

# PROTOCOL 4

## *ON THE FUNCTIONS AND POWERS OF THE EFTA SURVEILLANCE AUTHORITY IN THE FIELD OF COMPETITION {<sup>1</sup>}*

### TABLE OF CONTENTS WITH REFERENCES TO THE CORRESPONDING EC ACTS OR PROVISIONS OF THE EEA AGREEMENT

#### PART I INTRODUCTION:

**Chapter I** Introduction

#### PART II APPLICATION OF ARTICLES 53 AND 54 OF THE EEA AGREEMENT:

**Chapter II** Implementation of the rules on competition laid down in Articles 53 and 54 of the EEA Agreement (cf. Regulation (EC) No 1/2003, as amended by Regulations (EC) No 411/2004 and 1419/2006)

**Chapter III** Rules relating to the conduct of proceedings by the EFTA Surveillance Authority pursuant to Articles 53 and 54 of the EEA Agreement (cf. Regulation (EC) No 773/2004, as amended by Regulations (EC) No 1792/2006 and 622/2008)

#### PART III CONTROL OF CONCENTRATIONS:

**Chapter IV** Rules relating to control of concentrations between undertakings (cf. Articles 4(4) and (5) and 6-24 of Regulation (EC) No 139/2004)

**Chapter V** Implementing Chapter IV on the control of concentrations between undertakings (cf. Regulation (EC) No 802/2004, as amended by Regulations (EC) No 1792/2006 and 1033/2008)

#### PART IV COAL AND STEEL:

**Chapter VI** Rules applicable to undertakings in the field of coal and steel

*Section I* General rules regarding agreements and concentrations (cf. Articles 65(2), subparagraphs 3 to 5, (3), (4), subparagraphs 2 and (5) and 66(2), subparagraphs 2 to 4, and (4) to (6), 47, 36(1) and 82 of ECSC Treaty)

*Section II* Information to be furnished (Article 2(4) of Section I) (cf. Decision 26/54)

*Section III* Limitation periods in proceedings and the enforcement of sanctions under Protocol 25 to the EEA Agreement and the present Chapter (cf. Decision 715/78)

*Section IV* Powers of officials and agents of the EFTA Surveillance Authority instructed to carry out the checks provided for in Protocol 25 to the EEA Agreement and in this Chapter (cf. Decision 379/84)

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{<sup>1</sup>} As amended by the Agreements amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), signed in Brussels on 24 November 1993, 7 March 1994, 14 March 1997, 27 March 1998, 17 July 1998, 15 July 1999, 11 May 2000, 4 June 2004, 24 September 2004, 3 December 2004, 11 March 2005, 10 March 2006, 1 February 2007, 18 November 2009, 27 June 2014 and 9 February 2018.

**PART V LIMITATION PERIODS, TRANSITIONAL AND OTHER RULES:**

**Chapter VII** Limitation periods in proceedings and the enforcement of sanctions under the rules relating to transport and competition as contained in Chapters IV and V (cf. Regulation (EEC) No 2988/74, as amended by Regulation (EC) No 1/2003)

**Chapter VIII** Transitional and other rules

*Section I* Rules applicable to former Chapters II to XII and XV (cf. former Articles 5 to 7 and 9, Article 8 and Articles 10 et seq. of Protocol 21 to the EEA Agreement)

*Section II* Rules applicable to former Chapters XIII and XIV (cf. Article 25(2) of Regulation (EC) No 4064/89)

**APPENDICES**

*Appendix 1* Form referred to in Article 5(1) of Chapter III (Form C)

*Appendix 2* Form referred to in Article 3(1) of Chapter V (Form CO)

*Appendix 3* Form referred to in Article 3(1) of Chapter V (Short Form CO)

*Appendix 4* Form referred to in Article 6(1) of Chapter V (Form RS)

*Appendix 5* Form referred to in Article 20 of Chapter V (Form RM))

**PART I****GENERAL RULES****CHAPTER I****INTRODUCTION*****Article 1***

This Protocol sets out provisions for the implementation of competition rules applicable to undertakings in the EEA Agreement, and in particular for the implementation of Protocols 21 to 25 to that Agreement.

***Article 2***

1. Chapters II to V apply to all sectors covered by the EEA Agreement unless otherwise provided.
2. Chapters II to V shall not apply to cases covered by Chapter VI on the conditions set out therein.

***Article 3***

Chapter VIII sets out the transitional rules applicable for former Chapters II to XV.<sup>2</sup>

#### *Article 4*

The EFTA Surveillance Authority may, in accordance with Article 49 of this Agreement, submit to the Governments of the EFTA States proposals for amendments to this Protocol including its Appendices.

## **PART II**

### **APPLICATION OF ARTICLES 53 AND 54 OF THE EEA AGREEMENT**

#### **CHAPTER II**

#### **IMPLEMENTATION OF THE RULES ON COMPETITION LAID DOWN IN ARTICLES 53 AND 54 OF THE EEA AGREEMENT**

#### **SECTION I**

#### **PRINCIPLES**

##### *Article 1*

##### **Application of Articles 53 and 54 of the EEA Agreement**

1. Agreements, decisions and concerted practices caught by Article 53(1) of the EEA Agreement which do not satisfy the conditions of Article 53(3) of the EEA Agreement shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 53(1) of the EEA Agreement which satisfy the conditions of Article 53(3) of the EEA Agreement shall not be prohibited, no prior decision to that effect being required.
3. The abuse of a dominant position referred to in Article 54 of the EEA Agreement shall be prohibited, no prior decision to that effect being required.

##### *Article 2*

##### **Burden of proof**

In any national or EFTA proceedings for the application of Articles 53 and 54 of the EEA Agreement, the burden of proving an infringement of Article 53(1) or of Article 54 of the EEA Agreement shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 53(3) of the EEA Agreement shall bear the burden of proving that the conditions of that paragraph are fulfilled.

##### *Article 3*

##### **Relationship between Articles 53 and 54 of the EEA Agreement and national competition laws**

1. Where the competition authorities of the EFTA States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 53(1) of the EEA Agreement which may affect trade between the Contracting Parties to the EEA Agreement within the meaning of that

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{2} The content of Chapter VIII has not been revised since the original adoption of Protocol 4 and it refers therefore to the Chapters of the Protocol as they were published in OJ L 344, 31.1.1994, p. 3.

provision, they shall also apply Article 53 of the EEA Agreement to such agreements, decisions or concerted practices. Where the competition authorities of the EFTA States or national courts apply national competition law to any abuse prohibited by Article 54 of the EEA Agreement, they shall also apply Article 54 of the EEA Agreement.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between the Contracting Parties to the EEA Agreement but which do not restrict competition within the meaning of Article 53(1) of the EEA Agreement, or which fulfil the conditions of Article 53(3) of the EEA Agreement or which are covered by an act for the application of Article 53(3) of the EEA Agreement. EFTA States shall not under this act be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
3. Without prejudice to general principles and other provisions of EEA law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the EFTA States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 53 and 54 of the EEA Agreement.

## SECTION II

### POWERS

#### *Article 4*

##### **Powers of the EFTA Surveillance Authority**

For the purpose of applying Articles 53 and 54 of the EEA Agreement, the EFTA Surveillance Authority shall have the powers provided for by this Chapter.

#### *Article 5*

##### **Powers of the competition authorities of the EFTA States**

The competition authorities of the EFTA States shall have the power to apply Articles 53 and 54 of the EEA Agreement in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

#### *Article 6*

##### **Powers of the national courts**

National courts shall have the power to apply Articles 53 and 54 of the EEA Agreement.

## SECTION III

### DECISIONS BY THE EFTA SURVEILLANCE AUTHORITY

### *Article 7*

#### **Finding and termination of infringement**

1. Where the EFTA Surveillance Authority, acting on a complaint or on its own initiative, finds that there is an infringement of Article 53 or of Article 54 of the EEA Agreement, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the EFTA Surveillance Authority has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.
2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and EFTA States.

### *Article 8*

#### **Interim measures**

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the EFTA Surveillance Authority, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.
2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

### *Article 9*

#### **Commitments**

1. Where the EFTA Surveillance Authority intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the EFTA Surveillance Authority in its preliminary assessment, the EFTA Surveillance Authority may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the EFTA Surveillance Authority.
2. The EFTA Surveillance Authority may, upon request or on its own initiative, reopen the proceedings:
  - (a) where there has been a material change in any of the facts on which the decision was based;
  - (b) where the undertakings concerned act contrary to their commitments; or
  - (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

### *Article 10*

#### **Finding of inapplicability**

Where the public interest under the EEA Agreement relating to the application of Articles 53 and 54 of the EEA Agreement so requires, the EFTA Surveillance Authority, acting on its own initiative, may by decision find that Article 53 of the EEA Agreement is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 53(1) of the EEA Agreement are not fulfilled, or because the conditions of Article 53(3) of the EEA Agreement are satisfied.

The EFTA Surveillance Authority may likewise make such a finding with reference to Article 54 of the EEA Agreement.

## **SECTION IV**

## **COOPERATION**

### *Article 11*

#### **Cooperation between the EFTA Surveillance Authority and the competition authorities of the EFTA States**

1. The EFTA Surveillance Authority and the competition authorities of the EFTA States shall apply the EEA competition rules in close cooperation.
2. The EFTA Surveillance Authority shall transmit to the competition authorities of the EFTA States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of an EFTA State, the EFTA Surveillance Authority shall provide it with a copy of other existing documents necessary for the assessment of the case.
3. The competition authorities of the EFTA States shall, when acting under Article 53 or Article 54 of the EEA Agreement, inform the EFTA Surveillance Authority in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other EFTA States.
4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption act, the competition authorities of the EFTA States shall inform the EFTA Surveillance Authority. To that effect, they shall provide the EFTA Surveillance Authority with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other EFTA States. At the request of the EFTA Surveillance Authority, the acting competition authority shall make available to the EFTA Surveillance Authority other documents it holds which are necessary for the assessment of the case. The information supplied to the EFTA Surveillance Authority may be made available to the competition authorities of the other EFTA States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 53 or Article 54 of the EEA Agreement.
5. The competition authorities of the EFTA States may consult the EFTA Surveillance Authority on any case involving the application of EEA law.
6. The initiation by the EFTA Surveillance Authority of proceedings for the adoption of a decision under Section III should relieve the competition authorities of the EFTA States of their competence to apply Articles 53 and 54 of the EEA Agreement. If a competition authority of an EFTA State is already acting on a case, the EFTA Surveillance Authority shall only initiate proceedings after consulting with that national competition authority.
7. The EFTA Surveillance Authority shall forthwith transmit to the competent authorities of the EFTA States information received from the EC Commission pursuant to Articles 2, 3(1) first indent, 4, 7, 8(1) and 11 of Protocol 23 to the EEA Agreement. The EFTA Surveillance Authority may also transmit other information pursuant to Protocol 23 of the EEA Agreement.

#### *Article 11 A*

##### **Leniency information received pursuant to Protocol 23 to the EEA Agreement**

1. The competition authorities of the EFTA States cannot use information referred to in Article 11(7) as the basis for starting an investigation on their own behalf in cases where the EFTA Surveillance Authority received that information from the EC Commission in accordance with Article 2(1) or (2) of Protocol 23 to the EEA Agreement, and that information concerns a case which has been initiated as a result of an application for leniency. This is without prejudice to any power of the competition authorities of the EFTA States to open an investigation on the basis of information received from other sources.
2. The limitations and conditions stated in Article 9(4) and 9(5) of Protocol 23 to the EEA Agreement shall apply *mutatis mutandis* between the EFTA Surveillance Authority and the competition authorities of the EFTA States to the forwarding of information according to Article 11(7).

#### *Article 11 B*

##### **Leniency information originating from the EFTA Surveillance Authority or from the competition authorities of the EFTA States**

1. Where the EFTA Surveillance Authority or a competition authority of an EFTA State deals with a case which has been initiated as a result of a leniency application, information submitted to the other authorities pursuant to Article 11 (1) to (6) in such cases will not be used by these authorities as the basis for starting an investigation on their own behalf whether under the competition rules of the EEA Agreement or, in the case of competition authorities of the EFTA States, under their national competition law or other laws. This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources or, subject to paragraphs (2) and (3) below, to request, be provided with and use information pursuant to Article 12 from any of the other authorities, including the authority to whom the leniency application was submitted.
2. Save as provided under paragraph 3, information voluntarily submitted by a leniency applicant will only be

transmitted to another authority pursuant to Article 12 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 another authority pursuant to Article 12 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 another 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.

3. Notwithstanding the above, the consent of the applicant for the transmission of information to another authority pursuant to Article 12 is not required in any of the following circumstances:
  - (a) No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting 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 authority.
  - (b) No consent is required where the receiving 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 authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions:
    - (i) on the leniency applicant;
    - (ii) 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
    - (iii) on any employee or former employee of any of the persons covered by (i) or (ii).A copy of the receiving authority's written commitment will be provided to the applicant.
  - (c) In the case of information collected by a competition authority of an EFTA State under Article 22(1) on behalf of and for the account of the authority to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the authority to whom the application was made.

## *Article 12*

### **Exchange of information**

1. For the purpose of applying Articles 53 and 54 of the EEA Agreement the EFTA Surveillance Authority and the competition authorities of the EFTA States 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 exchanged shall only be used in evidence for the purpose of applying Article 53 or Article 54 of the EEA Agreement and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to EEA competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.
3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:
  - the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 53 or Article 54 of the EEA Agreement or, in the absence thereof,
  - the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

## *Article 13*

### **Suspension or termination of proceedings**

1. Where competition authorities of two or more EFTA States have received a complaint or are acting on their own initiative under Article 53 or Article 54 of the EEA Agreement against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The EFTA Surveillance Authority may likewise reject a complaint on the ground that a competition authority of an EFTA State is dealing with the case.
2. Where a competition authority of an EFTA State or the EFTA Surveillance Authority has received a complaint

against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

#### *Article 14*

##### **Advisory Committee**

1. The EFTA Surveillance Authority shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).
2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the EFTA States. For meetings in which issues other than individual cases are being discussed, an additional EFTA State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

The EC Commission and the EC Member States shall be entitled to be present in the Advisory Committee and to express their views therein, as provided for in Protocol 23 to the EEA Agreement. However, their representatives shall not have the right to vote.

3. The consultation may take place at a meeting convened and chaired by the EFTA Surveillance Authority, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the EFTA Surveillance Authority dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any EFTA State. The Advisory Committee shall deliver a written opinion on the EFTA Surveillance Authority's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.
4. Consultation may also take place by written procedure. However, if any EFTA State or the EC Commission so requests, the EFTA Surveillance Authority shall convene a meeting. In case of written procedure, the EFTA Surveillance Authority shall determine a time limit of not less than 14 days within which the EFTA States are to put forward their observations for circulation to all other EFTA States. In case of decisions to be taken pursuant to Article 8, the time limit of 14 days is replaced by seven days. Where the EFTA Surveillance Authority determines a time limit for the written procedure which is shorter than those specified above, the proposed time limit shall be applicable in the absence of an objection by any EFTA State.
5. The EFTA Surveillance Authority shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the EFTA Surveillance Authority shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.
7. At the request of a competition authority of an EFTA State, the EFTA Surveillance Authority shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of an EFTA State under Article 53 or Article 54 of the EEA Agreement. The EFTA Surveillance Authority may also do so on its own initiative. In either case, the EFTA Surveillance Authority shall inform the competition authority concerned.

A request may in particular be made by a competition authority of an EFTA State in respect of a case where the EFTA Surveillance Authority intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the EFTA States. The Advisory Committee may also discuss general issues of EEA competition law.

8. In view of the participation provided for in the second subparagraph of paragraph 2, the EC Commission shall receive an invitation to participate in consultations in accordance with paragraphs 3 and 4, and the relevant information as provided for in Article 6 of Protocol 23 to the EEA Agreement.

#### *Article 15*

##### **Cooperation with national courts**

1. In proceedings for the application of Article 53 or Article 54 of the EEA Agreement, courts of the EFTA States may ask the EFTA Surveillance Authority to transmit to them information in its possession or its opinion on questions concerning the application of the EEA competition rules.
2. EFTA States shall forward to the EFTA Surveillance Authority a copy of any written judgment of national courts deciding on the application of Article 53 or Article 54 of the EEA Agreement. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the EFTA States, acting on their own initiative, may submit written observations to the national courts of their EFTA State on issues relating to the application of Article 53 or Article 54 of the EEA Agreement. With the permission of the court in question, they may also submit oral observations to the national courts of their EFTA State. Where the coherent application of Article 53 or Article 54 of the EEA Agreement so requires, the EFTA Surveillance Authority, acting on its own initiative, may submit written observations to courts of the EFTA States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the EFTA States and the EFTA Surveillance Authority may request the relevant court of the EFTA State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the EFTA States under the law of the EFTA State.

### *Article 16*

#### **Uniform application of EEA competition law**

1. When national courts rule on agreements, decisions or practices under Article 53 or Article 54 of the EEA Agreement which are already the subject of a decision by the EFTA Surveillance Authority, they cannot take decisions running counter to the decision adopted by the EFTA Surveillance Authority. They must also avoid giving decisions which would conflict with a decision contemplated by the EFTA Surveillance Authority in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 34 of the Surveillance and Court Agreement.
2. When competition authorities of the EFTA States rule on agreements, decisions or practices under Article 53 or Article 54 of the EEA Agreement which are already the subject of a decision by the EFTA Surveillance Authority, they cannot take decisions which would run counter to the decision adopted by the EFTA Surveillance Authority.

## **SECTION V**

### **POWERS OF INVESTIGATION**

#### *Article 17*

##### **Investigations into sectors of the economy and into types of agreements**

1. Where the trend of trade between the Contracting Parties to the EEA Agreement, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the territory covered by the EEA Agreement, the EFTA Surveillance Authority may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the EFTA Surveillance Authority may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 53 and 54 of the EEA Agreement and may carry out any inspections necessary for that purpose.

The EFTA Surveillance Authority may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The EFTA Surveillance Authority may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply *mutatis mutandis*.

#### *Article 18*

##### **Requests for information**

1. In order to carry out the duties assigned to it by Articles 55 and 58 of the EEA Agreement, by the provisions set out in Protocol 23 and in Annex XIV to the EEA Agreement or by this Chapter, the EFTA Surveillance Authority may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.
2. When sending a simple request for information to an undertaking or association of undertakings, the EFTA Surveillance Authority shall state the legal basis and the purpose of the request, specify what information is required

and fix the time limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the EFTA Surveillance Authority requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the EFTA Court.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. The EFTA Surveillance Authority shall without delay forward a copy of the simple request or of the decision to the competition authority of the EFTA State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the EFTA State whose territory is affected.
6. At the request of the EFTA Surveillance Authority the governments and competition authorities of the EFTA States shall provide the EFTA Surveillance Authority with all necessary information to carry out the duties assigned to it by this Chapter.

### *Article 19*

#### **Power to take statements**

1. In order to carry out the duties assigned to it by this Chapter, the EFTA Surveillance Authority may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.
2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the EFTA Surveillance Authority shall inform the competition authority of the EFTA State in whose territory the interview takes place. If so requested by the competition authority of that EFTA State, its officials may assist the officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct the interview.

### *Article 20*

#### **The EFTA Surveillance Authority's powers of inspection**

1. In order to carry out the duties assigned to it by this Chapter, the EFTA Surveillance Authority may conduct all necessary inspections of undertakings and associations of undertakings.
1. The officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection are empowered:
  - (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
  - (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
  - (c) to take or obtain in any form copies of or extracts from such books or records;
  - (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
  - (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.
3. The officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the EFTA Surveillance Authority shall give notice of the inspection to the competition authority of the EFTA State in whose territory it is to be conducted.

The EFTA Surveillance Authority shall provide an authorisation as referred to in the first subparagraph to representatives of the EC Commission who shall take part in the investigation in accordance with Article 8(3) of Protocol 23 to the EEA Agreement.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the

EFTA Surveillance Authority. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the EFTA Court. The EFTA Surveillance Authority shall take such decisions after consulting the competition authority of the EFTA State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the EFTA State in whose territory the inspection is to be conducted shall, at the request of that authority or of the EFTA Surveillance Authority, actively assist the officials and other accompanying persons authorised by the EFTA Surveillance Authority. To this end, they shall enjoy the powers specified in paragraph 2.
6. Where the officials and other accompanying persons authorised by the EFTA Surveillance Authority find that an undertaking opposes an inspection ordered pursuant to this Article, the EFTA State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.
7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.
8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the decision by the EFTA Surveillance Authority is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the EFTA Surveillance Authority, directly or through the EFTA State competition authority, for detailed explanations in particular on the grounds the EFTA Surveillance Authority has for suspecting infringement of Articles 53 and 54 of the EEA Agreement, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the EFTA Surveillance Authority's file. The lawfulness of the decision by the EFTA Surveillance Authority shall be subject to review only by the EFTA Court.

### **Article 21**

#### **Inspection of other premises**

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 53 or Article 54 of the EEA Agreement, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the EFTA Surveillance Authority can by decision order an inspection to be conducted in such other premises, land and means of transport.
2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the EFTA Court. It shall in particular state the reasons that have led the EFTA Surveillance Authority to conclude that a suspicion in the sense of paragraph 1 exists. The EFTA Surveillance Authority shall take such decisions after consulting the competition authority of the EFTA State in whose territory the inspection is to be conducted.
3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the EFTA State concerned. The national judicial authority shall control that the decision by the EFTA Surveillance Authority is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the EFTA Surveillance Authority, directly or through the EFTA State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the EFTA Surveillance Authority's file. The lawfulness of the decision by the EFTA Surveillance Authority shall be subject to review only by the EFTA Court.

4. The officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply *mutatis mutandis*.

### **Article 22**

#### **Investigations by competition authorities of EFTA States**

1. The competition authority of an EFTA State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another EFTA State in order to establish whether there has been an infringement of Article 53 or Article 54 of the EEA Agreement. Any

exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the EFTA Surveillance Authority, the competition authorities of the EFTA States shall undertake the inspections which the EFTA Surveillance Authority considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the EFTA States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the EFTA Surveillance Authority or by the competition authority of the EFTA State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the EFTA Surveillance Authority may assist the officials of the authority concerned.

## SECTION VI

### PENALTIES

#### *Article 23*

##### **Fines**

1. The EFTA Surveillance Authority may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:
  - (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
  - (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;
  - (c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
  - (d) in response to a question asked in accordance with Article 20(2)(e),
    - they give an incorrect or misleading answer,
    - they fail to rectify within a time limit set by the EFTA Surveillance Authority an incorrect, incomplete or misleading answer given by a member of staff, or
    - they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
  - (e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the EFTA Surveillance Authority have been broken.
2. The EFTA Surveillance Authority may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:
  - (a) they infringe Article 53 or Article 54 of the EEA Agreement; or
  - (b) they contravene a decision ordering interim measures under Article 8; or
  - (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the

association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time limit fixed by the EFTA Surveillance Authority, the EFTA Surveillance Authority may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the EFTA Surveillance Authority has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the EFTA Surveillance Authority may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the EFTA Surveillance Authority shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the EFTA Surveillance Authority started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

#### *Article 24*

##### **Periodic penalty payments**

1. The EFTA Surveillance Authority may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:
  - (a) to put an end to an infringement of Article 53 or Article 54 of the EEA Agreement, in accordance with a decision taken pursuant to Article 7;
  - (b) to comply with a decision ordering interim measures taken pursuant to Article 8; (c) to comply with a commitment made binding by a decision pursuant to Article 9;
  - (d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
  - (e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).
2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the EFTA Surveillance Authority may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

## **SECTION VII**

### **LIMITATION PERIODS**

#### *Article 25*

##### **Limitation periods for the imposition of penalties**

1. The powers conferred on the EFTA Surveillance Authority by Articles 23 and 24 shall be subject to the following limitation periods:
  - (a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
  - (b) five years in the case of all other infringements.
2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

2. Any action taken by the EFTA Surveillance Authority or by the competition authority of an EFTA State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:
  - (a) written requests for information by the EFTA Surveillance Authority or by the competition authority of an EFTA State;
    - (a) written authorisations to conduct inspections issued to its officials by the EFTA Surveillance Authority or by the competition authority of an EFTA State;
    - (b) the initiation of proceedings by the EFTA Surveillance Authority or by the competition authority of an EFTA State;
    - (c) notification of the statement of objections of the EFTA Surveillance Authority or of the competition authority of an EFTA State.
4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the EFTA Surveillance Authority having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.
6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the EFTA Surveillance Authority is the subject of proceedings pending before the EFTA Court.

#### *Article 26*

#### **Limitation period for the enforcement of penalties**

1. The power of the EFTA Surveillance Authority to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted:
  - (a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
  - (b) by any action of the EFTA Surveillance Authority or of an EFTA State, acting at the request of the EFTA Surveillance Authority, designed to enforce payment of the fine or periodic penalty payment.
4. Each interruption shall start time running afresh.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
  - (a) time to pay is allowed;
  - (b) enforcement of payment is suspended pursuant to a decision of the EFTA Court.

## **SECTION VIII**

### **HEARINGS AND PROFESSIONAL SECRECY**

#### *Article 27*

#### **Hearing of the parties, complainants and others**

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the EFTA Surveillance Authority shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the EFTA

Surveillance Authority the opportunity of being heard on the matters to which the EFTA Surveillance Authority has taken objection. The EFTA Surveillance Authority shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the EFTA Surveillance Authority's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the EFTA Surveillance Authority and the EC Commission or the competition authorities of the EFTA States or the EC Member States. In particular, the right of access shall 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 Member States or EFTA States, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the EFTA Surveillance Authority from disclosing and using information necessary to prove an infringement.
3. If the EFTA Surveillance Authority considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the EFTA States may also ask the EFTA Surveillance Authority to hear other natural or legal persons.
4. Where the EFTA Surveillance Authority intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the EFTA Surveillance Authority in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

### *Article 28*

#### **Professional secrecy**

1. Without prejudice to Article 9 of Protocol 23 to the EEA Agreement and Articles 12 and 15 of this Chapter, information collected pursuant to Articles 17 to 22 or of Article 58 of the EEA Agreement and Protocol 23 thereto, shall be used only for the purpose for which it was acquired.
2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the EFTA Surveillance Authority and the competition authorities of the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the EFTA States shall not disclose information acquired or exchanged by them pursuant to this Chapter or Article 58 of the EEA Agreement and Protocol 23 thereto and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of EFTA States attending meetings of the Advisory Committee pursuant to Article 14.

This obligation shall also apply to the representatives of the EC Commission and of the EC Member States who participate in the Advisory Committee pursuant to Article 14(2) of this Chapter and in the hearing pursuant to Article 14(3) of Chapter III.

## **SECTION IX**

### **EXEMPTION ACTS**

#### *Article 29*

##### **Withdrawal in individual cases**

1. Where it follows from acts incorporated into Annex XIV of the EEA Agreement that Article 53(1) of the EEA Agreement is inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, the EFTA Surveillance Authority may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption act when it finds that in any particular case an agreement, decision or concerted practice to which the exemption act applies has certain effects which are incompatible with Article 53(3) of the EEA Agreement.
2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which an act referred to in paragraph 1 applies have effects which are incompatible with Article 53(3) of the EEA Agreement in the territory of an EFTA State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that EFTA State may withdraw the benefit of the act in question in respect of that territory.

## SECTION X

### GENERAL PROVISIONS

#### *Article 30*

##### **Publication of decisions**

1. The EFTA Surveillance Authority shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.
2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### *Article 31*

##### **Review by the EFTA Court**

The EFTA Court shall have unlimited jurisdiction to review decisions whereby the EFTA Surveillance Authority has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

#### *Article 32*

(No text)<sup>3</sup>

#### *Article 33*

##### **Implementing provisions**

1. The EFTA Surveillance Authority shall be authorised to take such measures as may be appropriate in order to apply this Chapter. The measures may concern, *inter alia*:
  - (a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;
  - (b) the practical arrangements for the exchange of information and consultations provided for in Article 11;
  - (c) the practical arrangements for the hearings provided for in Article 27.
2. Before the adoption of any measures pursuant to paragraph 1, the EFTA Surveillance Authority shall publish a draft thereof and invite all interested parties to submit their comments within the time limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the EFTA Surveillance Authority shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

## SECTION XI

### TRANSITIONAL AND SPECIAL PROVISIONS

#### *Article 34*

##### **References to former Articles and Chapters**

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{3} Article 32 (Exclusions) deleted by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 1 February 2007 (e.i.f. 8.10.2007).

For the purposes of this Section, references to former Articles and Chapters shall be understood as references to the Articles and Chapters as they applied before the entry into force of the Agreement amending Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice signed on 24 September 2004.

### *Article 35*

#### **Transitional provisions**

1. Applications made to the EFTA Surveillance Authority under former Article 2 of Chapter II of Part I, notifications made under former Articles 4 and 5 of that Chapter and the corresponding applications and notifications made under former Chapter VI of Part II, Chapter IX of Part II and Chapter XI of Part II shall lapse.
2. Procedural steps taken under former Chapter II of Part I and Chapters VI, IX and XI of Part II shall continue to have effect for the purposes of applying this Chapter.

### *Article 36*

#### **Duration and revocation of decisions applying Article 5 of the act referred to in point 10 of Annex XIV to the EEA Agreement (Regulation (EEC) No 1017/68)**

The following provision continues to apply to decisions adopted pursuant to Article 5 of the act referred to in point 10 of Annex XIV (Regulation (EEC) No 1017/68) until the date of expiration of those decisions:

The EFTA Surveillance Authority may revoke or amend its decision or prohibit specified acts by the parties:

- (a) where there has been a change in any of the facts which were basic to the making of the decision;
- (b) where the parties commit a breach of any obligation attached to the decision;
- (c) where the decision is based on incorrect information or was induced by deceit;
- (d) where the parties abuse the exemption from the provisions of Article 2 of the said act granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

### *Article 37*

#### **Duration and revocation of decisions applying Article 53(3) of the EEA Agreement to maritime transport (Regulation (EEC) No 4056/86)**

The following provision continues to apply to decisions applying Article 53(3) of the EEA Agreement to maritime transport according to former Chapter IX of Part II until the date of expiration of those decisions:

The EFTA Surveillance Authority may revoke or amend its decision or prohibit specified acts by the parties:

- (a) where there has been a change in any of the facts which were basic to the making of the decision;
- (b) where the parties commit a breach of any obligation attached to the decision;
- (c) where the decision is based on incorrect information or was induced by deceit; or
- (d) where the parties abuse the exemption from the provisions of Article 53(1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

### *Article 38*

#### **Duration and revocation of decisions applying Article 53(3) of the EEA Agreement in the air transport sector (Regulation (EEC) No 3975/87)**

The following provision continues to apply to decisions applying Article 53(3) of the EEA Agreement to air transport services according to former Chapter XI of Part II until the date of expiration of those decisions:

The EFTA Surveillance Authority may revoke or amend its decision or prohibit specified acts by the parties:

- (a) where there has been a change in any of the facts which were basic to the making of the decision;
- (b) where the parties commit a breach of any obligation attached to the decision;
- (c) where the decision is based on incorrect information or was induced by deceit; or
- (d) where the parties abuse the exemption from the provisions of Article 53(1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

### *Article 39*

#### **Duration and revocation of decisions applying Article 53(3) of the EEA Agreement (Regulation 17/62)**

The following provision continues to apply to decisions applying Article 53(3) of the EEA Agreement according to former Chapter II of Part I until the date of expiration of those decisions:

The EFTA Surveillance Authority may revoke or amend its decision or prohibit specified acts by the parties:

- (a) where there has been a change in any of the facts which were basic to the making of the decision;
- (b) where the parties commit a breach of any obligation attached to the decision;
- (c) where the decision is based on incorrect information or was induced by deceit; or
- (d) where the parties abuse the exemption from the provisions of Article 53(1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

### *Article 40*

#### **Designation of competition authorities of EFTA States**

1. The EFTA States shall designate the competition authority or authorities responsible for the application of Articles 53 and 54 of the EEA Agreement in such a way that the provisions of this Chapter are effectively complied with. The authorities designated may include courts.
2. When enforcement of EEA competition law is entrusted to national administrative and judicial authorities, the EFTA States may allocate different powers and functions to those different national authorities, whether administrative or judicial.
3. The effects of Article 11(6) apply to the authorities designated by the EFTA States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.
4. Notwithstanding paragraph 3, in the EFTA States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which should withdraw its claim before the judicial authority when the EFTA Surveillance Authority opens proceedings and this withdrawal shall facilitate that national proceedings be brought effectively to an end

### *Article 41*

#### **Reservation for Liechtenstein**

The Principality of Liechtenstein is not obliged to designate a competition authority or other authorities responsible for the application of Articles 53 and 54 of the EEA Agreement. When the Principality of Liechtenstein empowers a competition authority or another authority to apply Articles 53 and 54 of the EEA Agreement, it shall inform the other EFTA States and the EFTA Surveillance Authority thereof. In the interim and without prejudice to the first sentence of this paragraph, the competition authorities of the EFTA States shall, for the purpose of Chapters II and III of this Protocol, include the competent authority of the Principality of Liechtenstein.

*Article 42***Special provisions**

The EFTA Surveillance Authority may submit to the attention of the EFTA States, for consultation within the Standing Committee in accordance with Article 2 of the Agreement on a Standing Committee of the EFTA States, proposals regarding the application of Article 53(3) of the EEA Agreement to certain categories of agreements, decisions or concerted practices.

**CHAPTER III****RULES RELATING TO THE CONDUCT OF PROCEEDINGS BY THE  
EFTA SURVEILLANCE AUTHORITY PURSUANT TO ARTICLES 53  
AND 54 OF THE EEA AGREEMENT****SECTION I****SCOPE***Article 1***Subject-matter and scope**

This Chapter applies to proceedings conducted by the EFTA Surveillance Authority for the application of Articles 53 and 54 of the EEA Agreement.

**SECTION II****INITIATION OF PROCEEDINGS***Article 2***Initiation of proceedings**

1. The EFTA Surveillance Authority may decide to initiate proceedings with a view to adopting a decision pursuant to Section III of Chapter II at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Chapter, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Chapter is published, whichever is the earlier.
2. The EFTA Surveillance Authority may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.
3. The EFTA Surveillance Authority may exercise its powers of investigation pursuant to Section V of Chapter II before initiating proceedings.
4. The EFTA Surveillance Authority may reject a complaint pursuant to Article 7 of Chapter II without initiating proceedings.

**SECTION III**

## INVESTIGATIONS BY THE EFTA SURVEILLANCE AUTHORITY

### *Article 3*

#### **Power to take statements**

1. Where the EFTA Surveillance Authority interviews a person with his consent in accordance with Article 19 of Chapter II, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.
2. The interview may be conducted by any means including by telephone or electronic means.
3. The EFTA Surveillance Authority may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the EFTA Surveillance Authority shall set a time limit within which the person interviewed may communicate to it any correction to be made to the statement.

### *Article 4*

#### **Oral questions during inspections**

1. When, pursuant to Article 20(2)(e) of Chapter II, officials or other accompanying persons authorised by the EFTA Surveillance Authority ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.
2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.
3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the EFTA Surveillance Authority shall set a time limit within which the undertaking or the association of undertakings may communicate to the EFTA Surveillance Authority any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph

### *Article 4a*

#### **The EFTA Surveillance Authority's Leniency Programme**

1. The EFTA Surveillance Authority may set the requirements and cooperation conditions under which it may reward undertakings that are or have been party to secret cartels, for their cooperation in disclosing the cartel and facilitating the establishment of an infringement, with immunity from fines or a reduction in fines which would otherwise be imposed under Article 23(2) of Chapter II (the EFTA Surveillance Authority leniency programme).

Immunity from fines may be granted to the undertaking that is the first to submit evidence which in the EFTA Surveillance Authority's view would enable it to carry out a targeted inspection or find an infringement of Article 53 of the EEA Agreement in connection with the alleged cartel. A reduction in fines may be granted to undertakings which provide the EFTA Surveillance Authority with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the EFTA Surveillance Authority's possession.

The EFTA Surveillance Authority will only grant immunity from or a reduction of the fine under its leniency programme if, at the end of the administrative proceedings, the undertaking has met the requirements and cooperation conditions set out in the leniency programme. Those may cover, among others, the type of information and evidence the undertakings are required to submit and the further cooperation expected from the undertakings during the administrative proceedings.

2. In order to qualify for immunity from or reduction of the fine which would otherwise be imposed, undertakings shall provide the EFTA Surveillance Authority with voluntary presentations of their knowledge of a secret cartel and their role therein, which may be also in the form of voluntary presentations of the knowledge of former or current employees or representatives of the undertaking (leniency corporate statements). Such leniency corporate statements shall be drawn up specifically for submission to the EFTA Surveillance Authority with a view to obtaining immunity from or reduction of fines under the EFTA Surveillance Authority's leniency programme.
3. The EFTA Surveillance Authority will offer parties appropriate methods of providing leniency corporate statements other

than by written submission, including orally. Oral corporate statements may be recorded and transcribed at the EFTA Surveillance Authority's premises. The undertaking shall be granted an opportunity to check the technical accuracy of the recording of its oral statement at the EFTA Surveillance Authority's premises, and, where necessary, to correct the substance of the statement without delay. The rules in this Chapter on leniency corporate statements shall apply to such statements irrespective of the medium on which they are stored. Pre-existing information, i.e. evidence that exists irrespective of the EFTA Surveillance Authority proceedings and that is submitted to the EFTA Surveillance Authority by an undertaking in the context of its application for immunity from or reduction of the fine, is not part of a leniency corporate statement.

## **SECTION IV HANDLING OF COMPLAINTS**

### *Article 5*

#### **Admissibility of complaints**

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Chapter II.

Such complaints shall contain the information required by Form C, issued for this purpose by the Governments of the EFTA States, by common accord, as set out in Appendix 1, or by the Commission. The EFTA Surveillance Authority may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the EFTA Surveillance Authority. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.
3. Complaints shall be submitted in one of the official languages of an EFTA State or the Community.

### *Article 6*

#### **Participation of complainants in proceedings**

1. Where the EFTA Surveillance Authority issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections, except in cases where the settlement procedure applies, where it shall inform the complainant in writing of the nature and subject matter of the procedure. The EFTA Surveillance Authority shall also set a time limit within which the complainant may make known its views in writing.
2. 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 issued, if complainants so request in their written comments.

### *Article 7*

#### **Rejection of complaints**

1. Where the EFTA Surveillance Authority considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time limit within which the complainant may make known its views in writing. The EFTA Surveillance Authority shall not be obliged to take into account any further written submission received after the expiry of that time limit.
2. If the complainant makes known its views within the time limit set by the EFTA Surveillance Authority and the written submissions made by the complainant do not lead to a different assessment of the complaint, the EFTA Surveillance Authority shall reject the complaint by decision.
3. If the complainant fails to make known its views within the time limit set by the EFTA Surveillance Authority, the complaint shall be deemed to have been withdrawn.

### *Article 8*

#### **Access to information**

Where the EFTA Surveillance Authority has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the EFTA Surveillance Authority bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

### *Article 9*

#### **Rejections of complaints pursuant to Article 13 of Chapter II**

Where the EFTA Surveillance Authority rejects a complaint pursuant to Article 13 of Chapter II, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

## **SECTION V**

### **EXERCISE OF THE RIGHT TO BE HEARD**

#### *Article 10*

##### **Statement of objections and reply**

1. The EFTA Surveillance Authority shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified in writing to each of the parties against whom objections are raised.
2. The EFTA Surveillance Authority shall, when notifying the statement of objections to the parties concerned, set a time limit within which these parties may inform it in writing of their views. The EFTA Surveillance Authority shall not be obliged to take into account written submissions received after the expiry of that time limit.
3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the EFTA Surveillance Authority. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, six paper copies of their submission and of the documents attached to it. They may propose that the EFTA Surveillance Authority hear persons who may corroborate the facts set out in their submission.

#### *Article 10a*

##### **Settlement procedure in cartel cases**

1. After the initiation of proceedings pursuant to Article 11(6) of Chapter II, the EFTA Surveillance Authority may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. The EFTA Surveillance Authority shall not be obliged to take into account replies received after the expiry of that time limit.

If two or more parties within the same undertaking indicate their willingness to engage in settlement discussions pursuant to the first subparagraph, they shall appoint a joint representation to engage in discussions with the EFTA Surveillance Authority on their behalf. When setting the time limit referred to in the first subparagraph, the EFTA Surveillance Authority shall indicate to the relevant parties that they are identified within the same undertaking, for the sole purpose of enabling them to comply with this provision.

2. Parties taking part in settlement discussions may be informed by the EFTA Surveillance Authority of:
  - (a) the objections it envisages to raise against them;
  - (b) the evidence used to determine the envisaged objections;
  - (c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position

regarding a time period or any other particular aspect of the cartel; and

- (d) the range of potential fines.

This information shall be confidential vis-à-vis third parties, save where the EFTA Surveillance Authority has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the EFTA Surveillance Authority may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 53 of the EEA Agreement as well as their liability. These settlement submissions shall be specifically drawn up by the undertakings concerned as a formal request to the EFTA Surveillance Authority to adopt any decision in their case following the settlement procedure. Before the EFTA Surveillance Authority sets a time limit for the introduction of settlement submissions, the parties concerned shall be entitled to have the information specified in the first subparagraph, disclosed to them, upon request, in a timely manner. The EFTA Surveillance Authority shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

The EFTA Surveillance Authority will offer parties appropriate methods of providing settlement submissions other than by written submission, including orally. Oral settlement submissions may be recorded and transcribed at the EFTA Surveillance Authority's premises. The undertaking shall be granted an opportunity to check the technical accuracy of the recording of its oral submission at the EFTA Surveillance Authority's premises, and, where necessary, to correct the substance of their submission without delay. The rules in this Chapter on settlement submissions shall apply to settlement submissions irrespective of the medium on which they are stored.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the EFTA Surveillance Authority, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The EFTA Surveillance Authority may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Chapter II after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Chapter II.
4. The EFTA Surveillance Authority may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.

### *Article 11*

#### **Right to be heard**

1. The EFTA Surveillance Authority shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Chapter II.
2. The EFTA Surveillance Authority shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

### *Article 12*

1. The EFTA Surveillance Authority shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.
2. However, when introducing their settlement submissions the parties shall confirm to the EFTA Surveillance Authority that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions.

### *Article 13*

#### **Hearing of other persons**

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the EFTA Surveillance Authority shall inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views in writing.
2. The EFTA Surveillance Authority may, where appropriate, invite persons referred to in paragraph 1 to develop their

arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.

3. The EFTA Surveillance Authority may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The EFTA Surveillance Authority may also invite such persons to express their views at that oral hearing.

#### *Article 14*

#### **Conduct of oral hearings**

1. Hearings shall be conducted by a Hearing Officer in full independence.
2. The EFTA Surveillance Authority shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.
3. The EFTA Surveillance Authority shall invite the competition authorities of the EFTA States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the EFTA States. It shall invite the EC Commission and the EC Member States to be represented at hearings as provided for in Protocol 23 to the EEA Agreement.
4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.
5. Persons heard by the EFTA Surveillance Authority may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.
6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the EFTA Surveillance Authority services and the authorities of the EFTA States to ask questions during the hearing.
8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

## **SECTION VI**

### **ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION**

#### *Article 15*

#### **Access to the file**

1. If so requested, the EFTA Surveillance Authority shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.
  - 1a. After the initiation of proceedings pursuant to Article 11(6) of Chapter II and in order to enable the parties to introduce settlement submissions, the EFTA Surveillance Authority shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the EFTA Surveillance Authority that they will only require access to the file pursuant to paragraph 1 after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions. Where settlement discussions have been

discontinued with one or more of the parties, such party shall be granted access to the file pursuant to paragraph 1 when a statement of objections has been addressed to it.

- 1b. Access pursuant to paragraph 1 or 1a to a leniency corporate statement within the meaning of Article 4a(2) or to a settlement submission within the meaning of Article 10a(2), shall only be granted at the premises of the EFTA Surveillance Authority. The parties and their representatives shall not copy the leniency corporate statements or settlement submissions by any mechanical or electronic means.
2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the EFTA Surveillance Authority and the EC Commission or of the competition authorities of the EFTA States or the EC Member States. The right of access to the file shall also not extend to correspondence between the surveillance authorities, between a surveillance authority and EC Member States and EFTA States or between competition authorities of the EC Member States or EFTA States, where such correspondence is contained in the file of the EFTA Surveillance Authority.
3. Nothing in this Chapter prevents the EFTA Surveillance Authority from disclosing and using information necessary to prove an infringement of Articles 53 or 54 of the EEA Agreement.

### *Article 16*

#### **Identification and protection of confidential information**

1. Information, including documents, shall not be communicated or made accessible by the EFTA Surveillance Authority in so far as it contains business secrets or other confidential information of any person.
2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) of this Chapter or subsequently submits further information to the EFTA Surveillance Authority in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the EFTA Surveillance Authority for making its views known.
3. Without prejudice to paragraph 2 of this Article, the EFTA Surveillance Authority may require undertakings and associations of undertakings which produce documents or statements pursuant to Chapter II to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The EFTA Surveillance Authority may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Chapter II or a decision adopted by the EFTA Surveillance Authority which in their view contains business secrets.

The EFTA Surveillance Authority may set a time limit within which the undertakings and associations of undertakings are to:

- (a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;
  - (b) provide the EFTA Surveillance Authority with a non-confidential version of the documents or statements, in which the confidential passages are deleted;
  - (c) provide a concise description of each piece of deleted information.
4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the EFTA Surveillance Authority may assume that the documents or statements concerned do not contain confidential information.

## **SECTION VIa**

### **LIMITATIONS TO THE USE OF INFORMATION OBTAINED IN THE COURSE OF EFTA SURVEILLANCE AUTHORITY PROCEEDINGS**

#### *Article 16a*

1. Information obtained pursuant to this Chapter shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 53 and 54 of the EEA Agreement.

2. Access to leniency corporate statements within the meaning of Article 4a(2) or to settlement submissions within the meaning of Article 10a(2) shall be granted only for the purposes of exercising the rights of defence in proceedings before the EFTA Surveillance Authority. Information taken from such statements and submissions may be used by the party having obtained access to the file only where necessary for the exercise of its rights of defence in proceedings:
  - (a) before the EFTA Court reviewing EFTA Surveillance Authority decisions; or
  - (b) before the courts of the EFTA States in cases that are directly related to the case in which access has been granted, and which concern:
    - (i) the allocation between cartel participants of a fine imposed jointly and severally on them by the EFTA Surveillance Authority; or
    - (ii) the review of a decision by which a competition authority of an EFTA State has found an infringement of Article 53 of the EEA Agreement.
3. The following categories of information obtained pursuant to this Chapter shall not be used in proceedings before national courts until the EFTA Surveillance Authority has closed its proceedings against all parties under investigation by adopting a decision pursuant to Article 7, 9 or 10 of Chapter II or has otherwise terminated its proceedings:
  - (a) information that was prepared by other natural or legal persons specifically for the proceedings of the EFTA Surveillance Authority; and
  - (c) information that the EFTA Surveillance Authority has drawn up and sent to the parties in the course of its proceedings.

## SECTION VII

### GENERAL AND FINAL PROVISIONS

#### *Article 17*

##### **Time limits**

1. In setting the time limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2), Article 10a(1), Article 10a(2), Article 10a(3) and Article 16(3), the EFTA Surveillance Authority shall have regard both to the time required for preparation of the submission and to the urgency of the case.
2. The time limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Chapter II, the time limit may be shortened to one week.
3. The time limits referred to in Article 4(3), Article 10a(1), Article 10a(2) and Article 16(3) shall be at least two weeks. The time limit referred to in Article 3(3) shall be at least two weeks, except for settlement submissions, for which corrections shall be made within one week. The time limit referred to in Article 10a(3) shall be at least two weeks.
4. Where appropriate and upon reasoned request made before the expiry of the original time limit, time limits may be extended.

#### *Article 18*

(No text)

#### *Article 19*

##### **Transitional provisions**

Procedural steps taken under former Chapter IV of Part I and Chapter XII of Part II as they applied before the entry into force of the Agreement amending Protocol 4 to the of the Agreement between EFTA States on the establishment of a Surveillance and Court of Justice signed on 3 December 2004 shall continue to have effect for the purpose of applying this Chapter.

**Article 20****Special provisions**

The EFTA Surveillance Authority may submit to the Governments of the EFTA States, in accordance with Article 49 of this Agreement, proposals for forms and complementary notes.

**PART III****CONTROL OF CONCENTRATIONS****CHAPTER IV****RULES RELATING TO CONTROL OF CONCENTRATIONS BETWEEN  
UNDERTAKINGS**

*Due to the division of the text of Regulation (EEC) No 139/2004 between Annex XIV to the EEA Agreement (substantive rules) and the present Chapter (procedural rules), the text, as adapted, of Articles 1 to 3, 4 (1) to (3) and 5 are to be found in the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004). The EFTA Surveillance Authority shall carry out the control of concentration in accordance with the provisions of Article 57 of the EEA Agreement, in particular paragraph 2(b).*

**Articles 1 to 3**

(No text)

**Article 4**

1. (No text)
2. (No text)
3. (No text)
4. Prior to the notification of a concentration within the meaning of Article 4(1) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), the persons or undertakings referred to in paragraph 2 of the same Article may inform the EFTA Surveillance Authority, by means of a reasoned submission, that the concentration may significantly affect competition in a market within an EFTA State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State.

The EFTA Surveillance Authority shall transmit this submission to all EFTA States without delay. The EFTA State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that EFTA State takes no such decision within this period, it shall be deemed to have agreed.

Unless that EFTA State disagrees, the EFTA Surveillance Authority, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that EFTA State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the EFTA Surveillance Authority. The EFTA Surveillance Authority shall inform the other EFTA States and the persons or undertakings concerned of its decision. If the EFTA Surveillance Authority does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the EFTA Surveillance Authority decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to Article 4(1) of the said

act and national competition law shall apply. Article 9(6) to (9) of this Chapter shall apply *mutatis mutandis*.

5. With regard to a concentration as defined in Article 3 of the said act which does not have an EFTA dimension within the meaning of Article 1 of the said act and which is capable of being reviewed under the national competition laws of at least three EFTA States, the persons or undertakings referred to in Article 4(2) of the said act may, before any notification to the competent authorities, inform the EFTA Surveillance Authority by means of a reasoned submission that the concentration should be examined by the EFTA Surveillance Authority.

The EFTA Surveillance Authority shall transmit this submission to all EFTA States without delay.

Any EFTA State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such EFTA State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The EFTA Surveillance Authority shall, without delay, inform all EFTA States and the persons or undertakings concerned of any such expression of disagreement.

Where no EFTA State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have an EFTA dimension and shall be notified to the EFTA Surveillance Authority in accordance with Article 4(1) and (2) of the said act. In such situations, no EFTA State shall apply its national competition law to the concentration.

6. (No text)

### *Article 5*

(No text)

### *Article 6*

#### **Examination of the notification and initiation of proceedings**

1. The EFTA Surveillance Authority shall examine the notification as soon as it is received.
  - (a) Where it concludes that the concentration notified does not fall within the scope of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), it shall record that finding by means of a decision.
  - (b) Where it finds that the concentration notified, although falling within the scope of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), does not raise serious doubts as to its compatibility with the functioning of the EEA Agreement, it shall decide not to oppose it and shall declare that it is compatible with the EEA Agreement.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.
  - (c) Without prejudice to paragraph 2, where the EFTA Surveillance Authority finds that the concentration notified falls within the scope of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and raises serious doubts as to its compatibility with the functioning of the EEA Agreement, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the EFTA Surveillance Authority that they have abandoned the concentration.
2. Where the EFTA Surveillance Authority finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the functioning of the EEA Agreement pursuant to paragraph 1(b).

The EFTA Surveillance Authority may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the EFTA Surveillance Authority with a view to rendering the concentration compatible with the functioning of the EEA Agreement.
3. The EFTA Surveillance Authority may revoke the decision it took pursuant to paragraph 1(a) or (b) where:
  - (a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

- (b) the undertakings concerned commit a breach of an obligation attached to the decision.
- 4. In the cases referred to in paragraph 3, the EFTA Surveillance Authority may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).
- 5. The EFTA Surveillance Authority shall notify its decision to the undertakings concerned and the competent authorities of the EFTA States without delay.

### *Article 7*

#### **Suspension of concentrations**

1. A concentration with an EFTA dimension as defined in Article 1 of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), or which is to be examined by the EFTA Surveillance Authority pursuant to Article 4(5) of this Chapter, shall not be implemented either before its notification or until it has been declared compatible with the functioning of the EEA Agreement pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).
2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 of the said act is acquired from various sellers, provided that:
  - (a) the concentration is notified to the EFTA Surveillance Authority pursuant to Article 4(1), (2) and (3) of the said act and Article 4(4) and (5) of this Chapter without delay; and
  - (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the EFTA Surveillance Authority under paragraph 3.
3. The EFTA Surveillance Authority may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the EFTA Surveillance Authority shall take into account *inter alia* the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.
4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

### *Article 8*

#### **Powers of decision of the EFTA Surveillance Authority**

1. Where the EFTA Surveillance Authority finds that a notified concentration fulfils the criterion laid down in Article 2(2) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and, in the cases referred to in Article 2(4) of the said act, the criteria laid down in Article 53(3) of the EEA Agreement, it shall issue a decision declaring the concentration compatible with the functioning of the EEA Agreement.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.
2. Where the EFTA Surveillance Authority finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) of the said act and, in the cases referred to in Article 2(4) of the said act, the criteria laid down in Article 53(3) of the EEA Agreement, it shall issue a decision declaring the concentration compatible with the functioning of the EEA Agreement.

The EFTA Surveillance Authority may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the EFTA Surveillance Authority with a view to rendering the concentration compatible with the functioning of the EEA Agreement.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the EFTA Surveillance Authority finds that a concentration fulfils the criterion defined in Article 2(3) of the said act or, in the cases referred to in Article 2(4) of the said act, does not fulfil the criteria laid down in Article 53(3) of the EEA Agreement, it shall issue a decision declaring that the concentration is incompatible with the functioning of the EEA Agreement.
4. Where the EFTA Surveillance Authority finds that a concentration:
  - (a) has already been implemented and that concentration has been declared incompatible with the functioning of the EEA Agreement, or
  - (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) of the said act or, in the cases referred to in Article 2(4) of the said act, would not fulfil the criteria laid down in Article 53(3) of the EEA Agreement,

the EFTA Surveillance Authority may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the EFTA Surveillance Authority may take any other measure appropriate to achieve such restoration as far as possible,
- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The EFTA Surveillance Authority may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:
  - (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the functioning of the EEA Agreement has not yet been taken;
  - (b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;
  - (c) has already been implemented and is declared incompatible with the functioning of the EEA Agreement.
6. The EFTA Surveillance Authority may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:
  - (a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or
  - (b) the undertakings concerned commit a breach of an obligation attached to the decision.
7. The EFTA Surveillance Authority may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:
  - (a) it finds that a concentration has been implemented
    - (i) in contravention of a condition attached to a decision under Article 6(1)(b), or
    - (ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the functioning of the EEA Agreement; or
  - (b) a decision has been revoked pursuant to paragraph 6.
8. The EFTA Surveillance Authority shall notify its decision to the undertakings concerned and the competent authorities of the EFTA States without delay.

#### *Article 9*

### Referral to the competent authorities of the EFTA States

1. The EFTA Surveillance Authority may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other EFTA States, refer a notified concentration to the competent authorities of the EFTA State concerned in the following circumstances.
2. Within 15 working days of the date of receipt of the copy of the notification, an EFTA State, on its own initiative or upon the invitation of the EFTA Surveillance Authority, may inform the EFTA Surveillance Authority, which shall inform the undertakings concerned, that:
  - (a) a concentration threatens to affect significantly competition in a market within that EFTA State, which presents all the characteristics of a distinct market, or
  - (b) a concentration affects competition in a market within that EFTA State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the territory of the EFTA States.
3. If the EFTA Surveillance Authority considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:
  - (a) it shall itself deal with the case in accordance with Articles 57 and 58 of the EEA Agreement, by provisions set out in Protocol 24 and in Annex XIV to the EEA Agreement and by the provisions of this Chapter; or
  - (b) it shall refer the whole or part of the case to the competent authorities of the EFTA State concerned with a view to the application of that State's national competition law.

If, however, the EFTA Surveillance Authority considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the EFTA State concerned, and shall itself deal with the case in accordance with the Articles 57 and 58 of the EEA Agreement, by provisions set out in Protocol 24 and in Annex XIV to the EEA Agreement and by the provisions of this Chapter.

In cases where an EFTA State informs the EFTA Surveillance Authority pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the territory of the EFTA States, the EFTA Surveillance Authority shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:
  - (a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the EFTA Surveillance Authority, pursuant to Article 6(1)(b), has not initiated proceedings; or
  - (b) within 65 working days at most of the notification of the concentration concerned where the EFTA Surveillance Authority has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.
5. If within the 65 working days referred to in paragraph 4(b) the EFTA Surveillance Authority, despite a reminder from the EFTA State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the EFTA State concerned in accordance with paragraph 3(b).
6. The competent authority of the EFTA State concerned shall decide upon the case without undue delay.

Within 45 working days after the EFTA Surveillance Authority's referral, the competent authority of the EFTA State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The EFTA State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that EFTA State.
7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the EFTA State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.
9. In accordance with the relevant provisions of the EEA Agreement, any EFTA State may appeal to the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, and in particular request the application of Article 41 of this Agreement, for the purpose of applying its national competition law.

### *Article 10*

#### **Time limits for initiating proceedings and for decisions**

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the EFTA Surveillance Authority receives a request from an EFTA State in accordance with Article 9(2) or where the undertakings concerned offer commitments pursuant to Article 6(2), with a view to rendering the concentration compatible with the functioning of the EEA Agreement.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.
3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the functioning of the EEA Agreement, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the EFTA Surveillance Authority with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the EFTA Surveillance Authority has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the EFTA Court gives a judgement which annuls the whole or part of an EFTA Surveillance Authority decision, which is subject to a time limit set by this Article, the concentration shall be re-examined by the EFTA Surveillance Authority with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the EFTA Surveillance Authority has not taken a decision in accordance with Articles 6(1)(b),(c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the functioning of the EEA Agreement, without prejudice to Article 9.

### *Article 11*

#### **Requests for information**

1. In order to carry out the duties assigned to it by Articles 57 or 58 of the EEA Agreement, by provisions set out in Protocol 24 and in Annex XIV to the EEA Agreement and by the provisions of this Chapter, the EFTA Surveillance Authority

may, by simple request or by decision, require the persons referred to in Article 3(1)(b) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the EFTA Surveillance Authority shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.
3. Where the EFTA Surveillance Authority requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the EFTA Court.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. The EFTA Surveillance Authority shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the EFTA State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the EFTA State whose territory is affected. At the specific request of the competent authority of an EFTA State, the EFTA Surveillance Authority shall also forward to that authority copies of simple requests for information relating to a notified concentration.
6. At the request of the EFTA Surveillance Authority, the governments and competent authorities of the EFTA States shall provide the EFTA Surveillance Authority with all necessary information to carry out the duties assigned to it by Articles 57 or 58 of the EEA Agreement, by provisions set out in Protocol 24 and in Annex XIV to the EEA Agreement and by the provisions of this Chapter.
7. In order to carry out the duties assigned to it by Articles 57 or 58 of the EEA Agreement, by provisions set out in Protocol 24 and in Annex XIV to the EEA Agreement and by the provisions of this Chapter, the EFTA Surveillance Authority may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the EFTA Surveillance Authority shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the EFTA Surveillance Authority or by telephone or other electronic means, the EFTA Surveillance Authority shall inform in advance the competent authority of the EFTA State in whose territory the interview takes place. If the competent authority of that EFTA State so requests, officials of that authority may assist the officials and other persons authorised by the EFTA Surveillance Authority to conduct the interview.

#### *Article 12*

##### **Inspections by the authorities of the EFTA States**

1. At the request of the EFTA Surveillance Authority, the competent authorities of the EFTA States shall undertake the inspections which the EFTA Surveillance Authority considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the EFTA States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.
2. If so requested by the EFTA Surveillance Authority or by the competent authority of the EFTA State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the EFTA Surveillance Authority may assist the officials of the authority concerned.

#### *Article 13*

##### **The EFTA Surveillance Authority's powers of inspection**

1. In order to carry out the duties assigned to it by Articles 57 and 58 of the EEA Agreement, by provisions set out in Protocol 24 and in Annex XIV to the EEA Agreement and by the provisions of this Chapter, the EFTA Surveillance Authority may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection shall have the power:
  - (a) enter any premises, land and means of transport of undertakings and associations of undertakings;
  - (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
  - (c) to take or obtain in any form copies of or extracts from such books or records;
  - (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
  - (e) to ask any representative or member of staff of the undertaking or association of undertaking for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.
3. Officials and other accompanying persons authorised by the EFTA Surveillance Authority to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the EFTA Surveillance Authority shall give notice of the inspection to the competent authority of the EFTA State in whose territory the inspection is to be conducted. The EFTA Surveillance Authority shall also provide such an authorisation to representatives of the EC Commission who shall take part in the inspection in accordance with Article 8(5) of Protocol 24 to the EEA Agreement
4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the EFTA Surveillance Authority. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, in particular Article 36. The EFTA Surveillance Authority shall take such decisions after consulting the competent authority of the EFTA State in whose territory the inspection is to be conducted.
5. Officials of, and those authorised or appointed by, the competent authority of the EFTA State in whose territory the inspection is to be conducted shall, at the request of that authority or of the EFTA Surveillance Authority, actively assist the officials and other accompanying persons authorised by the EFTA Surveillance Authority. To this end, they shall enjoy the powers specified in paragraph 2.
5. Where the officials and other accompanying persons authorised by the EFTA Surveillance Authority find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the EFTA State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.
7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.
8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the EFTA Surveillance Authority decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the EFTA Surveillance Authority, directly or through the competent authority of that EFTA State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the EFTA Surveillance Authority's file. The lawfulness of the EFTA Surveillance Authority's decision shall be subject to review only by the EFTA Court.

#### *Article 14*

##### **Fines**

1. The EFTA Surveillance Authority may by decision impose on the persons referred to in Article 3(1)(b) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), undertakings or associations of undertakings fines not exceeding 1% of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 of the said act where, intentionally or negligently:
  - (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4(1), (2) and (3) of the said act or Articles 4(4) and (5), 10(5) or 22(3) of this Chapter;
  - (b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);
  - (c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

- (d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);
  - (e) in response to a question asked in accordance with Article 13(2)(e),
    - they give an incorrect or misleading answer,
    - they fail to rectify within a time limit set by the EFTA Surveillance Authority an incorrect, incomplete or misleading answer given by a member of staff, or
    - they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);
  - (f) seals affixed by officials or other accompanying persons authorised by the EFTA Surveillance Authority in accordance with Article 13(2)(d) have been broken.
2. The EFTA Surveillance Authority may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 of the said act on the persons referred to in Article 3(1)b of the said act or the undertakings concerned where, either intentionally or negligently, they:
- (a) fail to notify a concentration in accordance with Article 4(1), (2) and (3) of the said act or Articles 4(4) and (5) and 22(3) of this Chapter prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
  - (b) implement a concentration in breach of Article 7;
  - (c) implement a concentration declared incompatible with the functioning of the EEA Agreement by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
  - (d) fail to comply with a condition or an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.
3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.
4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

### *Article 15*

#### **Periodic penalty payments**

1. The EFTA Surveillance Authority may by decision impose on the persons referred to in Article 3(1)(b) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 of the said act for each working day of delay, calculated from the date set in the decision, in order to compel them:
- (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
  - (b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);
  - (c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;
  - (d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).
2. Where the persons referred to in Article 3(1)(b) of the said act, undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the EFTA Surveillance Authority may fix the definite amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

### *Article 16*

#### **Review by the EFTA Court**

The EFTA Court, in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, shall have unlimited jurisdiction within the meaning of Article 36 of this Agreement to review decisions whereby the EFTA Surveillance Authority has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payments imposed.

### *Article 17*

#### **Professional secrecy**

1. Without prejudice to Article 9 of Protocol 24 to the EEA Agreement, information acquired as a result of the application of Articles 57 and 58 of the EEA Agreement, of Protocol 24 to the EEA Agreement and of this Chapter shall be used only for the purposes of the relevant request, investigation or hearing.
2. Without prejudice to Article 4(3) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and of Articles 18 and 20 of this Chapter, the EFTA Surveillance Authority and the competent authorities of the EFTA States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the EFTA States shall not disclose information they have acquired through the application of Protocol 24 to the EEA Agreement, of the said act or of this Chapter of the kind covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

### *Article 18*

#### **Hearing of the parties and of third persons**

1. Before taking any decision provided for in Article 6(3), Article 7 (3), Article 8 (2) to (6), and Articles 14 and 15, the EFTA Surveillance Authority shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.
2. By way of derogation from paragraph 1, a decision pursuant to Articles 7 (3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the EFTA Surveillance Authority gives them that opportunity as soon as possible after having taken its decision.
3. The EFTA Surveillance Authority shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.
4. In so far as the EFTA Surveillance Authority or the competent authorities of the EFTA States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees shall be entitled, upon application, to be heard.

### *Article 19*

#### **Liaison with the authorities of the EFTA States**

1. The EFTA Surveillance Authority shall transmit to the competent authorities of the EFTA States copies of notifications within 3 working days and, as soon as possible, copies of the most important documents lodged with or issued by the EFTA Surveillance Authority pursuant to the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and this Chapter. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the EFTA Surveillance Authority with a view to rendering the concentration compatible with the functioning of the EEA Agreement pursuant to Articles 6 (2) or 8 (2), second subparagraph.
2. The EFTA Surveillance Authority shall carry out the procedures set out in the said act and in this Chapter in close and constant liaison with the competent authorities of the EFTA States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the EFTA State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

The EFTA Surveillance Authority shall forthwith transmit to the competent authorities of the EFTA States all information received from the EC Commission pursuant to Articles 3, 6, 8 and 10 of Protocol 24 to the EEA Agreement.

3. An Advisory Committee on Concentrations shall be consulted before any decision is taken pursuant to Articles 8(1) to (6), 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).
4. The Advisory Committee shall consist of representatives of the competent authorities of the EFTA States. Each EFTA

State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of an EFTA State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the EFTA Surveillance Authority. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The EFTA Surveillance Authority may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.
6. The Advisory Committee shall deliver an opinion on the EFTA Surveillance Authority's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The EFTA Surveillance Authority shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
7. The EFTA Surveillance Authority shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

### *Article 20*

#### **Publication of decisions**

1. The EFTA Surveillance Authority shall publish the decisions which it takes pursuant to Article 8(1) to (6), 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the EEA Section of the *Official Journal of the European Union*.
2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

### *Article 21*

#### **Application of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and of this Chapter and Jurisdiction**

1. The act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and this Chapter alone shall apply to concentrations as defined in Article 3 of the said act. Chapter II and the act referred to in point 10 of Annex XIV to the EEA Agreement (Regulation (EC) No 169/2009) shall not apply, except in relation to joint ventures that do not have an EFTA dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.
2. Subject to review by the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, the EFTA Surveillance Authority shall have sole jurisdiction, on the conditions set out in Article 58 of the EEA Agreement, to take the decisions provided for in the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation No 139/2004) and this Chapter.
3. No EFTA State shall apply its national legislation on competition to any concentration that has an EFTA dimension.  

The first subparagraph shall be without prejudice to any EFTA State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).
4. Notwithstanding paragraphs 2 and 3, the EFTA States may take appropriate measures to protect legitimate interests other than those taken into consideration by the said act and this Chapter and compatible with the general principles and other provisions as provided for, directly or indirectly, under the EEA Agreement. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the EFTA Surveillance Authority by the EFTA State concerned and shall be recognised by the EFTA Surveillance Authority after an assessment of its compatibility with the general principles and other provisions as provided for, directly or indirectly, under the EEA Agreement before the measures referred to above may be taken. The EFTA Surveillance Authority shall inform the EFTA State concerned of its decision within 25 working days of that communication.

## *Article 22*

### **Referral to the EFTA Surveillance Authority**

1. One or more EFTA States may request the EFTA Surveillance Authority to examine any concentration as defined in Article 3 of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 139/2004) that does not have an EFTA dimension within the meaning of Article 1 of the said act but affects trade between EFTA States and threatens to significantly affect competition within the territory of the EFTA State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the EFTA State concerned.

2. The EFTA Surveillance Authority shall inform the competent authorities of the EFTA States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other EFTA State shall have the right to join the initial request within a period of 15 working days of being informed by the EFTA Surveillance Authority of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as an EFTA State has informed the EFTA Surveillance Authority and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The EFTA Surveillance Authority may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine the concentration where it considers that it affects trade between EFTA States and threatens to significantly affect competition within the territory of the EFTA State or States making the request. If the EFTA Surveillance Authority does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request. The EFTA Surveillance Authority shall inform all EFTA States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4(1), (2) and (3) of the said act and Article 4(4) and (5) of this Chapter.

The EFTA State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Articles 2, Article 4(2) to (3) and Article 5 of the said act and Articles 6 and 8 to 21 of this Chapter shall apply where the EFTA Surveillance Authority examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the EFTA Surveillance Authority informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4(1), (2) and (3) of the said act and Article 4(4) and (5) of this Chapter is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the EFTA Surveillance Authority informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The EFTA Surveillance Authority may inform one or several EFTA States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the EFTA Surveillance Authority may invite that EFTA State or those EFTA States to make a request pursuant to paragraph 1.

## *Article 23*

The EFTA Surveillance Authority may submit to the Governments of the EFTA States, in accordance with the provisions of Article 49 of this Agreement, proposals for forms to be used for notifications pursuant to Article 4(1), (2) and (3) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), reasoned submissions pursuant to Article 4(4) and (5) and modifications pursuant to Articles 6(2) and 8(2) of this Chapter, as well as proposals for complementary notes to the forms.

## *Article 24*

### **Relations with countries not party to the EEA Agreement**

1. The EFTA States shall inform the EFTA Surveillance Authority of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) in a country not Party to the EEA Agreement.
2. Initially not more than one year after the entry into force of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and this Chapter, and thereafter periodically the EFTA Surveillance Authority shall draw up a report examining the treatment accorded to EFTA undertakings having their seat or their principal fields of activity in the EFTA territory, in the terms referred to in paragraphs 3 and 4, as regards concentrations in countries not party to the EEA Agreement. The EFTA Surveillance Authority shall submit those reports to the

Standing Committee, together with any recommendations.

3. Whenever it appears to the EFTA Surveillance Authority, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a country not party to the EEA Agreement does not grant EFTA undertakings having their seat or their principal fields of activity in the EFTA territory, treatment comparable to that granted by EFTA States to undertakings from that country, the EFTA Surveillance Authority may submit proposals to each of the Governments of the EFTA States with a view to obtaining comparable treatment for EFTA undertakings having their seat or their principal fields of activity in the EFTA territory.
4. Measures taken under this Article shall comply with the obligations of the EFTA States under international agreements, whether bilateral or multilateral.

#### *Article 25*

(No text)

#### *Article 26*

Chapter XIII as applied before the entry into force of the Agreement amending Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice signed on 4 June 2004 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of Regulation (EEC) No 4064/89 before the date of application of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and former Chapter XIII, subject, in particular, to the provisions governing applicability set out in subparagraphs 1 and 2.<sup>4</sup>

## CHAPTER V

### IMPLEMENTING CHAPTER IV ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS

#### SECTION I

##### SCOPE

#### *Article 1*

##### Scope

This Chapter shall apply to the control of concentrations conducted pursuant to Chapter IV.

#### SECTION II

### NOTIFICATIONS AND OTHER SUBMISSIONS

#### *Article 2*

##### Persons entitled to submit notifications

1. Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004).

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{4} The text of Article 26 is identical to former Article 10(3) of Chapter XVI, as amended by the Agreement of 4 June 2004 amending Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (e.i.f. 20.5.2005). It should be noted that Subparagraph 1 as referred to in the Article is now in Article 10(1) of Chapter VIII of Part V. Subparagraph 2 of the Article has been deleted.

- 2.{5} Where notifications are signed by authorised external representatives of persons or of undertakings, such representatives shall produce written proof that they are authorised to act.
3. Joint notifications shall be submitted by a joint representative who is authorised to transmit and to receive documents on behalf of all notifying parties.

### *Article 3*

#### **Submission of notifications**

1. Notifications shall be submitted in the manner prescribed by Form CO as set out in Appendix 2 to this Protocol. Under the conditions set out in Appendix 3, notifications may be submitted in Short Form as defined therein. Joint notifications shall be submitted on a single form.
- 2.{6} The Form CO and the supporting documents shall be submitted to the EFTA Surveillance Authority in the format and with the number of copies specified by EFTA Surveillance Authority on its website. The notification shall be delivered to the address referred to in Article 23(1).
3. The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.
4. Notifications shall be in an official language of an EFTA State or of the Community. If undertakings choose to notify the EFTA Surveillance Authority in a language which is not one of the official languages of the States falling within the competence of that Authority, or a working language of that Authority, they shall simultaneously supplement all documentation with a translation into an official language or a working language of that Authority. The language which is chosen for the translation shall determine the language in which the undertakings may be addressed by the EFTA Surveillance Authority. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages as referred to above, a translation into the language of the proceedings shall be attached.
5. (No text)

### *Article 4*

#### **Information and documents to be provided**

- 1.{7} Notifications shall contain the information, including documents, requested in the applicable forms set out in Appendices II and III. The information shall be correct and complete.
2. The EFTA Surveillance Authority may dispense with the obligation to provide any particular information in the notification, including documents, or with any other requirement specified in Appendices 2 and 3 where the EFTA Surveillance Authority considers that compliance with those obligations or requirements is not necessary for the examination of the case.
3. The EFTA Surveillance Authority shall without delay acknowledge in writing to the notifying parties or their representatives receipt of the notification and of any reply to a letter sent by the EFTA Surveillance Authority pursuant to Article 5(2) and 5(3).

### *Article 5*

#### **Effective date of notification**

1. Subject to paragraphs 2, 3 and 4, notifications shall become effective on the date on which they are received by the EFTA Surveillance Authority.
2. Where the information, including documents, contained in the notification is incomplete in any material respect, the EFTA Surveillance Authority shall inform the notifying parties or their representatives in writing without delay. In such cases, the notification shall become effective on the date on which the complete information is received by the EFTA Surveillance Authority.

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{5} Paragraph 2 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

{6} Paragraph 2 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

{7} Paragraph 1 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

3. Material changes in the facts contained in the notification coming to light subsequent to the notification which the notifying parties know or ought to know, or any new information coming to light subsequent to the notification which the parties know or ought to know and which would have had to be notified if known at the time of notification, shall be communicated to the EFTA Surveillance Authority without delay. In such cases, when these material changes or new information could have a significant effect on the appraisal of the concentration, the notification may be considered by the EFTA Surveillance Authority as becoming effective on the date on which the relevant information is received by the EFTA Surveillance Authority; the EFTA Surveillance Authority shall inform the notifying parties or their representatives of this in writing and without delay.
4. Incorrect or misleading information shall be considered to be incomplete information.
5. When the EFTA Surveillance Authority publishes the fact of the notification pursuant to Article 4(3) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), it shall specify the date upon which the notification has been received. Where, further to the application of paragraphs 2, 3 and 4 of this Article, the effective date of notification is later than the date specified in that publication, the EFTA Surveillance Authority shall issue a further publication in which it shall state the later date.

### *Article 6*

#### **Specific provisions relating to reasoned submissions, supplements and certifications**

1. Reasoned submissions within the meaning of Article 4(4) and 4(5) of Chapter IV shall contain the information, including documents, requested in accordance with Appendix 4 to this Protocol.
2. {<sup>8</sup>} Article 2, Article 3(1), third sentence, Article 3(2) to (5), Article 4, Article 5(1) to (4), Article 21 and Article 23 of this Chapter shall apply mutatis mutandis to reasoned submissions within the meaning of Article 4(4) 4(5) of Chapter IV.

Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1) to (4), Article 21 and Article 23 of this Chapter shall apply mutatis mutandis to supplements to notifications and certifications within the meaning of Article 10(5) of Chapter IV.

## **SECTION III**

### **TIME LIMITS**

#### *Article 7*

##### **Beginning of time periods**

Time periods shall begin on the working day, as defined in Article 24 of this Chapter, following the event to which the relevant provision of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and Chapter IV refers.

#### *Article 8*

##### **Expiry of time periods**

A time period calculated in working days shall expire at the end of its last working day.

A time period set by the EFTA Surveillance Authority in terms of a calendar date shall expire at the end of that day.

#### *Article 9*

##### **Suspension of time limit**

1. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Chapter IV shall be suspended where the EFTA Surveillance Authority has to take a decision pursuant to Article 11(3) or Article 13(4) of that Chapter, on any of the following grounds:

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{<sup>8</sup>} Paragraph 2, first subparagraph, replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (c.i.f. 18.11.2016).

- (a) information which the EFTA Surveillance Authority has requested pursuant to Article 11(2) of Chapter IV from one of the notifying parties or another involved party, as defined in Article 11 of this Chapter, is not provided or not provided in full within the time limit fixed by the EFTA Surveillance Authority;
  - (b) information which the EFTA Surveillance Authority has requested pursuant to Article 11(2) of Chapter IV from a third party, as defined in Article 11 of this Chapter, is not provided or not provided in full within the time limit fixed by the EFTA Surveillance Authority owing to circumstances for which one of the notifying parties or another involved party, as defined in Article 11 of this Chapter, is responsible;
  - (c) one of the notifying parties or another involved party, as defined in Article 11 of this Chapter, has refused to submit to an inspection deemed necessary by the EFTA Surveillance Authority on the basis of Article 13(1) of Chapter IV or to cooperate in the carrying out of such an inspection in accordance with Article 13(2) of that Chapter;
  - (d) the notifying parties have failed to inform the EFTA Surveillance Authority of material changes in the facts contained in the notification, or of any new information of the kind referred to in Article 5(3) of this Chapter.
2. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Chapter IV shall be suspended where the EFTA Surveillance Authority has to take a decision pursuant to Article 11(3) of that Chapter, without proceeding first by way of simple request for information, owing to circumstances for which one of the undertakings involved in the concentration is responsible.
  3. The time limits referred to in Articles 9(4), Article 10(1) and (3) of Chapter IV shall be suspended:
    - (a) in the cases referred to in points (a) and (b) of paragraph 1, for the period between the expiry of the time limit set in the simple request for information, and the receipt of the complete and correct information required by decision;
    - (b) in the cases referred to in point (c) of paragraph 1, for the period between the unsuccessful attempt to carry out the inspection and the completion of the inspection ordered by decision;
    - (c) in the cases referred to in point (d) of paragraph 1, for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information.
    - (d) in the cases referred to in paragraph 2 for the period between the expiry of the time limit set in the decision and the receipt of the complete and correct information required by decision.
  4. The suspension of the time limit shall begin on the working day following the date on which the event causing the suspension occurred. It shall expire with the end of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time limit shall expire with the end of the following working day.

### *Article 10*

#### **Compliance with the time limits**

1. The time limits referred to in Article 4(4), fourth subparagraph, Article 9(4), Article 10(1) and (3), and Article 22(3) of Chapter IV shall be met where the EFTA Surveillance Authority has taken the relevant decision before the end of the period.
3. The time limits referred to in Article 4(4), second subparagraph, Article 4(5), third subparagraph, Article 9(2), Article 22(1), second subparagraph, and 22(2), second subparagraph, of Chapter IV shall be met by an EFTA State concerned where that EFTA State, before the end of the period, informs the EFTA Surveillance Authority in writing or makes or joins the request in writing, as the case may be.
3. The time limit referred to in Article 9(6) of Chapter IV shall be met where the competent authority of an EFTA State concerned informs the undertakings concerned in the manner set out in that provision before the end of the period.

## **SECTION IV**

## EXERCISE OF THE RIGHT TO BE HEARD; HEARINGS

### *Article 11*

#### **Parties to be heard**

For the purposes of the rights to be heard pursuant to Article 18 of Chapter IV, the following parties are distinguished:

- (a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4(2) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004);
- (b) other involved parties, that is, parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration;
- (c) third persons, that is natural or legal persons, including customers, suppliers and competitors, provided they demonstrate a sufficient interest within the meaning of Article 18(4), second sentence, of Chapter IV, which is the case in particular
  - for members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees;
  - for consumer associations, where the proposed concentration concerns products or services used by final consumers.
- (d) parties regarding whom the EFTA Surveillance Authority intends to take a decision pursuant to Article 14 or Article 15 of Chapter IV.

### *Article 12*

#### **Decisions on the suspension of concentrations**

1. Where the EFTA Surveillance Authority intends to take a decision pursuant to Article 7(3) of Chapter IV which adversely affects one or more of the parties, it shall, pursuant to Article 18(1) of that Chapter, inform the notifying parties and other involved parties in writing of its objections and shall set a time limit within which they may make known their views in writing.
2. Where the EFTA Surveillance Authority, pursuant to Article 18(2) of Chapter IV, has taken a decision referred to in paragraph 1 of this Article provisionally without having given the notifying parties and other involved parties the opportunity to make known their views, it shall without delay send them the text of the provisional decision and shall set a time limit within which they may make known their views in writing.

{<sup>9</sup>} Once the notifying parties and other involved parties have made known their views, the EFTA Surveillance Authority shall take a final decision repealing, amending or confirming the provisional decision. Where they have not made known their views in writing within the time limit set, the EFTA Surveillance Authority's provisional decision shall become final with the expiry of that period.

### *Article 13*

#### **Decisions on the substance of the case**

1. Where the EFTA Surveillance Authority intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Chapter IV, it shall, before consulting the Advisory Committee on Concentrations, hear the parties pursuant to Article 18(1) and (3) of that Chapter.

Article 12(2) of this Chapter shall apply *mutatis mutandis* where, in application of Article 18(2) of Chapter IV, the EFTA Surveillance Authority has taken a decision pursuant to Article 8(5) of that Chapter provisionally.

2. The EFTA Surveillance Authority shall address its objections in writing to the notifying parties.

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{<sup>9</sup>} First sentence of the second subparagraph replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

The EFTA Surveillance Authority shall, when giving notice of objections, set a time limit within which the notifying parties may inform the EFTA Surveillance Authority of their comments in writing.

The EFTA Surveillance Authority shall inform other involved parties in writing of these objections.

The EFTA Surveillance Authority shall also set a time limit within which those other involved parties may inform the EFTA Surveillance Authority of their comments in writing.

The EFTA Surveillance Authority shall not be obliged to take into account comments received after the expiry of a time limit which it has set.

- 3.<sup>{10}</sup> The parties to whom the EFTA Surveillance Authority's objections have been addressed or who have been informed of those objections may submit their comments on the objections. Any comments shall be submitted in writing within the time limit set. In their written comments, they may set out all facts and matters known to them which are relevant to their defense, and shall attach any relevant documents as proof of the facts set out. They may also propose that the EFTA Surveillance Authority hear persons who may corroborate those facts. They shall submit their comments to the EFTA Surveillance Authority at the address referred to in Article 23(1). The format in which the comments are to be submitted and the number of copies required shall be specified by the EFTA Surveillance Authority on its website. The EFTA Surveillance Authority shall forward copies of such written comments without delay to the competent authorities of the EFTA States.
4. Where the EFTA Surveillance Authority intends to take a decision pursuant to Article 14 or Article 15 of Chapter IV, it shall, before consulting the Advisory Committee on Concentrations, hear pursuant to Article 18(1) and (3) of that Chapter the parties regarding whom the EFTA Surveillance Authority intends to take such a decision.

The procedure provided for in paragraph 2, first and second subparagraphs, and paragraph 3 shall apply, *mutatis mutandis*.

#### *Article 14*

##### **Oral hearings**

1. Where the EFTA Surveillance Authority intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Chapter IV, it shall afford the notifying parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford the notifying parties the opportunity of expressing their views orally.
2. Where the EFTA Surveillance Authority intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Chapter IV, it shall also afford other involved parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford other involved parties the opportunity of expressing their views orally.
3. Where the EFTA Surveillance Authority intends to take a decision pursuant to Article 14 or Article 15 of Chapter IV, it shall afford parties on whom it proposes to impose a fine or periodic penalty payment the opportunity to develop their arguments in a formal oral hearing, if so requested in their written comments. It may also, at other stages in the proceedings, afford such parties the opportunity of expressing their views orally.

#### *Article 15*

##### **Conduct of formal oral hearings**

1. Formal oral hearings shall be conducted by the Hearing Officer in full independence.
2. The EFTA Surveillance Authority shall invite the persons to be heard to attend the formal oral hearing on such date as it shall determine.
3. The EFTA Surveillance Authority shall invite the competent authorities of the EFTA States to take part in any formal oral hearing.
4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

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{10} Paragraph 3 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

5. Persons heard by the EFTA Surveillance Authority may be assisted by their lawyers or other qualified and duly authorised persons admitted by the Hearing Officer.
6. Formal oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
7. The Hearing Officer may allow all parties within the meaning of Article 11, the EFTA Surveillance Authority and the competent authorities of the EFTA States to ask questions during the formal oral hearing.

The Hearing Officer may hold a preparatory meeting with the parties and the EFTA Surveillance Authority services, so as to facilitate the efficient organisation of the formal oral hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the formal oral hearing shall be made available to the persons who attended that hearing. Regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

### *Article 16*

#### **Hearing of third persons**

1. If third persons apply in writing to be heard pursuant to Article 18 (4), second sentence, of Chapter IV, the EFTA Surveillance Authority shall inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views.
2. The third persons referred to in paragraph 1 shall make known their views in writing within the time limit set. The EFTA Surveillance Authority may, where appropriate, afford such third parties who have so requested in their written comments the opportunity to participate in a formal hearing. It may also in other cases afford such third parties the opportunity of expressing their views orally.
3. The EFTA Surveillance Authority may likewise invite any other natural or legal person to express its views, in writing as well as orally, including at a formal oral hearing.

## **SECTION V**

# **ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION**

### *Article 17*

#### **Access to the file and use of documents**

1. If so requested, the EFTA Surveillance Authority shall grant access to the file to the parties to whom it has addressed a statement of objections, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the statement of objections.
2. The EFTA Surveillance Authority shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their comments.
- 3.<sup>{11}</sup> The right of access to the file shall not extend to confidential information, or to internal documents of the EFTA Surveillance Authority, the Commission, the competent authorities of the EFTA States or of the EU Member States. The right of access to the file shall equally not extend to correspondence between the EFTA Surveillance Authority and the competent authorities of the EFTA States, between the EFTA Surveillance Authority and the competent authorities of the EU States, between the competent authorities of the EFTA States and/or of the EU Member States and between the EFTA Surveillance Authority and other competition authorities.

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{11} Paragraph 3 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

4. Documents obtained through access to the file pursuant to this Article may only be used for the purposes of the relevant proceeding pursuant to the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and Chapter IV.

### *Article 18*

#### **Confidential information**

1. Information, including documents, shall not be communicated or made accessible by the EFTA Surveillance Authority in so far as it contains business secrets or other confidential information the disclosure of which is not considered necessary by the EFTA Surveillance Authority for the purpose of the procedure.
2. Any person which makes known its views or comments pursuant to Articles 12, Article 13 and Article 16 of this Chapter, or supplies information pursuant to Article 11 of Chapter IV, or subsequently submits further information to the EFTA Surveillance Authority in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the EFTA Surveillance Authority.
3. Without prejudice to paragraph 2, the EFTA Surveillance Authority may require persons referred to in Article 3 of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), undertakings and associations of undertakings in all cases where they produce or have produced documents or statements pursuant to the said act or Chapter IV to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential.

The EFTA Surveillance Authority may also require persons referred to in Article 3 of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004), undertakings or associations of undertakings to identify any part of a statement of objections, case summary or a decision adopted by the EFTA Surveillance Authority which in their view contains business secrets.

Where business secrets or other confidential information are identified, the persons, undertakings and associations of undertakings shall give reasons and provide a separate non-confidential version by the date set by the EFTA Surveillance Authority.

4. If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the EFTA Surveillance Authority may assume that the documents or statements concerned do not contain confidential information.

## **SECTION VI**

### **COMMITMENTS OFFERED BY THE UNDERTAKINGS CONCERNED**

#### *Article 19*

##### **Time limits for submission of commitments**

1. Commitments offered by the undertakings concerned pursuant to Article 6(2) of Chapter IV shall be submitted to the EFTA Surveillance Authority within not more than 20 working days from the date of receipt of the notification.
2. {<sup>12</sup>} Commitments offered by the undertakings concerned pursuant to Article 8(2) of Chapter IV shall be submitted to the EFTA Surveillance Authority within not more than 65 working days from the date on which proceedings were initiated.

Where the undertakings concerned first offer commitments within less than 55 working days from the date on which proceedings were initiated but submit a modified version of the commitments 55 or more working days from that date, the modified commitments shall be deemed to be new commitments for the purpose of applying the second sentence of Article 10(3) of Chapter IV.

Where pursuant to Article 10(3), second subparagraph, of Chapter IV the period for the adoption of a decision pursuant to Article 8(1), (2) and (3) is extended, the period of 65 working days for the submission of commitments shall

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{12} Paragraph 2 amended by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

automatically be extended by the same number of working days.

In exceptional circumstances, the EFTA Surveillance Authority may accept commitments offered after the expiry of the time limit for their submission within the meaning of this paragraph provided that the procedure provided for in Article 19(5) of Chapter IV is complied with.

3. Articles 7, 8 and 9 shall apply *mutatis mutandis*.

### *Article 20*

#### **Procedure for the submission of commitments**

1. {<sup>13</sup>} The commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Chapter IV shall be submitted to the EFTA Surveillance Authority at the address referred to in Article 23(1) in the format and with the number of copies specified by the EFTA Surveillance Authority on its website. The EFTA Surveillance Authority shall forward copies of such commitments without delay to the competent authorities of the EFTA States.
- 1a. {<sup>14</sup>} In addition to the requirements set out in paragraph 1, the undertakings concerned shall, at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Chapter IV, submit one original of the information and documents prescribed by the Form RM relating to remedies (Form RM) as set out in Appendix V to this Protocol as well as the number of copies specified by the EFTA Surveillance Authority on its website. The information submitted shall be correct and complete.
2. When offering commitments pursuant to Articles 6(2) or Article 8 (2) of Chapter IV, the undertakings concerned shall at the same time clearly identify any information which they consider to be confidential, giving reasons, and shall provide a separate non- confidential version.

### *Article 20a*

#### **Trustees**

1. The commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Chapter IV may include, at the own expense of the undertakings concerned, the appointment of an independent trustee (or trustees) assisting the EFTA Surveillance Authority in overseeing the parties' compliance with the commitments or having a mandate to implement the commitments. The trustee may be appointed by the parties, after the EFTA Surveillance Authority has approved its identity, or by the EFTA Surveillance Authority. The trustee shall carry out its tasks under the supervision of the EFTA Surveillance Authority.
2. The EFTA Surveillance Authority may attach such trustee-related provisions of the commitments as conditions and obligations pursuant to Article 6(2) or Article 8(2) of Chapter IV.

## **SECTION VII**

### **MISCELLANEOUS PROVISIONS**

#### *Article 21*

##### **Transmission of documents**

1. {<sup>15</sup>} The EFTA Surveillance Authority may transmit documents and invitations to the addressees in any of the following

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{13} Paragraph 1 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

{14} Paragraph 1a replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

{15} Paragraph 1 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

ways:

- (a) delivery by hand against receipt;
  - (b) registered letter with acknowledgement of receipt;
  - (c) fax with a request for acknowledgement of receipt;
  - (d) electronic mail with a request for acknowledgement of receipt.
2. Unless otherwise provided in this Chapter, paragraph 1 also applies to the transmission of documents from the notifying parties, from other involved parties or from third parties to the EFTA Surveillance Authority.
- 3.<sup>{16}</sup> Where a document is sent by fax or by electronic mail, it shall be presumed that it has been received by the addressee on the day on which it was sent.

## *Article 22*

### **Setting of time limits**

In setting the time limits provided for pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1), the EFTA Surveillance Authority shall have regard to the time required for the preparation of statements and to the urgency of the case. It shall also take account of working days as well as public holidays in the country of receipt of the EFTA Surveillance Authority's communication.

Time limits shall be set in terms of a precise calendar date.

## *Article 23*

### **Receipt of documents by the EFTA Surveillance Authority**

1. In accordance with the provisions of Article 5(1) of this Chapter, notifications shall be delivered to the EFTA Surveillance Authority.<sup>17</sup>
2. Additional information requested to complete notifications must reach the EFTA Surveillance Authority at the address referred to in paragraph 1.
3. Written comments on EFTA Surveillance Authority communications pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1) of this Chapter must have reached the EFTA Surveillance Authority at the address referred to in paragraph 1 before the expiry of the time limit set in each case.
- 4.<sup>{18}</sup> Where the EFTA Surveillance Authority specifies that documents submitted to it or any additional copies thereof are to be submitted electronically, the same format shall be used as specified from time to time by EFTA Surveillance Authority on its website. Submissions sent by electronic mail shall be sent to the electronic mail address of the EFTA Surveillance Authority's Competition and State Aid Directorate.

## *Article 24*

### **Definition of working days**

The expression working days in the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EC) No 139/2004) and in this Chapter means all days other than Saturdays, Sundays, and EFTA Surveillance Authority holidays as published in the EEA Section of, and the EEA Supplement to, the Official Journal of the European Union before the beginning of each year.

## *Article 25*

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{16} Paragraph 3 replaced by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

{17} EFTA Surveillance Authority, Rue Belliard 35, B-1040 Brussels, Belgium

{18} Paragraph 4 added by the Agreement amending Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice signed in Brussels on 27 June 2014 (e.i.f. 18.11.2016).

(No text)

## **PART IV COAL AND STEEL**

### **CHAPTER VI**

## **RULES APPLICABLE TO UNDERTAKINGS IN THE FIELD OF COAL AND STEEL**

### **SECTION I**

## **General Rules regarding Agreements and Concentrations**

#### *Article 1*

1. Authorizations pursuant to Article 1(2) of Protocol 25 to the EEA Agreement may be granted subject to specified conditions and for limited periods. In such cases the EFTA Surveillance Authority shall renew an authorization once or several times if it finds that the requirements of subparagraphs (a) to (c) of Article 1(2) of Protocol 25 to the EEA Agreement are still met at the time of renewal.
2. The EFTA Surveillance Authority shall revoke or amend an authorization if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorization.
3. Decisions granting, renewing, amending, refusing or revoking an authorization shall be published together with the reasons therefor; the restrictions imposed by Article 3(2) shall not apply thereto.
4. The EFTA Surveillance Authority may, as provided in Article 3, obtain any information needed for the application of Article 1 of Protocol 25 to the EEA Agreement and of this Article, either by making a special request to the parties concerned or by means of decisions stating the kinds of agreement, decision or practice which must be communicated to it.
5. The EFTA Surveillance Authority shall have sole jurisdiction, subject to the right to bring actions before the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement and, on the conditions set out in Article 55 of the EEA Agreement and Protocols 22 and 25 thereto, to rule whether any such agreement or decision is compatible with Article 1 of Protocol 25 to the EEA Agreement.
6. On any undertaking which has entered into an agreement which is automatically void pursuant to Article 1(3) of Protocol 25 to the EEA Agreement, or has enforced or attempted to enforce, by arbitration, penalty, boycott or any other means, an agreement or decision which is automatically void or an agreement for which authorization has been refused or revoked, or has obtained an authorization by means of information which it knew to be false or misleading, or has engaged in practices prohibited by Article 1(1) of Protocol 25 to the EEA Agreement, the EFTA Surveillance Authority may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the agreement, decision or practice prohibited by Article 1(1) of Protocol 25 to the EEA Agreement; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10% of the annual turnover of the undertakings in question in the case of fines, and 20% of the daily turnover in the case of periodic penalty payments.

#### *Article 2*

1. In assessing whether the requirements of Article 2(2) of Protocol 25 to the EEA Agreement are met, the EFTA Surveillance Authority shall, in accordance with the principle of non-discrimination, take account of the size of like undertakings in the territory covered by the EEA Agreement, to the extent it considers justified in order to avoid or correct disadvantages resulting from unequal competitive conditions.
2. The EFTA Surveillance Authority may make its authorization subject to any conditions which it considers appropriate for the purposes of Article 2(2) of Protocol 25 to the EEA Agreement.
3. Before ruling on a transaction concerning undertakings at least one of which is not subject to Article 3 of Protocol 25 to the EEA Agreement, the EFTA Surveillance Authority shall obtain the comments of the Governments concerned.

4. Without prejudice to the application of Article 3 to undertakings within its jurisdiction, the EFTA Surveillance Authority may obtain from the natural or legal persons who have acquired or regrouped or are intending to acquire or regroup the rights or assets in question any information needed for the application of Article 2 of Protocol 25 to the EEA Agreement and of the present Article concerning transactions liable to produce the effect referred to in Article 2(1) of Protocol 25 to the EEA Agreement.
5. If a concentration should occur which the EFTA Surveillance Authority finds has been effected contrary to the provisions of Article 2(1) of Protocol 25 to the EEA Agreement but which nevertheless meets the requirements of Article 2(2) of Protocol 25 to the EEA Agreement, the EFTA Surveillance Authority shall make its approval of that concentration subject to payment by the persons who have acquired or regrouped the rights or assets in question of the fine provided for in paragraph 12(b); the amount of the fine shall not be less than half of the maximum determined in that subparagraph (b) should it be clear that authorization ought to have been applied for. If the fine is not paid, the EFTA Surveillance Authority shall take the steps hereinafter provided for in respect of concentrations found to be unlawful.
6. If a concentration should occur which the EFTA Surveillance Authority finds cannot fulfil the general or specific conditions to which an authorization under Article 2(2) of Protocol 25 to the EEA Agreement would be subject, the EFTA Surveillance Authority shall, by means of a reasoned decision, declare the concentration unlawful and, after giving the parties concerned the opportunity to submit their comments, shall order separation of the undertakings or assets improperly concentrated or cessation of joint control, and any other measures which it considers appropriate to return the undertakings or assets in question into independent operation and restore normal conditions of competition. Any person directly concerned may institute proceedings against such decisions, as provided in Articles 108(2)(b) of the EEA Agreement and 18 of the present Agreement. The EFTA Court, in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, shall have unlimited jurisdiction to assess whether the transaction effected is a concentration within the meaning of Article 2(1) of Protocol 25 to the EEA Agreement and of the acts concerning coal and steel as contained in Annex XIV to the EEA Agreement. The institution of proceedings shall have suspensory effect. Proceedings may not be instituted until the measures provided for above have been ordered, unless the EFTA Surveillance Authority agrees to the institution of separate proceedings against the decision declaring the transaction unlawful.
7. The EFTA Surveillance Authority may at any time, unless Article 41 of this Agreement is applied, take or cause to be taken such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties, and to forestall any step which might hinder the implementation of its decisions. Unless the EFTA Court decides otherwise, proceedings shall not have suspensory effect in respect of such interim measures.
8. The EFTA Surveillance Authority shall allow the parties concerned a reasonable period in which to comply with its decisions, on expiration of which it may impose daily penalty payments not exceeding one-tenth of 1% of the value of the rights or assets in question.
9. Furthermore, if the parties concerned do not fulfil their obligations, the EFTA Surveillance Authority shall itself take steps to implement its decision.
10. The EFTA Surveillance Authority is also empowered to make such recommendations to the EFTA States concerned as may be necessary to ensure that the measures provided for in the preceding paragraphs are implemented under their own law.
11. In the exercise of its powers, the EFTA Surveillance Authority shall take account of the rights of third parties which have been acquired in good faith.
12. The EFTA Surveillance Authority may impose fines not exceeding:
  - (a) 3% of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 4;
  - (b) 10% of the value of the assets acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in Article 2(1) of Protocol 25 to the EEA Agreement; this maximum shall be increased by one twenty-fourth for each month which elapses after the end of the twelfth month following completion of the transaction until the EFTA Surveillance Authority establishes that there has been an infringement;
  - (c) 10% of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have obtained or attempted to obtain authorization under Article 2(2) of Protocol 25 to the EEA Agreement by means of false or misleading information;
  - (d) 15% of the value of the assets acquired or regrouped, on undertakings within its jurisdiction which have engaged in or been party to transactions contrary to the provisions of Article 2 of Protocol 25 to the EEA Agreement or of the present Article.
13. Persons fined under paragraph 12 may appeal to the EFTA Court as provided in Article 35 of this Agreement.

### ***Article 3***

1. The EFTA Surveillance Authority may obtain the information it requires to carry out its tasks. It may have any necessary checks made.
2. Without prejudice to Articles 9(2) and 10(2) and (3) of Protocol 23 to the EEA Agreement, the EFTA Surveillance Authority must not disclose information acquired as a result of the application of Articles 55 and 58 of the EEA Agreement, of Protocol 25 thereto and of the provisions of this Chapter and which is of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. This obligation shall also apply to the representatives of the EC Commission and of the EC Member States who participate in the Advisory Committee pursuant to Article 14(2) of Chapter II and in the hearing pursuant to Article 14(3) of Chapter III.

Subject to this reservation, it shall publish such data as could be useful to governments or to any other parties concerned.

3. The EFTA Surveillance Authority may impose fines or periodic penalty payments on undertakings which evade their obligations under decisions taken pursuant of this Article or which knowingly furnish false information. The maximum amount of such fines shall be 1% of the annual turnover, and the maximum amount of such penalty payments shall be 5% of the average daily turnover for each day's delay.
4. Any breach of professional secrecy by the EFTA Surveillance Authority which has caused damage to an undertaking may be the subject of an action for compensation before the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement, in particular Article 39.

### ***Article 4***

Before imposing a pecuniary sanction or ordering a periodic penalty payment as provided for in this Chapter, the EFTA Surveillance Authority must give the party concerned the opportunity to submit its comments.

### ***Article 5***

The turnover taken as the basis for calculating any fines and periodic penalty payments imposed on undertakings under this Chapter shall be the turnover on products referred to in Protocol 14 to the EEA Agreement.

## **SECTION II**

### **Information to be Furnished (Article 2 (4) of Section I)**

#### ***PART ONE***

#### ***Compulsory notification***

##### ***Article 1***

All natural and legal persons except persons engaged within the territory covered by the EEA Agreement in the production of coal and steel or in the distribution of those products other than by way of sale to domestic consumers or small craft industries shall, where they effect transactions specified in the following Articles, furnish information as provided for in this Section.

##### ***Article 2***

The persons referred to in Article 1 shall notify the EFTA Surveillance Authority of any acquisition of rights in an undertaking covered by Article 3 of Protocol 25 to the EEA Agreement and any acquisition of power to exercise on their own behalf or on behalf of third parties rights in any such undertaking, whereby they acquire more than 10% of the voting power at meetings of shareholders or other members of such undertaking and where the total value of the rights held by them exceeds ECU 100 000. Any rights, or power to exercise rights on behalf of others, held by the persons concerned before the transaction in question shall be included in that calculation.

##### ***Article 3***

Article 1 shall also apply to the acquisition of rights in any undertaking which exercises control over an undertaking

covered by Article 3 of Protocol 25 to the EEA Agreement.

#### ***Article 4***

1. Banks and their agents shall be exempt from the obligation to notify the transactions mentioned in Articles 2 and 3 where exercise of voting rights attaches:
  - to shares belonging to customers of those or other banks; or
  - to registered shares or stock in respect of which the bank is entitled to exercise such rights in a fiduciary capacity on behalf of its clients.
2. Paragraph 1 shall not affect:
  - the obligation for banks to furnish information on such transactions under Article 7;
  - the obligation for their customers to notify such transactions in accordance with Articles 2 and 3 or to furnish information under Article 7.

#### ***Article 5***

The EFTA Surveillance Authority may, by special authorization and subject to certain conditions, grant exemption from the obligation to notify the transactions mentioned in Articles 2 and 3 to duly accredited stockbrokers where they do not exercise the voting rights attaching to the stock held by them.

#### ***Article 6***

The notification provided for in Articles 2 and 3 shall be made within four weeks from the date on which the person required to make notification has knowledge of the transaction in question.

## ***PART TWO***

### ***Special requests for information***

#### ***Article 7***

1. The EFTA Surveillance Authority may, by special request, obtain from the persons mentioned in Article 1 all information necessary for the implementation of Article 2 of Section I regarding:
  - (1) acquisition of ownership of or of rights to use premises, industrial plant or concessions of any undertaking if, before such acquisition, those premises, plant or concessions were used in the operations of that undertaking;
  - (2) acquisition of rights, in an undertaking, conferring voting powers at meetings of shareholders or other members of such undertaking;
  - (3) acquisition of the power to exercise on their own behalf or on behalf of third parties rights of the kind referred to in subparagraph (2) belonging to third parties;
  - (4) acquisition by contract of the power to make decisions as to how the profits of an undertaking are shown in the accounts or applied;
  - (5) acquisition of the power to participate in the management of an undertaking, alone or with others, whether as owner, beneficiary, manager or member of the managing organs;
  - (6) appointment to the Board of Directors of an undertaking.
2. The persons subject to the obligation to furnish information must likewise declare to the EFTA Surveillance Authority at the latter's request the name and address of the actual owner of the rights concerned, where they are empowered:
  - to exercise the rights referred to in paragraph 1 in a fiduciary capacity on behalf of a third party;
  - to exercise on their own behalf or on behalf of third parties the rights referred to in paragraph 1 belonging to

third parties.

## SECTION III

### Limitation Periods in Proceedings and the Enforcement of Sanctions under Protocol 25 to the EEA Agreement and the Present Chapter

#### *Article 1*

##### **Limitation periods in proceedings**

1. The power of the EFTA Surveillance Authority to impose fines for infringements of the provisions of Articles 53 and 54 of the EEA Agreement and Protocol 25 thereto or of the provisions contained in this Chapter shall be subject to a limitation period:
  - (a) of three years in the case of infringements of provisions concerning applications or communications of the parties, requests for information, or the carrying out of investigations;
  - (b) of five years in the case of all other infringements.
2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run upon the day on which the infringement ceases.

#### *Article 2*

##### **Interruption of the limitation period in proceedings**

1. Any action taken by the EFTA Surveillance Authority for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one party which has participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

- (a) written requests for information by the EFTA Surveillance Authority or decisions by the EFTA Surveillance Authority requiring the requested information;
  - (b) written authorizations to carry out investigations issued to their officials by the EFTA Surveillance Authority or a decision by the EFTA Surveillance Authority ordering an investigation;
  - (c) the commencement of proceedings by the EFTA Surveillance Authority;
  - (d) notification by the EFTA Surveillance Authority of a letter giving the party concerned the opportunity to submit its comments, pursuant to Article 4 of Section I.
2. The interruption of the limitation period shall apply for all parties which have participated in the infringement.
  3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the EFTA Surveillance Authority having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.

#### *Article 3*

##### **Suspension of the limitation period in proceedings**

The limitation period in proceedings shall be suspended for as long as the decision of the EFTA Surveillance Authority is the subject of proceedings pending before the EFTA Court.

#### *Article 4*

##### **Limitation period for the enforcement of sanctions**

1. The power of the EFTA Surveillance Authority to enforce decisions imposing fines or periodic payments for

infringements of the provisions of the EEA Agreement or of provisions made for its implementation shall be subject to a limitation period of five years.

2. Time shall begin to run upon the day on which the decision becomes final.

#### *Article 5*

##### **Interruption of the limitation period for the enforcement of sanctions**

1. The limitation period for the enforcement of sanctions shall be interrupted:
  - (a) by notification of a decision varying the original amount of the fine or periodic penalty payments or refusing an application for variation;
  - (b) by any action of the EFTA Surveillance Authority or of an EFTA State at the request of the EFTA Surveillance Authority, for the purpose of enforcing payments of a fine or periodic penalty payment.
2. Each interruption shall start time running afresh.

#### *Article 6*

##### **Suspension of the limitation period for the enforcement of sanctions**

The limitation period for the enforcement of sanctions shall be suspended for so long as:

- (a) time to pay is allowed; or
- (b) enforcement of payment is suspended pursuant to a decision of the EFTA Court.

## **SECTION IV**

### **Powers of Officials and Agents of the EFTA Surveillance Authority instructed to carry out the checks provided for in Protocol 25 to the EEA Agreement and in this Chapter**

#### *Article 1*

1. Officials and agents of the EFTA Surveillance Authority instructed to carry out the checks on undertakings provided for in Protocol 25 and Annex XIV to the EEA Agreement and in the provisions of this Chapter, in particular Article 3(1) of Section I, are hereby empowered:
  - (a) to examine books and business records to the extent necessary for the purpose of the check, including records held in automated systems of any kind, wherever such books or business records are kept;
  - (b) to take copies or photocopies of or extracts from the books and business records, including data stored in automated systems of any kind;
  - (c) to require oral explanations on the spot;
  - (d) to enter any premises, land or means of transport of undertakings, and of any third party with whom books or business records have been deposited, and in so doing to have sight of the said books and business records so as to be able to select all those that are relevant and are to be produced for inspection.
2. Forthcoming visits of inspection and the status of the officials shall be duly notified to the State concerned. Officials of that State may, at its request or at that of the EFTA Surveillance Authority, assist the officials of the EFTA Surveillance Authority in the performance of their tasks.
3. Undertakings shall assist officials and agents of the EFTA Surveillance Authority in carrying out their duties.

#### *Article 2*

Officials and agents of the EFTA Surveillance Authority instructed to carry out checks shall exercise their powers upon production of an authorization in writing specifying the purpose of the check. The EFTA Surveillance Authority shall also provide such an authorization to representatives of the EC Commission who shall take part in the investigation in accordance with Article 8(3) of Protocol 23 to the EEA Agreement.

### *Article 3*

Undertakings shall comply with the obligations imposed by Article 1 of this Section without an individual decision being required for that purpose, failure to do so rendering them liable to the fines and penalties provided for in Article 3(3) of Section I.

## **PART V**

### **LIMITATION PERIODS, TRANSITIONAL AND OTHER RULES**

#### **CHAPTER VII**

### **LIMITATION PERIODS IN PROCEEDINGS AND THE ENFORCEMENT OF SANCTIONS UNDER THE RULES RELATING TO TRANSPORT AND COMPETITION AS CONTAINED IN CHAPTERS IV AND V**

#### *Article 1*

##### **Limitation periods in proceedings**

1. The power of the EFTA Surveillance Authority to impose fines or penalties for infringements of the rules of the EEA Agreement relating to transport or competition shall be subject to the following limitation periods:
  - (a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations;
  - (b) five years in the case of all other infringements.
2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

#### *Article 2*

##### **Interruption of the limitation period in proceedings**

1. Any action taken by the EFTA Surveillance Authority, by the EC Commission at the request of the EFTA Surveillance Authority pursuant to Article 8 of Protocol 23 to the EEA Agreement, or by any EFTA State, acting at the request of the EFTA Surveillance Authority, for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which have participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

  - (a) written requests for information by the EFTA Surveillance Authority, or by the competent authority of an EFTA State acting at the request of the EFTA Surveillance Authority; or a decision by the EFTA Surveillance Authority requiring the requested information;
  - (b) written authorizations to carry out investigations issued to their officials by the EFTA Surveillance Authority or by the competent authority of any EFTA State at the request of the EFTA Surveillance Authority; or a decision by the EFTA Surveillance Authority ordering an investigation;
  - (c) the commencement of proceedings by the EFTA Surveillance Authority;
  - (d) notification of the EFTA Surveillance Authority's statement of objections.
2. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day

on which a period equal to twice the limitation period has elapsed without the EFTA Surveillance Authority having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.

### ***Article 3***

#### **Suspension of the limitation period in proceedings**

The limitation period in proceedings shall be suspended for as long as the decision of the EFTA Surveillance Authority is the subject of proceedings pending before the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement.

### ***Article 4***

#### **Limitation period for the enforcement of sanctions**

1. The power of the EFTA Surveillance Authority to enforce decisions imposing fines, penalties, or periodic payments for infringements of the rules of the EEA Agreement relating to transport or competition shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.

### ***Article 5***

#### **Interruption of the limitation period for the enforcement of sanctions**

1. The limitation period for the enforcement of sanctions shall be interrupted:
  - (a) by notification of a decision varying the original amount of the fine, penalty or periodic penalty payments or refusing an application for variation;
  - (b) by any action of the EFTA Surveillance Authority or of an EFTA State at the request of the EFTA Surveillance Authority, for the purpose of enforcing payments of a fine, penalty or periodic penalty payment.
2. Each interruption shall start time running afresh.

### ***Article 6***

#### **Suspension of the limitation period for the enforcement of sanctions**

The limitation period for the enforcement of sanctions shall be suspended for so long as:

- (a) time to pay is allowed; or
- (b) enforcement of payment is suspended pursuant to a decision of the EFTA Court in accordance with Article 108(2) of the EEA Agreement and with the relevant provisions of this Agreement.

### ***Article 7***

#### **Exclusion**

This Chapter shall not apply to measures taken under Chapter II of this Protocol on Implementation of the rules on competition laid down in Articles 53 and 54 of the EEA Agreement.

## **CHAPTER VIII<sup>19</sup> TRANSITIONAL AND OTHER RULES**

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{19} Chapter VIII lays down transitional and other provisions linked to the entry into force of the EEA Agreement and the Surveillance and Court Agreement in 1994. Any transitional provisions adopted after that date are incorporated into the relevant Chapters of this Protocol.

## SECTION I

### Rules Applicable to Former Chapters II to XII and XV

#### *Article 1*

##### **Notification of existing agreements, decisions and practices**

1. Agreements, decisions and concerted practices of the kind described in Article 53(1) of the EEA Agreement which are in existence at the date of entry into force of the EEA Agreement and in respect of which the parties seek application of Article 53(3) of the EEA Agreement shall be notified to the EFTA Surveillance Authority pursuant to the provisions in Article 56 of the EEA Agreement, the rules referred to in Articles 1 to 3 of Protocol 21 and Protocol 23 to the EEA Agreement, as well as Chapters III, VI, VII, IX, X, XI, XII and XV, within six months of the date of entry into force of the EEA Agreement.
2. Paragraph 1 shall not apply to agreements, decisions or concerted practices of the kind described in Article 53(1) of the EEA Agreement and falling under Article 4(2) of Chapter II; these may be notified to the EFTA Surveillance Authority pursuant to Article 56 of the EEA Agreement, the rules referred to in Articles 1 to 3 of Protocol 21 and Protocol 23 to the EEA Agreement, as well as Chapters III, VI, VII, IX, X, XI, XII and XV.

#### *Article 2*

##### **Decisions pursuant to Article 53(3) of the EEA Agreement**

1. Whenever the EFTA Surveillance Authority takes a decision pursuant to Article 53(3) of the EEA Agreement, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.
2. The second sentence of paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4(2) of Chapter II and Article 1(2) of this Chapter, nor to those falling within Article 1(1) which have been notified within the time limit specified in Article 1(1).

#### *Article 3*

##### **Special provisions for existing agreements, decisions and practices**

1. Where agreements, decisions or concerted practices of the kind described in Article 53(1) of the EEA Agreement which are in existence at the date of entry into force of the EEA Agreement and notified within the time limits specified in Article 1(1) of this Chapter do not satisfy the requirements of Article 53(3) of the EEA Agreement and the undertakings or associations of undertakings concerned cease to give effect to them or modify them in such a manner that they no longer fall under the prohibition contained in Article 53(1) or that they satisfy the requirements of Article 53(3), the prohibition contained in Article 53(1) shall apply only for a period fixed by the EFTA Surveillance Authority. A decision by the EFTA Surveillance Authority pursuant to the foregoing sentence shall not apply as against undertakings and associations of undertakings which did not expressly consent to the notification.
2. Paragraph 1 shall apply to agreements, decisions or concerted practices falling under Article 4(2) of Chapter II which are in existence at the date of entry into force of the EEA Agreement if they are notified within six months after that date.

#### *Article 4*

Applications and notifications submitted to the EC Commission prior to the date of entry into force of the EEA Agreement shall be deemed to comply with the provisions on application and notification under that Agreement.

The EFTA Surveillance Authority pursuant to Article 56 of the EEA Agreement and Article 10 of Protocol 23 to the EEA Agreement may require a duly completed form as prescribed for the implementation of the EEA Agreement to be submitted to it within such time as it shall appoint. In that event, applications and notifications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of the EEA Agreement and of Chapters II, III, V, VII, X, XII and XV of this Protocol.

#### *Article 5*

##### **Fines**

Fines for infringement of Article 53(1) of the EEA Agreement shall not be imposed in respect of any act prior to notification

of the agreements, decisions and concerted practices to which Articles 1 and 2 of this Chapter apply and which have been notified within the period specified therein.

#### *Article 6*

The EFTA States shall ensure that the measures affording the necessary assistance to officials of the EFTA Surveillance Authority and the EC Commission, in order to enable them to make their investigations as foreseen under the Agreement, are taken within six months of the entry into force of the EEA Agreement.

#### *Article 7*

As regards agreements, decisions and concerted practices already in existence at the date of entry into force of the EEA Agreement which fall under Article 53(1) of the EEA Agreement, the prohibition in Article 53(1) shall not apply where the agreements, decisions or practices are modified within six months from the date of entry into force of the EEA Agreement so as to fulfil the conditions contained in the block exemptions provided for in Annex XIV to the EEA Agreement.

#### *Article 8*

As regards agreements, decisions of associations of undertakings and concerted practices already in existence at the date of entry into force of the EEA Agreement which fall under Article 53(1) of the EEA Agreement, the prohibition in Article 53(1) shall not apply, from the date of entry into force of the Agreement, where the agreements, decisions or practices are modified within six months from the date of entry into force of the EEA Agreement so as not to fall under the prohibition of Article 53(1) any more.

#### *Article 9*

Agreements, decisions of associations of undertakings and concerted practices which benefit from an individual exemption granted under Article 85(3) of the Treaty establishing the European Economic Community before the entry into force of the EEA Agreement shall continue to be exempted as regards the provisions of the EEA Agreement, until their date of expiry as provided for in the decisions granting these exemptions or until the EC Commission otherwise decides, whichever date is the earlier.

## **SECTION II**

### **Rules Applicable to Former Chapters XIII and XIV**

#### *Article 10*

The act as referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89) and Chapter XIII shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of the said act before the entry into force of the EEA Agreement and they shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by an EFTA State's authority with responsibility for competition.