

**AGREEMENT AMENDING PROTOCOL 2 AND 3 TO THE AGREEMENT
BETWEEN THE EFTA STATES ON THE ESTABLISHMENT OF A
SURVEILLANCE AUTHORITY AND A COURT OF JUSTICE**

THE REPUBLIC OF AUSTRIA,
THE REPUBLIC OF FINLAND,
THE REPUBLIC OF ICELAND,
THE KINGDOM OF NORWAY AND
THE KINGDOM OF SWEDEN,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, as adjusted by the Protocol Adjusting the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, hereinafter referred to as the Surveillance and Court Agreement, and in particular Article 49 thereof,

In agreement with the EFTA Surveillance Authority,

Having regard to the Decision of the EEA Joint Committee No 7/94 of 21 March 1994 amending Protocol 47 and certain Annexes to the EEA Agreement, and in particular the amendments made to Annexes XV and XVI thereto,

Whereas, therefore, Protocols 2 and 3 to the Surveillance and Court Agreement should be amended,

HAVE AGREED AS FOLLOWS:

Article 1

Protocol 2 on the functions and powers of the EFTA Surveillance Authority in the field of procurement shall be as follows:

A. The following heading shall be inserted before Article 1:

«SECTION 1»

B. In Article 1 the words «Without prejudice to Article 31 of this Agreement» shall be replaced by the words «Without prejudice to Articles 31 and 32 of this Agreement».

C. In Article 2 the word «Protocol» shall be replaced by the word «Section».

D. The following Section shall be inserted after Article 2 as a new Section 2:

« SECTION 2
Corrective mechanism
Article 3

1. Without prejudice to Articles 31 and 32 of this Agreement the EFTA Surveillance Authority may invoke the procedures for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the act referred to in point 4 of Annex XVI to the EEA Agreement or in relation to Article 3(2)(a) of that act in the case of the contracting entities to which that provision applies.
2. The EFTA Surveillance Authority shall notify the EFTA States and the contracting entity concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction by appropriate means.
3. Within 30 days of receipt of the notification referred to in paragraph 2, the EFTA States concerned shall communicate to the EFTA Surveillance Authority:
 - (a) its confirmation that the infringement has been corrected; or
 - (b) a reasoned submission as to why no correction has been made; or
 - (c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a) of the act referred to in point 5a of Annex XVI to the EEA Agreement.
4. A reasoned submission in accordance with paragraph 3 (b) of this Article may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9) of the act referred to in point 5a of Annex XVI to the EEA Agreement. In such a case, the EFTA State shall inform the EFTA Surveillance Authority of the result of those proceedings as soon as it becomes known.
5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3 (c) of this Article, the EFTA State concerned shall notify the EFTA Surveillance Authority when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been

corrected or include a reasoned submission as to why no correction has been made.

Conciliation

Article 4

1. Any person having or having had an interest in obtaining a particular contract falling within the scope of the act referred to in point 4 of Annex XVI to the EEA Agreement and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of the provisions of the EEA Agreement in the field of procurement or national rules implementing those provisions may request the application of the conciliation procedure provided for in Articles 5 and 6 of the present Protocol.
2. The request referred to in paragraph 1 shall be addressed in writing to the EFTA Surveillance Authority or to the national authorities listed in the Appendix to the present Protocol. These authorities shall forward requests to the EFTA Surveillance Authority as quickly as possible.

Article 5

1. Where the EFTA Surveillance Authority considers, on the basis of the request referred to in Article 4, that the dispute concerns the correct application of the provisions of the EEA Agreement, it shall ask the contracting entity to state whether it is willing to take part in the conciliation procedure. If the contracting entity declines to take part, the EFTA Surveillance Authority shall inform the person who made the request that the procedure cannot be initiated. If the contracting entity agrees, paragraphs 2 to 7 shall apply.
2. The EFTA Surveillance Authority shall propose, as quickly as possible, a conciliator drawn from a list of independent persons accredited for this purpose. This list shall be drawn up by the EFTA Surveillance Authority, following consultation of an advisory committee composed of representatives of the EFTA States or, in the case of contracting entities the activities of which are defined in Article 2(2)(d) of the act referred to in point 4 of Annex XVI to the EEA Agreement, following consultation of such an advisory committee enforced with expertise on telecommunications procurement.

Each party to the conciliation procedure shall declare whether it accepts the conciliator, and shall designate an additional conciliator. The conciliators may invite not more than two other persons as experts to advise them in their work. The parties to the conciliation procedure and the EFTA Surveillance Authority may reject any expert invited by the conciliators.

3. The conciliators shall give the person requesting the application of the conciliation procedure, the contracting entity and any other candidate or tenderer

- participating in the relevant contract award procedure the opportunity to make representations on the matter either orally or in writing.
4. The conciliators shall endeavour as quickly as possible to reach an agreement between the parties which is in accordance with the provisions of the EEA Agreement.
 5. The conciliators shall report to the EFTA Surveillance Authority on their findings and on any result achieved.
 6. The person requesting the application of the conciliation procedure and the contracting entity shall have the right to terminate the procedure at any time.
 7. Unless the parties decide otherwise, the person requesting the application of the conciliation procedure and the contracting entity shall be responsible for their own costs. In addition, they shall each bear half of the costs of the procedure, excluding the costs of intervening parties.

Article 6

1. Where, in relation to a particular contract award procedure, an interested person within the meaning of Article 4, other than the person requesting the conciliation procedure, is pursuing judicial review proceedings or other proceedings for review within the meaning of the act referred to in point 5a of Annex XVI to the EEA Agreement, the contracting entity shall inform the conciliators. These shall inform that person that a request has been made to apply the conciliation procedure and shall invite that person to indicate within a given time limit whether he agrees to participate in that procedure. If that person refuses to participate, the conciliators may decide, acting if necessary by a majority, to terminate the conciliation procedure if they consider that the participation of this person is necessary to resolve the dispute. They shall notify their decision to the EFTA Surveillance Authority and give their reasons for it.
2. Action taken pursuant to Articles 4 to 6 shall be without prejudice to:
 - (a) any action that the EFTA Surveillance Authority or any EFTA State might take pursuant to Articles 31 and 32 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice or pursuant to Article 3 of the present Protocol;
 - (b) the rights of the persons requesting the conciliation procedure, of the contracting entity or of any other person.

Article 7

1. Not later than 1 January 1996, the EFTA Surveillance Authority, in consultation with the advisory committee composed of representatives of the EFTA States, shall review the manner in which the provisions of this Section and the provisions of the act referred to in point 5a of Annex XVI to the EEA Agreement have been implemented and, in particular, the use of the European Standards and, if necessary, make proposals for amendments.
2. Before 1 March each year the EFTA States shall communicate to the EFTA Surveillance Authority information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the EFTA Surveillance Authority in consultation with the advisory committee.
3. In the case of matters relating to contracting entities the activities of which are defined in Article 2(2) (d) of the act referred to in point 4 of Annex XVI to the EEA Agreement, the EFTA Surveillance Authority shall also consult such an advisory committee enforced with expertise on telecommunications procurement.
»

E. The following Appendix shall be added to the present Protocol:

« APPENDIX

Austria

Bundesministerium für wirtschaftliche Angelegenheiten

(Federal Ministry of Economic Affairs)

Finland

Kauppa- ja teollisuusministeriö,

Handels- och industriministeriet

(Ministry of Trade and Industry)

Iceland

Fjármálaráðuneytid

(Ministry of Finance)

Norway

Nærings- og energidepartementet

(Ministry of Industry and Energy)

Sweden

Nämnden för offentlig upphandling

(The Swedish National Board for Public Procurement) »

Article 2

Protocol 3 on the functions and powers of the EFTA Surveillance Authority in the field of State Aid shall be amended as follows:

A. The following shall be inserted after Article 2 as a new Article 3.

«Article 3

1. In order to assess the compatibility with the functioning of the EEA Agreement of State aid measures in the steel industry falling under the act referred to in point 1a of Annex XV to the EEA Agreement, the rules laid down in Article 1 of this Protocol shall be further specified, as follows:
2. The notification of aid plans falling under the act referred to in paragraph 1, must be lodged with the EFTA Surveillance Authority at the latest by the date of entry into force of the Decision of the EEA Joint Committee No. 7/94 of 21 March 1994 amending Protocol 47 and certain Annexes to the EEA Agreement as regards aid covered by Article 5 of the act referred to in paragraph 1 and 30 June 1996 as regards all other aid. All individual awards of the types of aid referred to in Articles 4 and 5 of the act referred to in paragraph 1 shall be notified to the EFTA Surveillance Authority in accordance with the procedure provided for in Article 1(3) of this Protocol. The EFTA Surveillance Authority also reserves the right to require that some or all individual awards of aid of the types referred to in Articles 2 and 3 of the act referred to in paragraph 1 be notified in accordance with Article 1(3) of this Protocol.
3. The EFTA Surveillance Authority shall be informed, in sufficient time for it to submit its comments, and by 30 June 1996 at the latest, of any plans for transfers of State resources, by EFTA States, regional or local authorities or other bodies to

steel undertakings in the form of acquisition of shareholdings or provisions of capital or similar financing.

The EFTA Surveillance Authority shall determine whether the financial transfers involve aid elements within the meaning of Article 1(2) of the act referred to in paragraph 1 and, if so, shall examine whether they are compatible with the functioning of the EEA Agreement under the provisions of Articles 2 to 5 of the aforementioned act.

4. The EFTA Surveillance Authority shall seek the views of the EFTA States on plans for closure aid, for regional investment aid when the amount of the aided investment or of the total aided investments during 12 consecutive months is in excess of ECU 10 million, and on other major aid proposals notified to it before adopting a position on them. It shall inform the EFTA States of the position it has adopted on all aid proposals, specifying the form and volume of aid.
5. If, after giving notice to the interested parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid in a given case is incompatible with the provisions of the act referred to in paragraph 1, it shall inform the EFTA State concerned of its decision. The EFTA Surveillance Authority shall take such a decision not later than three months after receiving the information needed to assess the proposed aid.
6. If the EFTA Surveillance Authority fails to initiate the procedure provided for in Article 1(2), subparagraph 1 of this Protocol, or to otherwise make its position known within two months of receiving notification of a proposal, the planned measures may be put into effect provided that the EFTA State first informs the EFTA Surveillance Authority of its intention to do so. Where the EFTA Surveillance Authority seeks the view of EFTA States under the provisions of paragraph 4, the above-mentioned time period shall be three months. »

Article 3

1. This Agreement shall be approved by the EFTA States in accordance with their respective constitutional requirements.

It shall be deposited with the Government of Sweden which shall notify all other EFTA States.

The instruments of acceptance shall be deposited with the Government of Sweden which shall notify all other EFTA States.

2. This Agreement shall enter into force on the day the Decision of the EEA Joint

Committee No 7/94 of 21 March 1994 amending Protocol 47 and certain Annexes to the EEA Agreement enters into force or on the day all instruments of acceptance have been deposited by the EFTA States, whichever day is the later.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized thereto, have signed this Agreement.

Done at Brussels, this 21st day of March 1994.