Notice of the EFTA Surveillance Authority

Notice on agreements of minor importance which do not appreciably restrict competition under Article 53(1) of the EEA Agreement (*De Minimis Notice*)

A.

This Notice is issued pursuant to the rules of the Agreement on the European Economic Area (the "EEA Agreement" or "EEA") and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the "Surveillance and Court Agreement").

B.

The European Commission has issued a revised "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)".[1] That non-binding act defines when agreements between companies are not prohibited under Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU").

C.

The EFTA Surveillance Authority (the "Authority") considers the European Commission notice to be EEA relevant. In order to maintain equal conditions of competition and to ensure uniform application of the EEA competition rules throughout the European Economic Area, the Authority adopts the present Notice under the powers 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 in a particular case.

D.

This Notice replaces the Authority's previous Notice of 2003 on agreements of minor importance which do not appreciably restrict competition under Article 53(1) of the EEA Agreement.[2]

[1] Adopted on 25 June 2014; not yet published in the Official Journal of the European Union. Available at: http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice.pdf.

[2] OJ C 67, 20.3.2003, p. 20 and EEA Supplement to the OJ No 15, 20.3.2003, p. 11.

I

1. Article 53(1) of the EEA Agreement prohibits agreements between undertakings which may affect trade between the Contracting Parties to the EEA Agreement and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement. The Court of Justice of the European Union has clarified that the corresponding Article 101(1) TFEU is not applicable where the impact of the agreement on trade between EU Member States or on competition is not appreciable.[3] By virtue of the provisions of Article 6 EEA and Article 3 of the Surveillance and Court Agreement this principle should also be applied to the interpretation of Article 53(1) EEA, such that Article 53(1) EEA is not applicable where the impact on trade between the Contracting Parties to the EEA Agreement or on competition is not appreciable.

2. The Court of Justice has also clarified that an agreement which may affect trade between EU Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition.[4] This Notice does not therefore cover agreements which have as their object the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

3. In this Notice the Authority indicates, with the help of market share thresholds, the circumstances in which it considers that agreements which may have as their effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement do not constitute an appreciable restriction of competition under Article 53 EEA.[5] This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this Notice constitute an appreciable restriction of competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 53(1) EEA.[6]

4. Agreements may also fall outside Article 53(1) EEA because they are not capable of appreciably affecting trade between Contracting Parties to the EEA Agreement. This Notice does not indicate what constitutes an appreciable effect on trade between the Contracting Parties to the EEA Agreement. Guidance to that effect is to be found in the Authority's Notice on effect on trade,[7] in which the Authority quantifies, with the help of the combination of a 5 % market share threshold and a EUR 40 million turnover threshold, which agreements are in principle not capable of appreciably affecting trade between the Contracting Parties to the EEA Agreement.[8] Such agreements normally fall

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3 See Case C-226/11 *Expedia*, EU:C:2012:795, paragraphs 16 and17.

4 See Case C-226/11 *Expedia*, in particular paragraphs 35, 36 and 37.

5 The competence to handle individual cases falling under Article 53 of the EEA Agreement is divided between the EFTA Surveillance Authority and the European Commission according to the rules laid down in Article 56 EEA. Only one authority is competent to handle any given case.

6 See, for example, Joined Cases C-215/96 and C-216/96 *Bagnasco and Others*, EU:C:1999:12, paragraphs 34 and 35.

7 Authority Notice – Guidelines on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement (OJ C 291, 30.11.2006, p. 46 and EEA Supplement to the OJ No 59, 30.11.2006, p. 18), in particular points 44 to 57.

8 It should be noted that agreements between small and medium sized undertakings (SMEs), as defined in the Authority's Decision No 112/96/COL of 11 September 1996 and referring to the current European Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises or any future recommendation replacing it, are also not normally capable of affecting

outside Article 53(1) EEA even if they have as their object the prevention, restriction or distortion of competition.

5. In cases covered by this Notice, the Authority will not institute proceedings either upon a complaint or on its own initiative. In addition, where the Authority has instituted proceedings but undertakings can demonstrate that they have assumed in good faith that the market shares referred to in paragraphs 8, 9, 10 and 11 were not exceeded, the Authority will not impose fines. Although not binding on them, this Notice is also intended to give guidance to the courts and competition authorities of the EFTA States in their application of Article 53 EEA.[9]

6. The principles set out in this Notice also apply to decisions by associations of undertakings and to concerted practices.

7. This Notice is without prejudice to any interpretation of Article 53 EEA and/or Article 101 TFEU which may be given by the EFTA Court or the Court of Justice of the European Union.

II

8. The Authority holds the view that agreements between undertakings which may affect trade between the Contracting Parties to the EEA Agreement and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 53(1) EEA:

(a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors);[10] or

(b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is

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trade between EEA States. See in particular point 50 of the Notice on effect of trade. The Authority's Decision No 112/96/COL of 11 September 1996 referred to the definition of small and medium size enterprises laid down in European Commission Recommendation 96/280/EC (OJ L 107, 30.4.1996, p.4), which was replaced with effect from 1.1.2005 by Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) and was incorporated into the EEA Agreement by EEA Joint Committee Decision of 24 September 2004 No 131/2004 (OJ L 64, 10.3.2005, p. 67 and EEA Supplement to the OJ No 12, 10.3.2005, p. 49).

9 In particular, in order to determine whether or not a restriction of competition is appreciable, the competition authorities and the courts of the EFTA States may take into account the thresholds established in this Notice but are not required to do so. See Case C-226/11 *Expedia*, paragraph 31.

10 On the definition of actual or potential competitors, see the EFTA Surveillance Authority Notice entitled "Guidelines on the applicability of Article 53 of the EEA Agreement to horizontal cooperation agreements", adopted by Decision No. 187/12/COL of 23 May 2012 (OJ C 362, 12.12.2013, p. 3 and EEA Supplement to the OJ No 69, 12.12.2013, p. 1), point 10. Two undertakings are treated as actual competitors if they are active on the same relevant market. An undertaking is treated as a potential competitor of another undertaking if, in the absence of the agreement, in the event of a small but permanent increase in relative prices, it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.

made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors).

9. In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold is applicable.

10. Where, in a relevant market, competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds set out in paragraphs 8 and 9 are reduced to 5 %, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5 %, are in general not considered to contribute significantly to a cumulative foreclosure effect.[11] A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.

11. The Authority also holds the view that agreements do not appreciably restrict competition if the market shares of the parties to the agreement do not exceed the thresholds of, respectively, 10 %, 15 % and 5 % set out in paragraphs 8, 9 and 10 during two successive calendar years by more than two (2) percentage points.

12. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the Authority's Notice on the definition of the relevant market for the purposes of EEA competition law.[12] The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

13. In view of the clarification of the Court of Justice referred to in paragraph 2, this Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement. The Authority will therefore not apply the safe harbour created by the market share thresholds set out in paragraphs 8, 9, 10 and 11 to such agreements.[13] For example, as regards agreements between competitors, the Authority will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. Likewise, the Authority will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any

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11 See also the EFTA Surveillance Authority Notice entitled "Guidelines on Vertical Restraints" (OJ C 362, 22.11.2012, p. 1 and EEA Supplement to the OJ No 65, 22.11.2012, p. 1), in particular points 76, 134 and 179. While in the Guidelines on Vertical Restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this Notice all market share thresholds refer to total market shares.

12 Notice of the EFTA Surveillance Authority on the definition of the relevant market for the purpose of competition law within the European Economic Area (EEA) (OJ L 200, 16.7.1998, p. 46 and EEA Supplement to the OJ No 28, 16.7.1998, p. 3).

13 In respect of such agreements, the Authority will exercise its discretion in deciding whether or not to institute proceedings.

current or future block exemption regulation adopted by the Authority,[14] which are considered by the Authority generally to constitute restrictions by object.

14. The safe harbour created by the market share thresholds set out in paragraphs 8, 9, 10 and 11 is particularly relevant for categories of agreements not covered by any block exemption regulation adopted by the Authority.[15] The safe harbour is also relevant for agreements covered by a block exemption regulation adopted by the Authority to the extent that those agreements contain an excluded restriction, that is, a restriction not listed as a hardcore restriction but nonetheless not covered by a block exemption regulation adopted by the Authority.[16]

15. For the purpose of this Notice, the terms "undertaking", "party to the agreement", "distributor" and "supplier" include their respective connected undertakings.

16. For the purpose of this Notice "connected undertakings" are:

    (a) undertakings in which a party to the agreement, directly or indirectly:

        i. has the power to exercise more than half the voting rights, or

        ii. has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

        iii. has the right to manage the undertaking's affairs;

    (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

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[14] For supply and distribution agreements between non-competitors, see in particular Article 4 of the act referred to in point 2 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 330/2010 of 20 April 2010) on the application of Article 53(3) of the EEA Agreement to categories of vertical agreements and concerted practices (the "Vertical Block Exemption Regulation") (OJ L 102, 23.4.2010, p.1, incorporated into the EEA Agreement by Decision 77/2010 (OJ L 244, 16.9.2010, p. 35 and EEA Supplement No 49, 16.9.2010, p. 34)); for licensing agreements between non-competitors, see in particular Article 4(2) of the act referred to in point 5 of Annex XIV to the EEA Agreement (Commission Regulation (EC) No 772/2004 of 27 April 2004) on the application of Article 53(3) of the EEA Agreement to certain categories of technology transfer agreements (the "TTBER") (OJ L 123, 27.4.2004, p. 11, incorporated into the EEA Agreement by Decision No 42/2005 (OJ L 198, 28.7.2005, p. 42 and EEA Supplement No 38, 28.7.2005, p. 24)). For agreements between competitors, see in particular Article 5 of the act referred to in point 7 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 1217/2010 of 14 December 2010) on research and development agreements (the "R&D Block Exemption Regulation") (OJ L 335, 18.12.2010, p.36, incorporated into the EEA Agreement by Decision 3/2011 (OJ L 93, 7.4.2011, p. 32 and EEA Supplement No 19, 7.4.2011, p. 7)); and Article 4 of the act referred to in point 6 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 1218/2010 of 14 December 2010) on the application of Article 53(3) of the EEA Agreement to certain categories of specialisation agreements (the "Specialisation Block Exemption Regulation") (OJ L 335, 18.12.2010, p.43, incorporated into the EEA Agreement by Decision 3/2011 (OJ L 93, 7.4.2011, p. 32 and EEA Supplement No 19, 7.4.2011, p. 7)) as well as Article 4(1) of the TTBER.

[15] For example, trade mark licence agreements and most types of agreements between competitors, with the exception of research and development agreements and specialisation agreements, are not covered by any block exemption regulation.

[16] For excluded restrictions, see in particular Article 5 of the Vertical Block Exemption Regulation, Article 5 of the TTBER and Article 6 of the R&D Block Exemption Regulation.

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

i. parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

ii. one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

For the purposes of point (e) in paragraph 16, the market share held by these jointly held undertakings is apportioned equally to each undertaking having the rights or the powers listed in point (a) in paragraph 16.