EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

EFTA Surveillance Authority notice on cooperation between national competition authorities and the EFTA Surveillance Authority in handling cases falling within the scope of Articles 53 or 54 of the EEA Agreement

(2000/C 307/06)

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 on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86 (now Articles 81 and 82) of the EC Treaty [1]. This non-binding act contains principles and rules which the European Commission follows in the field of competition. It also explains the ways in which the Commission envisages to cooperate with national competition authorities.

C. The EFTA Surveillance Authority considers the above-mentioned 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, the EFTA Surveillance 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. In particular, the purpose of this notice is to spell out how the EFTA Surveillance Authority intends to cooperate with the competition authorities of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement in individual cases.

I. ROLE OF THE EFTA STATES AND OF THE EFTA SURVEILLANCE AUTHORITY

1. In competition policy the EFTA Surveillance Authority and the EFTA States perform different functions. Whereas the EFTA Surveillance Authority is, together with the European Commission (hereinafter 'the Commission'), responsible only for implementing the EEA competition rules, EFTA States not only apply their domestic law but also have a hand in implementing Articles 53 and 54 of the EEA Agreement.

2. This involvement of the EFTA States in competition policy within the EEA means that decisions can be taken as closely as possible to those concerned. The decentralized application of EEA competition rules also leads to a better allocation of tasks. If, by reason of its scale or effects, the proposed action can best be taken at EEA level, it is for the EFTA Surveillance Authority, when competent pursuant to Article 56 of the EEA Agreement [2], to act. Otherwise, it is for the competition authority of the EFTA State concerned to act.

3. EEA law is implemented by the EFTA Surveillance Authority, the Commission and national competition authorities, on the one hand, and national courts, on the other, in accordance with the principles developed by the EEA legislature and by the EFTA Court, the Court of Justice and the Court of First Instance of the European Communities.

It is the task of national courts to safeguard the rights of private persons in their relations with one another [3]. Under EC law those rights derive from the fact that the prohibitions in Articles 81(1) and 82 of the EC Treaty [4] and the exemptions granted by regulation [5] have been recognized by the Court of Justice as being directly applicable. Insofar as EEA

[1] OJ C 313, 15.10.1997, p. 3.

[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] Case T-24/90 Automec v. Commission ('Automec II') [1992] ECR II-2223, paragraph 85. 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 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.

[4] Case 127/73 BRT v. SABAM [1974] ECR 51, paragraph 16.

[5] Case 63/75 Fonderies Roubaix-Wattrelos v. Fonderies A. Roux [1976] ECR 111.

law and the EFTA States are concerned, the EFTA Surveillance Authority considers that the internal effect of EEA law in the EFTA States is governed by national constitutional law, subject to Protocol 35 to the EEA Agreement. According to this Protocol, the EFTA States are under an obligation to ensure, if necessary by a separate statutory provision, that in cases of conflict between implemented EEA rules and other statutory provisions, the implemented EEA rules prevail. Furthermore, according to the EFTA Court, it is inherent in the nature of such a provision that individuals and economic operators, in cases of conflict between implemented EEA rules and national statutory provisions, must be entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise ([6]). Relations between national courts and the EFTA Surveillance Authority in applying Articles 53 and 54 of the EEA Agreement were spelt out in a Notice published by the Authority in 1995 ([7]). This Notice is the counterpart for relations with national authorities, to that of 1995 on relations with national courts.

4. As administrative authorities, both the EFTA Surveillance Authority and National competition authorities act in the public interest in performing their general task of monitoring and enforcing the competition rules ([8]). Relations between them are determined primarily by this common role of protecting the general interest. Although similar to the Notice on cooperation with national courts, this Notice accordingly reflects this special feature.

5. The specific nature of the role of the EFTA Surveillance Authority and of national competition authorities is characterized by the powers conferred on those bodies within the framework of the EEA Agreement and the Surveillance and Court Agreement. Article 9(1) of Chapter II of Protocol 4 to the Surveillance and Court Agreement ([9]). thus provides: 'Subject to review of its decision by the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, the EFTA Surveillance Authority shall have sole power to declare Article 53(1) inapplicable pursuant to Article 53(3) of the EEA Agreement on the conditions set out in Article 56 of the EEA Agreement'. And Article 9(3) of the same Chapter provides: 'As long as the EFTA Surveillance Authority has not initiated any procedure under Article 2 ([10]), 3 ([11]) or 6 ([12]), the authorities of the EFTA States shall remain competent to apply Article 53(1) and Article 54.'

It follows that, provided their national law has conferred the necessary powers on them, national competition authorities are empowered to apply the prohibitions in Articles 53(1) and 54 of the EEA Agreement. On the other hand, for the purposes of applying Article 53(3), they do not have any powers to grant exemptions in individual cases; they must take due account of any decisions or other measures adopted by the EFTA Surveillance Authority under that provision. They may also take account of other steps taken by the Authority in such cases, in particular comfort letters, treating them as factual evidence.

6. The EFTA Surveillance Authority is convinced that enhancing the role of national competition authorities will boost the effectiveness of Articles 53 and 54 of the EEA Agreement and, generally speaking, will bolster the application of EEA competition rules throughout the EEA. In the interests of safeguarding and developing the EEA, the Authority considers that those provisions should be used as widely as possible. Being closer to the activities and businesses that require monitoring, national authorities are often in a better position than the Authority to protect competition.

7. Cooperation must therefore be organized between national authorities and the EFTA Surveillance Authority. If this cooperation is to be fruitful, they will have to keep in close and constant touch.

8. The EFTA Surveillance Authority proposes to set out in this Notice the principles it will apply in future when dealing with the cases described herein. The Notice also seeks to induce firms to approach national competition authorities more often.

9. This Notice describes the practical cooperation which is desirable between the EFTA Surveillance Authority and national authorities. It does not affect the extent of the powers conferred by EEA law on either the Authority or national authorities for the purpose of dealing with individual cases.

10. For cases falling within the scope of EEA law, to avoid duplication of checks on compliance with the competition rules which are applicable to them, which is costly for the firms concerned, checks should wherever possible be carried out by a single authority (either an EFTA State's competition authority or the EFTA Surveillance Authority). Control by a single authority offers advantages for businesses.

([6]) See Case E-1/94, Restamark, judgement of 16.12.1994, Report of the EFTA Court 1 January 1994 — 30 June 1995, p. 15, at paragraph 77.

([7]) Notice on cooperation between national courts and the EFTA Surveillance Authority in applying Articles 53 and 54 of the EEA Agreement (The EEA Section of, and the EEA Supplement to, the *Official Journal of the European Communities* No. 16 of 4.5.1995).

([8]) Automec II, see footnote 3; paragraph 85.

([9]) Corresponds to Article 9(1) of Council Regulation (EEC) No 17 of 6 February 1962.

([10]) Negative clearance.

([11]) Termination of infringements — prohibition decisions.

([12]) Decisions pursuant to Article 53(3).

Parallel proceedings before the EFTA Surveillance Authority, on the one hand, and a national competition authority, on the other, are costly for businesses whose activities fall within the scope both of EEA law and of EFTA States' competition laws. They can lead to the repetition of checks on the same activity, by the Authority, on the one hand, and by the competition authorities of the EFTA States concerned, on the other.

Businesses in the EEA may therefore in certain circumstances find it to their advantage if some cases falling within the scope of EEA competition law were dealt with solely by national authorities. In order that this advantage may be enjoyed to the full, the EFTA Surveillance Authority thinks it is desirable that national authorities should themselves apply EEA law directly or, failing that, obtain, by applying their domestic law, a result similar to that which would have been obtained had EEA law been applied.

11. What is more, in addition to the resulting benefits accruing to competition authorities in terms of mobilization of their resources, cooperation between authorities reduces the risk of divergent decisions and hence the opportunities for those who might the tempted to do so to seek out whichever authority seemed to them to be the most favourable to their interests.

12. EFTA States' competition authorities often have a more detailed and precise knowledge than the EFTA Surveillance Authority of the relevant markets (particularly those with highly specific national features) and the businesses concerned. Above all, they may be in a better position than the Authority to detect restrictive practices that have not been notified or abuses of a dominant position whose effects are essentially confined to their territory.

13. Many cases handled by national authorities involve arguments based on national law and arguments drawn from EEA competition law. In the interests of keeping proceedings as short as possible, the EFTA Surveillance Authority considers it preferable that national authorities should directly apply EEA law themselves, instead of making firms refer the EEA-law aspects of their cases to the Authority.

14. An increasing number of major issues in the field of Community and EEA competition law have been clarified over the last thirty years through the case-law of the Court of Justice and the Court of First Instance of the European Communities and of the EFTA Court, through decisions taken on questions of principle adopted by the Commission and acts corresponding to Commission block exemption regulations referred to in Annex XIV to the EEA Agreement. The application of that law by national authorities is thereby simplified.

15. The EFTA Surveillance Authority intends to encourage the competition authorities of all EFTA States to engage in this cooperation. However, the national legislation of the EFTA States does not currently provide competition authorities with the procedural means of applying Articles 53(1) and 54 of the EEA Agreement. In such circumstances conduct caught by the EEA provisions can be effectively dealt with by national authorities only under national law.

In the EFTA Surveillance Authority's view, it is desirable that national authorities should apply Articles 53 or 54 of the EEA Agreement, if appropriate in conjunction with their domestic competition rules, when handling cases that fall within the scope of those provisions.

16. Where authorities are not in a position to do this and hence can apply only their national law to such cases, the application of that law should not prejudice the uniform application throughout the EEA of the EEA rules on cartels and of the full effect of the measures adopted in implementation of those rules ([13]). At the very least, the solution they find to a case falling within the scope of EEA law must be compatible with that law, since any conflicts which may arise when national and EEA competition law are applied simultaneously are foreseen in the EEA Agreement to be resolved so that EEA law takes precedence. The purpose of this principle is to rule out any national measure which could jeopardize the full effectiveness of the provisions of the EEA Agreement ([14]). Furthermore, it follows from Article 3 of the EEA Agreement and Article 2 of the Surveillance and Court Agreement that the EFTA States shall cooperate in good faith and abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement.

17. Divergent decisions are more likely to be reached where a national authority applies its national law rather than EEA law. Where an EFTA State's competition authority applies EEA law, it is required to take due account of any decisions taken previously by the EFTA Surveillance Authority or the Commission in the same proceedings. Where the case has merely been the subject of a comfort letter, then, in line with the case law of the Court of Justice of the European Communities and pursuant to Article 6 of the EEA Agreement, although this type of letter does not bind national courts, the opinion expressed by the Authority or the Commission ([15]) constitutes a factor which the national courts may take into account in examining whether the agreements on conduct in question are in accordance with the provisions of Article 53 ([16]). In the Authority's view, the same holds true for national authorities.

([13]) Case 14/68 Walt Wilhelm and Others v. Bundeskartellamt [1969] ECR I, paragraph 4.

([14]) See paragraph 14 of the EFTA Surveillance Authority Notice on cooperation between national courts and the EFTA Surveillance Authority in applying Articles 53 and 54 of the EEA Agreement.

([15]) See footnote 2.

([16]) Case 99/79 Lancôme v. Etos [1980] ECR 2511, paragraph 11, cited in paragraph 18 of the above-mentioned notice on cooperation between national courts and the EFTA Surveillance Authority in applying Articles 53 and 54.

18. Where an infringement of Articles 53 or 54 is established by EFTA Surveillance Authority or Commission decision, that decision may preclude the application of a domestic legal provision authorising what the Authority or the Commission has prohibited. The objective of the prohibitions in Articles 53(1) and 54 is to ensure equal conditions of competition within a homogeneous EEA. They must be strictly complied with in order not to impair the effectiveness and uniformity of EEA competition rules and measures taken to enforce them ([17]).

19. The legal position is less clear as to whether national authorities are allowed to apply their more stringent national competition law where the situation they are assessing has previously been the subject of an individual exemption decision of the EFTA Surveillance Authority or the Commission or is covered by a block exemption. In Walt Wilhelm, the Court stated that the Treaty 'permits the Community authorities to carry out certain positive, though indirect, actions with a view to promoting a harmonious development of economic activities within the whole Community' (paragraph 5 of the judgement). In Bundeskartellamt v. Volkswagen and VAG Leasing ([18]), the Commission contended that national authorities may not prohibit exempted agreements. The uniform application of Community law would be frustrated every time an exemption granted under Community law was made to depend on the relevant national rules. Otherwise, not only would a given agreement be treated differently depending on the law of each EC Member State, thus detracting from the uniform application of Community law, but the full effectiveness of an act giving effect to the Treaty — which an exemption under Article 81(3) undoubtedly is — would also be disregarded. In the case in point, however, the Court did not have to settle the question. As has already been stated above, simultaneous application of national legislation in the EFTA States is only compatible with EEA law in so far as it does not impair the effectiveness and uniformity of EEA competition rules and the measures taken to enforce them.

20. If the EFTA Surveillance Authority's Competition and State Aid Directorate sends a comfort letter in which it expresses the opinion that an agreement or a practice is incompatible with Article 53 of the EEA Agreement but states that, for reasons to do with its internal priorities, it will not propose that the Authority take a decision thereon in accordance with the formal procedures laid down in Chapter II of Protocol 4 to the Surveillance and Court Agreement, it goes without saying that the national authorities in whose territory the effects of the agreement or practice are felt may take action in respect of that agreement or practice.

21. In the case of a comfort letter in which the Competition and State Aid Directorate expresses the opinion that an agreement does restrict competition within the meaning of Article 53(1) but qualifies for exemption under Article 53(3), the Authority will call upon national authorities to consult it before they decide whether to adopt a different decision under EEA or national law.

22. According to the Judgement of the Court of Justice in Procureur de la République v. Giry and Guerlain ([19]), as regards comfort letters in which the Commission expresses the opinion that, on the basis of the information in its possession, there is no need for it to take any action under Article 81(1) or Article 82 of the Treaty, 'that fact cannot by itself have the result of preventing the national authorities from applying to those agreements' or practices 'provisions of national competition law which may be more rigorous than Community law in this respect. The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained in Article 85(1) and (2)' (now Article 81(1) and (2)) or Article 82, 'the scope of which is limited to agreements' or dominant positions 'capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally'. The EFTA Surveillance Authority is of the opinion that the same principles must be applied to comfort letters with equivalent content issued by the Authority vis-à-vis the national authorities of the EFTA States.

II. GUIDELINES ON CASE ALLOCATION

23. Cooperation between the EFTA Surveillance Authority and national competition authorities has to comply with the current legal framework. First, if it is to be caught by EEA law and not merely by national competition law, the conduct in question must be liable to have an appreciable effect on trade between the Contracting Parties to the EEA Agreement. Secondly, the Authority has sole power to declare Article 53(1) of the EEA Agreement inapplicable under Article 53(3).

24. In practice, decisions taken by a national authority can apply effectively only to restrictions of competition whose impact is felt essentially within its territory. This is the case in particular with the restrictions referred to in Article 4(2)(a) of Chapter II of Protocol 4 to the Surveillance and Court Agreeement, namely agreements, decisions or concerted pracrices the only parties to which are undertakings from one EFTA State or one EC Member State and which, though they do not relate either to imports or to exports between

([17]) See footnote 14.

([18]) Case C-266/93 [1995] ECR I-3477; see also the Opinion of Advocate-General Tesauro in the same case, paragraph 51.

([19]) Joined Cases 253/78 and 1 to 3/79 Procureur de la République v. Giry en Guerlain [1980] ECR 2327, paragraph 18.

Contracting Parties to the EEA Agreement, may affect trade within the EEA ([20]). It is extremely difficult from a legal standpoint for such an authority to conduct investigations outside its home country, such as when on-the-spot inspections need to be carried out on businesses, and to ensure that its decisions are enforced beyond its national borders. The upshot is that the EFTA Surveillance Authority usually has to handle cases involving businesses whose relevant activities are carried on in more than one EFTA State.

25. A national authority having sufficient resources in terms of manpower and equipment and having had the requisite powers conferred on it, also needs to be able to deal effectively with any cases covered by the EEA rules which it proposes to take on. The effectiveness of a national authority's action is dependent on its powers of investigation the legal means it has at its disposal for settling a case — including the power to order interim measures in an emergency — and the penalties it is empowered to impose on businesses found guilty of infringing the competition rules. Differences between the rules of procedure applicable in the various EFTA States should not, in the EFTA Surveillance Authority's view, lead to outcomes which differ in their effectiveness when similar cases are being dealt with.

26. In deciding which cases to handle itself, the EFTA Surveillance Authority will take into account the effects of the restrictive practice or abuse of a dominant position and the nature of the infringement.

In principle, national authorities will handle cases the effects of which are felt mainly in their territory and which appear upon preliminary examination unlikely to qualify for exemption under Article 53(3) of the EEA Agreement. However, the Authority reserves the right to take on certain cases displaying a particular interest under the EEA Agreement.

Mainly national effects

27. First of all, it should be pointed out that the only cases at issue here are those which fall within the scope of Articles 53 and 54 of the EEA Agreement.

That being so, the existing and foreseeable effects of a restrictive practice or abuse of a dominant position may be deemed to be closely linked to the territory in which the agreement or practice is applied and to the geographic market for the goods or services in question.

([20]) The Court of Justice of the European Communities has held that it is possible that an agreement, 'although it does not relate either to imports or to exports between Member States' within the meaning of Article 4 of Regulation No 17, 'may affect trade between Member States' within the meaning of Article 81(1) of the Treaty (judgement of the Court of Justice in Case 43/69 Bilger v. Jehle [970] ECR 127, paragraph 5).

28. Where the relevant geographic market is limited to the territory of a single EFTA State and the agreement or practice is applied only in that State, the effects of the agreement or practice must be deemed to occur mainly within the State even if, theoretically, the agreement or practice is capable of affecting trade between States within the territory covered by the EEA Agreement.

Nature of the infringement: cases that cannot be exempted

29. The following considerations apply to cases brought before the EFTA Surveillance Authority, to cases brought before a national competition authority and to cases which both may have to deal with.

A distinction should be drawn between infringements of Article 53 of the EEA Agreement and infringements of Article 54.

30. The EFTA Surveillance Authority has exclusive powers under Article 53(3) of the EEA Agreement to declare the provisions of Article 53(1) inapplicable. Any notified restrictive practice that prima facie qualifies for exemption must therefore be examined by the Authority which will take account of the criteria developed in this area by the Court of Justice and the Court of First Instance of the European Communities and the EFTA Court and also by the relevant EEA rules and its own previous decisions.

31. The EFTA Surveillance Authority also has exclusive responsibility for investigating complaints against decisions it has taken under its exclusive powers, such as a decision to withdraw an exemption previously granted by it under Article 53(3) ([21]).

32. No such limitation exists, however, on implementation of Article 54 of the EEA Agreement. The EFTA Surveillance Authority and the EFTA States have concurrent competence to investigate complaints and to prohibit abuses of dominant positions.

Cases of particular significance under the EEA Agreement

33. Some cases considered by the EFTA Surveillance Authority to be of particular interest under the EEA Agreement will more often be dealt with by the Authority even if, inasmuch as they satisfy the requirements set out above (points 27-28 and 29-32), they can be dealt with by a national authority.

34. This category includes cases which raise a new point of law, that is to say, those which have not yet been the subject of an EFTA Surveillance Authority or Commission decision or a judgement of the Court of Justice or the Court of First Instance of the European Communities or the EFTA Court.

([21]) Automec II, see footnote 3; paragraph 75.

35. The economic magnitude of a case is not in itself sufficient reason for its being dealt with by the EFTA Surveillance Authority. The position might be different where access to be relevant market by firms from other States within the territory covered by the EEA Agreement is significantly impeded.

36. Cases involving alleged anti-competitive behaviour by a public undertaking, an undertaking to which an EFTA State has granted special or exclusive rights within the meaning of Article 59(1) of the EEA Agreement, or an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly within the meaning of Article 59(2) of the EEA Agreement may also be of particular interest under the EEA Agreement.

III. COOPERATION IN CASES WHICH THE EFTA SURVEILLANCE AUTHORITY DEALS WITH FIRST

37. Cases dealt with by the EFTA Surveillance Authority have three possible origins: own-initiative proceedings, notifications and complaints. By their very nature, own-initiative proceedings do not lend themselves to decentralized processing by national competition authorities.

38. The exclusivity of the EFTA Surveillance Authority's powers to apply Article 53(3) of the EEA Agreement in individual cases means that cases notified to the Authority under Article 4(1) of Chapter II of Protocol 4 to the Surveillance and Court Agreement by parties seeking exemption under Article 53(3) cannot be dealt with by a national competition authority on the Authority's initiative. According to the case-law of the Court of First Instance and pursuant to Article 6 of the EEA Agreement, these exclusive powers confer on the applicant the right to obtain from the Authority a decision on the substance of his request for exemption ([22]).

39. National competition authorities may deal, at the EFTA Surveillance Authority's request with complaints that do not involve the application of Article 53(3), namely those relating to restrictive practices which must be notified under Articles 4(1) of Chapter II of Protocol 4 to the Surveillance and Court Agreement and Article 1(1) of Annex XIV to the EEA Agreement but have not been notified to the Authority and those based on alleged infringement of Article 54 of the EEA Agreement. On the other hand, complaints concerning matters falling within the scope of the Authority's exclusive powers, such as withdrawal of exemption, cannot be usefully handled by a national competition authority ([23]).

40. The criteria set out at points 23 to 36 above in relation to the handling of a case by the EFTA Surveillance Authority or a national authority, in particular as regards the territorial extent of the effects of a restrictive practice or dominant position (points 27-28), should be taken into account.

EFTA Surveillance Authority's right to reject a complaint

41. It follows form the case-law of the Court of First Instance of the European Communities that the Commission is entitled under certain conditions to reject a complaint which does not display sufficient Community interest to justify further investigation ([24]). The EFTA Surveillance Authority is of the opinion that a similar principle based on display of sufficiently strong interest under the EEA Agreement may be applied by the Authority within the context of the EEA Agreement.

42. The EFTA Surveillance Authority's resultant right to reject a complaint stems from the concurrent competence of the Authority, national courts and — where they have the power — national competition authorities to apply Articles 53(1) and 54 of the EEA Agreement and from the consequent protection available to complainants before the courts and administrative authorities. With regard to that concurrent competence, it has been consistently held by the Court of Justice and the Court of First Instance of the European Communities that Article 3 of Regulation No 17 (the legal basis for the right to lodge a complaint with the Commission for alleged infringement of Article 81 or Article 82 of the EC Treaty), which corresponds to Article 3 of Chapter II of Protocol 4 to the Surveillance and Court Agreement, does not entitle an applicant under that Article to obtain from the Commission a decision within the meaning of Article 249 of the EC Treaty as to whether or not the alleged infringement has occurred ([25]). Pursuant to Article 3 of the Surveillance and Court Agreement, the Authority is of the opinion that the same applies vis à vis the Authority.

Conditions for rejecting a complaint

43. The investigation of a complaint by a national authority presupposes that the following specific conditions, derived from the case-law of the Court of First Instance of the European Communities, are met.

([22]) Case T-23/90, Peugeot v. Commission [1991], ECR II-653, paragraph 47

([23]) Automec II, see footnote 3; paragraph 75.

([24]) Automec II, see footnote 3; paragraph 85; cited in Case T-114/92 BEMIN v. Commission [1995] ECR II-147, paragraph 80, and in Case T-77/95 SFEI and Others v. Commission [1997] ECR II-1, paragraphs 29 and 55.

([25]) See in particular Case 125/78, GEMA v. Commission [1979] ECR 3173, paragraph 17, and Case T-16/91, Rendo and Others v. Commisison [1992] ECR II-2417, paragraph 98.

44. The first of these conditions is that, in order to assess whether or not there is a sufficiently strong interest under the EEA Agreement in having a case investigated further, the EFTA Surveillance Authority must first undertake a carefull examination of the questions of fact and law set out in the complaint ([26]). In accordance with the obligation imposed on it by Article 16 of the Surveillance and Court Agreement to state the reasons for its decisions, the Authority has to inform the complainant of the legal and factual considerations which have induced it to conclude that the complaint does not display a sufficiently strong interest under the EEA Agreement to justify further investigation. The Autority cannot therefore confine itself to an abstract reference to the interested under the EEA Agreement ([27]).

45. In assessing whether it is entitled to reject a complaint for lack of any sufficiently strong interest under the EEA Agreement, the EFTA Surveillance Authority must balance the signifiance of the alleged infringement as regards the functioning of the EEA Agreement, the probability of its being able to establish the existence of the infringement, and the extent of the investigation measures required for it to perform, under the best possible conditions, its task of making sure that Articles 53 and 54 of the EEA Agreement are complied with ([28]). In particular, as the Court of First Instance held in BEMIM ([29]), where the effects of the infringements alleged in a complaint are essentially confined to the territory of one EC Member State and where proceedings have been brought before the courts and competent administrative authorities of that EC Member State by the complainant against the body against which the complaint was made, the Commission is entitled to reject the complaint for lack of any sufficient Community interest in further investigation of the case, provided however that the rights of the complainant can be adequately safeguarded. Under similiar circumstances in relation to an EFTA State, the Authority may reject a complaint for lack of any sufficiently strong interest under the EEA Agreement in further investigation of the case, provided that the rights of the complainant can be adequately safeguarded. As to whether the effects of the restrictive practice are localized, such is the case in particular with practices to which the only parties are undertakings from one EC Member State or EFTA State and which, altough they do not relate either to imports or to exports between Contracting Parties to the EEA Agreement, within the meaning of point (a) of Article 4(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement ([30]), are capable of affecting intra-EEA trade. As regards the safeguarding of the complainant's rights, the Authority considers that the referral of the matter to the national authority concerned must protect them quite adequately. On this latter point, the Authority takes the view that the effectiveness of the national authority's action depends notably on whether that authority is able to take interim measures if it deems it necessary, without prejudice to the possibility, found in the law of certain EFTA States, that such measures may be taken with the requisite degree of effectiveness by a court.

Procedure

46. Where the EFTA Surveillance Authority considers these conditions to have been met, it will ask the competition authority of the EFTA State in which most of the effects of the contested agreement or practice are felt if it would agree to investigate and decide on the complaint. Where the competition authority agrees to do so, the Authority will reject the complaint pending before it on the ground that it does not display a sufficiently strong interest under the EEA Agreement and will refer the matter to the national competition authority, either automatically or at the complainant's request. The Authority will place the relevant documents in its prossession at the national authority's disposal ([31]).

47. With regard to investigation of the complaint, it should be stressed that, in accordance with the ruling given by the Court of Justice in Case C-67/91 ([32]) (the 'Spanish banks' case), national competition authorities are not entitled to use as evidence, for the purposes of applying either national rules or the EEA competition rules, unpublished information contained in replies to requests for information sent to firms under Article 11 of Chapter II, of Protocol 4 to the Surveillance and Court Agreement or information obtained as a result of any inspections carried out under Article 14 of that Chapter. This information can nevertheless be taken into account, where appropriate, to justify instituting national proceedings' ([33]).

IV. COOPERATION IN CASES WHICH A NATIONAL AUTHORITY DEALS WITH FIRST

Introduction

48. At issue here are cases falling within the scope of EEA competition law which a national competition authority handles on its own initiative, applying Articles 53(1) or 54

([26]) Automec II, see footnote 3; paragraph 82.

([27]) Automec II, see footnote 3; paragraph 85.

([28]) Automec II, see footnote 3; paragraph 86, cited in BEMIM, paragraph 80.

([29]) See footnote 24, paragraph 86.

([30]) See footnote 20.

([31]) However, in the case of information accompanied by a request for confidentiality with a view to protecting the informant's anonymity, an institution which accepts such information is bound, under Article 122 of the EEA Agreement, to comply with such a condition (Case 145/83 Adams v. Commission [1985] ECR 3539). The EFTA Surveillance Authority will thus not divulge to national authorities the name of an informant who wishes to remain anonymous unless the person concerned withdraws, at the Authority's request, his request for anonymity vis-à-vis the national authority which may be dealing with his complaint.

([32]) Case C-67/91 Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada (AEB) and Others [1992] ECR I-4785, operative part.

([33]) See footnote 32; paragraphs 39 and 43.

of the EEA Agreement, either alone or in conjunction with its national competition rules, or, where it cannot do so, its national rules alone. This covers all cases within this field which a national authority investigates before he EFTA Surveillance Authority — where appropriate — does so, irrespective of their procedural origin (own-initiative proceedings, notification, complaint, etc.) These cases are therefore those which fulfil the conditions set out in Part II (Guidelines on case allocation) of this Notice.

49. As regards cases which they deal with under EEA law, it is desirable that national authorities should systematically inform the EFTA Surveillance Authority of any proceddings they initiate. The Authority will pass on this information to the authorities in the other EFTA States.

50. This cooperation is especially necessary in regard to cases of particular significance to the EEA within the meaning of points 33-36. This category inlcudes (a) all cases raising a new point of law, the aim being to avoid decisions, whether based on national law or on EEA law, which are incompatible with the latter; (b) among cases of the utmost importance from an economic point of view, only those in which access by firms from other EC Member States or EFTA States to the relevant national market is significantly impeded; and (c) certain cases in which a public undertaking or an undertaking treated as equivalent to a public undertaking (within the meaning of Article 59(1) and (2) of the EEA Agreement) is suspected of having engaged in an anti-competitive practice. Each national authority must determine, if necessary after consulting the EFTA Surveillance Authority, whether a given case fits into one of these sub-categories.

51. Such cases will be investigated by national competition authorities in accordance with the procedures laid down by their national law, whether they are acting with a view to applying the EEA competition rules or applying their national competition rules ([34]).

52. The EFTA Surveillance Authority also takes the view that, like national courts to which competition cases involving Articles 53 or 54 of the EEA Agreement have been referred, national competition authorities applying those provisions are always at liberty, within the limits of their national procedural rules and subject to Article 122 of the EEA Agreement, to seek information from the Authority on the state of any proceedings which the Authority may have set in motion and as to the likelihood of its giving an official ruling, pursuant to Chapter II of Protocol 4 to the Surveillance and Court Agreement, on cases which they are investigating on their own initiative. Under the same circumstances, national competition authorities may contact the Authority where the concrete application of Article 53(1) or of Article 54 raises particular difficulties, in order to obtain the economic and legal information which the Authority is in a position to supply to them ([35]).

53. The EFTA Surveillance Authority is convinced that close cooperation with national authorities will forestall any contradictory decisions. But if, during national proceedings, it appears possible that the decision to be taken by the Authority at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures (Walt Wilhelm) to ensure that measures implementing EEA competition law are fully effective. The Authority takes the view that these measures should generally consist in national authorities staying their proceedings pending the outcome of the proceedings being conducted by the Authority. Where a national authority applies its national law, such a stay of proceedings would be based on the principles that the simultaneous application of national competition law and EEA law must not impair the effectiveness and uniformity of the EEA competition rules and the measures taken to enfore them ([36]) and legal certainty, and where it applies EEA law, on the principle of legal certainty alone. For its part, the Authority will endeavour to deal as a matter of priority with cases subject to national proceedings thus stayed. A second possibility may, however, be envisaged, whereby the Authority is consulted before adopting the national decision. The consultations would consist, due regard being had to the judgement in the Spanish banks case, in exchanging any documents preparatory to the decisions envisaged, so that EFTA States authorities might be able to take account of the Authority's position in their own decision without the latter having to be deferred until such time as the Authority's decision has been taken.

Procedure

In respect of complaints

54. Since complainants cannot force the EFTA Surveillance Authority to take a decision as to whether the infringement they allege has actually occurred and since the Authority is entitled to reject a complaint which lacks a sufficiently strong interest under the EEA Agreement, national competition authorities should not have any special difficulty in handling complaints submitted initially to them involving matters that fall within the scope of the EEA competition rules.

([34]) See footnote 32: paragraph 32.

([35]) Case C-234/89, Delimitis v. Henninger Bräu, [1991] ECR I-935, paragraph 53.

([36]) See footnote 14 and paragraph 16 of this notice.

In respect of notifications

55. Although they form a very small percentage of all notifications to the EFTA Surveillance Authority, special consideration needs to be given to notifications to the Authority of restrictive practices undergoing investigation by a national authority made for dilatory purposes. A dilatory notification is one where a firm, threatened with a decision banning a restrictive practice which a national authority is poised to take following an investigation under Article 53(1) or under national law, notifies the disputed agreement to the Authority and asks for it to be exempted under Article 53(3) of the EEA Agreement. Such a notification is made in order to induce the Authority to initiate a proceeding under Articles 2, 3 or 6 of Chapter II of Protocol 4 to the Surveillance and Court Agreement and hence, by virtue of Article 9(3) of that Chapter to remove from EFTA States' authorities the power to apply the provisions of Article 53(1). The Authority will not consider a notification to be dilatory until after it has contacted the national authority concerned and checked that the latter agrees with its assessment. The Authority calls upon national authorities, moreover, to inform it of their own accord of any notifications they receive which, in their view, are dilatory in nature.

56. A similar situation arises where an agreement is notified to the EFTA Surveillance Authority with a view to preventing the imminent initiation of national proceedings which might result in the prohibition of that agreement ([37]).

57. The EFTA Surveillance Authority recognizes, of course, that a firm requesting exemption is entitled to obtain from it a decision on the substance of its request (see point 38). However if the Authority takes the view that such notification is chiefly aimed at suspending the national proceedings, given its exclusive powers to grant exemptions it considers itself justified in not examining it as a matter of priority.

58. The national authority which is investigating the matter and has therefore initiated proceedings should normally ask the EFTA Surveillance Authority for its provisional opinion on the likelihood of its exempting the agreement now notified to it. As regards national courts, the Authority has stated in its notice on cooperation with national courts that such a request will be superfluous where, 'in the light of the relevant criteria developed by the case-law of the EFTA Court, the Court of Justice and the Court of First Instance of the European Communities, by previous decisions of the Authority and the Commission, by acts corresponding to Commission block exemption regulations referred to in Annex XIV to the EEA Agreement', the national court has 'ascertained that the agreement, decision or concerted practice at issue cannot be the subject of an individual exemption' ([38]). The same applies to national authorities.

59. The EFTA Surveillance Authority will deliver its provisional opinion on the likelihood of an exemption being granted, in the light of a preliminary examination of the questions of fact and law involved, as quickly as possible once the complete notification is received. Examination of the notification having revealed that the agreement in question is unlikely to qualify for exemption under Article 53(3) of the EEA Agreement and that its effects are mainly confined to one EFTA State, the opinion will state that further investigation of the matter is not an Authority priority.

60. The EFTA Surveillance Authority will transmit this opinion in writing to the national authority investigating the case and to the notifying parties. It will state in its letter that it will be highly unlikely to take a decision on the matter before the national authority to which it was referred has taken its final decision and that the notifying parties retain their immunity from any fines the Authority might impose.

61. In its reply, the national authority, after taking note of the EFTA Surveillance Authority's opinion, should undertake to contact the Authority forthwith if its investigation leads it to a conclusion which differs from that opinion. This will be the case if, following its investigation, the national authority concludes that the agreement in question should not be banned under Article 53(1) of the EEA Agreement or, if that provision cannot be applied, under the relevant national law. The national authority should also undertake to forward a copy of its final decision on the matter to the Authority. Copies of the correspondence will be sent to the competition authorities of the other EFTA States for information.

62. The EFTA Surveillance Authority will not initiate proceedings in the same case before the proceedings pending before the national authority have been completed; in accordance with Article 9(3) of Chapter II of Protocol 4 to the Surveillance and Court Agreement, such action would have the effect of taking the matter out of the hands of the national authority. The Authority will do this only in quite exceptional circumstances — in a situation where, against all expectations, the national authority is liable to find that there has been no infringement of Articles 53 or 54 of the EEA Agreement or of its national competition law, or where the national proceedings are unduly long and drawn-out.

([37]) With respect to agreements not subject to notification pursuant to point 1 of Article 4 (2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement, points 56 and 57 of this Notice also apply *mutatis mutandis* to express request for exemption.

([38]) Points 27 and 28 of the Notice on cooperation between national courts and the EFTA Surveillance Authority.

63. Before initiating proceedings the EFTA Surveillance Authority will consult the national authority to discover the factual or legal grounds for that authority's proposed favourable decision or the reasons for the delay in the proceedings.

V. CONCLUDING REMARKS

64. This Notice is without prejudice to any interpretation by the Court of Justice and the Court of First Instance of the European Communities and the EFTA Court.

65. In the interests of effective, consistent application of EEA law throughout the EEA, and legal simplicity and certainty for the benefit of undertakings, the EFTA Surveillance Authority calls upon those EFTA States which have not already done so to adopt legislation enabling their competition authority to implement Articles 53(1) and 54 of the EEA Agreement effectively.

66. In applying this Notice, the EFTA Surveillance Authority and the competent authorities of the EFTA States and their officials and other staff will observe the principle of professional secrecy in accordance with Article 20 of Chapter II of Protocol 4 to the Surveillance and Court Agreement.

67. This Notice does not apply to competition rules in the transport sector, owing to the highly specific way in which cases arising in that sector are handled from a procedural point of view ([39]).

68. The actual application of this Notice, especially in terms of the measures considered desirable to facilitate its implementation, will be the subject of an annual review carried out jointly by the authorities of the EFTA States and the EFTA Surveillance Authority.

69. This Notice will be reviewed no later than at the end of the fourth year after its adoption.

([39]) See the relevant provision on the application of the EEA competition rules to the transport sector in Article 3 of Protocol 21 to the EEA Agreement and the relevant Chapters of Protocol 4 to the Surveillance and Court Agreement.