to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.

14 Protocol 1 EEA provides for horizontal adaptations for the legal acts, i.e. the EU secondary legislation, that are incorporated into the EEA Agreement. When such acts describe functions for the Commission in the context of verification or approval, information, notification or consultation similar matters shall for the EFTA States be carried out according to procedures established by the EFTA States.

15 Through Protocol 1 SCA and Protocol 1 to the Agreement on a Standing Committee, the EFTA States have allocated the different types of operative tasks in secondary legislation between ESA and the Standing Committee. As a rule of thumb, ESA will carry out all operative tasks that do not involve policy considerations. Policy related tasks are to be carried out by the EFTA States through the Standing committee.  

16 ESA tasks under Protocol 1 SCA includes practically important tasks in various areas such as veterinary field, technical regulations, energy, precautionary and safeguard measures. The veterinary and phytosanitary field is a particularly operative field in which ESA shall make assessments, carry out tests and on-the-spot checks, approve programmes, emergency vaccination programs, lists of approved zones etc.

Article 6  [Right to information from the EFTA States and from undertakings]

In accordance with the provisions of this Agreement and the EEA Agreement, the EFTA Surveillance Authority may, in carrying out the duties assigned to it, request all the necessary information from the Governments and competent authorities of the EFTA States and from undertakings and associations of undertakings.

1 Art. 6 provides ESA with a legal basis to request necessary information from all level of government in the EFTA States and from undertakings and their associations.

2 The right to obtain information from the EFTA States is of crucial importance to ESA. ESA has in the fields of general surveillance and state aid (with few exceptions) no investigative powers as such. As opposed to the powers towards undertakings in competition investigations, ESA cannot undertake inspections and seize documents, or require statements from government officials.

3 The fulfilment of ESA’s surveillance tasks is thus based on a system of close cooperation with the governments of the EFTA States. The governments’ duty to cooperate and to provide ESA with all the relevant and necessary information

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8 See also the comments by Thynes on Art. 108 EEA in Part II of this book and by Fredriksen and Jónsdóttir on Art. 3 of the Standing Committee Agreement in Part IV of this book.
is as such the corollary of ESA’s right to request information and the obligations also follows from the **general loyalty provision** in Art. 3 EEA.

An EFTA State’s failure to reply to information requests will constitute an **infringement** which can be pursued in accordance with the procedures governing ESA’s general surveillance.¹

The limitation “necessary information” has so far not been subject to judicial review by the EFTA Court. In other words, no dispute concerning ESA’s right to ask for information has reached the EFTA Court.² The absence of disputes may be due to ESA being somewhat careful not to ask for specific, internal documents of a sensitive nature, such as the Government’s internal deliberations, or correspondence containing legal advice that potentially could raise issue about principles of right of defence. Such documents could nevertheless be relevant, particularly to determine whether a restrictive measure is based on a legitimate aim. One example of such a dispute is the Gaming machine case from 2006.³

ESA’s right to information is **not limited to documents**. ESA may for instance ask for explanations about national law, case law and administrative practices. Replying to information requests may be work and resource demanding for national authorities, but as long as the information can be deemed “necessary” the national authorities must submit the requested information.⁴ Extensive requests may, however, justify extensions of time limits.

For **state aid** cases, ESA has additional legal basis for information requests in Protocol 3, Section II. Art. 5 thereto specifies for notification cases that when an EFTA State does not reply to the request the notification may be deemed withdrawn. For cases concerning potential unlawful aid, ESA may issue an information injunction under Art. 10.⁵

The general right to request information also from undertakings and associations of undertakings was at the time of entry into force of the SCA an EFTA pillar novelty. The Commission has never had similar, general competence.

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1 See further the comments on Art. 22 below.
2 In 2015 ESA delivered a Reasoned Opinion to Iceland for failure to provide information. The press release dated 5.3.2015 states: ‘The EFTA Surveillance Authority has issued a reasoned opinion to Iceland for its failure to respond to the Authority’s requests for information in two cases concerning food safety and veterinary matters. This is the first time that the Authority takes the step of delivering a reasoned opinion due to lack of cooperation in such a situation by one of the EFTA states.’
3 Case E-1/06, 14.3.2007, **ESA v Norway**, in which ESA submitted that the restriction on the operation of gaming machines in Norway was unjustified because it pursued an economic aim. The EFTA Court stated in para. 33: ‘The Court holds that any materials from which the legislative intent can be deduced must be taken into account when assessing that intent. It is clear, however, that, as a matter of principle, the Government’s proposal and the reports on the parliamentary debate will be more indicative than earlier drafts and documents. The Court also takes into account that views may change during the legislative process.’
4 Examples in the past includes requests to specify all provisions in national law that entails a differentiation of treatment between residents and non-residents with regard to investments and taxation.
5 ESA has also in certain instances the powers to undertake so called On-site monitoring which resembles unannounced competition inspections.
Since ESA in general pursues its cases and investigations in the same manner as the Commission, the competence to request information from undertakings has been of limited practical importance. Subsequent amendments on the EU side have extended such rights for the Commission for purposes such as sector inquiries in the field of competition. Similar powers have been extended to ESA through a revision of Protocol 4 SCA, and ESA has on that basis also carried out a number of sector inquiries.

In 2015, the EU adopted the new State Aid Procedural Regulation\textsuperscript{6} that grants the Commission competence to request undertakings and associations of undertakings to submit necessary market information. It may also under strict conditions impose fines and penalty payments for incorrect, incomplete or misleading information.

The new competence to impose fines has delayed the incorporation of the act into the EEA Agreement and, as a consequence, the corresponding amendments to the SCA by way of adjustments to Protocol 3 SCA.\textsuperscript{7} ESA may in the meantime rely on Art. 6 SCA to request similar information from undertakings and association of undertakings, although without competence to impose penalties for non-compliance.\textsuperscript{8}

**Article 7 [Composition]**

The EFTA Surveillance Authority shall consist of three members, who shall be chosen on the grounds of their general competence and whose independence is beyond doubt. Save as in the circumstances set out in the third paragraph of Article 9 at least two of the three members shall be nationals of the EFTA States.

1. The set-up with one member from each of the participating EFTA States mirrors the original organisational set-up of the Commission. The number of members were reduced from five to three following Austria, Finland and Sweden joining the EU in 1995 and Liechtenstein’s (almost) parallel accession to the EEA.

2. The members of ESA (ESA College Members) shall be chosen on the grounds of their general competence and their independence shall be beyond doubt.\textsuperscript{1} The criterion regarding general competence is vague and does not in practice represent any limitation as to whom the Governments may appoint.

3. The role of ESA is essentially limited to surveillance – it does not mirror the Commission task to also develop policy and propose legislation. It is therefore not surprising that the EFTA States mainly has appointed lawyers, preferably

\textsuperscript{6} Council Reg. (EU) 2015/1589 laying down detailed rules for the application of Art. 108 TFEU.

\textsuperscript{7} See the comments by Jordal and Mathisen on Art. 61-64 EEA, mn.12.

\textsuperscript{8} The financial crisis and the hitherto unprecedented state aid to banks was an important trigger for the Commission’s new powers to issue information request to obtain market information.

\textsuperscript{1} The requirements concerning the personal qualifications and independence mirrors those of Article 17(3) of the TFEU.