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.
with previous international experience. Iceland and Liechtenstein have consistently appointed lawyers, most with Foreign affairs and other public sector background. The first Norwegian College Member (and President of ESA) was also a lawyer, but since 2002 Norway has appointed members with other professional backgrounds. Four of the five Norwegian College Members appointed in this period came from long careers in the Ministry of Foreign Affairs, three came directly from the Norwegian Mission to the EU in Brussels, serving as ambassadors to the EU.

Such a background certainly entails general and relevant competence and may contribute to an efficient substitution of members as the newcomers already possess knowledge of the institutional set up of ESA and even knowledge of some of the pending cases. However, these appointments have raised questions as to whether the requirements of the members’ independence beyond doubt has been fulfilled.²

Two of the three members shall be nationals of the EFTA States.³

Article 8 [Independence of the members]

The members of the EFTA Surveillance Authority shall be completely independent in the performance of their duties. They shall neither seek nor take instructions from any Government or other body. They shall refrain from any action incompatible with their duties. Each EFTA State undertakes to respect this principle and not to seek to influence the members of the EFTA Surveillance Authority in the performance of their tasks.

The members of the EFTA Surveillance Authority shall not, during their term of office, engage in any other occupation, whether gainful or not.

When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the EFTA Court may, on application by the EFTA Surveillance Authority, rule that the member concerned be, according to the circumstances, either compulsorily retired or deprived of his right to a pension or other benefits in its stead.

The provision reiterates and set out more in detail the fundamental requirement of independence for the members of ESA. They shall be completely independent. The emphasis on independence in several provisions of the SCA underlines the crucial importance this has to the functioning of the EEA Agreement. They shall neither seek nor take instructions from any Government or other body. That obligation is at the outset clear and unambiguous.¹

² The requirement of independence is further discussed below under Art. 8.
³ For the EFTA Court, Art. 28 SCA provides merely for three judges and there are no nationality requirements. Liechtenstein has on that basis appointed Carl Baudenbacher, a Swiss national, as judge at the court. For comments regarding a scenario with only two remaining EEA EFTA States, see comments by Poulsen to Art. 50 SCA below.