

**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 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty¹.

Having regard to Decision of the EEA Joint Committee No178/2004 of 3 December 2004 amending Protocol 21 and Protocol 23 to the EEA Agreement,

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

HAVE AGREED AS FOLLOWS:

¹ OJ L 123, 27.4.2004, p. 18.

Article 1

Chapter III of Part I of Protocol 4 to the Surveillance and Court Agreement shall be replaced by the following:

‘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 or a statement of objections 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 1.

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 and 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

1. 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.

2. The documents to which the complainant has had access in the context of proceedings conducted by the EFTA Surveillance Authority under Articles 53 and 54 of the EEA

Agreement may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those provisions of the EEA Agreement.

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 in writing of the objections raised against them. The statement of objections shall be notified to each of them.
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 11

Right to be heard

1. The EFTA Surveillance Authority shall give the parties to whom it has addressed 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

Right to an oral hearing

The EFTA Surveillance Authority shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written 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 shall likewise invite officials and civil servants of other authorities of the EFTA States as well as the EC Commission and the EC Member States.
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 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. Access shall be granted after the notification of the statement of objections.
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.
4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 53 and 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 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) and Article 16(3) of this Chapter, 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) of this Chapter 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 3(3), Article 4(3) and Article 16(3) of this Chapter 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.

Article 2

The Table of Contents to Protocol 4 to the Surveillance and Court Agreement shall be amended as follows:

1. In Part I, the text of Chapter III shall be replaced by ‘Rules relating to the conduct of proceedings by the EFTA Surveillance Authority pursuant to Articles 53 and 54 of the EEA Agreement’.
2. The text of Chapters IV and XII shall be deleted.
3. In Part V, the text of Appendix 1 shall be replaced by ‘Form referred to in Article 5 (1) of Chapter III.’

Article 3

In Chapter II of Part I, the text of the last paragraph of Article 28 (2) shall be replaced by ‘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(3) and in the hearing pursuant to Article 14 (3) of Chapter III.’

Article 4

The text of Chapter IV of Part I of Protocol 4 to the Surveillance and Court Agreement shall be deleted.

Article 5

The text of Chapter XII of Part II of Protocol 4 to the Surveillance and Court Agreement shall be deleted.

Article 6

The text of Appendix 1 to Protocol 4 to the Surveillance and Court Agreement shall be replaced as specified in the Annex to this Agreement.

Article 7

The texts of Appendices 3 and 5 to Protocol 4 to the Surveillance and Court Agreement shall be deleted.

Article 8

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 178/2004 of 3 December 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, 3 December 2004

.....
FOR THE REPUBLIC OF ICELAND

.....
FOR THE PRINCIPALITY OF
LIECHTENSTEIN

.....
FOR THE KINGDOM OF NORWAY

ANNEX
to the Agreement amending Protocol 4 to the Agreement between the EFTA States
on the establishment of a Surveillance Authority and a Court of Justice

The text of Appendix 1 to Protocol 4 shall be replaced by the following:

FORM C

COMPLAINT PURSUANT TO ARTICLE 7 OF CHAPTER II

I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. Details of the alleged infringement and evidence

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Articles 53 or 54 of the EEA Agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between EC Member States or between the Community and one or more EFTA States or between EFTA States may be affected by the conduct complained of.

III. Finding sought from the EFTA Surveillance Authority and legitimate interest

6. Explain what finding or action you are seeking as a result of proceedings brought by the EFTA Surveillance Authority.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Chapter II. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the EFTA Surveillance Authority would be liable to remedy the alleged grievance.

IV. Proceedings before national competition authorities or national courts

8. Provide full information about whether you have approached, concerning the same or closely related subject matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.