the ECJ, the EFTA Court, and particularly the importance of the Charter, could give rise to different interpretations.\(^4\)

So far, the EFTA Court has relied on the EEA Agreement, both on specific provisions and as a whole. Where possible, the Court has relied on any references to fundamental rights in secondary EU legislation incorporated into the Agreement, to refer to social rights when interpreting EEA law.\(^5\) The reference in the Preamble’s eleventh recital to the importance of the development of the social dimension indicates that the evolving social policy in the secondary legislation and in the case law of the ECJ must be implemented into EEA law.\(^6\) Generally speaking, the substantive law on social policy and labour law is essentially the same in the EEA as in the EU. A notable exception is Dir. 2000/78 on a general framework for the equal treatment in employment and occupation.\(^7\)

**Article 67 [Health and safety of workers]**

1. **The Contracting Parties shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers.** In order to help achieve this objective, minimum requirements shall be applied for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Contracting Parties. Such minimum requirements shall not prevent any Contracting Party from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Agreement.

2. **Annex XVIII specifies the provisions to be implemented as the minimum requirements referred to in paragraph 1.**

   **I. The minimum requirements in an EEA context**

1. Article 67 is based on Art. 118A TEEC, now Art. 153 TFEU: Particular attention shall be paid to the **health and safety of workers**. The tenth recital in the Preamble also notes the Contracting Parties’ determination to ensure a high level of protection concerning health and safety as a basis for further development of the regulation of the internal market.\(^1\) The Contracting Parties may maintain or introduce **more stringent measures**, but these must be compatible with the EEA Agreement.

2. Just like other similar “gateway” provisions of the Main Part of the Agreement, the wording of Art. 67 promises more than it can hold. In practice, it is not the EEA Contracting Parties who decide on the level of protection offered in the EEA; this is decided by the **EU institutions** as they enact novel EU legal acts

---

\(^4\) See the comments by Sundet on Art. 68.
\(^6\) See the comments by Arnesen and Fredriksen on the preamble, eleventh recital mn. 34.
\(^7\) See the comments by Søvig on Art. 70 mn. 29-30.
\(^1\) See the comments by Arnesen and Fredriksen on the preamble, 10\(^{th}\) recital, mn. 33.
which the EEA Joint Committee later on incorporates into the EEA Agreement. However, as long as the Union lives up to the objectives set out in Art. 153 TFEU, so will the EEA Contracting Parties adhere to Art. 67 EEA when they add the novel EU social policy rules to the EEA Agreement.

II. Annex XVIII – an overview

Secondary EU legislation on health and safety is included in Annex XVIII. In short, the substantive law with regard to the minimum requirements for health and safety at work is the same in the EEA as in the EU. The overview below does not list subsequent changes or supplements to the directives.

The EU legal acts concerning minimum requirements concerning health and safety at the workplace incorporated into Annex XVIII include:

- Dir. 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work;
- Dir. 89/654/EEC concerning the minimum safety and health requirements for the workplace;
- Dir. 89/656/EEC on the minimum health and safety requirements for the use by workers of personal protective equipment at workplace;
- Dir. 92/58/EEC on the minimum requirements for the provision of safety and/or health signs at work;
- Dir. 2009/104/EC concerning the minimum safety and health requirements for the use of work equipment by workers at work;

Annex XVIII further incorporates the directives on the protection of workers against exposure to chemical, physical or biological agents at work:

- Dir. 91/322/EEC on establishing indicative limit values by implementing Dir. 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work;
- Dir. 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work;
- Dir. 1999/92/EC on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres;
- Dir. 2000/39/EC establishing a first list of indicative occupational exposure limit values in implementation of Dir. 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work;
- Dir. 2000/54/EC on the protection of workers from risks related to exposure to biological agents at work;
- Dir. 2002/44/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration);
- Dir. 2003/10/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise);
PART II: The Agreement on the European Economic Area

- Dir. 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work;
- Dir. 2006/15/EC establishing a second list of indicative occupational exposure limit values in implementation of Dir. 98/24/EC and amending Dirs. 91/322/EEC and 2000/39/EC;
- Dir. 2006/25/EC on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents;
- Dir. 2009/148/EC on the protection of workers from the risks related to exposure to asbestos at work;
- Dir. 2009/161/EU establishing a third list of indicative occupational exposure limit values in implementation of Dir. 98/24/EC;
- Dir. 2013/35/EU on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields).

Annex XVIII also incorporates secondary EU legislation on protection against risks in certain workplaces, working situations or for precarious workers:

- Dir. 90/269/EEC on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers;
- Dir. 90/270/EEC on the minimum safety and health requirements for work with display screen equipment;
- Dir. 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship;
- Dir. 92/29/EEC on the minimum safety and health requirements for improved medical treatment on board vessels;
- Dir. 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites;
- Dir. 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding;
- Dir. 92/91/EEC concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling;
- Dir. 92/104/EEC on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries;
- Dir. 93/103/EC concerning the minimum safety and health requirements for work on board fishing vessels;
- Dir. 2010/32/EU implementing the Framework Agreement on prevention from sharp injuries in the hospital and healthcare sector.
In addition to these directives, Annex XVIII also incorporates guidelines and recommendations that the Contracting Parties shall take note of:

- Communication from the Commission (COM(2000) 466 final, as corrected by COM(2000) 466 final/2) on the Guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (Council Dir. 92/85/EEC);
- Council Recommendation 2003/134/EC concerning the improvement of the protection of the health and safety at work of self-employed workers.

Autonomous agreements between the Social Partners supplements the regulations incorporated into Annex XVIII. For example, the autonomous framework agreement of 8 October 2004 between the social partners outlining different measures to prevent work-related stress, was also implemented in the EEA states, cf. Art. 71 below.

**III. Effective implementation**

Regulations on health and safety at work must be effective and applied at the workplace level, and imposes obligations on the state, employers and workers. The directives on health and safety for workers impose minimum standards to be implemented.\(^2\) In Case E-2/10 Kolbeinsson, the EFTA Court was asked whether it was compatible with Dir. 89/331 on safety and health at work and Dir. 92/57 on minimum safety and health requirements at temporary or mobile construction sites, to deny compensation to workers in cases of contributory negligence, even in cases where the accident would not have occurred had the employer complied with the rules regarding safety in the workplace. An Icelandic carpenter had fallen five meters from joists on a temporary construction site and had suffered physical injuries. The employer had not taken any precautions at the workplace. The carpenter’s claim for compensation from the employer was dismissed due to contributory negligence: He had not taken any precautions despite being familiar with the working conditions and having considerable work experience.\(^3\) The carpenter then claimed compensation from the Icelandic state, arguing that the defeat in the case against his employer violated his rights under the above-mentioned directives. A first question in the State liability case was thus whether Icelandic tort law violated the obligations flowing from the Directives. Before the EFTA Court, the Icelandic and Norwegian governments argued that matters of civil liability was outside the scope of the directives, but the EFTA Court disagreed:

\(^2\) Se comments by Franklin on Art. 3 mn. 20.
\(^3\) The essence of the Supreme Court of Iceland’s reasoning in its judgment of 20 December 2005 is reported in the EFTA Court’s advisory opinion in Case E-2/10, 10.12.2010, Kolbeinsson, para. 5.
"Provisions establishing a duty would be reduced to mere declarations of intent if they were imposed without any form of liability in the event of the duty being breached."

The EFTA Court also noted that any sanctions for breaching the duties established by the directives, “must reflect the principle that the employer bears the main responsibility for the safety and health of workers”:

“This does not exclude the possibility of attributing responsibility for an accident to an employee who has contributed to the accident through his own negligence. However, save in exceptional circumstances it would be contrary to the principle that the main responsibility lies with the employer to attribute all, or the greater share, of the losses suffered as a result of an accident at work to the employee due to his own contributory negligence when it has been established that the employer, in disregard of his duties according to the Directives, had not on his own initiative complied with rules regarding safety and conditions in the work place. Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer.”

The EFTA Court noted that possible criminal sanctions against an employer would not be sufficient in order to ensure effective sanctions against possible breaches of the directives on health and safety at the workplace.

Article 68 [Labour law]

In the field of labour law, the Contracting Parties shall introduce the measures necessary to ensure the good functioning of this Agreement. These measures are specified in Annex XVIII.

I. Legal context and starting points

1. Legal Context

Article 68 is the basis for implementing legislation based on Art. 118 TEEC, cf. Art. 153 TFEU. Annex XVIII incorporates secondary legislation on labour law, and the substantive labour law is generally the same in the EEA as in the EU.

Of the EFTA Court’s case law in the period 1994–2016, about 16 cases are related to social policy and labour law. In some areas, it may be questioned whether the interpretation of EEA law advocated by the EFTA Court deviates from the ECJ’s approach to corresponding provisions in EU law, see comments in Section I.2, IV and V below.

2. The relationship between market freedoms and labour law

Market regulation is closely connected to labour law. The free movement of workers, as part of the single market, gives the opportunity to seek em-