



2023/2397

5.10.2023

EFTA SURVEILLANCE AUTHORITY DECISION No 085/23/COL

of 14 June 2023

adopting a Notice on informal guidance relating to novel or unresolved questions concerning Articles 53 and 54 of the EEA Agreement that arise in individual cases (guidance letters) [2023/2397]

THE EFTA SURVEILLANCE AUTHORITY ('the Authority'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Article 6 thereof;

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('Surveillance and Court Agreement'), in particular Articles 3(2), 5(2)(b) and Article 25 thereof,

Whereas:

Under Article 25 of the Surveillance and Court Agreement, the Authority shall give effect to the provisions of the EEA Agreement concerning competition.

Under Article 5(2)(b) of the Surveillance and Court Agreement, the Authority is to issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if the Authority considers it necessary.

The European Commission ('the Commission') has issued a notice entitled 'Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of European Union that arise in individual cases (guidance letters)' ⁽¹⁾. The Commission's notice is also of relevance for the European Economic Area ('EEA').

Uniform application of the EEA competition rules is to be ensured throughout the EEA, in line with the objective of homogeneity established in Article 1 of the EEA Agreement.

According to point II under the heading 'General' on page 11 of Annex XIV to the EEA Agreement, the Authority is to adopt, after consultation with the Commission, acts corresponding to those adopted by the Commission in order to maintain equal conditions of competition.

Having consulted the Commission and the EFTA States,

HAS ADOPTED THIS DECISION:

Article 1

The Authority shall issue a Notice on informal guidance relating to novel or unresolved questions concerning Articles 53 and 54 of the EEA Agreement that arise in individual cases (guidance letters), which is annexed to this Decision.

Article 2

The Decision, including the Notice set out in the Annex, shall be authentic in the English language.

⁽¹⁾ OJ C 381, 4.10.2022, p. 9.

Article 3

The Notice shall be published in the EEA Section of *the Official Journal of the European Union* and in the EEA Supplement thereto.

Article 4

1. The EFTA States shall be informed by means of a copy of the Decision, including the Annex.
2. The European Commission shall be informed by means of a copy of the Decision, including the Annex.

Done at Brussels, 14 June 2023.

For the EFTA Surveillance Authority

Arne RØKSUND
President

Stefan BARRIGA
College Member

Árni Páll ÁRNASON
Responsible College Member

Melpo-Menie JOSÉPHIDÈS
Countersigning as Director, Legal and Executive Affairs

ANNEX

EFTA Surveillance Authority Notice on informal guidance relating to novel or unresolved questions concerning Articles 53 and 54 of the EEA Agreement that arise in individual cases (guidance letters)

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area ('EEA Agreement' or 'EEA') and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ('Surveillance and Court Agreement').
- B. The European Commission ('Commission') has issued a notice entitled 'Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of European Union that arise in individual cases (guidance letters)' ⁽¹⁾. That non-binding act contains principles and rules which the Commission follows in the field of competition. It also explains how the Commission intends to provide informal guidance to undertakings.
- C. The EFTA Surveillance Authority ('the Authority') considers the abovementioned act to be EEA relevant. In order to maintain equal conditions of competition and to ensure a uniform application of the EEA competition rules throughout the European Economic Area, the Authority adopts the present notice ('Notice') under the power conferred upon it by Article 5(2)(b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this Notice when applying the relevant EEA rules to a particular case ⁽²⁾.
- D. In particular, the purpose of this Notice is to spell out how the Authority aims to provide informal guidance concerning its application of Articles 53 and 54 EEA in a particular case.
- E. The present notice applies to cases where the Authority is the competent surveillance authority under Article 56 EEA.

I. CHAPTER II OF PROTOCOL 4 TO THE SURVEILLANCE AND COURT AGREEMENT

- 1. Chapter II of Protocol 4 to the Surveillance and Court Agreement ('Chapter II') ⁽³⁾ sets up the enforcement system for Articles 53 and 54 of the EEA Agreement. While designed to enable the Authority to focus on its primary task of effective enforcement of the competition rules, Chapter II also creates legal certainty inasmuch as it provides that agreements ⁽⁴⁾ which fall under Article 53(1) EEA but fulfil the conditions in Article 53(3) EEA are valid and fully enforceable without a prior decision by a competition authority (Article 1 of Chapter II).
- 2. The framework of Chapter II, while providing for parallel competence of the Authority, EFTA States' ⁽⁵⁾ competition authorities and EFTA States' courts to apply Articles 53 and 54 EEA in their entirety, limits risks of inconsistent application by a range of measures, thereby ensuring the primary aspect of legal certainty for undertakings as reflected in the case-law of the EFTA Court and the Court of Justice of the European Union ('CJEU') ⁽⁶⁾, i.e. that the competition rules are applied in a consistent way throughout the European Economic Area.

⁽¹⁾ OJ C 381, 4.10.2022, p. 9.

⁽²⁾ The competence of the Authority and the Commission to handle individual cases falling under Articles 53 and 54 EEA is divided according to the rules laid down in Article 56 EEA.

⁽³⁾ Chapter II (on the implementation of the rules on competition laid down in Articles 53 and 54 of the EEA Agreement) of Protocol 4 (on the functions and powers of the EFTA Surveillance Authority in the field of competition) to the Surveillance and Court Agreement. Chapter II reflects in the EFTA pillar Council Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

⁽⁴⁾ In this Notice, the term 'agreement' is used for agreements, decisions by associations of undertakings and concerted practices. The term 'unilateral practices' refers to the conduct of dominant undertakings. The term 'undertakings' equally covers 'associations of undertakings'.

⁽⁵⁾ Pursuant to Article 2(b) of the EEA Agreement, the term 'EFTA States' means Iceland, the Principality of Liechtenstein and the Kingdom of Norway.

⁽⁶⁾ The Court of Justice of the European Union consists of two courts: the Court of Justice and the General Court.

3. Undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or unilateral practice and in what form. They are close to the facts and have at their disposal the framework of acts, corresponding to EU block exemption regulations, referred to in Annex XIV to the EEA Agreement ('block exemptions'), case-law and existing Authority and Commission decisions as well as extensive guidance in Authority guidelines and notices, which have been provided in order to further assist self-assessment by undertakings ⁽⁷⁾. The Authority has also produced guidelines on the application of Article 53(3) EEA ⁽⁸⁾. This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 53 EEA.
4. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 53 or 54 EEA, individual undertakings may wish to seek informal guidance from the Authority. In line with the principles set out in Section II of this Notice, a request for guidance will not entitle an applicant to receive any such guidance, as this Notice cannot re-introduce a system that would be inconsistent with the self-assessment framework of Chapter II. However, where the Authority considers it appropriate and subject to its enforcement priorities, the Authority may provide such informal guidance on the interpretation of Articles 53 or 54 EEA in a written statement (guidance letter). This Notice sets out the details of this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

5. Chapter II confers powers on the Authority to effectively investigate and prosecute infringements of Articles 53 and 54 EEA, and to impose fines ⁽⁹⁾. One major objective of Chapter II is to ensure efficient enforcement of the EEA competition rules by setting up a self-assessment system, thereby removing the former notification system and allowing the Authority to focus its enforcement policy on the most serious infringements of Articles 53 and 54 EEA.
6. While Chapter II is without prejudice to the ability of the Authority to issue informal guidance to individual undertakings, as set out in this Notice, this ability should not interfere with the primary objective of Chapter II, which is to ensure effective enforcement of Articles 53 and 54 EEA. The Authority may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.
7. Subject to point 6, the Authority, seized of a request for a guidance letter, will consider whether it is appropriate to process it. Issuing a guidance letter may only be considered if a *prima facie* assessment of the facts and legal considerations of the conduct or envisaged conduct suggests that, in the Authority's view, there are valid reasons to provide clarifications on the applicability of Articles 53 or 54 EEA to the agreement or unilateral practice in question through a guidance letter. Such *prima facie* assessment will be based on the following two cumulative elements:
 - (a) Novel or unresolved questions: The substantive assessment of the agreement or unilateral practice with regard to Articles 53 or 54 EEA poses a question of application of the law for which there is no sufficient clarity in the existing EEA legal framework including the case-law of the EFTA Court and the CJEU, nor sufficient publicly available general guidance at European Economic Area/European Union level in decision-making practice or previous guidance letters ⁽¹⁰⁾; and

⁽⁷⁾ The Authority has issued guidelines and notices; block exemptions can be found in Annex XIV to the EEA Agreement. In addition, the Authority publishes its decisions. All texts are available at: <https://eftasurv.int>.

⁽⁸⁾ EFTA Surveillance Authority Notice – Guidelines on the application of Article 53(3) of the EEA Agreement (OJ C 208, 6.9.2007, p. 1).

⁽⁹⁾ See, in particular, Articles 7–9, 12, 17–24, and 29 of Chapter II.

⁽¹⁰⁾ Article 6 of the EEA Agreement provides that, without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [Treaty on the functioning of the European Union] and to acts adopted in application of [that treaty], shall in their implementation and application, be interpreted in conformity with the relevant rulings of the [CJEU] given prior to the date of signature of the EEA Agreement. As regards relevant rulings by the Court of Justice given after the date of signature of the EEA Agreement, it follows from Article 3(2) of the Surveillance and Court Agreement that the Authority and the EFTA Court shall pay due account to the principles laid down by these rulings. As stated in Article 58 of the EEA Agreement and Protocol 23 thereto, the Authority and the Commission are to co-operate with a view to *inter alia* promoting a homogenous implementation, application and interpretation of the EEA Agreement. Although the Commission's decisions and informal guidance letters are not binding on the Authority, the Authority will endeavour to take due account of the case practice of the Commission.

- (b) Interest in providing guidance: The *prima facie* assessment of the agreement or unilateral practice suggests that a public clarification of the applicability of Articles 53 or 54 EEA through a guidance letter would provide added value with respect to legal certainty, taking into account one or more of the following elements:
- the actual or potential economic importance of the goods or services concerned by the agreement or unilateral practice, in particular taking into account the interests of consumers,
 - whether the objectives of the agreement or unilateral practice are relevant for the achievement of the Authority's priorities or European Economic Area interest,
 - the magnitude of the investments made or to be made by the undertakings concerned, which are linked to the agreement or unilateral practice, and
 - the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread usage in the European Economic Area ⁽¹¹⁾.
8. The Authority will not normally issue a guidance letter in either of the following circumstances:
- the questions raised in the request are identical or similar to issues raised in a case pending before the EFTA Court or the CJEU, or
 - the agreement or unilateral practice to which the request refers is subject to proceedings pending with the Authority, an EFTA State court or EFTA State competition authority.
9. The Authority will not consider hypothetical questions and will not issue guidance letters on agreements or unilateral practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Authority in relation to questions raised by an agreement or unilateral practice that they envisage, i.e. before the implementation of that agreement or unilateral practice. In this case, planning must have reached a sufficiently advanced stage for a request to be considered.

III. INDICATIONS ON HOW TO REQUEST GUIDANCE

10. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or unilateral practice that could fall within the scope of Articles 53 or 54 EEA with regard to questions of interpretation raised by such agreement or unilateral practice.
11. A request for a guidance letter should be addressed to the following address:
- EFTA Surveillance Authority
 Competition and State Aid Directorate
 Avenue des Arts/Kunstlaan 19H
 1000 Bruxelles/Brussel
 BELGIQUE/BELGIË
- Or by email to <mailto:registry@eftasurv.int>.
12. In the request for guidance letter, the applicant(s) should include:
- the identity of all undertakings concerned as well as a single address for contact with the Authority,
 - the specific questions on which informal guidance is sought,
 - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation, so as to allow the Authority to issue a guidance letter on the basis of the information provided,

⁽¹¹⁾ This Notice leaves unaltered the possibility for EFTA States' competition authorities to provide guidance in accordance with their legal framework, in particular where an agreement or unilateral practice corresponds or is liable to correspond to usage that is predominantly limited to one EFTA State.

- the applicant(s)' own preliminary assessment, having regard to point 7(a) of this Notice, as to why the request presents novel or unresolved question(s) in view of the existing EEA legal framework, including the case-law of the EFTA Court or the CJEU, publicly available general guidance at European Economic Area/European Union level in decision-making practice or previous guidance letters,
 - the applicant(s)' own preliminary assessment, having regard to the elements listed at point 7(b) of this Notice, as to why a public clarification of the applicability of Articles 53 or 54 EEA through a guidance letter would provide added value with respect to legal certainty,
 - the applicant(s)' own preliminary assessment, to the best of its (their) abilities, of the application of Articles 53 or 54 EEA to the novel or unresolved question(s) raised by the agreement or unilateral practice,
 - all other information that permits an evaluation of the request in the light of the aspects explained in points 8–9 of this Notice, including in particular a declaration that, to the best of the applicant(s)' knowledge, the agreement or unilateral practice to which the request refers is not subject to proceedings pending before an EFTA State court or competition authority,
 - where the request contains elements that are considered business secrets, a clear identification of these elements,
 - any other information or documentation relevant for the assessment of the agreement or unilateral practice.
13. Prior to the formal submission of the request for a guidance letter, the undertaking(s) may contact the Competition and State Aid Directorate of the Authority via <mailto:registry@eftasurv.int>, to discuss their intended submission informally and in confidence.

IV. PROCESSING OF THE REQUEST

14. The Authority will in principle evaluate the request on the basis of the information provided and will not process applications which do not fulfil the requirements set out in point 12 of this Notice. Nevertheless, the Authority may use additional information at its disposal from public sources, previous case-law, decision-making practice and guidance letters at European Economic Area/European Union level or any other source and may ask the applicant(s) or, in exceptional cases, other selected parties to provide supplementary information while safeguarding the confidentiality of the information provided by the applicant(s). Where such information contains personal data, the Authority processes the personal data in accordance with its Rules on Data Protection as set out in Decision No 100/19/COL. ⁽¹²⁾
15. The Authority may share the information submitted to it with the Commission and EFTA States' competition authorities and receive input from them. It may discuss the substance of the request with the Commission and EFTA States' competition authorities before issuing a guidance letter.
16. With reference to points 13-15 of this Notice, the rules on professional secrecy set out by Article 28(2) of Chapter II apply to the information supplied by the applicant(s) or other selected third parties.
17. The Authority will use its best efforts to inform the applicant of the course of action that it intends to take with regard to the request for guidance within a reasonable time, depending on the circumstances of each case. Where no guidance letter is issued, the Authority shall inform the applicant(s) accordingly in writing.
18. The applicant(s) may withdraw its/their request at any point in time. In such cases, no guidance letter will be issued. In any event, information supplied in the context of a request for informal guidance remains available to the Authority and can be used to launch subsequent procedures under Chapter II.

⁽¹²⁾ Available at: <https://www.eftasurv.int/cms/sites/default/files/documents/Rules-on-Data-Protection—EFTA-Surveillance-Authority.pdf>.

19. A request for a guidance letter is without prejudice to the power of the Authority to open proceedings in accordance with Chapter II with regard to the facts presented in the request.

V. GUIDANCE LETTERS

20. A guidance letter issued by the Authority sets out:
- a summary description of the facts on which it is based,
 - the principal legal reasoning underlying the understanding of the Authority on the application of Articles 53 or 54 EEA to the novel or unresolved questions raised by the agreement or unilateral practice.
21. A guidance letter may be limited to part of the question(s) raised in the request. It may also include additional aspects to those set out in the request. If appropriate, the Authority may set out in a guidance letter a time limit for its application or specify that the guidance letter is premised on the existence or absence of certain factual circumstances.
22. Guidance letters will be published on the Authority's website, having regard to the legitimate interest of the applicant(s) in the protection of their business secrets. The Authority will agree with the applicant(s) on a public version prior to the publication of the guidance letter.

VI. THE EFFECTS OF GUIDANCE LETTERS

23. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements or unilateral practices. In that respect, the applicant(s) remain(s) responsible for carrying out its/their own self-assessment of the applicability of Articles 53 or 54 EEA. Guidance letters reflect the Authority's observations on the facts presented to it and do not create any rights or obligations for the applicant(s) or any third party.
24. A guidance letter cannot prejudice the assessment of the same question by the EFTA Court or the CJEU.
25. Where an agreement or unilateral practice has formed the factual basis for a guidance letter, the Authority is not precluded from subsequently examining that same agreement or unilateral practice in a procedure under Chapter II. In that case, the Authority will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects discovered by the Authority or raised by a complaint, to developments in the case-law of the EFTA Court or the CJEU or wider changes of the Authority's policy and developments on the markets concerned. In principle and subject to point 26 of this Notice, the Authority will not impose any fines on applicant(s), with respect to any action taken by the applicant(s) relying in good faith on the Authority's guidance letter ⁽¹³⁾. Where the public interest so requires, the Authority can also modify or revoke a guidance letter accordingly ⁽¹⁴⁾.
26. The clarifications on the applicability of Articles 53 or 54 EEA included in a guidance letter are expressly conditioned on the accuracy and truthfulness of information provided by the applicant(s) and any material divergence from the information provided by the applicant(s) will render the guidance letter inoperative.
27. Guidance letters are not Authority decisions and do not bind EFTA States' competition authorities or EFTA States' courts that have the power to apply Articles 53 and 54 EEA. However, it is open to EFTA States' competition authorities and EFTA States' courts to take account of guidance letters issued by the Authority as they see fit in the context of a case.

⁽¹³⁾ An applicant cannot claim to rely in good faith on a guidance letter if the facts on which it is based have materially changed.

⁽¹⁴⁾ For the avoidance of doubt, the Authority is not required to modify or revoke a guidance letter prior to examining an agreement or unilateral practice in a procedure under Chapter II and imposing fines on the applicant(s).