

## NOTICES CONCERNING THE EUROPEAN ECONOMIC AREA

## EFTA SURVEILLANCE AUTHORITY

**EFTA Surveillance Authority Notice on the handling of complaints by the Authority under Articles 53 and 54 of the EEA Agreement**

(2007/C 287/06)

- 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 the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' <sup>(1)</sup>. 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 handle complaints.
- 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 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 <sup>(2)</sup>.
- D. In particular, the purpose of this Notice is to spell out how the EFTA Surveillance Authority aims to handle complaints concerning alleged infringements of Articles 53 and 54 of the EEA Agreement.
- E. The present notice applies to cases where the Authority is the competent surveillance authority under Article 56 of the EEA Agreement.

**I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE**

1. Chapter II of Part I of Protocol 4 to the Surveillance and Court Agreement (hereafter 'Chapter II') <sup>(3)</sup> establishes a system in which the EFTA Surveillance Authority and the EFTA States' competition authorities and courts can apply Articles 53 and 54 of the EEA Agreement. Chapter II recognises in particular the complementary functions of the Authority and EFTA States' competition authorities acting as public enforcers and the EFTA States' courts that rule on private lawsuits in order to safeguard the rights of individuals deriving from Articles 53 and 54.
2. Under Chapter II, the public enforcers may focus their action on the investigation of serious infringements of Articles 53 and 54 which are often difficult to detect. For their enforcement activity, they benefit from information supplied by undertakings and by consumers in the market.

<sup>(1)</sup> OJ C 101, 27.4.2004, p. 65.

<sup>(2)</sup> 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.

<sup>(3)</sup> Following the entry into force on 20 May 2005 of the Agreement amending Protocol 4 to the Agreement of the EFTA States on the establishment of a Surveillance Authority and a Court of Justice of 24 September 2004, Chapter II of Protocol 4 of the Surveillance and Court Agreement reflects to a large extent in the EFTA pillar Council Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

3. The EFTA Surveillance Authority therefore wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules. At the level of the Authority, there are two ways to do this, one is by lodging a complaint pursuant to Article 7(2) of Chapter II. Under Articles 5 to 9 of Chapter III of Part I of Protocol 4 to the Surveillance and Court Agreement (hereafter 'Chapter III') <sup>(1)</sup>, such complaints must fulfil certain requirements.
4. The other way is the provision of market information that does not have to comply with the requirements for complaints pursuant to Article 7(2) of Chapter II. Such information about suspected infringements of Articles 53 and 54 can be the starting point for an investigation by the EFTA Surveillance Authority <sup>(2)</sup>. Information about suspected infringements can be supplied to the following address:

EFTA Surveillance Authority  
Competition and State Aid Directorate  
Rue Belliard 35  
B-1040 Bruxelles/Brussel  
competition@eftasurv.int

5. Without prejudice to the interpretation of Chapters II and III by the EFTA Court, the present Notice intends to provide guidance to citizens and undertakings that are seeking relief from suspected infringements of the competition rules. The Notice contains two main parts:
  - part II gives indications about the choice between complaining to the EFTA Surveillance Authority or bringing a lawsuit before a national court. Moreover, it recalls the principles related to the work-sharing between the Authority and the national competition authorities of the EFTA States in the enforcement system established by Chapter II that are explained in the Notice on cooperation within the EFTA network of competition authorities <sup>(3)</sup>,
  - part III explains the procedure for the treatment of complaints pursuant to Article 7(2) of Chapter II by the Authority.
6. This Notice does not address the following situations:
  - complaints lodged by EFTA States pursuant to Article 7(2) of Chapter II,
  - complaints that ask the EFTA Surveillance Authority to take action against a EFTA State pursuant to Article 59(3) in conjunction with Articles 53 or 54 of the EEA Agreement,
  - complaints relating to Article 61 of the EEA Agreement on State aids,
  - complaints relating to infringements by EFTA States that the Authority may pursue in the framework of Article 31 of the Surveillance and Court Agreement.

## II. DIFFERENT POSSIBILITIES FOR LODGING COMPLAINTS ABOUT SUSPECTED INFRINGEMENTS OF ARTICLES 53 OR 54 OF THE EEA AGREEMENT

### A. Complaints in the new enforcement system established by Chapter II

7. Depending on the nature of the complaint, a complainant may bring his complaint either to a national court or to an EFTA State competition authority that acts as public enforcer. The present chapter of this Notice intends to help potential complainants to make an informed choice about whether to address themselves to the EFTA Surveillance Authority, to one of the EFTA States' competition authorities or to a national court.

<sup>(1)</sup> Following the entry into force on 1 July 2005 of the Agreement of the EFTA States on the establishment of a Surveillance Authority and a Court of Justice of 3 December 2004, Chapter III of Protocol 4 to the Surveillance and Court Agreement will reflect Commission Regulation (EC) No 773/2004 (OJ L 123, 27.4.2004, p. 18).

<sup>(2)</sup> The Authority handles correspondence from informants in accordance with its principles of good administrative practice.

<sup>(3)</sup> EFTA Surveillance Authority Notice on cooperation within the EFTA Network of competition authorities, not yet published.

8. While national courts are called upon to safeguard the rights of individuals and are thus bound to rule on cases brought before them, public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases. The EFTA Surveillance Authority, entrusted by Article 55(1) of the EEA Agreement with the task of ensuring application of the principles laid down in Articles 53 and 54 of the EEA Agreement, is responsible for defining and implementing the orientation of EEA competition policy <sup>(1)</sup>. According to the case law of the Court of Justice of the European Communities, the Commission, in order to perform its tasks effectively, is entitled to give differing degrees of priority to the complaints brought before it under Article 81 or 82 of the EC Treaty <sup>(2)</sup>. The Authority is of the opinion that a similar principle applies to the Authority within the context of the EEA Agreement.
  
9. Chapter II empowers EFTA States' courts and EFTA States' competition authorities to apply Articles 53 and 54 of the EEA Agreement in their entirety alongside the EFTA Surveillance Authority. Chapter II pursues as one principal objective that EFTA States' courts and competition authorities should participate effectively in the enforcement of Articles 53 and 54 <sup>(3)</sup>.
  
10. Moreover, Article 3 of Chapter II provides that EFTA States' courts and competition authorities have to apply Articles 53 and 54 of the EEA Agreement to all cases of agreements or conduct that are capable of affecting trade between Contracting Parties to the EEA Agreement to which they apply their national competition laws. In addition, Articles 11 and 15 of Chapter II create a range of mechanisms by which EFTA States' courts and competition authorities cooperate with the EFTA Surveillance Authority in the enforcement of Articles 53 and 54.
  
11. In this new legislative framework, the EFTA Surveillance Authority intends to refocus its enforcement resources along the following lines:
  - enforce the EEA competition rules in cases for which it is well placed to act <sup>(4)</sup>, concentrating its resources on the most serious infringements,
  
  - handle cases in relation to which the EFTA Surveillance Authority should act with a view to define EEA competition policy and/or to ensure coherent application of Articles 53 or 54 of the EEA Agreement.

### B. The complementary roles of private and public enforcement

12. It has been consistently held by the Community Courts that national courts are called upon to safeguard the rights of individuals created by the direct effect of Articles 81(1) and 82 of the EC Treaty <sup>(5)</sup>. It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts <sup>(6)</sup>. However, according to Protocol 35, 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. According to the EFTA Court, it is inherent in the nature of such a

<sup>(1)</sup> These tasks are shared with the Commission in accordance with the rules of competence in Article 56 of the EEA Agreement.

<sup>(2)</sup> Case C-344/98, *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, paragraph 46; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraph 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraphs 73-77. 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 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.

<sup>(3)</sup> Cf. in particular Articles 5, 6, 11, 12, 15, 22, 29 and 40 of Chapter II.

<sup>(4)</sup> Cf. Notice on cooperation within the EFTA network of competition authorities, paragraphs 5ss.

<sup>(5)</sup> Settled case law in the Community, cf. Case 127/73, *Belgische Radio en Televisie (BRT) v SABAM and Fonior*, [1974] ECR 51, paragraph 16; Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, paragraph 39; Case C-453/99, *Courage v Bernhard Crehan*, [2001] ECR I-6297, paragraph 23.

<sup>(6)</sup> See Case E-4/01, *Karlsson*, EFTA Court Report [2002], p. 240, paragraph 28.

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 <sup>(1)</sup>.

13. National courts can decide upon the nullity or validity of contracts and only national courts can grant damages to an individual in case of an infringement of Articles 53 and 54 of the EEA Agreement. In order to ensure the full effectiveness of the EEA competition rules, any individual must be able to claim damages for loss caused to him by a contract or by conduct which restricts or distorts competition. Such actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the territory covered by the EEA Agreement as they discourage undertakings from concluding or applying restrictive agreements or practices <sup>(2)</sup>.
14. Chapter II takes express account of the fact that national courts have an essential part to play in applying the EEA competition rules <sup>(3)</sup>. By extending the power to apply Article 53(3) to national courts it removes the possibility for undertakings to delay national court proceedings by a notification to the EFTA Surveillance Authority and thus eliminates an obstacle for private litigation that existed under the previous rules.
15. Without prejudice to the right or obligation of national courts to request an advisory opinion from the EFTA Court in accordance with Article 34 of the Surveillance and Court Agreement, Article 15(1) of Chapter II provides expressly that national courts may ask for opinions or information from the EFTA Surveillance Authority. This provision aims at facilitating the application of Articles 53 and 54 by national courts <sup>(4)</sup>.
16. Action before national courts has the following advantages for complainants:
  - national courts may award damages for loss suffered as a result of an infringement of Article 53 or 54,
  - national courts may rule on claims for payment or contractual obligations based on an agreement that they examine under Article 53,
  - it is for the national courts to apply the civil sanction of nullity of Article 53(2) in contractual relationships between individuals <sup>(5)</sup>. They can in particular assess, in the light of the applicable national law, the scope and consequences of the nullity of certain contractual provisions under Article 53(2), with particular regard to all the other matters covered by the agreement <sup>(6)</sup>,
  - national courts are usually better placed than the EFTA Surveillance Authority to adopt interim measures <sup>(7)</sup>,
  - before national courts, it is possible to combine a claim under EEA competition law with other claims under national law,
  - courts normally have the power to award legal costs to the successful applicant. This is never possible in an administrative procedure before the Authority.

<sup>(1)</sup> See Case E-1/94, *Restamark*, EFTA Court Report [1994-1995], p. 15, paragraph 77.

<sup>(2)</sup> Case C-453/99, *Courage v Bernhard Crehan*, [2001] ECR I-6297, paragraphs 26-27.

<sup>(3)</sup> Cf. Articles 1, 6 and 15 of Chapter II.

<sup>(4)</sup> For more detailed explanations of this mechanism, cf. Notice on the co-operation between the Authority and the courts of the EFTA States in the application of Articles 53 and 54 EC, not yet published.

<sup>(5)</sup> Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraph 93.

<sup>(6)</sup> Cf. the EFTA Court's decisions in Case E-3/97 *Jæger v Opel Norge*, EFTA Court Report [1998], p. 1, paragraph 77, and Case E-7/01 *Hegelstad v Hydro Texaco*, EFTA Court Report [2002], p. 310, paragraph 43, as well as the Community courts' decisions in Case C-230/96, *Cabour and Nord Distribution Automobile v Armor 'SOCO'*, [1998] ECR I-2055, paragraph 51; Joined Cases T-185/96, T-189/96 and T-190/96, *Dalmasso and Others v Commission of the European Communities*, [1999] ECR II-93, paragraph 50.

<sup>(7)</sup> Cf. Article 8 of Chapter II and paragraph 80 below. Depending on the case, EFTA States' competition authorities may equally be well placed to adopt interim measures.

17. The fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the EFTA Surveillance Authority may take into account in its examination of the interest under the EEA Agreement for investigating a complaint <sup>(1)</sup>.
18. The EFTA Surveillance Authority holds the view that the new enforcement system established by Chapter II strengthens the possibilities for complainants to seek and obtain effective relief before national courts.

### C. Work-sharing between the public enforcers in the EFTA pillar

19. Chapter II creates a system where both the EFTA Surveillance Authority and the EFTA States' competition authorities are empowered to apply Articles 53 and 54 in their entirety (Article 5). Decentralised enforcement by EFTA States' competition authorities is further encouraged by the possibility to exchange information (Article 12) and to provide each other assistance with investigations (Article 22).
20. Chapter II does not regulate the work-sharing between the EFTA Surveillance Authority and the EFTA States' competition authorities but leaves the division of case work to the cooperation of the Authority and the EFTA States' competition authorities inside the EFTA Competition Network. Chapter II pursues the objective of ensuring effective enforcement of Articles 53 and 54 through a flexible division of case work between the EFTA public enforcers.
21. Orientations for the work sharing between the EFTA Surveillance Authority and the EFTA States' competition authorities are laid down in a separate Notice <sup>(2)</sup>. The guidance contained in that Notice, which concerns the relations between the EFTA public enforcers, will be of interest to complainants as it permits them to address a complaint to the authority most likely to be well placed to deal with their case.
22. The Notice on cooperation within the EFTA Network of Competition Authorities states in particular <sup>(3)</sup>:

'An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

- (1) the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
- (2) the authority is able to effectively bring to an end the entire infringement i.e. it can adopt a cease and desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
- (3) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

The above criteria indicate that a material link between the infringement and the territory of an EFTA State must exist in order for that EFTA State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those EFTA States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the EFTA Surveillance Authority is better placed to act (see below [...]).

It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory. [...]

<sup>(1)</sup> Cf. paragraphs 41ss. below.

<sup>(2)</sup> Notice on cooperation within the EFTA Network of competition authorities.

<sup>(3)</sup> Notice on cooperation within the EFTA Network of competition authorities, paragraphs 8-14.

Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end. [...]

Parallel action by several NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. [...]

The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

The EFTA Surveillance Authority is also well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in two or more EFTA States (cross-border markets covering two or more EFTA States or several national markets).

Moreover, the EFTA Surveillance Authority is particularly well placed to deal with a case if it is closely linked to other EEA provisions which may be exclusively or more effectively applied by the Authority, if the EEA interest requires the adoption of an Authority decision to develop EEA competition policy when a new competition issue arises or to ensure effective enforcement.'

23. Within the EFTA Competition Network, information on cases that are being investigated following a complaint will be made available to the other members of the network before or without delay after commencing the first formal investigative measure <sup>(1)</sup>. Where the same complaint has been lodged with several authorities or where a case has not been lodged with an authority that is well placed, the members of the network will endeavour to determine within an indicative time-limit of two months which authority or authorities should be in charge of the case.
24. Complainants themselves have an important role to play in further reducing the potential need for reallocation of a case originating from their complaint by referring to the orientations on work sharing in the network set out in the present chapter when deciding on where to lodge their complaint. If nonetheless a case is reallocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved <sup>(2)</sup>.
25. The EFTA Surveillance Authority may reject a complaint in accordance with Article 13 of Chapter II, on the grounds that an EFTA State competition authority is dealing or has dealt with the case. When doing so, the Authority must, in accordance with Article 9 of Chapter III, inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

### III. THE EFTA SURVEILLANCE AUTHORITY'S HANDLING OF COMPLAINTS PURSUANT TO ARTICLE 7(2) OF CHAPTER II

#### A. General

26. According to Article 7(2) of Chapter II, natural or legal persons that can show a legitimate interest <sup>(3)</sup> are entitled to lodge a complaint to ask the EFTA Surveillance Authority to find an infringement of Articles 53 and 54 EEA and to require that the infringement be brought to an end in accordance with Article 7(1) of Chapter II. The present part of this Notice explains the requirements applicable to complaints based on Article 7(2) of Chapter II, their assessment and the procedure followed by the Authority.

<sup>(1)</sup> Article 11(2) and (3) of Chapter II ; Notice on cooperation within the EFTA Network of Competition Authorities paragraphs 15-16.

<sup>(2)</sup> Notice on cooperation within the EFTA Network of Competition Authorities, paragraph 33.

<sup>(3)</sup> For more extensive explanations on this notion in particular, cf. paragraphs 33ss. below.

27. The EFTA Surveillance Authority, unlike civil courts, whose task is to safeguard the individual rights of private persons, is an administrative authority that must act in the public interest. It is an inherent feature of the Authority's task as public enforcer that it has a margin of discretion to set priorities in its enforcement activity <sup>(1)</sup>.
28. The EFTA Surveillance Authority is entitled to give different degrees of priority to complaints made to it and may refer to the interest under the EEA Agreement presented by a case as a criterion of priority <sup>(2)</sup>. The Authority may reject a complaint when it considers that the case does not display a sufficient interest under the EEA Agreement to justify further investigation. Where the Authority rejects a complaint, the complainant is entitled to a decision of the Authority <sup>(3)</sup> without prejudice to Article 7(3) of Chapter III.

## B. Making a complaint pursuant to Article 7(2) of Chapter II

### (a) Complaint form

29. A complaint pursuant to Article 7(2) of Chapter II can only be made about an alleged infringement of Articles 53 or 54 with a view to the EFTA Surveillance Authority taking action under Article 7(1) of Chapter II. A complaint under Article 7(2) of Chapter II has to comply with Form C mentioned in Article 5(1) of Chapter III.
30. Form C is available at: <http://www.eftasurv.int/fieldsOfWork/fieldcompetition/faq/> and is also annexed to this Notice. The complaint must be submitted in three paper copies as well as, if possible, an electronic copy. In addition, the complainant must provide a non-confidential version of the complaint (Article 5(2) of Chapter III. Electronic transmission to the EFTA Surveillance Authority is possible via the website indicated above, the paper copies should be sent to the following address:  
  
EFTA Surveillance Authority  
Competition and State Aid Directorate  
Rue Belliard 35  
B-1040 Bruxelles/Brussel
31. Form C requires complainants to submit comprehensive information in relation to their complaint. They should also provide copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the EFTA Surveillance Authority. In particular cases, the Authority may dispense with the obligation to provide information in relation to part of the information required by Form C (Article 5(1) of Chapter III). The Authority holds the view that this possibility can in particular play a role to facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of.
32. Correspondence to the EFTA Surveillance Authority that does not comply with the requirements of Article 5 of Chapter III and therefore does not constitute a complaint within the meaning of Article 7(2) of Chapter II will be considered by the Authority as general information that, where it is useful, may lead to an own-initiative investigation (cf. paragraph 4 above).

<sup>(1)</sup> The Community courts has recognised such a margin of discretion for the Commission in its enforcement activities, see e.g. Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraph 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraphs 73-77 and 85. See also paragraph 8 above.

<sup>(2)</sup> The Commission's possibility to refer to the Community interest presented by a case as a criterion of priority has been settled case law since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraph 85. The Authority considers that a similar possibility exists for the Authority within the context of the EEA Agreement.

<sup>(3)</sup> See in the Community context: Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, paragraph 36.

(b) *Legitimate interest*

33. The status of formal complainant under Article 7(2) of Chapter II is reserved to legal and natural persons who can show a legitimate interest <sup>(1)</sup>. EFTA States are deemed to have a legitimate interest for all complaints they choose to lodge.
34. In many cases, the condition of legitimate interest is not a matter of doubt as the complainants are in a position of being directly and adversely affected by the alleged infringement. However, there are situations where the condition of a 'legitimate interest' in Article 7(2) requires further analysis to conclude that it is fulfilled. Useful guidance can best be provided by a non-exhaustive set of examples.
35. The Court of First Instance of the European Communities has held that an association of undertakings may claim a legitimate interest in lodging a complaint regarding conduct concerning its members, even if it is not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided that, first, it is entitled to represent the interests of its members and secondly, the conduct complained of is liable to adversely affect the interests of its members <sup>(2)</sup>. Conversely, the Commission has been found to be entitled not to pursue the complaint of an association of undertakings whose members were not involved in the type of business transactions complained of <sup>(3)</sup>.
36. Taking account of this case law, the EFTA Surveillance Authority is of the opinion that undertakings (themselves or through associations that are entitled to represent their interests) can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests. The Authority considers that a legitimate interest can, for instance, be claimed by the parties to the agreement or practice which is the subject of the complaint, by competitors whose interests have allegedly been damaged by the behaviour complained of or by undertakings excluded from a distribution system.
37. Consumer associations can equally lodge complaints with the EFTA Surveillance Authority <sup>(4)</sup>. The Authority moreover holds the view that individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest <sup>(5)</sup>.
38. However, the EFTA Surveillance Authority does not consider as a legitimate interest within the meaning of Article 7(2) the interest of persons or organisations that wish to come forward on general interest considerations without showing that they or their members are liable to be directly and adversely affected by the infringement (*pro bono publico*).
39. Local or regional public authorities may be able to show a legitimate interest in their capacity as buyers or users of goods or services affected by the conduct complained of. Conversely, they cannot be considered as showing a legitimate interest within the meaning of Article 7(2) of Chapter II to the extent that they bring to the attention of the EFTA Surveillance Authority alleged infringements *pro bono publico*.
40. Complainants have to demonstrate their legitimate interest. Where a natural or legal person lodging a complaint is unable to demonstrate a legitimate interest, the EFTA Surveillance Authority is entitled, without prejudice to its right to initiate proceedings of its own initiative, not to pursue the complaint. The Authority may ascertain whether this condition is met at any stage of the investigation <sup>(6)</sup>.

<sup>(1)</sup> Cf. Article 5(1) of Chapter II.

<sup>(2)</sup> Case T-114/92, *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities*, [1995] ECR II-147, paragraph 28. Associations of undertakings were also the complainants in the cases underlying the judgments in Case 298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities*, [1985] ECR 1105 and Case T-319/99, *Federacion Nacional de Empresas (FENIN) v Commission of the European Communities*, not yet published in [2003] ECR.

<sup>(3)</sup> Joined Cases T-133/95 and T-204/95, *International Express Carriers Conference (IECC) v Commission of the European Communities*, [1998] ECR II-3645, paragraphs 79-83.

<sup>(4)</sup> See in the Community context: Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities*, [1994] ECR II-285, paragraph 36.

<sup>(5)</sup> This question is currently raised in a pending procedure before the Court of First Instance of the European Communities (Joined Cases T-213 and 214/01). The Commission has also accepted as complainant an individual consumer in its Decision of 9 December 1998 in Case IV/D-2/34.466, *Greek Ferries*, OJ L 109, 27.4.1999, p. 24, paragraph 1.

<sup>(6)</sup> Joined Cases T-133/95 and T-204/95, *International Express Carriers Conference (IECC) v Commission of the European Communities*, [1998] ECR II-3645, paragraph 79.

### C. Assessment of complaints

#### (a) Interest under the EEA Agreement

41. With reference to settled case law of the Community Courts and practice of the Commission, the EFTA Surveillance Authority considers that it is not required to conduct an investigation in each case <sup>(1)</sup> or, *a fortiori*, to take a decision within the meaning of Article 5(2)(a) of the Surveillance and Court Agreement on the existence or non-existence of an infringement of Articles 53 or 54 of the EEA Agreement <sup>(2)</sup>, but is entitled to give differing degrees of priority to the complaints brought before it and refer to interest under the EEA Agreement in order to determine the degree of priority to be applied to the various complaints it receives <sup>(3)</sup>. The position is different only if the complaint falls within the exclusive competence of the Authority <sup>(4)</sup>.
42. The EFTA Surveillance Authority must however examine carefully the factual and legal elements brought to its attention by the complainant in order to assess the interest under the EEA Agreement in further investigation of a case <sup>(5)</sup>.
43. The assessment of interest under the EEA Agreement raised by a complaint depends on the circumstances of each individual case. Accordingly, the number of criteria of assessment to which the EFTA Surveillance Authority may refer is not limited, nor is the Authority required to have recourse exclusively to certain criteria. As the factual and legal circumstances may differ considerably from case to case, it is permissible to apply new criteria which had not before been considered <sup>(6)</sup>. Where appropriate, the Authority may give priority to a single criterion for assessing the Community interest under the EEA Agreement <sup>(7)</sup>.
44. Among the criteria which may be held relevant for the assessment of the interest under the EEA Agreement in the (further) investigation of a case are the following:
- The EFTA Surveillance Authority can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts <sup>(8)</sup>.
  - The Authority may not regard certain situations as excluded in principle from its purview under the task entrusted to it by the EEA Agreement but is required to assess in each case how serious the alleged infringements are and how persistent their consequences are. This means in particular that it must take into account the duration and the extent of the infringements complained of and their effect on the competition situation in the territory covered by the EEA Agreement <sup>(9)</sup>.
  - The Authority may have to balance the significance of the alleged infringement as regards the functioning of the EEA Agreement, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil its task of ensuring that Articles 53 and 54 of the EEA Agreement are complied with <sup>(10)</sup>.

<sup>(1)</sup> Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraph 76; Case C-91/95 P, *Roger Tremblay and Others v Commission of the European Communities*, [1996] ECR I-5547, paragraph 30.

<sup>(2)</sup> Case 125/78, *GEMA v Commission of the European Communities*, [1979] ECR 3173, paragraph 17; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraph 87.

<sup>(3)</sup> Settled case law in the Community since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraphs 77 and 85; see also footnotes 26 and 27 above.

<sup>(4)</sup> Settled case law in the Community since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraph 75. Under Chapter II, this principle may only be relevant in the context of Article 29 of that Chapter.

<sup>(5)</sup> See in this context: Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities*, [1983] ECR 3045, paragraph 19; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraph 86.

<sup>(6)</sup> Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraphs 79-80.

<sup>(7)</sup> See in this context: Case C-450/98 P, *International Express Carriers Conference (IECC) v Commission of the European Communities*, [2001] ECR I-3947, paragraphs 57-59.

<sup>(8)</sup> See in this context: Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraphs 88ss.; Case T-5/93, *Roger Tremblay and Others v Commission of the European Communities*, [1995] ECR II-185, paragraphs 65ss.; Case T-575/93, *Casper Koelman v Commission of the European Communities*, [1996] ECR II-1, paragraphs 75-80; see also part II above where more detailed explanations concerning this situation are given.

<sup>(9)</sup> See in this context: Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraphs 92 and 93.

<sup>(10)</sup> Settled case law in the Community since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraph 86.

- While the Authority's discretion does not depend on how advanced the investigation of a case is, the stage of the investigation forms part of the circumstances of the case which the Authority may have to take into consideration <sup>(1)</sup>.
  - The Authority may decide that it is not appropriate to investigate a complaint where the practices in question have ceased. However, for this purpose, the Authority will have to ascertain whether anti-competitive effects persist and if the seriousness of the infringements or the persistence of their effects does not give the complaint an interest under the EEA Agreement <sup>(2)</sup>.
  - The Authority may also decide that it is not appropriate to investigate a complaint where the undertakings concerned agree to change their conduct in such a way that it can consider that there is no longer a sufficient interest under the EEA Agreement to intervene <sup>(3)</sup>.
45. Where it forms the view that a case does not display sufficient interest under the EEA Agreement to justify (further) investigation, the EFTA Surveillance Authority may reject the complaint on that ground. Such a decision can be taken either before commencing an investigation or after taking investigative measures <sup>(4)</sup>. However, the Authority is not obliged to set aside a complaint for lack of sufficiently strong interest under the EEA Agreement <sup>(5)</sup>.

(b) *Assessment under Articles 53 and 54*

46. The examination of a complaint under Articles 53 and 54 involves two aspects, one relating to the facts to be established to prove an infringement of Articles 53 or 54 and the other relating to the legal assessment of the conduct complained of.
47. Where the complaint, while complying with the requirements of Article 5 of Chapter III and Form C, does not sufficiently substantiate the allegations put forward, it may be rejected on that ground <sup>(6)</sup>. In order to reject a complaint on the ground that the conduct complained of does not infringe the EEA competition rules or does not fall within their scope of application, the EFTA Surveillance Authority is not obliged to take into account circumstances that have not been brought to its attention by the complainant and that it could only have uncovered by the investigation of the case <sup>(7)</sup>.
48. The criteria for the legal assessment of agreements or practices under Articles 53 and 54 cannot be dealt with exhaustively in the present Notice. However, potential complainants should refer to the extensive guidance available from the EFTA Surveillance Authority <sup>(8)</sup>, in addition to other sources and in particular the case law of the EFTA Court and the Community Courts and the case practice of the Authority and the Commission <sup>(9)</sup>. Four specific issues are mentioned in the following points with indications on where to find further guidance.

<sup>(1)</sup> See in this context: Case C-449/98 P, *International Express Carriers Conference (IECC) v Commission of the European Communities*, [2001] ECR I-3875, paragraph 37.

<sup>(2)</sup> See in this context: Case T-77/95, *Syndicat français de l'Express International and Others v Commission of the European Communities*, [1997] ECR II-1, paragraph 57; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, paragraph 95. Cf. also Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities*, [1994] ECR II-285, paragraph 113, where an unwritten commitment between a Member State and a third country outside the common commercial policy was held not to suffice to establish that the conduct complained of had ceased.

<sup>(3)</sup> See in this context: Case T-110/95, *International Express Carriers (IECC) v Commission of the European Communities and Others*, [1998] ECR II-3605, paragraph 57, upheld by Case 449/98 P, *International Express Carriers (IECC) v Commission of the European Communities and Others*, [2001] ECR I-3875, paragraphs 44-47.

<sup>(4)</sup> See in this context: Case C-449/98 P, *International Express Carriers (IECC) v Commission of the European Communities e.a.*, [2001] ECR I-3875, paragraph 37.

<sup>(5)</sup> See in this context: Case T-77/92, *Parker Pen v Commission of the European Communities*, [1994] ECR II-549, paragraphs 64 and 65.

<sup>(6)</sup> Case 298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities*, [1985] ECR 1105, paragraphs 21-24; Case T-198/98, *Micro Leader Business v Commission of the European Communities*, [1999] ECR II-3989, paragraphs 32-39.

<sup>(7)</sup> See in this context: Case T-319/99, *Federacion Nacional de Empresas (FENIN) v Commission of the European Communities*, not yet published in [2003] ECR, paragraph 43.

<sup>(8)</sup> Extensive guidance can be found on the Authority's website at: <http://www.eftasurv.int/fieldsofwork/fieldcompetition/>

<sup>(9)</sup> 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.

49. Agreements and practices fall within the scope of application of Articles 53 and 54 where they are capable of affecting trade between the Contracting Parties to the EEA Agreement. Where an agreement or practice does not fulfil this condition, national competition law may apply, but not EEA competition law. Extensive guidance on this subject can be found in the Notice on the effect on trade concept <sup>(1)</sup>.
50. Agreements falling within the scope of Article 53 may be agreements of minor importance which are deemed not to restrict competition appreciably. Guidance on this issue can be found in the EFTA Surveillance Authority's *de minimis* Notice <sup>(2)</sup>.
51. Agreements that fulfil the conditions of a block exemption regulation are deemed to satisfy the conditions of Article 53(3). For the EFTA Surveillance Authority to withdraw the benefit of the block exemption pursuant to Article 29 of Chapter II, it must find that upon individual assessment an agreement to which the exemption regulation applies has certain effects which are incompatible with Article 53(3).
52. Agreements that restrict competition within the meaning of Article 53(1) of the EEA Agreement may fulfil the conditions of Article 53(3) of the EEA Agreement. Pursuant to Article 1(2) of Chapter II and without a prior administrative decision being required, such agreements are not prohibited. Guidance on the conditions to be fulfilled by an agreement pursuant to Article 53(3) can be found in the Notice on Article 53(3) <sup>(3)</sup>.

#### D. The EFTA Surveillance Authority's procedures when dealing with complaints

##### (a) Overview

53. As recalled above, the EFTA Surveillance Authority is not obliged to carry out an investigation on the basis of every complaint submitted with a view to establishing whether an infringement has been committed. However, the Authority is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to infringe Articles 53 and 54 <sup>(4)</sup>.
54. In the EFTA Surveillance Authority's procedure for dealing with complaints, different stages can be distinguished <sup>(5)</sup>.
55. During the first stage, following the submission of the complaint, the EFTA Surveillance Authority examines the complaint and may collect further information in order to decide what action it will take on the complaint. That stage may include an informal exchange of views between the Authority and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned. In this stage, the Authority may give an initial reaction to the complainant allowing the complainant an opportunity to expand on his allegations in the light of that initial reaction.
56. In the second stage, the EFTA Surveillance Authority may investigate the case further with a view to initiating proceedings pursuant to Article 7(1) of Chapter II against the undertakings complained of. Where the Authority considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time-limit which it fixes (Article 7(1) of Chapter III).

<sup>(1)</sup> Notice on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement, not yet published.

<sup>(2)</sup> Authority Notice on agreements of minor importance which do not appreciably restrict competition under Article 53(1) of the EEA Agreement (*de minimis*) (OJ C 67, 20.3.2003, p. 20) and EEA Supplement to the OJ No 15, 20.3.2003, p. 11.

<sup>(3)</sup> Authority Notice — Guidelines on the application of Article 53(3) of the EEA Agreement, not yet published.

<sup>(4)</sup> See in this context: Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities*, [1983] ECR 3045, paragraph 19; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paragraph 79.

<sup>(5)</sup> See in this context: Cf. Case T-64/89, *Automec v Commission of the European Communities*, [1990] ECR II-367, paragraphs 45-47; Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities*, [1994] ECR II-285, paragraph 29.

57. If the complainant fails to make known its views within the time-limit set by the EFTA Surveillance Authority, the complaint is deemed to have been withdrawn (Article 7(3) of Chapter III). In all other cases, in the third stage of the procedure, the Authority takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint <sup>(1)</sup>.
58. Where the EFTA Surveillance Authority rejects a complaint pursuant to Article 13 of Chapter II on the grounds that another authority is dealing or has dealt with the case, the Authority proceeds in accordance with Article 9 of Chapter III.
59. Throughout the procedure, complainants benefit from a range of rights as provided in particular in Articles 6 to 8 of Chapter III. However, proceedings of the EFTA Surveillance Authority in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand. Accordingly, the procedural rights of complainants are less far-reaching than the right to a fair hearing of the companies which are the subject of an infringement procedure <sup>(2)</sup>.

(b) *Indicative time limit for informing the complainant of the EFTA Surveillance Authority's proposed action*

60. The EFTA Surveillance Authority is under an obligation to decide on complaints within a reasonable time <sup>(3)</sup>. What is a reasonable duration depends on the circumstances of each case and in particular, its context, the various procedural steps followed by the Authority, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved <sup>(4)</sup>.
61. The EFTA Surveillance Authority will in principle endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the reception of the complaint. Thus, subject to the circumstances of the individual case and in particular the possible need to request complementary information from the complainant or third parties, the Authority will in principle inform the complainant within four months whether or not it intends to investigate its case further. This time-limit does not constitute a binding statutory term.
62. Accordingly, within this four month period, the EFTA Surveillance Authority may communicate its proposed course of action to the complainant as an initial reaction within the first phase of the procedure (see point 55 above). The Authority may also, where the examination of the complaint has progressed to the second stage (see point 56 above), directly proceed to informing the complainant about its provisional assessment by a letter pursuant to Article 7(1) of Chapter III.
63. To ensure the most expeditious treatment of their complaint, it is desirable that complainants cooperate diligently in the procedures <sup>(5)</sup>, for example by informing the EFTA Surveillance Authority of new developments.

(c) *Procedural rights of the complainant*

64. Where the EFTA Surveillance Authority addresses a statement of objections to the companies complained of pursuant to Article 10(1) of Chapter III, the complainant is entitled to receive a copy of this document from which business secrets and other confidential information of the companies concerned have been removed (non-confidential version of the statement of objections; cf. Article 6(1) of Chapter III). The complainant is invited to comment in writing on the statement of objections. A time-limit will be set for such written comments.

<sup>(1)</sup> See in this context: Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, paragraph 36.

<sup>(2)</sup> Joined Cases 142 and 156/84, *British American Tobacco Company and R. J. Reynolds Industries v Commission of the European Communities*, [1987] ECR 249, paragraphs 19-20.

<sup>(3)</sup> See in this context: Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, paragraph 37.

<sup>(4)</sup> See in this context: Joined Cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities*, [1997] ECR 1739, paragraph 57.

<sup>(5)</sup> The notion of 'diligence' on the part of the complainant is used by the Court of First Instance of the European Communities in Case T-77/94, *Vereniging van Groothandelaren in Bloemkwekerijprodukten and Others v Commission of the European Communities*, [1997] ECR II-759, paragraph 75.

65. Furthermore, the EFTA Surveillance Authority may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been addressed, if the complainants so request in their written comments <sup>(1)</sup>.
66. Complainants may submit, of their own initiative or following a request by the EFTA Surveillance Authority, documents that contain business secrets or other confidential information. Confidential information will be protected by the Authority <sup>(2)</sup>. Under Article 16 of Chapter III, complainants are obliged to identify confidential information, give reasons why the information is considered confidential and submit a separate non-confidential version when they make their views known pursuant to Articles 6(1) and 7(1) of Chapter III, as well as when they subsequently submit further information in the course of the same procedure. Moreover, the Authority may, in all other cases, request complainants which produce documents or statements to identify the documents or parts of the documents or statements which they consider to be confidential. It may in particular set a deadline for the complainant to specify why it considers a piece of information to be confidential and to provide a non-confidential version, including a concise description or non-confidential version of each piece of information deleted.
67. The qualification of information as confidential does not prevent the EFTA Surveillance Authority from disclosing and using information where that is necessary to prove an infringement of Articles 53 or 54 <sup>(3)</sup>. Where business secrets and confidential information are necessary to prove an infringement, the Authority must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.
68. Where the EFTA Surveillance Authority takes the view that a complaint should not be further examined, because there is no sufficient interest under the EEA Agreement in pursuing the case further or on other grounds, it will inform the complainant in the form of a letter which indicates its legal basis (Article 7(1) of Chapter III), sets out the reasons that have led the Authority to provisionally conclude in the sense indicated and provides the complainant with the opportunity to submit supplementary information or observations within a time-limit set by the Authority. The Authority will also indicate the consequences of not replying pursuant to Article 7(3) of Chapter III, as explained below.
69. Pursuant to Article 8(1) of Chapter III, the complainant has the right to access the information on which the Authority bases its preliminary view. Such access is normally provided by annexing to the letter a copy of the relevant documents.
70. The time-limit for observations by the complainant on the letter pursuant to Article 7(1) of Chapter III will be set in accordance with the circumstances of the case. It will not be shorter than four weeks (Article 17(2) of Chapter III). If the complainant does not respond within the time-limit set, the complaint is deemed to have been withdrawn pursuant to Article 7(3) of Chapter III. Complainants are also entitled to withdraw their complaint at any time if they so wish.
71. The complainant may request an extension of the time-limit for the provision of comments. Depending on the circumstances of the case, the EFTA Surveillance Authority may grant such an extension.
72. In that case, where the complainant submits supplementary observations, the EFTA Surveillance Authority takes cognisance of those observations. Where they are of such a nature as to make the Authority change its previous course of action, it may initiate a procedure against the companies complained of. In this procedure, the complainant has the procedural rights explained above.
73. Where the observations of the complainant do not alter the EFTA Surveillance Authority's proposed course of action, it rejects the complaint by decision <sup>(4)</sup>.

<sup>(1)</sup> Article 6(2) of Chapter III.

<sup>(2)</sup> Article 122 of the EEA Agreement, Article 14(4) of the Surveillance and Court Agreement, Article 28 of Chapter II and Articles 15 and 16 of Chapter III.

<sup>(3)</sup> Article 27(2) of Chapter II.

<sup>(4)</sup> Article 7(2) of Chapter III, see in this context Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, paragraph 36.

(d) *The EFTA Surveillance Authority decision rejecting a complaint*

74. Where the EFTA Surveillance Authority rejects a complaint by decision pursuant to Article 7(2) of Chapter III, it must state the reasons in accordance with Article 16 of the Surveillance and Court Agreement, i.e. in a way that is appropriate to the act at issue and takes into account the circumstances of each case.
75. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the EFTA Surveillance Authority in such a way as to enable the complainant to ascertain the reasons for the decision and to enable the EFTA Court to exercise its power of review. However, the Authority is not obliged to adopt a position on all the arguments relied on by the complainant in support of its complaint. It only needs to set out the facts and legal considerations which are of decisive importance in the context of the decision <sup>(1)</sup>.
76. Where the EFTA Surveillance Authority rejects a complaint in a case that also gives rise to a decision pursuant to Article 10 of Chapter II (Finding of inapplicability of Articles 53 or 54) or Article 9 of Chapter II (Commitments), the decision rejecting a complaint may refer to that other decision adopted on the basis of the provisions mentioned.
77. A decision to reject a complaint is subject to appeal before the EFTA Court <sup>(2)</sup>.
78. A decision rejecting a complaint prevents complainants from requiring the reopening of the investigation unless they put forward significant new evidence. Accordingly, further correspondence on the same alleged infringement by former complainants cannot be regarded as a new complaint unless significant new evidence is brought to the attention of the EFTA Surveillance Authority. However, the Authority may re-open a file under appropriate circumstances.
79. A decision to reject a complaint does not definitively rule on the question of whether or not there is an infringement of Articles 53 or 54, even where the EFTA Surveillance Authority has assessed the facts on the basis of Articles 53 and 54. The assessments made by the Authority in a decision rejecting a complaint therefore do not prevent an EFTA State court or competition authority from applying Articles 53 and 54 to agreements and practices brought before it. The assessments made by the Authority in a decision rejecting a complaint constitute facts which EFTA States' courts or competition authorities may take into account in examining whether the agreements or conduct in question are in conformity with Articles 53 and 54 <sup>(3)</sup>.

(e) *Specific situations*

80. According to Article 8 of Chapter II, the EFTA Surveillance Authority may on its own initiative order interim measures where there is the risk of serious and irreparable damage to competition. Article 8 of Chapter II makes it clear that interim measures cannot be applied for by complainants under Article 7(2) of Chapter II. Requests for interim measures by undertakings can be brought before EFTA States' courts which are well placed to decide on such measures <sup>(4)</sup>.
81. Some persons may wish to inform the EFTA Surveillance Authority about suspected infringements of Articles 53 or 54 without having their identity revealed to the undertakings concerned by the allegations. These persons are welcome to contact the Authority. The Authority is bound to respect an informant's request for anonymity <sup>(5)</sup>, unless the request to remain anonymous is manifestly unjustified.

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<sup>(1)</sup> Settled case law, cf. Case E-2/94, *Scottish Salmon Growers Association Limited v the EFTA Surveillance Authority*, EFTA Court Report [1994-1995] p. 59, Case E-4/97, *Norwegian Bankers' Association v the EFTA Surveillance Authority*, EFTA Court Report [1998], p. 38, and in the Community i.a. Case T-114/92, *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities*, [1995] ECR II-147, paragraph 41.

<sup>(2)</sup> Article 36(2) of the Surveillance and Court Agreement. See in the Community context: Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities*, [1983] ECR 3045.

<sup>(3)</sup> See in this context: Case T-575/93, *Casper Koelman v Commission of the European Communities*, [1996] ECR II-1, paragraphs 41-43.

<sup>(4)</sup> Depending on the case, EFTA States' competition authorities may equally be well placed to adopt interim measures.

<sup>(5)</sup> Case 145/83, *Stanley George Adams v Commission of the European Communities*, [1985] ECR 3539.

## ANNEX

## FORM C

**COMPLAINT PURSUANT TO ARTICLE 7 OF CHAPTER II****I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant *vis-à-vis* the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

**II. Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Articles 53 or 54 of the EEA Agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations ...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers, etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between EC Member States or between the Community and one or more EFTA States or between EFTA States may be affected by the conduct complained of.

**III. Finding sought from the EFTA Surveillance Authority and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the EFTA Surveillance Authority.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Chapter II. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the EFTA Surveillance Authority would be liable to remedy the alleged grievance.

**IV. Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature