

NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA Surveillance Authority notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Chapter II of Protocol 4 to the Surveillance and Court Agreement in cartel cases

(2014/C 48/05)

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (the 'EEA Agreement') and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (the 'SCA').
- B. The European Commission has issued a notice entitled 'Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' ⁽¹⁾. That non-binding act sets out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement to cartel cases ⁽²⁾.
- C. The EFTA Surveillance Authority (the 'Authority') considers the above mentioned act to be EEA relevant. In order to maintain equal conditions of competition and to ensure uniform application of the EEA competition rules throughout the European Economic Area (EEA), the EFTA Surveillance Authority adopts the present notice pursuant to Article 5(2)(b) and Article 25(1) of the SCA.

1. Introduction

- (1) This notice sets out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Article 53 of the EEA Agreement to cartel cases ⁽³⁾. The settlement procedure may allow the Authority to handle more cases with the same resources, thereby fostering the public interest in the Authority's delivery of effective and timely punishment, while increasing overall deterrence. The cooperation covered by this notice is different from the voluntary production of evidence to trigger or advance the Authority's investigation, which is covered by the Authority notice on Immunity from fines and reduction of fines in cartel cases ⁽⁴⁾ (the Leniency Notice). Provided that the cooperation offered by an undertaking qualifies under both Authority notices, it can be cumulatively rewarded accordingly ⁽⁵⁾.

⁽¹⁾ The notice refers to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles (101 TFEU) and (102 TFEU), OJ C 167, 2.7.2008, p. 1.

⁽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⁾ 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 anticompetitive actions against other competitors. Such practices are among the most serious violations of Article 53 of the EEA Agreement.

⁽⁴⁾ OJ C 294, 3.12.2009, p. 7 and EEA Supplement to the OJ No 64, 3.12.2009, p. 1.

⁽⁵⁾ See point 33.

- (2) When parties to the proceedings are prepared to acknowledge their participation in a cartel violating Article 53 EEA and their liability therefore, they may also contribute to expediting the proceedings leading to the adoption of the corresponding decision pursuant to Article 7 and Article 23 of Chapter II of Protocol 4 to the SCA on the implementation of the rules on competition laid down in Articles 53 and 54 of the EEA Agreement in the way and with the safeguards specified in this notice. Whilst the Authority, as one of the investigative authorities and the guardians of the EEA Agreement empowered to adopt enforcement decisions subject to judicial control by the EFTA Court, does not negotiate the question of the existence of an infringement of EEA law and the appropriate sanction, it can reward the cooperation described in this notice.
- (3) Chapter III of Protocol 4 to the SCA relating to the conduct of proceedings by the Authority pursuant to Articles 53 and 54 of the EEA Agreement lays down the core practical rules concerning the conduct of proceedings in antitrust cases including those applicable in the variant for settlement. In this regard, Chapter III of Protocol 4 to the SCA bestows on the Authority the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties.
- (4) Effective enforcement of EEA competition law is compatible with full respect of the parties' rights of defence, which constitutes a fundamental principle of EEA law to be respected in all circumstances, and in particular in antitrust procedures which may give rise to penalties. It follows that the rules established to conduct the Authority proceedings to enforce Article 53 of the EEA Agreement should ensure that the undertakings and associations of undertakings concerned are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Authority ⁽¹⁾, throughout the administrative procedure.

2. Procedure

- (5) The Authority retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent might apply. The Authority may also decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine. Distortion or destruction of evidence relevant to the establishment of the infringement or any part thereof may also constitute an aggravating circumstance within the meaning of point 28 of the Authority Guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Chapter II of Protocol 4 to the SCA (the Guidelines on fines), and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. The Authority may only engage in settlement discussions upon the written request of the parties concerned.
- (6) While parties to the proceedings do not have a right to settle, should the Authority consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.

⁽¹⁾ Case 85/76 *Hoffmann-La Roche v Commission* (1979) ECR 461, at paragraphs 9 and 11. The Authority must ensure the respect of the procedural rights of the parties as set out in the SCA and in the case law of the EFTA Court and the Court of Justice of the European Union (see Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* (2012) EFTA Ct. Rep. 246, paragraphs 85–92).

- (7) The parties to the proceedings may not disclose to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorisation by the Authority. Any breach in this regard may lead the Authority to disregard the undertaking's request to follow the settlement procedure. Such disclosure may also constitute an aggravating circumstance, within the meaning of point 20 of the Guidelines on fines and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice.

2.1. Initiation of proceedings and exploratory steps regarding settlement

- (8) Where the Authority contemplates the adoption of a decision pursuant to Article 7 and/or Article 23 of Chapter II of Protocol 4 to the SCA, it is required in advance to identify and recognise as parties to the proceedings the legal persons on whom a penalty may be imposed for an infringement of Article 53 of the EEA Agreement.
- (9) To this end, the initiation of proceedings pursuant to Article 11(6) of Chapter II of Protocol 4 to the SCA in view of adopting such a decision can take place at any point in time, but no later than the date on which the Authority issues a statement of objections against the parties concerned. Article 2(1) of Chapter III of Protocol 4 to the SCA further specifies that, should the Authority consider it suitable to explore the parties' interest in engaging in settlement discussions, it will initiate proceedings no later than the date on which it either issues a statement of objections or requests the parties to express in writing their interest to engage in settlement discussions, whichever is the earlier.
- (10) The initiation of proceedings pursuant to Article 11(6) of Chapter II of Protocol 4 to the SCA by the Authority should relieve the competition authorities of the EFTA States of their competence to apply Article 53 of the EEA Agreement to the case in point.
- (11) Should the Authority consider it suitable to explore the parties' interest to engage in settlement discussions, it will set a time limit of no less than 2 weeks pursuant to Articles 10a(1) and 17(3) of Chapter III of Protocol 4 to the SCA within which parties to the same proceedings should declare in writing whether they envisage engaging in settlement discussions in view of possibly introducing settlement submissions at a later stage. This written declaration does not imply an admission by the parties of having participated in an infringement or of being liable for it.
- (12) Whenever the Authority initiates proceedings against two or more parties within the same undertaking, the Authority will inform each of them of the other legal entities which it identifies within the same undertaking and which are also concerned by the proceedings. In such a case, should the concerned parties wish to engage in settlement discussions, they must appoint joint representatives duly empowered to act on their behalf by the end of the time limit referred to in point 11. The appointment of joint representatives aims solely to facilitate the settlement discussions and it does not prejudice in any way the attribution of liability for the infringement amongst the different parties.
- (13) The Authority may disregard any application for immunity from fines or reduction of fines on the ground that it has been submitted after the expiry of the time limit referred to in point 11.

2.2. Commencing the settlement procedure: settlement discussions

- (14) Should some of the parties to the proceedings request settlement discussions and comply with the requirements referred to in points 11 and 12, the Authority may decide to pursue the settlement procedure by means of bilateral contacts between the Authority and the settlement candidates.

- (15) The Authority retains discretion to determine the appropriateness and the pace of the bilateral settlement discussions with each undertaking. In line with Article 10a(2) of Chapter III of Protocol 4 to the SCA, this includes determining, in view of the progress made overall in the settlement procedure, the order and sequence of the bilateral settlement discussions as well as the timing of the disclosure of information, including the evidence in the Authority file used to establish the envisaged objections and the potential fine ⁽¹⁾. Information will be disclosed in a timely manner as settlement discussions progress.
- (16) Such an early disclosure in the context of settlement discussions pursuant to Article 10a(2) and Article 15(1a) of Chapter III of Protocol 4 to the SCA will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle. Upon request by a party, the Authority will also grant it access to non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the cartel ⁽²⁾.
- (17) When the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Authority, and the Authority takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Authority may grant a final time limit of at least 15 working days for an undertaking to introduce a final settlement submission pursuant to Articles 10a(2) and 17(3) of Chapter III of Protocol 4 to the SCA. The time limit can be extended following a reasoned request. Before granting such time limit, the parties will be entitled to have the information specified in point 16 disclosed to them upon request.
- (18) The parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected.
- (19) Should the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision in their regard will follow the general provisions, in particular Articles 10(2), 12(1) and 15(1) of Chapter III of Protocol 4 to the SCA, instead of those regulating the settlement procedure.

2.3. Settlement submissions

- (20) Parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. The settlement submission provided for in Article 10a(2) of Chapter III of Protocol 4 to the SCA should contain:
- (a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;

⁽¹⁾ Reference to the 'potential fine' in Article 10a(2) of Chapter III of Protocol 4 to the SCA affords the Authority the possibility to inform the parties concerned by settlement discussions of an estimate of their potential fine in view of the guidance contained in the Guidelines on fines, the provisions of this notice and the Leniency Notice, where applicable.

⁽²⁾ For that purpose, the parties will be provided with a list of all accessible documents in the case file at that point in time.

- (b) an indication⁽¹⁾ of the maximum amount of the fine the parties foresee to be imposed by the Authority and which the parties would accept in the framework of a settlement procedure;
 - (c) the parties' confirmation that, they have been sufficiently informed of the objections the Authority envisages raising against them and that they have been given sufficient opportunity to make their views known to the Authority;
 - (d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Authority does not reflect their settlement submissions in the statement of objections and the decision;
 - (e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Chapter II of Protocol 4 to the SCA in an agreed official language of the EEA.
- (21) The acknowledgments and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Authority meeting their settlement request, including the anticipated maximum amount of the fine.
- (22) Settlement requests cannot be revoked unilaterally by the parties which have provided them unless the Authority does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29). The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein.

2.4. *Statement of objections and reply*

- (23) Pursuant to Article 10(1) of Chapter III of Protocol 4 to the SCA, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Authority will issue a statement of objections also in a settlement procedure⁽²⁾.
- (24) For the parties' rights of defence to be exercised effectively, the Authority should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate⁽³⁾. The Authority must be able not only to accept or reject the parties' relevant arguments expressed during the administrative procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.
- (25) By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Authority to effectively take their views into account already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision⁽⁴⁾.
- (26) Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time limit of at least 2 weeks set by the Authority in accordance with Articles 10a(3) and 17(3) of Chapter III of Protocol 4 to the SCA, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Authority will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure.

⁽¹⁾ This would result from the discussions as set out in points 16 and 17.

⁽²⁾ In the context of settlement procedures, statements of objections should contain the information necessary to enable the parties to corroborate that it reflects their settlement submissions.

⁽³⁾ In line with settled case law, the Authority shall base its decisions only on objections on which the parties concerned have been able to comment and, to this end, they shall be entitled to have access to the Authority's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

⁽⁴⁾ As required by Article 11(1) of Chapter III of Protocol 4 to the SCA and Article 27(1) of Chapter II of Protocol 4 to the SCA, respectively.

- (27) The Authority retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Articles 10(2), 12(1) and 15(1) of Chapter III of Protocol 4 to the SCA will apply. The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a time limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing.

2.5. Authority decision and settlement reward

- (28) Upon the parties' replies to the statement of objections confirming their commitment to settle, Chapter III of Protocol 4 to the SCA allows the Authority to proceed, without any other procedural step, to the adoption of the subsequent final decision pursuant to Articles 7 and/or 23 of Chapter II of Protocol 4 to the SCA, after consultation of the Advisory Committee pursuant to Article 14 of Chapter II of Protocol 4 to the SCA. In particular, this implies that no oral hearing or access to the file may be requested by those parties once their settlement submissions have been reflected by the statement of objections, in line with Articles 12(2) and 15(1a) of Chapter III of Protocol 4 to the SCA.
- (29) The Authority retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Authority to this effect. However, should the Authority opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties would then be entitled to have access to the file, to request an oral hearing and to reply to the statement of objections. The acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.
- (30) The final amount of the fine in a particular case is determined in the decision finding an infringement pursuant to Article 7 and imposing a fine pursuant to Article 23 of Chapter II of Protocol 4 to the SCA.
- (31) In line with the Authority's practice, the fact that an undertaking cooperated with the Authority under this notice during the administrative procedure will be indicated in the final decision, so as to explain the reason for the level of the fine.
- (32) Should the Authority decide to reward a party for settlement in the framework of this notice, it will reduce by 10 % the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Chapter II of Protocol 4 to the SCA. Any specific increase for deterrence⁽¹⁾ used in their regard will not exceed a multiplication by two.
- (33) When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.

3. General considerations

- (34) This notice applies to any case pending before the Authority at the time of or after its publication in the *Official Journal of the European Union*.

⁽¹⁾ Point 22 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Chapter II of Protocol 4 to the SCA (OJ C 314, 21.12.2006, p. 84 and EEA Supplement to the OJ No 63, 21.12.2006, p. 44).

- (35) Access to settlement submissions is only granted to those addressees of a statement of objections who have not requested settlement, 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 settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of the EEA competition rules at issue in the related proceedings. Other parties such as complainants will not be granted access to settlement submissions.
- (36) 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 the Leniency Notice. Moreover, if any such use is made after the Authority has already adopted a prohibition decision in the proceedings, 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.
- (37) Settlement submissions made under this notice will only be transmitted to the competition authorities of the EFTA States pursuant to Article 12 of Chapter II of Protocol 4 to the SCA, provided that the conditions set out in the Network Notice ⁽¹⁾ 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 Authority.
- (38) Upon the applicant's request, the Authority may accept that settlement submissions be provided orally. Oral settlement submissions will be recorded and transcribed at the Authority's premises. In accordance with Article 19 of Chapter II of Protocol 4 to the SCA and Articles 3(3) and 17(3) of Chapter III of Protocol 4 to the SCA undertakings making oral settlement submissions 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 settlement submissions and the accuracy of the transcript without delay.
- (39) The Authority will not transmit settlement submissions to national courts without the consent of the relevant applicants, in line with the provisions in the Authority Notice on the cooperation between the Authority and the courts of the EFTA States in the application of Articles 53 and 54 EEA ⁽²⁾.
- (40) The Authority considers that normally public disclosure of documents and written or recorded statements (including settlement submissions) 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 Article 4 of Authority Decision No 300/12/COL of 5 September 2012 to adopt revised Rules on public access to documents and repealing Decision 407/08/COL ⁽³⁾, even after the decision has been taken.
- (41) Final decisions taken by the Authority under Chapter II of Protocol 4 to the SCA are subject to judicial review in accordance with Article 36 of the SCA. Moreover, as provided in Article 35 of the SCA and Article 31 of Chapter II of Protocol 4 to the SCA, the EFTA Court has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Chapter II of Protocol 4 to the SCA.

⁽¹⁾ EFTA Surveillance Authority Notice on Cooperation within the EFTA Network of Competition Authorities (OJ C 227, 21.9.2006, p. 10 and EEA Supplement to the OJ No 47, 21.9.2006, p. 1).

⁽²⁾ OJ C 305, 14.12.2006, p. 19 and EEA Supplement to the OJ No 62, 14.12.2006, p. 21.

⁽³⁾ EFTA Surveillance Authority Decision No 300/12/COL, available on the Authority's website (<http://www.eftasurv.int/press-publications/rules-on-access-to-documents/>)

Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Chapter II of Protocol 4 to the SCA

- I. Investigation as usual
 - Parties may express their interest in a hypothetical settlement.
 - II. Exploratory steps regarding settlement
 - Letter to all companies (and EFTA States) informing of the decision to initiate proceedings in view of settlement (Article 11(6)) and requesting them to express their interest in settlement.
 - III. Bilateral rounds of settlement discussions
 - Disclosure and exchange of arguments on potential objections, liability, fines range.
 - Disclosure of evidence used to establish potential objections, liability, fines.
 - Disclosure of other non-confidential versions of documents in the file, when justified.
 - IV. Settlement
 - Conditional settlement submissions by the companies, jointly represented where applicable.
 - Authority sends acknowledgement of receipt.
 - V. 'Settled' statement of objections
 - Notification of streamlined SO endorsing company's settlement submissions, where appropriate.
 - Company's reply to SO confirming clearly that it reflects its settlement submission.
 - VI. 'Settlement' Decision pursuant to Articles 7 and 23 of Chapter II of Protocol 4 to the SCA
 - Advisory Committee on a draft streamlined final decision.
 - If College agrees:
 - adoption of streamlined final decision.
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