise if the two surveillance authorities, despite Art. 109(2), have diverging interpretations of the state aid rules. Given that there is no common EEA Court with jurisdiction to resolve any such disagreement, there is a need for a mechanism such as the one under Art. 64. However, in case the diverging interpretations are due to diverging case law from the EFTA Court and the ECJ or the General Court, the mechanism under Art. 111 would seem the more appropriate choice.¹

Art. 64 also refers to Art. 5 of Protocol 14 EEA. This provision is concerned with aid to the steel industry, and the rules that previously regulated such aid as a lex specialis. After the expiry of the ECSC Treaty in 2002, however, aid to the steel industry is now subject to Arts. 61–63 EEA.²

Art. 64 may be invoked by the Commission, or by ESA. It appears, though, that Art. 64 has never been invoked by any of the surveillance authorities. If invoked, the two authorities shall then initiate the exchange of views foreseen in Protocol 27, paragraph (f). They have two weeks to find a commonly agreed solution before “the affected Contracting Party” may immediately adopt interim measures in order to remedy the resulting distortion of competition. The requirements on the interim measures are not very strict; they are adopted unilaterally, cannot be met with countervailing measures and must only be “appropriate”. That is, they must be reasonably well targeted, aiming at and being capable of offsetting the effects of the (potential) distortion of competition.

In the EU pillar, “the affected Contracting Party” would be the EU. In the EFTA pillar, it would be Iceland, Liechtenstein or Norway. This entails a structural imbalance in the ability to use Art. 64. The Commission is an EU institution and could adopt, or initiate the adoption of interim measures on the EU side. ESA, however, is not a Liechtenstein, Icelandic or Norwegian institution; it cannot be instructed by any of the States to invoke Art. 64, and it cannot adopt,

¹ See the comments by Fredriksen on Art. 111.
or initiate the adoption of interim measures on their behalf. Thus, whereas it is difficult to see that Art. 64 will be formally invoked by any of the surveillance authorities, and even more difficult to see that it will come to the adoption of interim measures, it is particularly difficult to see the EFTA side making use of this mechanism.

If the Commission and ESA cannot find a commonly agreed solution by the end of the two-week period, **consultations shall be held in the EEA Joint Committee**. ESA is then side-lined, and the Contracting Parties must seek to find a commonly acceptable solution. The Joint Committee has **three months** from the end of the two-week period. If unsuccessful in resolving the matter, the affected Contracting Party may replace its interim measures with **definitive measures**. The requirements on the definitive measures are stricter; not because the practice against which measures are taken must result in (potential) distortion of competition so as to affect trade between the Contracting Parties, but because the definitive measures must be “strictly necessary” to “offset the effect” of such distortion. Moreover, priority shall be given to such measures that will least disturb the functioning of the EEA Agreement. This must be read as a **strict necessity** test. Like the interim measures, also the definitive measures cannot be met with countervailing measures. If the dispute thus continues, the settlement of it may continue under Art. 111.

The interim measures and later definitive measures may consist in measures such as those that may be taken under Art. 26, e.g. countervailing duties. As **Art. 64 is open on what type of measures may be adopted**, this goes even if Art. 26 does not apply where Arts. 61 and 62 apply. At the same time, potential interim or definitive measures are not restricted to those mentioned in Art. 26. Also, Art. 26 is perhaps designed more for national measures impacting on the export of goods than measures impacting on the cross-border provision of services or the establishment of companies. However, any interim or definitive measures are always **restricted by the requirements of appropriateness (for interim measures) and strict necessity (for definitive measures)**. These requirements may restrict the use of any measure beyond what Art. 26 would allow for.

Art. 64(2) makes the mechanism under Art. 64 applicable also to equivalent situations regarding the Commission’s or ESA’s enforcement of the EEA Agreement in cases involving **state monopolies** established after the date of signature of the Agreement, see e.g. Arts. 16 and 59(2).

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3 See further the comments by Bull on Art. 26 nn. 4-8.
Chapter 3: Other common rules

Article 65(1) [Public procurement]

1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.

I. Introduction

1. Art. 65(1) is the only provision in the Main Part of the EEA Agreement on public procurement. However, it does not contain any substantive regulation of public procurement, as it merely refers to Annex XVI. In comparison, the EU Treaties do not contain any specific provisions on public procurement; specific rules on public procurement are only found in the secondary legislation.1

2. The legal basis for the EU Acts on public procurement is found in the free movement rules, in particular Art. 34 TFEU (free movement of goods), Art. 49 TFEU (freedom of establishment) and Art. 56 TFEU (freedom to provide services). Thus, public procurement is an integral and important part of the internal market.2 Art. 18 TFEU prohibiting discrimination on the grounds of nationality also plays a role in public procurement, as well as the established fundamental principles deriving from the Treaty, i.e. the principles of equal treatment, transparency, proportionality and mutual recognition. Furthermore, public procurement constitutes a significant part of national Gross National Product and discriminatory procurement practices may thus have a negative impact on the competitive structures in the marketplace and distort the competition. Accordingly, the rules on public procurement have a clear connection to EU rules on competition and state aid.3

3. The adoption of an EU public procurement policy was necessary in order to ensure the creation of a single market with open cross-border competition. The main purpose of the coordination of public procurement procedures at Community level was, as pointed out by the ECJ in Case C-237/99, to eliminate barriers to the freedom to provide goods and services as well as to protect suppliers in one Member State wishing to provide goods or services to public authorities in other Member States.4 Without public procurement rules there is a risk

1 Indeed, Arts. 199(4) and 179(2) TFEU mention procurement regarding EU’s industrial policy and EU financed contracts.
2 Generally on objectives of EU policy and measures on public procurement, see Arrowsmith, The Law of Public and Utilities Procurement, regulations in the EU and UK, Volume 1, 3rd ed (2014), chapters 3 and 4.
3 On this subject, see Sánchez Graells A, Public procurement and the EU competition rules, 2nd ed (2015).