

**Explanatory Note regarding inspections undertaken pursuant to Article 20(4) of  
Chapter II of Protocol 4 to the Agreement between the EFTA States on the  
Establishment of a Surveillance Authority and a Court of Justice**

[March 2017]

This note is for information only and is without prejudice to any formal interpretation of the EFTA Surveillance Authority's powers of investigation.

1. Undertakings<sup>1</sup> are legally obliged to submit to an inspection ordered by decision of the EFTA Surveillance Authority (the "Authority") pursuant to Article 20(4) of Chapter II of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the "Surveillance and Court Agreement"). Written authorisations serve to name the officials and other accompanying persons authorised by the Authority to conduct the inspection (the "Inspectors"). The Inspectors will each provide a proof of identity.
2. The Inspectors cannot be required to expand upon the subject matter as set out in the decision or to justify the decision in any way. They may, however, explain procedural matters, particularly with regard to confidentiality, and the possible consequences of a refusal to submit to the inspection.
3. A certified copy of the decision is to be handed to the undertaking. The minute of notification of the decision serves only to certify delivery, and its signature by the recipient does not imply submission to the inspection.
4. The Inspectors are empowered pursuant to Article 20(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement:
  - 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;

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<sup>1</sup> In this note the term "undertaking" includes both undertakings and associations of undertakings.

- e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.
5. The officials and other accompanying persons authorised or appointed by the competition authority of the EFTA State in whose territory the inspection is conducted are entitled to actively assist the Inspectors in carrying out their duties. To this end, they enjoy the same powers under Article 20(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement as the Inspectors (see paragraph 4 above). They shall prove their identity in accordance with the relevant national rules.
6. The undertaking may consult external legal counsel during the inspection. However, the presence of such legal counsel is not a legal condition for the validity of the inspection. The Inspectors may enter the premises, notify the decision ordering the inspection and occupy the offices of their choice without waiting for the undertaking to consult its legal counsel. The Inspectors will, in any case, accept only a short delay pending consultation of the legal counsel before starting to examine the books and other records related to the business, taking copies or extracts of those documents, sealing business premises and books or records if need be or asking for oral explanations. Any such delay must be kept to the strict minimum.
7. Where any representative or member of staff of the undertaking gives, pursuant to Article 4(1) of Chapter III of Protocol 4 to the Surveillance and Court Agreement, oral explanations on the spot on facts or documents relating to the subject-matter of the inspection at the request of the Inspectors, the explanations may be recorded in any form. A copy of any such recording will be made available to the undertaking concerned after the inspection pursuant to Article 4(2) of Chapter III of Protocol 4 to the Surveillance and Court Agreement.
8. In cases where a member of staff of an undertaking who is not or was not authorised by the undertaking to provide explanations on behalf of the undertaking has been asked for explanations, the Authority shall set a time-limit within which the undertaking may communicate to the Authority any rectification, amendment or supplement to the explanations given by any such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded during the inspection.
9. The Inspectors are entitled to examine any books and records related to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. This includes the examination of electronic information and the taking of electronic and/or paper copies of such information.
10. The Inspectors can search the IT environment (e.g. servers, desktop computers, laptops, tablets and other mobile devices) and all storage media (e.g. CD-ROMs, DVDs, USB keys, external hard disks, backup tapes, cloud services) of the undertaking. This also applies to private devices and media that are used for professional reasons (e.g. Bring Your Own Device – BYOD) when they are found on the premises. For this purpose, the Inspectors may not only use any built-in (keyword) search tool, but may also make use of their own dedicated software and/or hardware (“Forensic IT tools”). These Forensic IT tools allow the Authority

to copy, search and recover data whilst respecting the integrity of the undertaking's systems and data.

11. The undertaking has the obligation to cooperate fully and actively with the inspection. This means that the undertaking may be required to provide appropriate representatives or members of staff to assist the Inspectors, not only for explanations on the organisation of the undertaking and its IT environment, but also for specific tasks such as the temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing 'administrator access rights'-support. When such actions are taken, the undertaking must not interfere in any way with these measures and it is the undertaking's responsibility to inform the employees affected accordingly. The Inspectors may ask to use hardware (e.g. hard disks, CD-ROMs, DVDs, USB-keys, connection cables, scanners, printers) provided by the undertaking, but cannot be obliged to use the undertaking's hardware.
12. Storage media selected for examination may be kept under the Inspectors' control until the end of the inspection at the undertakings' premises. They may be returned earlier, for instance after a forensic copy of the data under investigation has been made. Such a forensic copy is an authentic duplicate of (part or all of) the data stored on the original medium. The examination of the authentic duplicate is equal to the examination of the original storage medium.
13. At the end of the inspection the Inspectors completely wipe<sup>2</sup> all of the Forensic IT tools that contain data from the undertaking. Hardware provided by the undertaking will not be wiped by the Inspectors, but returned to the undertaking.
14. If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection at the undertaking's premises, a copy of the data set still to be searched may be collected to continue the inspection at a later time. This copy will be secured by placing it in a sealed envelope. The undertaking may request a duplicate. The Authority will invite the undertaking to be present when the sealed envelope is opened and during the continued inspection process at the Authority's premises. Alternatively, the Authority may decide to return the sealed envelope to the undertaking without opening it. The Authority may also ask the undertaking to keep the sealed envelope in a safe place to allow the Authority to continue the search process at the undertaking's premises in the course of a further announced visit.
15. The undertaking will receive an electronic copy of all of the final data selected by the Inspectors during the entire inspection (i.e. at both the undertaking's premises and the Authority's premises). The undertaking will be requested to sign the printed list(s) of data items selected. Copies of these data stored on one or more data carriers will be taken along by the Inspectors.
16. Each item of evidence selected during the course of the inspection may be collected and listed in its technical entirety during the inspection (e.g. if only one attachment to an email is selected, the final export will consist of the cover email, along with all attachments that belong to that particular email). During the final processing of the evidence into the case file at the Authority's premises each item

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<sup>2</sup> The technical term for this wiping is 'sanitize'. The goal of sanitizing is to completely remove the data from a storage device in a way that the data cannot be reconstructed by any known technique.

of evidence may be separated into its individual components (e.g. cover email, attachments and/or other embedded data items) which may be listed individually and accordingly receive individual reference numbers.

17. Where the undertaking makes material available for making copies at the request of the Inspectors, the Authority shall, at the request of the undertaking, reimburse the cost of the material used to produce such copies for the Authority.
18. The documents/data copied during an inspection will be covered by the provisions of Article 28 of Chapter II of Protocol 4 to the Surveillance and Court Agreement concerning professional secrecy. If, at a later stage of the procedure, it becomes necessary to grant other parties access to those documents/data, the undertaking will be asked to identify any business secrets or other confidential information contained in the documents/data, to justify those claims, and to provide non-confidential copies for the purpose of granting access to the file.
19. Where the Inspectors decide to seal business premises and books or records, a minute will be made. The undertaking has to ensure that seals that have been affixed are not broken until the seals are removed by the Inspectors. The Inspectors will also prepare a separate minute at the time when the seals are removed and will record the state of the seals at that time.
20. Decision No 235/16/COL laying down Rules on Data Protection applies to all personal data collected by the Authority during antitrust investigations. As EEA antitrust rules apply only to undertakings, personal data of individuals as such are not the target of antitrust investigations and inspections conducted by the Authority. Personal data of the individual staff members of undertakings (such as their names, telephone numbers, email addresses) may, however, be contained in business documents/data related to such investigations and may therefore be copied or obtained during an inspection and may become part of the Authority's file.
21. All personal data on the Authority's antitrust files may only be used for the purpose for which they were collected (the enforcement of Articles 53 and/or 54 of the EEA Agreement) and will be processed in compliance with Decision No 235/16/COL laying down Rules on Data Protection.