PROTOCOL 23 {[1]}

CONCERNING THE COOPERATION BETWEEN THE SURVEILLANCE AUTHORITIES (ARTICLE 58)

GENERAL PRINCIPLES

Article 1

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.

2. The EFTA Surveillance Authority and the EC Commission, in accordance with their internal rules, respecting Article 56 of the Agreement and Protocol 22 and the autonomy of both sides in their decisions, shall cooperate in the handling of individual cases falling under Article 56(1)(b) and (c), (2), second sentence and (3), as provided for in the provisions below.

3. For the purposes of this Protocol, the term 'territory of a surveillance authority' shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

{[2]}*Article 1A*

In the interests of homogeneous interpretation by the EFTA Surveillance Authority and the EC Commission of Articles 53 and 54 of the Agreement and of Articles 81 and 82 of the Treaty, the EFTA Surveillance Authority and the competent authorities of the EFTA States may also be allowed to participate in meetings of the network of public authorities referred to in recital 15 of Council Regulation (EC) No 1/2003 for the purposes of discussion of general policy issues only. The EFTA Surveillance Authority, the EC Commission and the competent authorities of the EFTA states and of the EC Member States shall have the power to make available all information necessary for the purpose of such general policy discussion in that network. Information made available in this context shall not be used for enforcement purposes. This participation shall be without prejudice to rights of participation of the EFTA States and the EFTA Surveillance Authority granted under the EEA Agreement.

THE INITIAL PHASE OF THE PROCEEDINGS

Article 2

1. In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other complaints to the extent that it is not apparent that these have been addressed to both surveillance authorities. They shall also inform each other when opening *ex officio* procedures.

{[1]} Text of protocol 23 replaced by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[2]} Article inserted by Decision No 147/2007 (OJ No L 100, 10.4.2008, p. 99 and EEA Supplement No 19, 10.4.2008, p.96), e.i.f. 27.10.2007.

2. The EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other information received from the national competition authorities within their respective territories concerning the commencement of the first formal investigative measure in cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement.

3. The surveillance authority which has received information as provided for in the first paragraph may present its comments thereon within 30 working days of its receipt.

Article 3

1. The competent surveillance authority shall, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, consult the other surveillance authority when:

   - addressing to the undertakings or associations of undertakings concerned its statement of objections,

   - publishing its intention to adopt a decision declaring Article 53 or 54 of the Agreement not applicable, or

   - publishing its intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

2. The other surveillance authority may deliver its comments within the time limits set out in the abovementioned publication or statement of objections.

3. Observations received from the undertakings concerned or third parties shall be transmitted to the other surveillance authority.

Article 4

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall transmit to the other surveillance authority the administrative letters by which a file is closed or a complaint rejected.

Article 5

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall invite the other surveillance authority to be represented at hearings of the undertakings concerned. The invitation shall also extend to the States falling within the competence of the other surveillance authority.

ADVISORY COMMITTEES

Article 6

1. In cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall, in due time, inform the other surveillance authority of the date of the meeting of the Advisory Committee and transmit the relevant documentation.

2. All documents forwarded for that purpose from the other surveillance authority shall be presented to the Advisory Committee of the surveillance authority which is competent to decide on a case in accordance with Article 56 together with the material sent out by that surveillance authority.

3. Each surveillance authority and the States falling within its competence shall be entitled to be present in the Advisory Committees of the other surveillance authority and to express their views therein; they shall not have, however, the right to vote.

4. Consultations may also take place by written procedure. However, if the surveillance authority which is not competent to decide on a case in accordance with Article 56 so requests, the competent surveillance authority shall convene a meeting.

REQUEST FOR DOCUMENTS AND THE RIGHT TO MAKE OBSERVATIONS

Article 7

The surveillance authority which is not competent to decide on a case in accordance with Article 56 of the Agreement may request from the other surveillance authority at all stages of the proceedings copies of the most important documents concerning cases falling under Article 56(1)(b) and (c), (2) second sentence and (3) of the Agreement, and may furthermore, before a final decision is taken, make any observations it considers appropriate.

ADMINISTRATIVE ASSISTANCE

Article 8

1. When the competent surveillance authority, as defined in Article 56 of the Agreement, by simple request or by decision requires an undertaking or association of undertakings located within the territory of the other surveillance authority to supply information, it shall at the same time forward a copy of the request or decision to the other surveillance authority.

2. At the request of the competent surveillance authority, as defined in Article 56 of the Agreement, the other surveillance authority shall, in accordance with its internal rules, undertake inspections within its territory in cases where the competent surveillance authority so requesting considers it to be necessary.

3. The competent surveillance authority is entitled to be represented and take an active part in inspections carried out by the other surveillance authority in respect of paragraph 2.

4. All information obtained during such inspections on request shall be transmitted to the surveillance authority which requested the inspections immediately after their finalization.

5. Where the competent surveillance authority, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, carries out inspections within its territory, it shall inform the other surveillance authority of the fact that such inspections have taken place and, on request, transmit to that authority the relevant results of the inspections.

6. When the competent surveillance authority as defined in Article 56 of the Agreement interviews a consenting natural or legal person in the territory of the other surveillance authority, the latter shall be informed thereof. The surveillance authority which is not competent may be present during such an interview, as well as officials from the competition authority on whose territory the interviews are conducted.

EXCHANGE AND USE OF INFORMATION

Article 9

1. For the purpose of applying Articles 53 and 54 of the Agreement, the EFTA Surveillance Authority and the EC Commission shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information acquired or exchanged pursuant to this Protocol shall only be used in evidence for the purpose of procedures under Articles 53 and 54 of the Agreement and in respect of the subject matter for which it was collected.

3. Where the information referred to in Article 2 (1) and (2) concerns a case which has been initiated as a result of an application for leniency, that information cannot be used by the receiving surveillance authority as the basis for starting an inspection on its own behalf. This is without prejudice to any power of the surveillance authority to open an inspection on the basis of information received from other sources.

4. Save as provided under paragraph 5, information voluntarily submitted by a leniency applicant will only be transmitted to the other surveillance authority with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to the other surveillance authority if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. Once the leniency applicant has given consent to the transmission of information to the other surveillance authority, that consent may not be withdrawn. This paragraph is

without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

5. Notwithstanding paragraph 4, the consent of the applicant for the transmission of information to the other surveillance authority is not required in any of the following circumstances:

a) no consent is required where the receiving surveillance authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting surveillance authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving surveillance authority;

b) no consent is required where the receiving surveillance authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting surveillance authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant or on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme or on any employee or former employee of the leniency applicant or of any of the aforementioned persons. A copy of the receiving authority's written commitment will be provided to the applicant.

c) in the case of information collected by a surveillance authority under Article 8(2) at the request of the surveillance authority to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the surveillance authority to whom the application was made.

PROFESSIONAL SECRECY

Article 10

1. For the purpose of carrying out the tasks entrusted to it by this Protocol, the EC Commission and the EFTA Surveillance Authority can forward to the States falling within their respective territories all information acquired or exchanged by them pursuant to this Protocol.

2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and servants of other authorities of the States shall not disclose information acquired or exchanged by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.

3. Rules on professional secrecy and restricted use of information provided for in the Agreement or in the legislation of the Contracting Parties shall not prevent exchange of information as set out in this Protocol.

ACCESS TO THE FILE{[3]}

Article 10A

When a surveillance authority grants access to the file to the parties to whom it has addressed a statement of objections, the right of access to the file shall not extend to internal documents of the other surveillance authority or of the competition authorities of the EC Member States and the EFTA States. The right of access to the file shall also not extend to correspondence between the surveillance authorities, between a surveillance authority and the competition authorities of the EC Member States or EFTA States or between the competition authorities of the EC

{[3]} Heading and article 10A inserted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

Member States or EFTA States where such correspondence is contained in the file of the competent surveillance authority.

COMPLAINTS AND TRANSFERRAL OF CASES

Article 11

1. Complaints may be addressed to either surveillance authority. Complaints addressed to the surveillance authority which, pursuant to Article 56, is not competent to decide on a given case shall be transferred without delay to the competent surveillance authority.

2. If, in the preparation or initiation of ex officio proceedings, it becomes apparent that the other surveillance authority is competent to decide on a case in accordance with Article 56 of the Agreement, this case shall be transferred to the competent surveillance authority.

3. Once a case is transferred to the other surveillance authority as provided for in paragraphs 1 and 2, the case may not be transferred back. A case may not be transferred after

   - the statement of objections has been sent to the undertakings or associations of undertakings concerned,

   - a letter has been sent to the complainant informing him that there are insufficient grounds for pursuing the complaint,

   - the publication of the intention to adopt a decision declaring Article 53 or 54 not applicable, or the publication of the intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

LANGUAGES

Article 12

Any natural or legal person shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the European Community which they choose as regards complaints. This shall also cover all instances of a proceeding, whether it be opened following a complaint or *ex officio* by the competent surveillance authority.