

**AGREEMENT AMENDING PROTOCOL 4 TO THE AGREEMENT BETWEEN
THE EFTA STATES ON THE ESTABLISHMENT OF A SURVEILLANCE
AUTHORITY AND A COURT OF JUSTICE INSERTING NEW ARTICLES 13
AND 22 IN CHAPTER XIII OF PART III**

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 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)¹.

Having regard to Decision of the EEA Joint Committee No 79/2004 incorporating Articles 13 and 22 of Regulation (EC) No 139/2004 into Protocol 21 and Protocol 24 to the EEA Agreement,

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

HAVE AGREED AS FOLLOWS:

¹ (OJ L 24, 29.1.2004, p. 1).

Article 1

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

1. The following new Article 13 shall be inserted:

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) 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 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.

6. 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.'

2. The following new Article 22 shall be inserted:

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 2

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

The instrument 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 79/2004 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 authorised thereto, have signed this Agreement.

Done at Brussels, 4 June 2004

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FOR THE REPUBLIC OF ICELAND

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FOR THE PRINCIPALITY OF
LIECHTENSTEIN

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FOR THE KINGDOM OF NORWAY