

**AGREEMENT AMENDING PROTOCOL 4 TO THE AGREEMENT
BETWEEN THE EFTA STATES ON THE ESTABLISHMENT OF A
SURVEILLANCE AUTHORITY AND A COURT OF JUSTICE**

THE REPUBLIC OF ICELAND
THE PRINCIPALITY OF LIECHTENSTEIN
THE KINGDOM OF NORWAY

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 Decision of the EEA Joint Committee No 27/98 of 27 March 1998 amending Annex XIV (Competition) of the EEA Agreement and amending Protocol 21 to the EEA Agreement, on the implementation of competition rules applicable to undertakings,

Whereas certain errors in Chapter XIII of Protocol 4 to the EEA Agreement have appeared,

Whereas, therefore, Protocol 4 to the Surveillance and Court Agreement should be amended,

HAVE AGREED AS FOLLOWS:

Article 1

Chapter XIII of Protocol 4 to the Surveillance and Court Agreement shall be amended as follows:

A. In Article 6:

(a) in paragraph 1:

- in point (b) the following subparagraph shall be added:

«The decision declaring the concentration compatible with the

functioning of the EEA Agreement shall also cover restrictions directly related and necessary to the implementation of the concentration.»;

- point (c) shall be replaced by the following:

« (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 (EEC) No 4064/89) and raises serious doubts as to its compatibility with the functioning of the EEA Agreement, it shall decide to initiate proceedings. »;

(b) the following paragraphs shall be inserted:

« 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 may decide to 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 has taken 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 deadlines referred to in Article 10 (1). »;

(c) paragraph 2 shall become paragraph 5.

B. in Article 7:

(a) paragraph 1 shall be replaced by the following:

«1. A concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the functioning of the EEA Agreement pursuant to a decision under Article 6 (1) (b) or Article 8 (2) or on the basis of a presumption according to Article 10 (6).»;

(b) paragraph 2 shall be deleted;

(c) paragraph 3 shall be amended as follows:

the words « paragraphs 1 and 2 » at the beginning of the paragraph shall be

replaced by the words « paragraph 1 ». The word « impede » at the beginning of the paragraph shall be replaced by the word « prevent ». The words « pursuant to paragraph 4 » at the end of the paragraph shall be replaced by the words « under paragraph 4 ».

(d) paragraph 4 shall be replaced by the following:

« 4. The EFTA Surveillance Authority may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 3. 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 a concentration or on a third party and the threat to competition posed by the concentration. That 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, even before notification or after the transaction. »;

(e) paragraph 5 shall be replaced by the following:

« 5. 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 (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 which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1. »;

C. in Article 8:

(a) paragraph 2 shall be replaced by the following:

«2. Where the EFTA Surveillance Authority finds that, following modification by the undertakings concerned if necessary, 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 (EEC) No 4064/89) 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.

It 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. The decision declaring the concentration compatible with the functioning of the EEA Agreement shall also cover restrictions directly related and necessary to the implementation of the concentration. »;

(b) paragraph 3 shall be replaced by the following:

« 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. »;

D. in Article 9:

(a) paragraph 2 shall be replaced by the following:

« 2. Within three weeks of the date of receipt of the copy of the notification an EFTA State may inform the EFTA Surveillance Authority, which shall inform the undertakings concerned, that:

- (a) a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that EFTA State, which presents all the characteristics of a distinct market, or
- (b) a concentration affects competition on 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. »;

(b) in paragraph 3:

- point (b) shall be replaced by the following:

« (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. »:

- the following subparagraph shall be added:

« In cases where an EFTA State informs the EFTA Surveillance Authority 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. »;

(c) paragraph 10 shall be deleted.

E. in Article 10:

(a) in paragraph 1, the following text shall be added at the end;

«or where, after notification of a concentration, the undertakings concerned submit commitments pursuant to Article 6 (2), which are intended by the parties to form the basis for a decision pursuant to Article 6(1) (b). »;

(b) at the beginning of paragraph 4 the phrase « The period set by paragraph 3 » shall be replaced by the phrase « The periods set by paragraphs 1 and 3 »;

(c) at the end of paragraph 3 the words « the proceeding » shall be replaced by the word « proceedings. »;

F. In Article 14:

(a) in paragraph 4 the word « a » before the words « criminal law » shall be deleted;

G. in Article 18:

- (a) in paragraph 1 the words: «Article 7 (2) and (4)» shall be replaced by the words «Article 7 (4).» The word «and» shall be inserted before the words «Articles 14 and 15.»;
- (b) paragraph 2 shall be replaced by the following:
 - « 2. By way of derogation from paragraph 1, a decision to grant a derogation from suspension as referred to in Article 7 (4) 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. »;
- (c) at the beginning of paragraph 4 the words « the EFTA Surveillance Authority and the competent authorities of the EFTA States » shall be replaced by the words « the EFTA Surveillance Authority or the competent authorities of the EFTA States. »;

H. in Article 19, the following text shall be added at the end of paragraph 1:

«Such documents shall include commitments which are intended by the parties to form the basis for a decision pursuant to Articles 6 (1) (b) or 8 (2).»;

I. in Article 22:

- (a) paragraphs 1 and 2 shall be replaced by the following:
 - «1. The act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89) and this Chapter alone shall apply to concentrations as defined in Article 3 of the said act, and Chapters II, VI, IX and XI and the acts referred to in points 10 and 11 of Annex XIV to the EEA Agreement (Regulations (EEC) No 1017/68 and (EEC) No 4056/86) 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. »;
- (b) paragraph 3 shall be amended as follows:
 - « 3. If the EFTA Surveillance Authority finds, at the request of an EFTA State or at the joint request of two or more EFTA States, that a concentration as defined in Article 3 of the said act that has no EFTA dimension within the meaning of Article 1 of the said act creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the EFTA State or States making the joint request, it may, in so far as that concentration affects trade between EFTA States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4). »;
- (c) paragraph 4 shall be replaced by the following:
 - « 4. Articles 2 (1) (a) and (b), and 5 of the said act and Articles 6, 8 and 10 to 20 of this Chapter shall apply to a request made pursuant to paragraph 3. Article 7 of this Chapter shall apply to the extent that the concentration has not been put into effect on the date on which the EFTA Surveillance Authority informs the

parties that a request has been made.

The period within which proceedings may be initiated pursuant to Article 10(1) shall begin on the day following that of the receipt of the request from the EFTA State or States concerned. The request must be made within one month at most of the date on which the concentration was made known to the EFTA State or to all EFTA States making a joint request or effected. This period shall begin on the date of the first of those events. »;

- (d) in paragraph 5 the phrase « or States » shall be inserted after the phrase « within the territory of the EFTA State. »;
- (e) paragraph 6 shall be deleted.

Article 2

In Article 10 of Chapter XVI of Protocol 4 to the Surveillance and Court Agreement the following paragraph shall be added:

« The amendments introduced by Council Regulation (EC) No 1310/97 to the act 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 1 March 1998 and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before 1 March 1998 by an EFTA State's authority with responsibility for competition. ».

Article 3

1. This Agreement, drawn up in a single copy and authentic in the English language, shall be approved by the EFTA States in accordance with their respective constitutional requirements.

Before the end of a period of six months from its entry into force, this Agreement shall be drawn up and authenticated in German, Icelandic and Norwegian.

2. This Agreement be deposited with the Government of Norway which shall notify other EFTA States.

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

3. This Agreement shall enter into force on the day Decision of the EEA Joint Committee No 27/98 of 27 March 1998 of amending Annex XIV (Competition) of the EEA Agreement and amending Protocol 21 to the EEA Agreement, on the implementation of competition rules applicable to undertakings, 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, 27 March 1998.