

NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA Surveillance Authority Notice on Immunity from fines and reduction of fines in cartel cases

(2009/C 294/04)

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. The European Commission has issued a notice entitled 'Notice on Immunity from fines and reduction of fines in cartel cases' ⁽¹⁾. That non-binding act sets out the principles which the European Commission follows in respect of the granting of immunity or reduced fines in cases considered under Article 81 of the EC Treaty and/or Article 53 of the EEA Agreement ⁽²⁾.
- C. The EFTA Surveillance Authority considers the abovementioned act to be EEA relevant. In order to maintain equal conditions of competition and to ensure a uniform application of the EEA competition rules throughout the European Economic Area (EEA), the Authority adopts the present notice under the power conferred upon it by Article 5(2)(b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA rules to a particular case.
- D. The present notice replaces the EFTA Surveillance Authority's 2003 notice on the non-imposition or reduction of fines in cartel cases (the '2003 notice') ⁽³⁾.

I. INTRODUCTION

- (1) This notice sets out the framework for rewarding cooperation in the EFTA Surveillance Authority investigation by undertakings which are or have been party to secret cartels affecting the EEA. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 53 EEA.
- (2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the EEA companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.
- (3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the EFTA Surveillance Authority considers that it is in the EEA interest to reward undertakings involved in this type of illegal

⁽¹⁾ OJ C 298, 8.12.2006, p. 17.

⁽²⁾ The competence to handle individual cases falling under Articles 53 and 54 of the EEA Agreement is divided between the EFTA Surveillance Authority and the European Commission according to the rules laid down in Article 56 of the EEA Agreement. Only one authority is competent to handle any given case.

⁽³⁾ OJ C 10, 16.1.2003, p. 13 and EEA Supplement to the OJ No 3, 16.1.2003, p. 1.

practices which are willing to put an end to their participation and co-operate in the Authority's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Authority to detect and prohibit such practices.

- (4) The EFTA Surveillance Authority considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.
- (5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the EFTA Surveillance Authority. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Authority's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Authority with evidence that adds significant value to that already in the Authority's possession.
- (6) In addition to submitting pre-existing documents, undertakings may provide the EFTA Surveillance Authority with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Authority under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 53 EEA in cartel cases and thus its subsequent or parallel effective private enforcement.
- (7) The supervisory task conferred on the EFTA Surveillance Authority by the EEA Agreement ⁽¹⁾ in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Authority, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Authority premises and normally on a single occasion following the formal notification of the objections.

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

- (8) The EFTA Surveillance Authority will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the EEA if that undertaking is the first to submit information and evidence which in the Authority's view will enable it to:
 - (a) carry out a targeted inspection in connection with the alleged cartel ⁽²⁾; or
 - (b) find an infringement of Article 53 EEA in connection with the alleged cartel.
- (9) For the EFTA Surveillance Authority to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Authority with the information and evidence listed below, to the extent that this, in the Authority's view, would not jeopardize the inspections:
 - (a) A corporate statement ⁽³⁾ which includes, in so far as it is known to the applicant at the time of the submission:

⁽¹⁾ This task is shared with the European Commission in accordance with Articles 55 and 56 of the EEA Agreement.

⁽²⁾ The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

⁽³⁾ Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

- A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.
 - The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel.
 - The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf.
 - Information on which other competition authorities, inside or outside the EEA, have been approached or are intended to be approached in relation to the alleged cartel; and
- (b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.
- (10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the EFTA Surveillance Authority had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.
- (11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the EFTA Surveillance Authority did not have, at the time of the submission, sufficient evidence to find an infringement of Article 53 EEA in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Authority to find an infringement of Article 53 EEA.
- (12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:
- (a) The undertaking cooperates genuinely⁽¹⁾, fully, on a continuous basis and expeditiously from the time it submits its application throughout the EFTA Surveillance Authority's administrative procedure. This includes:
- providing the Authority promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it,
 - remaining at the Authority's disposal to answer promptly to any request that may contribute to the establishment of the facts,
 - making current (and, if possible, former) employees and directors available for interviews with the Authority,

⁽¹⁾ This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-301/04 P, *Commission v SGL Carbon AG* a.o., at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C- 208/02 P and C-213/02 P, *Dansk Rørindustri A/S a.o. v. Commission*, at paragraphs 395-399. Article 6 of the EEA Agreement provides that, without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two treaties, shall in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement. As regards relevant rulings by the Court of Justice given after the date of signature of the EEA Agreement, it follows from Article 3(2) of the Surveillance and Court Agreement that the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by these rulings.

- not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel, and
 - not disclosing the fact or any of the content of its application before the Authority has issued a statement of objections in the case, unless otherwise agreed,
- (b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Authority's view, be reasonably necessary to preserve the integrity of the inspections,
- (c) When contemplating making its application to the Authority, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.
- (13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. Procedure

- (14) An undertaking wishing to apply for immunity from fines should contact the EFTA Surveillance Authority's Competition and State Aid Directorate. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Authority for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Authority may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.
- (15) The EFTA Surveillance Authority services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Authority with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Authority on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Authority services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Authority services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.
- (16) An undertaking making a formal immunity application to the EFTA Surveillance Authority must:
- (a) provide the Authority with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or
 - (b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.
- (17) If requested, the EFTA Surveillance Authority's Competition and State Aid Directorate will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.

- (18) Once the EFTA Surveillance Authority has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.
- (19) If the undertaking has presented information and evidence in hypothetical terms, the EFTA Surveillance Authority will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Authority will grant the undertaking conditional immunity from fines in writing.
- (20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the EFTA Surveillance Authority will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Authority to consider it under section III of this notice. This does not prevent the Authority from using its normal powers of investigation in order to obtain the information.
- (21) The EFTA Surveillance Authority will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.
- (22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the EFTA Surveillance Authority will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Authority, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

III. REDUCTION OF A FINE

A. Requirements to qualify for reduction of a fine

- (23) Undertakings disclosing their participation in an alleged cartel affecting the EEA that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.
- (24) In order to qualify, an undertaking must provide the EFTA Surveillance Authority with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Authority's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.
- (25) The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the EFTA Surveillance Authority's ability to prove the alleged cartel. In this assessment, the Authority will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.
- (26) The EFTA Surveillance Authority will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

— first undertaking to provide significant added value: a reduction of 30-50 %,

— second undertaking to provide significant added value: a reduction of 20-30 %,

— subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Authority will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Authority uses to establish additional facts increasing the gravity or the duration of the infringement, the Authority will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

B. Procedure

- (27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the EFTA Surveillance Authority and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Authority which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.
- (28) If requested, the EFTA Surveillance Authority's Competition and State Aid Directorate will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Authority will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.
- (29) If the EFTA Surveillance Authority comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Authority will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Authority may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.
- (30) The EFTA Surveillance Authority will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Authority will determine in any such final decision:
- (a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Authority's possession at that same time;
 - (b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;
 - (c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Authority finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

IV. CORPORATE STATEMENTS MADE TO QUALIFY UNDER THIS NOTICE

- (31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the EFTA Surveillance Authority of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Authority in relation to this notice, forms part of the Authority's file and can thus be used in evidence.

- (32) Upon the applicant's request, the EFTA Surveillance Authority may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Authority's premises. In accordance with Article 19 of Chapter II of Protocol 4 to the Surveillance and Court Agreement ⁽¹⁾ and Articles 3 and 17 of Chapter III of Protocol 4 to the Surveillance and Court Agreement ⁽²⁾, undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Authority's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Authority's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.
- (33) Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The EFTA Surveillance Authority considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.
- (34) In accordance with the Notice on the rules for access to the EFTA Surveillance Authority file in cases pursuant to Articles 53, 54 and 57 of the EEA Agreement ⁽³⁾, access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the EEA competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the EFTA Surveillance Authority has already adopted a prohibition decision in the proceeding, the Authority may, in any legal proceedings before the EFTA Court, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Authority may report the incident to the bar of that counsel, with a view to disciplinary action.
- (35) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Chapter II of Protocol 4 to the Surveillance and Court Agreement, provided that the conditions set out in the Notice on cooperation within the EFTA Network of Competition Authorities ⁽⁴⁾ are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

V. GENERAL CONSIDERATIONS

- (36) The EFTA Surveillance Authority will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Chapter II of Protocol 4 to the Surveillance and Court Agreement, as such applications would be devoid of purpose.

⁽¹⁾ Following the Agreement amending Protocol 4 to the Agreement of the EFTA States on the establishment of a Surveillance Authority and a Court of Justice of 24 September 2004, which entered into force on 20 May 2005, Chapter II of Protocol 4 to the Surveillance and Court Agreement reflects to a large extent in the EFTA pillar Council Regulation (EC) No 1/2003 of 16 December 2002.

⁽²⁾ Following the entry into force of the Agreement amending Protocol 4 to the Agreement of the EFTA States on the establishment of a Surveillance Authority and a Court of Justice of 3 December 2004 on 1 July 2005, Chapter III of Protocol 4 to the Surveillance and Court Agreement reflects Commission Regulation (EC) No 773/2004.

⁽³⁾ OJ C 250, 25.10.2007, p. 16 and EEA Supplement to the OJ No 50, 25.10.2007, p. 1.

⁽⁴⁾ OJ C 227, 21.9.2006, p. 10 and EEA Supplement to the OJ No 47, 21.9.2006, p. 1.

- (37) From the date of its publication in the Official Journal and the EEA supplement thereto, this notice replaces the 2003 EFTA Surveillance Authority notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the EFTA Surveillance Authority in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.
- (38) The EFTA Surveillance Authority is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Authority.
- (39) In line with the EFTA Surveillance Authority's practice, the fact that an undertaking cooperated with the Authority during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 53 EEA.
- (40) The EFTA Surveillance Authority considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of the Authority's general rules on access to documents ⁽¹⁾, even after the decision has been taken.
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⁽¹⁾ See <http://www.eftasurv.int>