

EFTA Surveillance Authority Notice on informal guidance relating to novel questions concerning Articles 53 and 54 of the EEA Agreement that arise in individual cases (guidance letters)

(2006/C 305/13)

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (hereafter the 'EEA Agreement') and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereafter the 'Surveillance and Court Agreement').
- B. The European Commission (hereafter the 'Commission') has issued a notice entitled 'Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)' ⁽¹⁾. That non-binding act contains principles and rules which the Commission follows in the field of competition. It also explains how the Commission intends to provide informal guidance to undertakings.
- 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, 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 ⁽²⁾.
- D. In particular, the purpose of this Notice is to spell out how the EFTA Surveillance Authority aims to provide informal guidance concerning its application of Articles 53 and 54 of the EEA Agreement in a particular case.
- E. The present notice applies to cases where the Authority is the competent surveillance authority under Article 56 of the EEA Agreement.

I. CHAPTER II OF PART I OF PROTOCOL 4 TO THE SURVEILLANCE AND COURT AGREEMENT

1. Chapter II of Part I of Protocol 4 to the Surveillance and Court Agreement ⁽³⁾ (hereafter 'Chapter II') sets up a new enforcement system for Articles 53 and 54 of the EEA Agreement in the EFTA pillar. While designed to restore the focus on the primary task of effective enforcement of the competition rules, Chapter II also creates legal certainty inasmuch as it provides that agreements ⁽⁴⁾ which fall under Article 53(1) but fulfil the conditions in Article 53(3) are valid and fully enforceable *ab initio* without a prior decision by a competition authority (Article 1 of Chapter II).
2. The framework of Chapter II, while introducing a system where the EFTA Surveillance Authority, EFTA States' competition authorities and EFTA States' courts can apply Articles 53 and 54 in their entirety, limits risks of inconsistent application by a range of measures, thereby ensuring the primary aspect of legal certainty for companies, i.e. that the competition rules are applied in a consistent way throughout the territory covered by the EEA Agreement.
3. Undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form. They are close to the facts and have at their disposal the framework of acts corresponding to Community block exemption regulations referred to in Annex XIV to the EEA Agreement (hereafter 'block exemptions'), case law and case practice as well as extensive guidance in the EFTA Surveillance Authority's guidelines and notices ⁽⁵⁾.

⁽¹⁾ OJ C 101, 27.4.2004, pages 78-80.

⁽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 Commission according to the rules laid down in Article 56 of the EEA Agreement. Only one of the surveillance authorities is competent to handle any given case.

⁽³⁾ When 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 has entered into force, Chapter II of Protocol 4 of the Surveillance and Court Agreement will to a large extent reflect in the EFTA pillar Council Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

⁽⁴⁾ In this Notice, the term 'agreement' is used for agreements, decisions by associations of undertakings and concerted practices. The term 'practices' refers to the conduct of dominant undertakings. The term 'undertakings' equally covers 'associations of undertakings'.

⁽⁵⁾ Most of the texts mentioned are available at <http://www.eftasurv.int/fieldsOfWork/fieldcompetition/> or at http://europa.eu.int/comm/competition/index_en.html.

4. Alongside the reform of the rules implementing Articles 53 and 54 brought about by Chapter II and the existing block exemptions, EFTA Surveillance Authority notices and guidelines have been revised with a view to further assist self-assessment by economic operators. The Authority has also produced guidelines on the application of Article 53(3) ⁽⁶⁾. This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 53. Furthermore, the Authority will impose more than symbolic fines ⁽⁷⁾ only in cases where it is established, either in horizontal instruments or in the case law and practice that a certain behaviour constitutes an infringement.
5. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 53 and 54, individual undertakings may wish to seek informal guidance from the EFTA Surveillance Authority. Where it considers it appropriate and subject to its enforcement priorities, the Authority may provide such guidance on novel questions concerning the interpretation of Articles 53 and/or 54 in a written statement (guidance letter). The present Notice sets out details of this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

6. Chapter II confers powers on the EFTA Surveillance Authority to effectively prosecute infringements of Articles 53 and 54 and to impose sanctions ⁽⁸⁾. One major objective of Chapter II is to ensure efficient enforcement of the EEA competition rules by removing the former notification system and thus allowing the Authority to focus its enforcement policy on the most serious infringements.
7. While Chapter II is without prejudice to the ability of the EFTA Surveillance Authority to issue informal guidance to individual undertakings, as set out in this Notice, this ability should not interfere with the primary objective of Chapter II, which is to ensure effective enforcement. The Authority may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.
8. Subject to point 7, the EFTA Surveillance Authority, seized of a request for a guidance letter, will consider whether it is appropriate to process it. Issuing a guidance letter may only be considered if the following cumulative conditions are fulfilled:
 - a) The substantive assessment of an agreement or practice with regard to Articles 53 and/or 54 of the EEA Agreement, poses a question of application of the law for which there is no clarification in the existing EEA legal framework including the case law of the EFTA Court and the Community Courts, nor publicly available general guidance or precedent in the decision-making practice or previous guidance letters of the EFTA Surveillance Authority or the Commission ⁽⁹⁾.
 - b) A *prima facie* evaluation of the specificities and background of the case suggests that the clarification of the novel question through a guidance letter is useful, taking into account the following elements:
 - the economic importance from the point of view of the consumer of the goods or services concerned by the agreement or practice, and/or

⁽⁶⁾ EFTA Surveillance Authority Notice — Guidelines on the application of Article 53(3) of the EEA Agreement, not yet published.

⁽⁷⁾ Symbolic fines will normally be set at EUR 1 000, cf. the EFTA Surveillance Authority's Guidelines on the method of setting fines imposed pursuant to the EEA competition rules, OJ C 10, 16.1.2003, p. 16 and EEA Supplement to the OJ No 3, 16.1.2003, p. 6.

⁽⁸⁾ Cf. in particular Articles 7 to 9, 12, 17-24 and 29 of Chapter II of Part I of Protocol 4 to the Surveillance and Court Agreement.

⁽⁹⁾ 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. As stated in Article 58 of the EEA Agreement and Protocol 23 thereto, the Authority and the Commission are to co-operate with a view to *inter alia* promoting a homogenous implementation, application and interpretation of the EEA Agreement. Although the Commission's Decisions and informal guidance letters are not binding on the Authority, the Authority will thus endeavour to take due account of the case practice of the Commission.

- the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread economic usage in the marketplace, and/or
 - the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture.
- c) It is possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.
9. Furthermore, the EFTA Surveillance Authority will not consider a request for a guidance letter in either of the following circumstances:
- the questions raised in the request are identical or similar to issues raised in a case pending before the EFTA Court, the Court of Justice or the Court of First Instance of the European Communities;
 - the agreement or practice to which the request refers is subject to proceedings pending with the Authority, an EFTA State court or an EFTA State competition authority.
10. The EFTA Surveillance Authority will not consider hypothetical questions and will not issue guidance letters on agreements or practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Authority in relation to questions raised by an agreement or practice that they envisage, i.e. before the implementation of that agreement or practice. In this case the transaction must have reached a sufficiently advanced stage for a request to be considered.
11. A request for a guidance letter is without prejudice to the power of the EFTA Surveillance Authority to open proceedings in accordance with Chapter II with regard to the facts presented in the request.

III. INDICATIONS ON HOW TO REQUEST GUIDANCE

12. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or practice that could fall within the scope of Articles 53 and/or 54 of the EEA Agreement with regard to questions of interpretation raised by such agreement or practice.
13. A request for a guidance letter should be addressed to the following address:
- EFTA Surveillance Authority
Competition and State Aid Directorate
Rue Belliard 35
B-1040 Bruxelles/Brussel
14. There is no form. A memorandum should be presented which clearly states:
- the identity of all undertakings concerned as well as a single address for contacts with the EFTA Surveillance Authority;
 - the specific questions on which guidance is sought;
 - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation;
 - a detailed reasoning, having regard to point 8 a), why the request presents (a) novel question(s);
 - all other information that permits an evaluation of the request in the light of the aspects explained in points 8 — 10 of this Notice, including in particular a declaration that the agreement or practice to which the request refers is not subject to proceedings pending before an EFTA State court or an EFTA State competition authority;
 - where the request contains elements that are considered business secrets, a clear identification of these elements;
 - any other information or documentation relevant to the individual case.

IV. PROCESSING OF THE REQUEST

15. The EFTA Surveillance Authority will in principle evaluate the request on the basis of the information provided. Notwithstanding point 8 c), the Authority may use additional information at its disposal from public sources, former proceedings or any other source and may ask the applicant(s) to provide supplementary information. The normal rules on professional secrecy apply to the information supplied by the applicant(s).
16. The EFTA Surveillance Authority may share the information submitted to it with the Commission and the EFTA States' competition authorities and receive input from them. It may discuss the substance of the request with the Commission or the EFTA States' competition authorities before issuing a guidance letter.
17. Where no guidance letter is issued, the EFTA Surveillance Authority shall inform the applicant(s) accordingly.
18. An undertaking can withdraw its request at any point in time. In any case, information supplied in the context of a request for guidance remains with the EFTA Surveillance Authority and can be used in subsequent procedures under Chapter II (cf. point 11 above).

V. GUIDANCE LETTERS

19. A guidance letter sets out:
 - a summary description of the facts on which it is based;
 - the principal legal reasoning underlying the understanding of the EFTA Surveillance Authority on novel questions relating to Articles 53 and/or 54 raised by the request.
20. A guidance letter may be limited to part of the questions raised in the request. It may also include additional aspects to those set out in the request.
21. Guidance letters will be posted on the EFTA Surveillance Authority's web-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Authority will agree with the applicants on a public version.

VI. THE EFFECTS OF GUIDANCE LETTERS

22. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements and practices.
 23. A guidance letter cannot prejudge the assessment of the same question by the EFTA Court or the Community Courts.
 24. Where an agreement or practice has formed the factual basis for a guidance letter, the EFTA Surveillance Authority is not precluded from subsequently examining that same agreement or practice in a procedure under Chapter II, in particular following a complaint. In that case, the Authority will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects raised by a complaint, to developments in the case law of the EFTA Court, Community Courts or wider changes of the Authority's policy.
 25. Guidance letters are not EFTA Surveillance Authority decisions and do not bind EFTA States' competition authorities or courts that have the power to apply Articles 53 and 54. However, it is open to EFTA States' competition authorities and courts to take account of guidance letters issued by the Authority as they see fit in the context of a case.
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