The list of regulations in Protocol 26 does not mean that the regulations have been implemented into the EEA Agreement and that the regulations take effect as such with the general adaptations following from Protocol 1 EEA. The purpose of the list is to ensure that ESA through **Protocol 3 to the SCA**, are granted similar powers as that of the Commission. Thus, the legal basis for ESAs enforcement is Protocol 3 SCA.

Protocol 27 CSA regulates the cooperation between ESA and the Commission in the field of State aid. One important aspect concerns the obligation to conduct surveys on State aid in their respective States and is implemented through the publication of annual State aid scoreboards.

Annex XV to the EEA Agreement contains several important legal acts such as transparency directive, the general *de minimis* regulation, the block exemption regulation and the exemption for certain Services of general economic interest.

The procedural rules in Protocol 3 SCA describes the **procedures for the review of new aid**, including the stand still and notification obligation for the EFTA States, the procedures governing the **misuse of aid** and the **review of existing aid schemes**.

The second paragraph concerns **state aid guidelines** and refers to the list in Annex 1 SCA which lists the various State aid guidelines in force in the European Community at the time of the conclusion of the EEA Agreement. Most of these guidelines have been replaced by newer guidelines, in fact all the State aid guidelines are at regular intervals subject to new assessment and adaptations. Footnote 1 to Annex 1 stipulates that “With regard to amendments to those acts or the adoption of other and future acts in this field, the obligation rests with the EFTA Surveillance Authority according to its competence under this Agreement.” ESA has on this basis constantly adopted corresponding guidelines to those of the Commission, sometimes with minor, necessary EFTA adaptations to reflect relevant differences between the TFEU and the EEA Agreement.²

**Article 25 [Responsibilities of the ESA in the field of the competition rules]**

The EFTA Surveillance Authority shall, in accordance with Articles 53 to 60 and 109 of, and Protocols 21 to 25 and Annex XIV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 4 to the present Agreement, give effect to the provisions of the EEA Agreement relating to the implementation of the competition rules applicable to undertakings as well as ensure that those provisions are applied.

² For a comprehensive description of the legal framework for ESAs State aid control, including the guidelines, see the comments by Jordal and Mathisen on Art. 61-64 EEA.
In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex II.

The system for the enforcement of the EEA Competition rules is regulated under a similar legal structure as the state aid rules. Art. 1(2) of the EEA Agreement describes as its objective the setting up of system to ensure that competition is not distorted. Art. 108 requires the EFTA States to set up an independent surveillance authority as well as procedures similar to those existing in the Community. Protocol 21 recalls that ESA shall, in an agreement between the EFTA States, be entrusted with equivalent powers to those of the Commission and lists, in addition to the acts in Annex XIV, the acts that reflect the powers and functions of the Commission in the application of the EU Competition rules.

The list of EU acts in Protocol 21 does not mean that the those acts, that includes Reg. 1/2003, has as such been implemented into the EEA Agreement and that the regulations take effect as such with the general adaptations following from Protocol 1 EEA. The purpose of the list is to ensure that ESA through Protocol 4 to the SCA, is provided with similar powers as that of the Commission. Thus, the legal basis for ESAs enforcement of the Competition rules is Protocol 4 SCA.

ESA has also published several guidelines in order to explain how it will enforce competition rules. Of particular importance is the Best Practice guidelines, in which ESA describes in more detail its procedures, including practical issues related to language, information requests, complaints, legal professional privilege, the role of the Hearing officer, the various steps in the procedure, commitments, access to file, etc.1

As mentioned above, Art. 5(1)(b) states ESAs to ensure the application of the EEA competition rules. This competence is however considerably limited by Art. 56 EEA that regulates the division of competence between the Commission and ESA, inter alia based on the undertakings’ turnover in the relevant markets and the potential effect on trade in the EU. The Court of Justice has described the EEA competition law regime as a one stop shop, meaning that only the Commission or ESA may be competent authority in a specific case. In practice the division of competence entails that most competition cases that have a sufficient cross border effect to be caught by the EEA Agreement in the first place, will be handled by the Commission, also towards undertakings in the EFTA States.

The EFTA States have also, in Chapter II, Art. 5 SCA, implemented their own version of de-centralised application of the EEA Competition rules in the EFTA-pillar. Such national enforcement does not limit ESA’s competence to apply the competition rules as such, but the effect will likely be to reduce the number

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1 See www.eftasurv.int/media/competition/Best-practice-guidelines.pdf.
of cases for ESA even more. For these reasons, ESA has adopted relatively few infringement decisions. No merger has to date fallen under ESA’s competence.

A practical and important part of ESA’s work in the field of competition concerns cooperation with the Commission, as regulated in Protocol 23 EEA. Those provisions regulate the transfer of cases between the two EEA competition authorities, ESA’s participation as observers in the EU’s competition networks and mutual administrative assistance, cf. Art. 8. ESA has on basis of that provision and on behalf of the Commission carried out numerous unannounced inspections in the EFTA States and gathered relevant evidence.2

Despite few cases, the procedural rules for the application of the competition rules are similar to those in the EU. They are, as mentioned above, reproduced in Protocol 4 SCA and an overview of the main provisions is given below.

Protocol 4 on the functions and powers of the EFTA Surveillance Authority in the field of competition consists of five Parts and is further divided in eight chapters. Some of the chapters are subdivided into sections. The Protocol has been amended a number of times since 1994 to reflect amendments to the procedural rules in the EU.

Part II of Protocol 4 reflects the Commission’s powers under the procedural regulation, Reg. No 1/2003. Chapter I thereof contains three basic provisions that concern the application of Arts. 53 and 54 (Art. 1), the burden of proof (Art. 2) and the relationship between the EEA competition rules and national competition laws Art. 3). The latter provision forms part of the system of national enforcement of the EEA competition rules that the EFTA States’ put in place in parallel with the modernisation reform of the EU competition rules, implemented through Regulation 1/2003 that introduced national enforcement of the EU Competition rules.

The decentralised application of the EEA competition rules and cooperation procedures between the ESA and national competition authorities, is further regulated inter alia in Arts. 5, 11-16. Particular attention is given to the protection of so-called leniency applications in the procedures for exchange of information and evidence. These issues are regulated in Arts. 11 A and B. The enforcement of EEA competition rules at the national level, is limited to the EFTA-pillar. The EU national competition authorities are not empowered to apply the EEA rules. This lack of a uniform approach to application of the EEA competition rules create many challenges.3

Art. 7 concerns the finding and termination of an infringement. It states that ESA, acting on a complaint or on its own, may by decision require the infringement brought to an end and ESA may, in accordance with the more detailed conditions, impose both structural and behavioural remedies. It follows from Art. 7(2) that natural and legal persons who can show a legitimate interest and EFTA States may be entitled to lodge a complaint. Thus, in competition cases

2 Examples include the investigation in the Tomra case, Case C-549/10.
3 See further the comments by Gjendemsjø on Art. 56 EEA.
the requirements to be acknowledged as a complainant are considerably stricter than in internal market and state aid cases.\textsuperscript{4}

Art. 8 provides the ESA with the power to adopt interim measures. Interim measures must be adopted by decision and be limited in time and scope and subject to review by the EFTA Court.

Art. 9 regulates the important instrument of commitments that may be offered by undertakings to address the concerns expressed by ESA. If ESA, after having tested the proposed commitments in the market, accepts the proposed commitments, ESA shall conclude that there are no longer grounds for action.\textsuperscript{5} This means that there will be no additional sanctions or remedies imposed by ESA. Moreover, and often equally important to the undertaking under scrutiny, there will be no decision establishing an infringement, which greatly reduces the possibilities for competitors to pursue follow-on damages actions before national courts.

Art. 14 regulates the role and activity of the Advisory Committee that shall be composed of representatives of the EFTA States, in most cases from their competition authorities. The Commission and the EU Member States may also be present but are not entitled to vote. In the same vein, ESA and the EFTA States may participate in Advisory Committee meetings in the EU chaired by the Commission. The Advisory Committee shall be consulted before ESA adopts decisions in individual cases and ESA shall take the utmost account of the opinion delivered by the Advisory Committee.

Art. 15 concerns cooperation with national courts and regulates exchange of information and opinions. It follows from Section 3 that ESA, acting on its own initiative, where the coherent application of the EEA competition rules so requires, may submit written observations to national court in the EFTA States. ESA has used this so-called amicus curie procedure on some occasions.\textsuperscript{6}

Art. 16 shall ensure a uniform application of EEA competition law and entails important limitations for national courts and competition authorities. When national courts rule on agreements, decisions or practices under Art. 53 or Art. 54 of the EEA Agreement which are already the subject of a decision by the EFTA Surveillance Authority, they cannot take decisions running counter to the decision adopted by the EFTA Surveillance Authority. A similar limitation applies for national competition authorities.\textsuperscript{7}

\textsuperscript{4} Requirement for legitimate interest will also be introduced in Protocol 3 SCA for state aid cases. \textsuperscript{5} ESA has hitherto adopted one commitment decision after Art. 9 SCA, Decision 605/08/COL, which concerned Liechtensteinische Kraftwerke and Telecom Liechtenstein AG. \textsuperscript{6} Three such amicus curie observations are accessible: http://www.eftasurv.int/competition/national/co-operation-with-national-courts/. \textsuperscript{7} It is also for this reason that an infringement decision from ESA as such will provide a basis for damages claims in national courts. ESA's decision should serve as sufficient proof of an infringement.
In cases for which ESA has initiated proceedings but not yet adopted any decision, national courts must also avoid giving decisions which could conflict with a future decision of ESA. To that effect, the national court may assess whether it is necessary to stay its proceedings. The principles laid down to avoid conflicting decisions in the same case, and where national authorities and courts must stand down to the Commission or ESA, is based on case law of the EU Court of Justice that refers the general loyalty principle, cf. Art. 3 EEA. This obligation for national courts in the EFTA pillar is not uncontroversial. Contrary to the basic principles of the TFEU, the EEA Agreement contains no specific limitations to the sovereignty of national courts. That is why the national courts in the EFTA States remain completely free with regard both to request and to follow the EFTA Court’s advisory opinions. That system is clearly different from the EU system of preliminary references.

Section V, Arts. 17-22 concerns ESA powers of investigation and includes sector inquiries, requests for information, statements and powers of inspections. Unannounced inspections are among the most important investigative tools for the competition authorities. ESA can request national competition authorities to carry out the inspections ESA considers necessary. ESA may moreover request to participate with own officials or persons authorised by ESA. In practice, such inspections are carried out in accordance with national law procedures, by teams consisting of national authority and ESA officials with the latter acting as team leaders. The officials are empowered to enter any premises of the undertakings under investigation and examine books and other records.

Whereas inspections in the past focused on the archives and offices, today’s inspections are mostly focused on the undertakings’ IT systems and servers. ESA and national authorities will for that purpose bring along qualified IT personnel, forensic IT software and technical equipment to store huge amounts of data selected on the basis of pre-determined search terms. The use of modern technology enables competition authorities to copy extensive amounts business records. This raises several issues with regard to ESAs investigative powers that are limited to make copies of documents relevant for the purpose and subject matter of the investigation. ESA may also, subject to stricter conditions, conduct inspections at other premises, including the homes of directors, managers and other members of staff of the undertaking under investigation.

Section VI and VII, Arts. 23-27, concerns fines and limitation periods. ESA may impose fines on undertakings where they supply incorrect, incomplete or misleading information or if seals affixed on inspected premises have been broken. Such fines cannot exceed 1% of the total turnover in the preceding business year.

For infringement of the substantive competition rules in Arts. 53 and 54 EEA, ESA may impose fines not exceeding 10% of each undertaking’s total turnover in the preceding year. ESA has published guidelines for the calculation of fines.
Section VIII, Arts. 27 and 28, concerns **hearings** and **professional secrecy**. ESA shall conduct hearings with the interested parties before adopting infringement decisions. The organisation of hearings and who may attend is further described in the Best Practice guidelines.9

Section X contains General provisions. Art. 30 regulates publication of infringement decisions, see comments to Art. 18 SCA above. Art. 31 concerns **judicial review** and states that the EFTA Court shall have **unlimited jurisdiction** to review decisions whereby ESA has fixed a fine or a periodic penalty payment. The court may cancel, reduce or increase the fine. The provision reiterates Art. 35 of the Main Part of the SCA. The case law illustrates that the ECJ and EFTA Courts do not avoid making discretionary adjustments of fines.10

Section XI covers transitional and special provisions. Art. 40 stipulates an obligation for the EFTA States to designate the competition authority responsible for the application of Art. 5 and 54 EEA. Liechtenstein is however not obliged to designate a competition authority, cf. Art. 41. Thus, in Liechtenstein, the EEA competition rules are to be enforced either by ESA, the Commission or by national courts.

**Reg. (EC) No 773/2004** contains the more detailed rules governing the Commission’s investigations and conduct of proceedings, in particular for the initiation of proceedings as well as the handling of complaints and the hearing of the parties concerned. The provisions of the implementing regulation are reproduced in **Chapter III Part II to Protocol 4 SCA**.

Chapter III consists of 20 Articles that supplements the provisions in Chapter II. The provisions govern the different stages in a competition proceeding, from the initiation of proceedings, the handling of complaints, the submission of **statement of objections and the right to be heard**, including the conduct of oral hearings. Art. 10a contains a **new settlement procedure** in cartel cases. The procedure differs from the commitment procedure described above as the parties must acknowledge their participation in an infringement of Art. 53 EEA. Thus, such a decision may form basis for competitors’ damages actions. The option may nevertheless be interesting for cartel members because of procedural efficiencies and thereby cost savings. ESA has to date not concluded any settlements proceedings. As mentioned above, a cartel case with sufficient cross border effect will normally be handled by the Commission according to Art. 56 EEA.

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9 See comments to Art. 35 SCA below.

10 One interesting example is the EFTA Court’s judgment in Case E-15/10, 18.4.2012, **Posten Nirge**. ESA had explicitly acknowledged that the duration of the procedure had been too long and granted Norway Post a 7.2% reduction of the fine. The court referred to its unlimited jurisdiction and to Art. 13 ECHR and held, with reference to all the circumstances of the case, that 20% was needed for the reduction to be an effective remedy.
Section VI, Art. 15 contains the provisions regarding **access to the file**. Access to the file is a crucial element of the right of defence. Thus, the parties addressed by a statement of objections have a right to be granted access to the file.

Since there are important exceptions regarding internal documents of the competition authorities, business secrets and other confidential information. Another important limitation concerns the use of the documents. They may only be used for the purposes of judicial or administrative proceedings for the application of Arts. 53 or 54 EEA. In order to prepare for access to file, ESA will routinely ask for identification of business secrets and for non-confidential versions from any person or business that ESA corresponds with in a given case.

**Article 25 a** [Responsibilities in the field of financial supervision]

The EFTA Surveillance Authority shall, in accordance with the acts referred to in Annex IX of the EEA Agreement providing within the European Union for powers of a European Supervisory Authority which, as regards the EFTA States and according to the adaptations contained in that Annex are to be exercised by the EFTA Surveillance Authority, as well as subject to the provisions contained in Protocol 8 to the present Agreement, give effect to the relevant provisions of the EEA Agreement and ensure that those provisions are applied.

1 As noted elsewhere, the EEA Agreement does not contain mechanisms to reflect the amends to the surveillance of the internal market on the EU side, in particular with regard to the establishment of new agencies with new, cross border competence to request information and adopt decisions. The extension of the agencies’ formal competence to markets, authorities and undertakings in the EFTA States represent a comparable challenge to the two-pillar structure of the EEA.

2 After years of stalemate between the EU and the EFTA States, a solution has now been found in Art. 25 a and Protocol 8 to the SCA. The arrangement is a system where the EU agency works closely with the EFTA Surveillance Authority and adopts a draft decision. The draft decision from the European Supervisory Authority, shall thereafter, without undue delay, be adopted by the ESA.

3 Art. 3 to Protocol 8 stipulates that ESA shall act in full independence. While this may formally speaking be true, it is obvious that the real decision making competence remains with the European Supervisory Authority. In that regard the new system deviates significantly from the normal two-pillar structure of the EEA Agreement. In that structure the cases are handled by and decided by the ESA and the EUs direct influence is limited to cooperation and dialogue. However, in the absence of a revision of the EEA Agreement, the parties, especially

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1 See, e.g., the comments by Tynes on Art. 108 EEA in Part II of this book.
2 See the comments on Art. 4 above.