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Protection of Rights in the EEA

Avenues for *ex post* Control of Agency Decisions in the EFTA Pillar

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1 Introduction

1.1 Topic and Background

This paper examines questions pertaining to protection of rights in the context of European agencies and the EEA EFTA States' affiliations to these agencies.[1]

The EEA Agreement extends the territorial scope of the European internal market to include the EFTA States.[2] While the EEA cooperation is not founded on the Union's philosophy of creating and moving towards "an ever closer union among the peoples of Europe"[3], the EEA Agreement foresees full and complete participation of the EFTA States in the Union's internal market and its four freedoms.[4] The EEA Agreement is institutionally built on the two-pillar structure and substantively on the principle of homogeneity.[5] As framed by the European Court of Justice ("ECJ")[6], homogeneity is "to be secured through the use of provisions which are textually identical to the corresponding provisions of [Union] law".[7] As follows, the EEA cooperation is inherently asymmetrical, facilitating a one-way street of *acquis communautaire* from the Union to the EFTA States.[8] Further, the EEA Agreement rests upon the principle of indirect administration, which entails that implementation and enforcement of EEA *acquis* is primarily a task for the national authorities of the EEA Member States.[9] To a certain extent, therefore, national administration *is* EEA administration, and national courts *are* EEA courts.[10] As follows, the duty of loyal cooperation is cardinal to achieve homogeneity and reciprocity.[11]

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1 Iceland, the Principality of Liechtenstein, and the Kingdom of Norway, Article 2(b) EEA. Switzerland is party to the EFTA Convention, but not the EEA Agreement. In this paper, the term "the EFTA States" is used to denote Iceland, Liechtenstein, and Norway unless stated otherwise.

2 Article 1 EEA. The continuous incorporation of additional Union secondary legislation into the EEA Agreement creates a "dynamism which ensures continued homogeneity". Given the comprehensive legal and institutional mechanisms to ensure homogeneity, the EEA may be viewed as a "nearly perfect tool of norm projection". Hillion (2011) p. 11–13.

3 Article 1(2) TEU. See ECJ Opinion 2/13 *ECHR*, para. 167 and 172.

4 Article 1(2) EEA.

5 Article 1(1) EEA.

6 The term "ECJ" will be used to denote the institution, i.e. both the ECJ and the General Court (GC) unless otherwise stated.

7 ECJ Opinion 1/91 para. 5.

8 The EEA Agreement is a "deep normative integration" agreement, see Öberg (2019) p. 204. Granted, the EFTA States may exert influence through various formal and informal channels, e.g. diplomatic relations or through procedures prescribed in Articles 99–100 EEA. Further, participation in agencies may be an arena for exerting influence, see section 4.2.

9 See e.g. NOU 2019:5 p. 745 and Jevnaker (2019) p. 4.. The term has been used interchangeably with "decentralized administration" and "indirect implementation", see Póltorak (2015) pp. 15–16.

10 NOU 2012:2 p. 206.

11 Article 3 EEA.

However, the emergence of European agencies marks a shift towards more *direct* forms of administration.[12] *Agencification* is a term used to denote the rise of and increasingly more influential powers afforded to agencies.[13] Along with other bodies and offices of the Union, the rise of agencies represents a development towards increased supranational cooperation at EEA level.[14] Common attributes among these entities are that they have been assigned with tasks of implementing, enforcing, and developing specific policy areas or sectors. Occasionally, their powers include the ability to issue binding decisions addressed to national authorities or private parties.[15] To some extent, the development bears certain resemblance with federal systems, although full-fledged federalism is both politically undesirable and contrary to the Union's principles of conferred competences and subsidiarity.[16] Irrespective of semantics, agencies have *de facto* become an indispensable part of the internal market, which would simply not function without agencies.[17] Although agencies are *Union entities*, their work has far-reaching impact on the entire European Economic Area. It is arguably not possible for the EFTA States to fully partake in the internal market and ensure the four freedoms without participating in the work of EU agencies.[18]

European agencies have traditionally not given rise to concerns over protection of rights. Their powers have been considered limited enough as not to require counterbalancing.[19] Nonetheless, in contemporary European law, agencies have far-reaching decision-making powers. Further, as we will discuss later, *agencification* within the Union has been permitted on the precondition that their powers are subject to control. The Union's legal framework provides for a comprehensive system to overview decisions issued by agencies, to endow agencies with democratic legitimacy, and to provide safeguards to affected parties. As follows, there are multitudinous checks and balances in place to control the increased powers of agencies within the European Union.[20]

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12 Graver (2018) p. 42.

13 The term "agencification" has been used by many scholars, e.g. Chatzopoulou (2019) p. 100, Chamon/Hofmann/Vos (2019) p. 1, Chiti (2018) p. 748, and Chamon (2016) p. 40. The terms "competences" and "powers" will be used interchangeably in this paper, notwithstanding how the terminology is employed in the EU Treaties.

14 NOU 2019:5 p. 774.

15 The term "private party" denotes any natural and legal person (e.g. individuals, companies, etc.).

16 Article 5 TEU. In this direction, Póltorak (2015) p. 16.

17 Vos (2016) p. 206.

18 Bekkedal (2019b) p. 371.

19 Chiti (2018) p. 767.

20 Chapter 5 explores various control mechanisms that exist in the EU.

In the EFTA States, however, the debate on *agencification* has primarily been connected to concerns over constitutional challenges.[21] Regrettably, it seems that circumventing constitutional constraints have been prioritized at the expense of other pressing matters, such as creating structures that ensure comprehensive protection of rights.[22] Against this background, scholars have proclaimed that, in the agency context, parties in the EFTA pillar enjoy weaker protection of rights than their Union counterparts.[23] This thought-provoking proclamation shapes the enquiries in this paper. In order to examine the validity of the proclamation, the basic exercise is to compare and contrast avenues that exist within the EFTA pillar with those in the EU pillar. In contrast to the Union's comprehensive system to control decisions of agencies, parties in the EFTA pillar may primarily rely on administrative and judicial review, i.e. *ex post* control avenues.

Admittedly, an in-depth examination of all avenues in the EFTA pillar is not possible to conduct in the frames of this paper. As of June 2020, the EFTA States participate in 17 decentralized agencies and have multiple other connections to the EU's administrative system.[24]

This paper is limited to the following six entities:

- The European Chemicals Agency (ECHA)[25]
- The Agency for the Cooperation of Energy Regulators (ACER)[26]
- The European Banking Authority (EBA)[27], the European Insurance and Occupational Pensions Authority (EIOPA)[28] and the European Securities and Markets Authority (ESMA)[29], in this paper referred to as *the financial supervisory authorities* or *financial agencies*.[30]

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21 See section 1.3.

22 Fredriksen/Franklin (2015) p. 677 and Bekkedal/Hertzberg (2018b) p. 206–207.

23 See e.g. Leonhardsen (2015) pp. 27, Fredriksen/Franklin (2015) p. 677, Fredriksen/Mathisen (2018) pp. 287–288, Eriksen/Fredriksen (2019) pp. 174, and Bekkedal/Hertzberg (2018b) pp. 225.

24 See EFTA (2020a).

25 Regulation (EC) 1907/2006 ("REACH").

26 Regulation (EU) 2019/942 ("ACER"). The 2019 Regulation repealed Regulation (EC) 713/2009, see Article 46 Regulation (EU) 2019/942. The revised Regulation has not been incorporated into the EEA Agreement. The revised Regulation forms part of the EU's Fourth Energy Package, and is currently under scrutiny for incorporation into the EEA Agreement. See EFTA (2020b). Thus, a revised legal act provides the powers of ACER in the EU, and the old regulation applies in the EEA. For the purposes of this paper, I will rely mainly on the revised Regulation. Where and if relevant, I will address the difference between the regulations.

27 Regulation (EU) 1093/2010 ("EBA")

28 Regulation (EU) 1094/2010 ("EIOPA")

29 Regulation (EU) 1095/2010 ("ESMA")

30 In EU literature, the abbreviation "ESAs" commonly refers to the financial supervisory authorities, e.g. Weismann (2016) p. 119. Here, the abbreviation *ESA* will be used to denote the EFTA Surveillance Authority, while EBA, EIOPA, and ESMA will simply be referred to as the financial supervisory authorities.

- The European Data Protection Board (EDPB).[31]

These entities have been selected for two main reasons.[32] First, a common denominator is that all six entities may adopt binding decisions vis-à-vis third parties in the EU pillar. Second – and as a contrast – the arrangements for the EFTA States' participation in each entity is unique and the result of sector-specific negotiations.

Nonetheless, despite the heterogeneous arrangements for participation in these entities, it will be argued that certain discrepancies pertaining to protection of rights seem to arise across all of the selected arrangements. This observation is a valuable backdrop for future arrangements, as the Union continues to establish additional agencies and the EFTA States are likely to seek certain forms of affiliation.[33] For instance, in May 2020, the Norwegian Government submitted a proposal to Parliament concerning incorporation of the EU's Fourth Railway Package into the EEA Agreement and accession to the European Union Agency for Railways ("ERA").[34] Further, in the same month the European Commission submitted its action plan for a Union policy on preventing money laundering and terrorist financing. In its communication, the Commission proposed either the establishment of a new, dedicated body (presumably an agency), or granting additional tasks to EBA.[35] An analysis which seeks to address certain general structural discrepancies with agency participation is therefore both relevant and timely.

1.2 Methodology and Challenges

This paper seeks to examine, analyze, compare, and contrast how agency decisions in the EU and EFTA pillars may be scrutinized before administrative review bodies and the judiciary. The magnitude of relevant sources of law creates a need to prioritize and balance. On the one hand, to grasp how an agency operates and how its decisions affect parties in both pillars of the EEA, there is a need to delve into sources specific for certain agencies. On the other hand, the primary aim is not to give an account of various particularities of selected agencies.

Due to space restrictions, the following will not explain in-depth how and why various sources are used. Rather, a presumption is that the reader is already familiar with the methodology typically employed within EU/EEA law and Norwegian law. The sources may be divided into three categories. *First*, the analysis examines various sources of Union law, e.g. treaty

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31 Regulation (EU) 2016/679 ("GDPR"). The Board is not an agency, but carries many of the characteristics of agencies and its binding decisions give rise to questions reminiscent of those which arise under EU agencies.

32 The choice is inspired observations made by Bekkedal (2019a) pp. 381–416.

33 Prop. 100 S (2015–2016) p. 12.

34 Prop. 101 LS (2019–2020).

35 COM (2020) 2800 final, p. 9.

provisions, regulations, directives, case-law, and agency decisions.[36] These sources explain what agencies are and how they operate. *Second*, the arrangements for the EFTA States' participation in agencies are determined by decisions of the EEA Joint Committee ("JCDs"), provisions in the EEA Agreement, the Court and Surveillance Agreement ("SCA"), and certain protocols to both the SCA and the EEA Agreement.[37] These sources explain how agency decisions are transposed into the EFTA pillar. Further, white papers and reports issued by the Norwegian Government provide insight into the negotiations for various JCDs, and how the Government interprets modalities of participation. *Third*, to contextualize how agency participation may work in the national legal order, I will provide certain examples with Norwegian arrangements based on Norwegian law.

On all three levels, we will encounter limited case-law directly applicable to the agency context. For this reason, inferences will be drawn from certain case-law from relevant sectors, e.g. how courts typically deal with administrative decisions *outside* the agency context. Lastly, although the paper is expressly focused on the selected six entities, it is intriguing to place those entities in a greater landscape of agencies.[38]

As the main question of the paper is a *legal issue*, the following chapters take on a legal-dogmatic approach and seek to study normative legal material. However, an analysis confined to a *de lege lata*-assessment would diminish valuable aspects of the discussion. The topics are highly political, and *agencification* is dynamic and constantly evolving. Further, as *agencification* in the EFTA pillar is a fairly recent development, the quantitative number of relevant decisions is very low. For this reason, there is limited primary material (decisions) to analyze. For these reasons, certain matters will be addressed *de lege ferenda*.

As will be explained throughout the paper, there are multitudinous avenues to control decisions in the agency context, e.g. national administrative review bodies, national courts, the EFTA Court, and the ECJ. In examining avenues for *ex post* control, especially two questions merit examination. First, this paper addresses whether there is *access to review*. Access typically hinges on certain criteria relating to admissibility, standing, etc. As will be examined, the prospect of genuine protection of rights is diminished if the access points to review are too narrowly construed.[39] Second, where there is access, a next question is *the scope of review*. I

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36 See e.g. Article 288 TFEU.

37 Article 98 EEA.

38 For instance, the European Medicines Agency (EMA), the European Union Aviation and Safety Agency (EASA), and the European Union Agency for Railways (ERA). See Regulation (EC) No 726/2004, Regulation (EU) 2018/1139, and Regulation (EU) 2016/796.

39 Craig (2018) p. 311.

believe that by answering these two questions for each avenue, it is possible to reflect on whether protection of rights is greater in one pillar or the other. In essence, this is precisely the exercise that I will conduct in chapter 5 (EU pillar) and chapters 6-7 (EFTA pillar).

1.3 Constitutional and Political Challenges

The constitutional and political challenges to agency participation have been the most prevalent aspect to the debate on *agencification* in the EFTA pillar.[40] A constitutional assessment is beyond the scope of this paper. Yet, it is clear that constitutional limits for transfer of powers have created the need for various institutional arrangements for participating in the Union's supranational administrative system.[41] There is little doubt that direct participation in decision-making agencies would entail transfer of competences to international organizations.[42]

Nonetheless, the Constitutions of Iceland[43] and Norway[44] permit certain transfer of powers. In Iceland, certain customary rules allow for exemptions, provided that the delegated competence is clearly delimited and does not entail a substantial burden on natural or legal persons.[45] More recently, the absence of explicit constitutional provisions for transfer of powers has resulted in complications concerning participation in agencies. For instance, the incorporation of acts relating to supervision of the financial market took many years.[46]

Similarly, Articles 26 and 115 in the Norwegian Constitution prescribe the conditions under which transfer of powers is allowed. Parliament may transfer powers either by a majority vote pursuant to Article 26, or by a majority of 3/4 where the conditions in Article 115 are satisfied.[47] Article 115 has only been invoked twice. In 1992, powers were transferred to ESA and the

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40 The constitutionality of agency participation is continuously under public and legal debate in Norway. For instance, the organization "Nei til EU" brought proceedings to challenge the constitutionality of Norway's participation in ACER. The action was rendered inadmissible, see TOSLO-2018-167528 and LB-2019-177184. The case has been appealed to the Supreme Court of Norway (as of June 2020).

41 See NOU 2012:2 pp. 855–856. For an account, see e.g. Bekkedal/Hertzberg (2018a), Fredriksen (2018a), and NOU 2019:5 p. 774 with further references.

42 E.g. Helgadóttir/Einarsdóttir (2018) p. 25.

43 Ibid. pp. 14–18.

44 Articles 26 and 115 in the Norwegian Constitution.

45 Helgadóttir/Einarsdóttir (2018) pp. 14–18.

46 Ibid. p. 25.

47 Pursuant to Article 26, Parliament may transfer powers to international organizations. However, if the transfer is beyond a *de minimis*-doctrine, Parliament may only transfer competences to organizations in which Norway is a member pursuant to Article 115. Thus, direct participation in EU agencies that have competences which go beyond the *de minimis*-doctrine is not possible, and has resulted in the transfer of corresponding competences to ESA, e.g. in the financial sector. See Finstad (2018) pp. 70–71. The current wording in Article 115 arguably prevents participation in ERA, as the EFTA States aim for direct participation (and not through ESA) and ERA's powers arguably exceed the *de minimis*-doctrine. See Eriksen (2020) pp. 37–40.

EFTA Court in the field of competition. In 2016, powers were again transferred to ESA and the EFTA Court, this time due to participation in the European financial supervisory authorities.[48] The transfer entails that ESA may issue binding decisions addressed to private parties.[49] As early as in 2012, the EEA Review Committee signaled the need to amend the Norwegian Constitution.[50] It has been submitted that the powers of ERA might be far-reaching enough as to require Parliament to employ or amend Article 115.[51]

Interestingly, Liechtenstein has not experienced constitutional challenges relating to participation in agencies.[52] Contrary to Iceland and Norway, Liechtenstein's monist legal system recognizes international obligations as part of the national legal order.[53]

As will be explained later, constitutional challenges have resulted in innovative and pragmatic solutions to ensure the EFTA States' participation in various agencies. Pragmatism seems to be the overriding principle, as the benefits of participation arguably outweigh potential downsides.[54] Given the constraints in the institutional set-up of the EEA's two pillars, current arrangements for participation aspire to be a balanced result. As such, the EFTA States have retained formal sovereignty within their domestic realm, although the true decision-making process takes place within the Union. Further, the supranational powers of agencies are confined to very limited and specific circumstances, and it is not likely that agencies will enact many decisions.[55] We will revisit these matters later. In the current context, two observations are of interest.

First, *agencification* challenges the institutional set-up of the EEA Agreement. While main characteristics of the EEA Agreement are its dynamism and comprehensive tools to ensure continuous homogeneity[56], the Agreement was initially construed to facilitate cooperation and integration primarily at the international level.[57] The explosion of supranational agencies since the early 1990s, however, challenges the very tenets of the Agreement.[58] While the Founding Treaties of the Union have undergone multiple revisions, the main part of the EEA Agreement

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48 See more in Finstad (2018) pp. 70–72, Graver (2018) pp. 11–13, and Hertzberg (2017) pp. 4–5.

49 ESA's powers in the agency context will be examined in chapter 4.5.

50 NOU 2012:2 p. 855–856.

51 E.g. Eriksen (2020) pp. 37–40.

52 Frommelt (2018) p. 41.

53 Ibid.

54 E.g. Einarsson (2018) p. 469.

55 Ibid.

56 Finstad (2018) p. 74.

57 ECJ Opinion 1/91 para. 20–21. See e.g. Hillion (2011) p. 11.

58 NOU 2012:2 p. 857.

has remained largely unchanged.[59] *Agencification* has arguably laid the groundwork for a certain overhaul. The Union continues to establish additional agencies with decision-making powers. Although external participation has been permitted, the Union has consistently insisted on preserving true decision-making powers within its agencies. As such, the very purpose is to have one supranational authority responsible across the entire internal market.[60] As the institutional set-up of the EEA Agreement remains a primary challenge, there is little doubt that equivalent challenges will reappear when the question of additional agencies arise

Second, there must be limits to the arguments of pragmatism and practicality. It is true that – in isolated terms – agencies adopt few decisions and operate in very specific fields. It is also true that the particularities of one sector does not necessarily have an impact on other sectors. Today, supranational cooperation affects more fields than ever, e.g. data protection, chemicals, medicines, aviation safety, competition and state aid (through previous arrangements), and finances. The justification that supranational cooperation is limited to very specific fields only holds so much weight when sectors are constantly added to the list. To make matters worse, certain agencies operate in highly politicized sectors, e.g. the energy sector (ACER) and railways (ERA). In fact, the Third Energy Package represents the first time that Norway has initiated the formal notification process as prescribed in Article 102 EEA (veto).[61] Although the Contracting Parties[62] to the EEA Agreement eventually reached a solution, it took ten years for the EFTA States to implement the EU's Third Energy Package. In the meantime, the Union had already moved on to its Fourth Energy Package, where the powers of ACER have been revised.[63]

1.4 Outline

Chapter 3 examines the emergence of the agency phenomenon in the European Union. Building on this examination, chapter 4 addresses questions of how the EFTA States participate in various agencies. A prerequisite for discussing avenues for protection of rights is understanding the process of enacting decisions in the EFTA pillar. As we will see, *the operative decisions* are taken within the European Union. Chapter 5 examines the Union's comprehensive system for controlling agency decisions. While this chapter addresses a multitude of control mechanisms, the primary focus is on administrative and judicial review. Thereafter, we venture onto the parallel questions of administrative and judicial review within the EFTA pillar in

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59 Ibid. p. 852 and Graver (2018) p. 12. The EFTA Court has emphasized that the continuous amendments of the EU Treaties have created a gap and certain discrepancies at the level of primary EEA law, E-28/15 *Jabbi* para. 62.

60 Einarsson (2018) p. 469.

61 NOU 2012:2 p. 103.

62 Article 2(c) EEA.

63 See remarks in section 1.1.

chapters 6 and 7. As follows, chapters 6-7 constitute the EFTA reflections of the findings in chapter 5. Finally, chapter 8 summarizes the main findings. Before that, however, we will briefly examine certain aspects of protection of rights in the EEA.

2 Protection of Rights in the EEA

This paper is built on the proclamation that protection of rights in the agency context might be weaker for parties in the EFTA pillar than for parties in the EU pillar. Thus, the research merits *comparison* between two systems.[64] Beyond the scope is the associated question of whether arrangements in the EFTA pillar violate the right to effective judicial protection. Such a question may presuppose an assessment of various human rights obligations. The following section will introduce certain key considerations on protection of rights in the EEA.

The EEA Agreement foresees homogeneity and reciprocity.[65] As a preliminary point, this entails that provisions must be interpreted the same way in the entire internal market.[66] However, homogeneity does not (always) require identical substantive rules, as the objectives of the EEA differ from those of the EU.[67] The principle of homogeneity has far-reaching consequences for parties in the EFTA pillar, as they are given both rights and obligations through incorporation of relevant secondary legislation into the EEA Agreement.[68]

Further, it is a prerogative of the ECJ to review the legality of secondary EU legislation.[69] As follows, there is an absence of judicial review of secondary legislation in the EFTA pillar. In such instances, parties in the EFTA pillar must reply on their EU counterparts to challenge the relevant act.[70] We will not discuss these matters further here. The crux of the matter is that *inherently*, there is a certain lacuna in protection of rights in the EFTA pillar due to the asymmetrical distribution of powers to various EU and EFTA institutions.[71] Precisely this point will be revisited in chapter 8, after the examination of whether there are lacunas in reviewing agency decisions.

As the Union's Charter of Fundamental Rights ("CFR") is not part of the EEA Agreement, the EFTA States are in principle not bound by its provisions.[72] Nonetheless, the EFTA Court has recognized the right to effective judicial protection as a general principle of EEA law.[73] The principles of homogeneity and reciprocity support the notion that parties affected by decisions

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64 See section 1.2 for a description of the exercise.

65 Articles 1 and 3 EEA.

66 See e.g. Article 6 EEA and Article 3 SCA.

67 E.g. ECJ Opinion 1/92 para. 17–18.

68 For a discussion, see Wennerås (2018) pp. 210f.

69 Wennerås (2018) p. 226 and Fredriksen/Franklin (2015) pp. 681–683.

70 Baudenbacher (2016) p. 165.

71 The democratic problems with the EEA Agreement are not new. See NOU 2012:2 p. 19.

72 Eriksen/Fredriksen (2019) pp. 64–65.

73 E-15/10 *Posten Norge AS* para. 86, cited in Fredriksen (2015) p. 389.

taken in the EFTA pillar are entitled a level of protection of rights equivalent to their counterparts in the EU pillar.[74] As such, homogeneity exceeds the limits of substantive EEA rules and requires *procedural* homogeneity, i.e. "equal access to justice" for parties across the entire EEA.[75] Although homogeneity does not require identical conclusions, effects, and enforcement in both pillars, the EFTA States should ensure the same standard of protection of rights, workings of institutions, and enforcement and effectiveness of rules.[76]

All Member States of the EEA Agreement are parties to the European Convention of Human Rights (ECHR). Articles 6 and 13 ECHR lay down minimum rules on effective protection of rights, by which arrangements in the EEA are confined.[77] Following the *Bosphorus*-doctrine, EU Member States may not be ruled for violating the ECHR as long as they comply with secondary law of the Union. The rationale is that Union law has direct effect, and the Union provides "equivalent protection" of human rights as the ECHR.[78] As for the EFTA States, the ECtHR has recently stated in an *obiter dictum* that the basis for the *Bosphorus*-doctrine does not apply to the EEA Agreement.[79] This is interesting in our context because while arrangements in the EU pillar enjoy the presumption of compliance with the ECHR, the same presumption does not automatically apply to the EFTA States. Where parties identify discrepancies in the EFTA pillar, the ECtHR might constitute an additional avenue to ensure protection of rights. This paper will not address these questions.

Weaker protection of rights in the EFTA pillar could have far-reaching impact, not only limited to the citizens and establishments of the EFTA States. A fundamental purpose of ensuring homogeneity is to create a common, internal market with equal conditions of competition.[80] If parties risk weaker protection in the EFTA States than in the EU States, such arrangements could deter market participants from operating in the EFTA States.[81]

The mobilization of private parties is a fundamental characteristic of the EEA Agreement. EEA law has become a reality through court proceedings, and especially through national courts.[82] As a preliminary point, the right to effective protection of rights is satisfied if national courts

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74 Fredriksen (2015) p. 390 and Eriksen/Fredriksen (2019) p. 167.

75 Magnússon (2014) p. 119.

76 Ibid.

77 Lang (2012) pp. 101–104.

78 *Bosphorus v Ireland* para. 156. See Wennerås (2018) p. 226.

79 *Konkurrenten.no v Norway* para. 43.

80 Article 1(1) EEA.

81 Fredriksen/Franklin (2015) p. 680.

82 Fredriksen/Mathisen (2018) p. 250. See 8th Recital of the Preamble in the EEA Agreement.

are an available avenue to challenge EEA rights.[83] In practice, however, administrative review bodies constitute a primary avenue for control.[84] Appealing decisions to a review body is less bureaucratic, less expensive, and expedient.[85] In addition, administrative review has become a crucial part of *agencification* within the Union, whereby affected parties may appeal agency decisions to designated Boards of Appeal.[86] Thus, this paper employs a wider term of protection of rights, encompassing both administrative and judicial review.

We now turn to examining fundamental characteristics with European agencies.

83 Eriksen/Fredriksen (2019) p. 194.

84 NOU 2012:2 pp. 202–204.

85 Ibid.

86 See chapter 5.

3 European Agencies

3.1 Overview

The purpose of the following chapter is to create a template against which one may examine *agencification* within the EFTA pillar. Section 3.2 gives a general account of the emergence of European agencies. Section 3.3 addresses questions pertaining to non-binding measures of agencies. Thereafter, section 3.4 examines decision-making powers of agencies. Finally, section 3.5 summarizes the main findings.

3.2 Emergence, Purpose, and Assignment

EU agencies are legal entities, distinct from the EU institutions.[87] The term "agency" is employed to cover a variety of entities at EU level, and there is great diversity in their mandates, composition, legal standings, and powers.[88] As a result, there are many ways of categorizing and classifying agencies.[89] This paper deals with the so-called *decentralized* agencies, and more specifically, a select five agencies in addition to the European Data Protection Board.[90] The Union has established around 40 decentralized agencies, covering policy areas such as financial markets, energy, data protection, and chemicals.[91]

There is no precise legal definition to decentralized agencies. Certain criteria, however, have been identified. Agencies are permanent, EU bodies, established through secondary legislation, and have separate legal personality.[92] The agencies central in this paper meet the criteria.[93] EDPB is formally not an agency (it is a board), yet it meets several of the requirements. Due to its powers and the way in which the EFTA States participate in EDPB, the Board will be dealt in conjunction with the selected agencies.

The Commission has highlighted that agencies provide enhanced efficiency in highly specialized, technical areas which require "advanced expertise and continuity, credibility and visibility of public action".[94] Further, agencies carry the advantage that they are based on

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87 *Inter alia*, the Commission, the ECJ, the Council, and the Parliament. See Articles 233f. TFEU. For an overview of EU agencies, see European Union (2020).

88 In fact, the Commission recognizes that their differences "far outweigh their similarities", see COM (2002) 718 final, 3.

89 Chamon (2016) p. 22 provides an example of the EFSA, which "is an information agency to Van Ooik and an observatory agency to Geradin and Perit, but a regulatory agency to Vos and a quasi-regulatory agency to Busuioc."

90 See section 1.1 for the rationale behind choosing these entities.

91 For the purposes of this paper, the terms 'decentralized agency', 'EU agency' and 'agency' will be used interchangeably and refers to the decentralized agencies unless otherwise noted.

92 Chamon (2016) p. 16.

93 Ibid.

94 COM (2002) 718 final, p. 5.

"purely technical considerations", and do not alter in accordance to shifting political climates.[95] Distinguishing between politics and administration enhances the credibility and legitimacy of Union action, and increases accountability.[96] The aims of achieving increased effective management at Union level, cooperation between Member States, and harmonized approaches are consistently underscored in the regulations establishing agencies.[97] Thus, agencies are to ensure effective and uniform implementation, application, enforcement, and development of Union law and policy.[98]

Decentralized agencies are located in various Member States, providing immediate presence of EU entities across the entire Union.[99] Agencies have legal personality[100] and constitute distinct entities separate from the Commission and other EU institutions, and their binding acts may be challenged before the ECJ.[101] Yet, the autonomous nature of agencies has been called into question, both due to their complicated relationship[102] to the Commission, and due to the Member States' influence over their action.[103] In academic circles, some have suggested that *agencification* facilitates a covert form of European integration and technocratic solutions at Union level; solutions that would have been politically unfeasible if attached to the Commission or the Brussels-bureaucracy.[104] An analysis based on the "supranationalism vs. intergovernmentalism"-dichotomy could place agencies in between, because *agencification* ensures regulatory capacity at Union level while preventing transfer of additional powers to the Commission.[105]

The "in between" nature of agencies is amplified by the fact that Member States are represented in various bodies of agencies, and yet agencies are intended to fulfill *Union* obligations.[106] The

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95 COM (2002) 718 final, p. 5. For a discussion, see Vos (2014) p. 28, noting that "it is illusionary to think that the managerial and scientific tasks conferred upon agencies in these fields are merely technical and do not embrace political issues". See also Vos (2016) pp. 207–208.

96 Martens (2012) p. 50 and Craig (2018) p. 192.

97 See e.g. Recital 10 and 16 ACER, Recital 15, 103, 104, and 109 REACH, and Recital 7–11 EBA, EIOPA and ESMA.

98 For further discussion, see Craig (2018) p. 154, and Chiti (2018) pp. 749–750.

99 ACER is located in Ljubljana, ECHA in Helsinki, the financial supervisory authorities in Frankfurt and Paris, and EDPB in Brussels (Belgium). European Union (2020)

100 E.g. Article 100 REACH, Article 16 ACER, Article 68 GDPR, and common Article 5 EBA, EIOPA, and ESMA.

101 Craig (2018) p. 175. See chapter 5.

102 Chiti (2018) pp. 760–762.

103 Mendes (2018) p. 284 with further references.

104 For an overview of contending views, see Craig (2018) p. 154. See also Mendes (2018) pp. 283–284.

105 See Chamon/Hofmann/Vos (2019) p. 2 and Mendes (2018) p. 285.

106 Mendes (2018) p. 285.

composition of bodies within the agencies varies, but they typically consist of representatives from the Member States with voting rights and Commission representatives with or without voting rights. Although independence and impartiality from domestic authorities are often expected of Member State representatives, representation provides insight, legitimacy, and presence.[107]

3.3 Non-Binding Measures

The agencies central in this paper have caught the attention of many due to their powers to adopt binding decisions.[108] Nonetheless, decision-making powers are rather an exception than a rule in the agency context, and agencies normally play instrumental and supporting roles for EU institutions or domestic authorities.[109]

In their instrumental tasks, agencies collect information, aid in coordination between national authorities, monitor implementation, produce guidelines, drafts, advice, or recommendations, or otherwise provide scientific or technical assistance in Union law and policies.[110] The term "non-binding" may camouflage that some measures enjoy a *de facto* influence over Union action. While recommendations, drafts, and guidelines are not binding *per se*, they carry considerable weight "particularly because they will commonly be concerned with technical and scientific matters".[111]

For instance, agencies play an indispensable role in centralized authorization procedures. Upon advice provided by agencies, the Commission grants authorizations, e.g. in the field of chemicals (ECHA) or medicines (EMA).[112] For example, the REACH Regulation envisages a Union system of registration and authorization of chemical products of high concern.[113] Manufacturers and importers alike submit applications to ECHA, which then conducts a scientific review.[114] On the basis of its findings, ECHA drafts a recommendation to the Commission.[115] As ECHA possesses scientific expertise and technical knowledge – contrary to the Commission – it is assumed that ECHA's view is determinative for the Commission's

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107 See more in Vos (2014) pp. 28–29 and Mendes (2018) pp. 285–287.

108 E.g. Mendes (2018) pp. 287–291 with further references.

109 There is a gliding scale from agencies that only perform supporting tasks to agencies with decision-making powers. See Chiti (2018) pp. 766–768 and Mendes (2018) pp. 287–291.

110 See e.g. Chamon/Hofmann/Vos (2019) p. 1 and Baur (2016) p. 50.

111 Craig (2018) p. 164.

112 Baur (2016) pp. 48–49. Regulation (EC) No 726/2004 (EMA).

113 Martens (2012) p. 48 and Chamon (2016) p. 349.

114 Article 59 REACH.

115 Martens (2012) p. 48.

decision.[116] Similarly, in the field of medicines, parties submit applications directly to EMA, which evaluates and provides an opinion. Formal authorization action is then taken by the Commission.[117]

Further examples may be taken from one of the financial supervisory authorities, EBA.[118] Article 290 TFEU stipulates that a legislative act may delegate to the Commission the competence to adopt regulatory technical standards. In areas related to banking, EBA shall *draft* such standards.[119] In accordance with Article 10 of the EBA Regulation, EBA submits drafts to the Commission for its endorsement. Recital 23 in the EBA Regulation reaffirms the strong presumption of endorsement, save in "very restricted and extraordinary circumstances". Further, the Commission enjoys a very limited degree of discretion. Amendments to drafts should occur only where drafts run counter to Union law, fundamental principles, or are disproportionate, and only after prior coordination with EBA.[120] As such, EBA exerts great *de facto* influence. The identical wording is found in the EIOPA and ESMA Regulations[121], illustrating the narrow constraints under which the Commission performs these tasks.[122]

As agencies play a central role in preparing legal acts, *agencification* marks a shift of the Union's decision-shaping arenas. While important discussions previously took place in the Union's main institutions, *agencification* has generated an increase of discussions within specialized expert entities.[123] For the EFTA States, the shift has in turn increased the need to participate in agencies.[124]

After this brief examination of non-binding measures available to agencies – some more encroaching than others – we now turn to questions pertaining to agencies' decision-making powers. Interestingly, affording agencies with decision-making powers may call for a reevaluation of the rationales behind their creation. While agency advice based on technical knowledge and scientific expertise surely provides an indispensable backdrop in the decision-making processes of *other* bodies, it is not self-evident that sector-specific expertise suffices where the agency is granted decision-making powers itself.[125] Scientific expertise does not

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116 Articles 60–64 REACH.

117 Tynes (2018) p. 853.

118 Craig (2018) p. 165.

119 Articles 10 and 13 EBA. See also Articles 10 and 13 EIOPA and ESMA, respectively.

120 Recital 23 EBA.

121 Recital 22 EIOPA, and Recital 23 ESMA.

122 Craig (2018) p. 192.

123 Mendes (2018) p. 287 and Chiti (2018) p. 767.

124 See section 4.2.

125 Craig (2018) pp. 192–193.

necessarily translate into an ability or the necessary legitimacy to balance broad public interests.[126] Moreover, it is not a given that balancing of public interests should be reserved to technocratic administrations, and exempt from public and political scrutiny.[127] As noted by the Court in *Pfizer Animal Health*, scientific legitimacy does not equal democratic legitimacy and does not constitute a "sufficient basis for the exercise of public authority".[128] As such, questions pertaining to scrutiny, accountability, and counter-balancing of the increased powers of agencies become ever more pertinent.[129]

3.4 Decision-Making Powers of EU Agencies

3.4.1 Legal Foundations and Constraints

A recurring tendency over the past three decades of *agencification* is the increased powers conferred upon agencies.[130] Great attention has been afforded to questions concerning the legality of establishing agencies and of empowering or delegating powers to agencies.

As for the *establishment of agencies*, the principle of conferral in Article 5(2) TEU requires that the Union must act within its explicit or implicit competences.[131] Given the absence of an express provision for establishing agencies, the EU has employed various provisions to pass constituent regulations.[132] More recently, the Union has employed Article 114 TFEU, e.g. in the cases of ACER, ECHA, EMA, EBA, EIOPA, and ESMA.[133] Article 114 is the Union's basis for enactment of measures for approximation of national rules pertaining to the internal market. The Union's employment of the provision might suggest that the Union considers agencies to be relevant for the entire internal market, including the EFTA States.[134]

Further, the *empowerment of agencies* has not remained unchallenged. In its seminal ruling in *Meroni*, the ECJ carved out general limitations to delegation of discretionary powers.[135] While recognizing the possibility of the High Authority to delegate powers under the European Coal

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126 Craig (2018) pp. 192–193.

127 Ibid.

128 T-13/99 *Pfizer Animal Health v Council* para. 201. Craig (2018) p. 193.

129 Chiti (2018) p. 767.

130 Not only has there been a quantitative increase in the number of agencies, but also in terms of nature and power conferred upon agencies. See more in Busuioc/Groenleer/Trondal (2012) pp. 3–6.

131 Craig/de Búrca (2015) p. 74.

132 Articles 114 and 352 TFEU, or their former equivalents. Mendes (2018) p. 291 and Craig (2018) p. 158.

133 Mendes (2018) p. 291.

134 Following the rulings in C-217/04 *ENISA* and C-270/12 *Short-selling*, in which the ECJ rejected the UK's challenge of the legality of employing Article 114, it may be presumed that Article 114 provides such basis. Mendes (2018) pp. 291–292.

135 C-9/56 *Meroni*.

and Steel Community ("ECSC"), the Court imposed limits. Delegation may only relate to "clearly defined executive powers", and the use of such powers must be "entirely subject to the supervision" of the delegating authority.[136] In addition, the Court underscored the Treaty's aim of guaranteeing institutional balance and that delegation of wide discretionary powers would "render that guarantee ineffective".[137] Although ruled under the ECSC, *Meroni* has been applied by the ECJ and legal scholars alike in the context of Union agencies.[138]

Following the ruling in *Short-selling*, the ECJ is likely to permit quite substantive discretionary and decision-making powers delegated to or conferred directly upon agencies.[139] In *Short-selling*, the UK sought annulment of Article 28 of Regulation No 236/2012, which accords ESMA with discretionary powers in short-selling cases under certain circumstances.[140] The ECJ noted *inter alia* that ESMA is an EU entity established by the EU legislature, and that any discretion afforded to ESMA is limited by various conditions and criteria. Further, the Treaties presuppose the existence of decision-making agencies in various provisions, e.g. Articles 263, 265, and 267 TFEU, which provide for judicial scrutiny of agency acts that are binding *vis-à-vis* third parties.[141]

While interesting, the discussion is of limited value in the context of this paper due to the broad political consensus between Member States and EU institutions alike as demonstrated through the continuous practice of establishing ever-more agencies with discretionary and decision-making powers. Nonetheless, the *rationale* behind permitting their far-reaching powers is a fundamental backdrop for the rest of the paper: Agencies may be vested with powers on the precondition that they are subject to control and amendable to review.[142]

3.4.2 Conceptualizing Decision-Making Powers

As noted, the selected agencies are empowered to adopt decisions which are legally binding on third parties. Upon enactment, agencies may apply law, facts, and discretion.[143] Because agencies operate on the basis of specific mandates, the circumstances which trigger the adoption of decisions and the parties affected by decisions are highly pluralistic. The founding

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136 Ibid. p. 152.

137 Ibid. See Mendes (2018) p. 292.

138 C-270/12 *Short-selling.* Craig (2018) pp. 168–169 and Mendes (2018) pp. 293–294.

139 Craig (2018) p. 170.

140 C-270/12 *Short-selling* para. 26.

141 Ibid. para. 46–54, 79–85.

142 Craig (2018) p. 164. See also Baran (2017) p. 307. Chapter 5 identifies the Union's multilayered avenues for control. By contrast, only *ex post* control is available in the EFTA pillar.

143 As such, agencies define the scope of their competences (law), assess and establish the relevant factual circumstances (facts), and appraise the circumstances in light of complex, scientific, and technical issues that involve some degree of discretion (discretion). Craig (2018) pp. 436–441.

regulations of each agency define the circumstances and limits under which agencies exercise decision-making powers. Further, numerous parties may be the addressees of decisions, such as national authorities or private parties, and plenty more may be affected more or less indirectly by such action.

As the purpose of this paper is to discuss protection of rights *vis-à-vis* agencies, the following will not examine in-depth the various circumstances and conditions required for the adoption of decisions, nor will it analyze technical aspects. Rather, the aim is simply to provide context, and to identify certain fundamental cross-sector similarities in the agencies' exercise of decision-making powers. The following provides for a general examination of each of the selected bodies, while chapter 4 examines how decisions from each body is enacted in the EFTA pillar.

3.4.2.1 Decisions of ECHA

The REACH Regulation creates a system of registration, information production, and authorization relating to all chemical products circulating in the internal market.[144] By imposing pre-market control and registration requirements on substances, the Regulation aims to ensure efficient functioning of the internal market for substances, and protection of human health and the environment.[145]

In this system, manufacturers and importers alike submit applications for registration directly to ECHA. ECHA may verify registrations as complete or reject applications in case of lacking documentation.[146] ECHA's decisions are binding upon applicants, and are amenable to both administrative and judicial review.[147] Formerly, national authorities were the first point of contact for private parties. Now, however, parties submit applications directly to ECHA. Further, ECHA plays an instrumental role in the Commission's authorization scheme as explained in section 3.3.

3.4.2.2 Decisions of ACER

The Union's Third and Fourth Energy Packages[148] aim to facilitate the functioning of the internal market for energy (electricity and gas). As noted, the Clean Energy Package is in force

144 Martens (2012) p. 47.

145 Recital 1–2 and Article 20 REACH.

146 Article 20 REACH. See Mendes (2018) p. 289.

147 Articles 91 and 94 REACH.

148 The Fourth Package is often referred to as the "Clean Energy Package".

in the EU, while the third package entered into force in the EEA as of November 2019. With the revised package, ACER has been granted additional powers in the EU.[149]

As a preliminary point, national regulatory authorities play a primary role in enforcement of EU energy law.[150] Where national authorities are competent to adopt binding decisions pursuant to EU energy law, such measures are addressed to the so-called transmission system operators (TSOs). TSOs are the companies that operate networks through which electricity and gas are transported.[151] The TSOs in Sweden, Denmark, Finland, and Norway are, respectively, Svenska Kraftnät, Energinet, Fingrid, and Statsnett. Although mostly publicly-owned, these companies are legal persons (private parties), and subject to decisions taken by national regulatory authorities.

ACER shall improve coordination between national regulatory authorities on cross-border cases, for example when actions of TSOs raise cross-border issues.[152] In issues concerning more than one Member States, ACER may enact individual decisions.[153] The decision-making powers of ACER are secondary, i.e. ACER will only adopt binding decisions in the absence of domestic action.[154]

An example may be taken from a case concerning disagreement between the national regulatory authorities of the Nordic countries regarding a proposal submitted by their respective TSOs.[155] The TSOs had submitted a joint proposal to their respective domestic authorities, who were to issue domestic acts to implement the proposal in the national legal order. However, the Finnish national regulatory authority found that the proposal conflicted with certain EU provisions.[156] Therefore, the case has been sent to ACER for a final decision, which shall enact a decision that ensures uniform application across all the Nordic countries. In Norway, ESA will enact a parallel decision.[157]

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149 Bjørnebye (2020) pp. 23–26. The following will not focus on ACER's amended tasks, but only provide a general overview of the decision-making powers that are similar in both regulations.

150 Hancher (2018) pp. 1099–1100.

151 COM MEMO (2011) 125 p. 2.

152 E.g. Recital 3 ACER.

153 Recital 16 ACER.

154 Ermacora/Tremmel (2016) p. 318, stating that ACER's powers depend on "whether or not the national regulatory authorities make use of their initial competence".

155 ACER (2020).

156 Commission Regulation (EU) 2017/2195 on establishing a guideline on electricity balancing.

157 See section 4.5.

3.4.2.3 Decisions of EBA, EIOPA, and ESMA

As a response to the financial crises of 2007–2008, the Union sought the establishment of a comprehensive European System of Financial Supervision ("ESFS"), to which the financial supervisory authorities form part.[158] Although there are certain variations to their competences, the same set of system applies in all three regulations.[159] As with other agencies, the regulations foresee primary domestic enforcement and application. Further, the Union's principles of institutional balance requires the involvement of the Commission or other Union institutions prior to enactment of agency decisions.[160] Thus, agency action carries the characteristic of a "last resort" measure and is limited to specifically delineated circumstances.[161] The regulations foresee enactment of decisions in three situations.

First, in cases of breach of Union law, the agencies may adopt decisions addressed to financial institutions or financial market participants.[162] Prior to enactment, the founding regulations foresee a system of investigation, recommendations to national competent authorities ("NCAs)[163], and formal opinions issued by the Commission.[164] Where such "softer" measures do not remedy the breach, the financial agencies may adopt binding decisions on NCAs, or effectively bypass NCAs by directly imposing obligations on private parties.[165]

Second, pursuant to Article 18 of all three regulations, the supervisory authorities may adopt decisions in emergency situations, i.e. in adverse developments which may "seriously jeopardise the orderly functioning and integrity of financial markets" or stability of the Union's financial system.[166] The enactment of emergency decisions hinges on the Council's preceding declaration of emergency.[167] The three regulations envisage a two-step mechanism, whereby the agencies first adopt decisions towards NCAs.[168] Should the NCAs not comply, decisions may be taken directly against a supervised institution.[169] It remains to be been seen which measures the Council and the financial agencies will take following the outbreak of covid-19.

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158 Recital 1 and Article 2 EBA, EIOPA, and ESMA.

159 In this paper, EBA, EIOPA, and ESMA will be addressed as a group, unless it is necessary to comment on individual variations.

160 E.g. Articles 17(4) and 18(2) EBA, EIOPA, and ESMA. See Bekkedal/Hertzberg (2018b) pp. 215–217.

161 E.g. Recital 9 EBA and ESMA, and Recital 8 EIOPA, underscoring the "integration of national and Union supervisory authorities, leaving day-to-day supervision to the national level".

162 See Article 4 in the EBA, EIOPA, and ESMA Regulations for definitions.

163 See Article 4 EBA, EIOPA, and ESMA for definition of "competent authority".

164 See Article 17(2)–(5) EBA, EIOPA, and ESMA.

165 Article 17(6) EBA, EIOPA, and ESMA. Haentjens (2018) pp. 978–979.

166 Article 18(1) EBA, EIOPA, and ESMA. See also Mendes (2018) p. 290.

167 Article 18(2) EBA, EIOPA, and ESMA.

168 Article 18(3) EBA, EIOPA, and ESMA.

169 Article 18(4) EBA, EIOPA, and ESMA.

The current climate is presumably the closest to an "emergency situation" since the financial crises in 2007-2008.

Third, the financial agencies may settle disagreements in cross-border situations. Common Article 19 foresees a two step-system. First, the agencies may facilitate informal mediation, and where unsuccessful, the agencies may adopt decisions. The addressees of such dispute resolution decisions are either NCAs, or under certain circumstances, supervised institutions.[170]

3.4.2.4 Decisions of EDPB

GDPR seeks to consolidate rules on processing of personal data.[171] In accordance with Article 51 GDPR, each Member State shall establish an independent data protection authority ("DPA") to be responsible for monitoring the application of GDPR within its Member State.[172] Several provisions in the Founding Treaties of the EU provide that national data protection authorities ("DPAs") shall be independent.[173]

In cases relating to an establishment's cross-border processing of data, Article 56 GDPR determines that one authority shall become the *lead authority* for that establishment.[174] The goal is to achieve a "one-stop-shop" mechanism. Because data protection regulations shall apply uniformly across the Union, establishments should only have to coordinate with one DPA. The mechanism eliminates bureaucratic barriers and simplifies cross-border activity.[175] Article 60 GDPR lays down various rules for cooperation between authorities. For instance, the lead DPA shall provide draft decisions to the other DPAs as to ensure uniform measures against an establishment. Further, DPAs may impose administrative fines in case of breaches with GDPR.[176] Although establishments such as Facebook, Google, Microsoft, and Twitter operate in all of the European states, the Irish DPA is their lead authority.[177]

EDPB only plays a role in the *consistency mechanism* as envisaged in Articles 64-67 GDPR. Article 65(1) provides various circumstances which prompt action by EDPB. For instance, EDPB shall act where a DPA has raised objections to drafts by the lead authority, where there

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170 Articles 19(3)(4) EBA, EIOPA, and ESMA.

171 Article 1 GDPR.

172 The tasks and powers entrusted to DPAs are listed in Articles 57–58 GDPR.

173 Article 16(2) TFEU and Article 8(3) CFR.

174 Article 56(1) GDPR determines that the supervisory authority of the *main* establishment shall be competent to act as lead supervisory authority.

175 Eriksen/Fredriksen (2019) p. 171.

176 Article 83 GDPR.

177 Berseth (2020).

are conflicting views on which authority is competent for the main establishment, or where an authority does not request the opinion of EDPB in a case where the conditions are met.[178]

In these three instances, EDPB may resolve disputes between the national authorities involved though the enactment of binding decisions. Subsequently, Article 65(6) stipulates that the domestic authorities to whom a decision is addressed, "shall adopt its final decision on the basis" of EDPB decision. Thus, the direct addressees of EDPB decisions are domestic data protection authorities. Yet, private parties[179] may also be affected, as subsequent domestic action may be addressed to them or may otherwise affect their rights and obligations.

3.5 Concluding Remarks

As exemplified, the selected entities were established to facilitate the functioning of the internal market, and their decision-making powers are generally based on the need for coordination and uniform implementation, application, and enforcement of EU *acquis*. Yet, European agencies conduct their affairs in the grander Union context. As a preliminary point, the principle of indirect administration still applies.[180] Three general observations merit mention.

First, tasks previously entrusted to domestic authorities are now performed by European agencies. As demonstrated, ECHA and EMA provide examples. Not only are they the first point of contact for manufacturers and importers of chemical products and medicines, but their decisions have binding effect on private parties.

Second, and as a contrast, the solutions in certain sectors reinforce the idea of primary domestic action, for instance in the field of data protection, energy, and finances. These agencies act only at the request of domestic authorities or in the absence of domestic action. The threshold for action is high, reaffirming the "last resort" character of agencies' binding powers.[181] The founding regulations anticipate that agencies must take certain mediatory or less encroaching measures prior to enactment of decisions. Moreover, agencies operate within the overarching institutional balance of the Union, as the involvement of the Union's institutions is often a precondition for enactment of decisions.

Third, agency decisions relate to a wide specter of actors, from natural and legal persons to national authorities. While ECHA and ACER's decisions are legally binding on private parties

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178 Article 65(1) litra a–c GDPR.

179 Decisions of national authorities are directed at various actors, such as data "controller" and "processor". See Article 4(7)(8) GDPR for definitions. Decisions concern "personal data", and thus "data subjects" are affected by decisions, see Article 4(1).

180 See e.g. Recital 9 EBA and ESMA, and Recital 8 EIOPA. See remarks in chapter 1.

181 See Haentjens (2018) p. 977.

such as manufacturers and TSOs, the decisions of EDPB are addressed to national supervisory authorities. Yet, because EDPB decisions addressed to national authorities result in obligations to adopt specific measures domestically, the Board's decisions also affect the rights and obligations of various private parties. Lastly, the financial supervisory authorities operate in a fusion, and may enact decisions on both national authorities and supervised institutions.

Following this overview, chapter 4 will examine how the EFTA States participate in the selected agencies.

4 Arrangements for External Participation

4.1 Overview

Some have argued that "the EU simply could not function without [European] agencies".[182] As the EEA Agreement is built on the principle of homogeneity and with the aim of extending the territorial scope of the internal market, the same axiom could apply within the greater European Economic Area as well.[183] A functioning EEA presupposes a functioning EU, and thus, the EFTA States' participation in EU agencies is essential. Yet, due to various constitutional constraints in the EFTA States and due to diversity in the mandates and powers of agencies, participation is not streamlined into one model.[184] The following chapter examines various arrangements of participation in agencies. Before that, the following section provides certain information on background and rationale behind external participation in agencies.

4.2 Background and Rationale

The founding regulations of agencies typically include a clause for third state cooperation.[185] Agencies are typically open to affiliates of the Union, such as parties to the Stabilization and Association Agreements, the EEA EFTA States, or Switzerland.[186] Participation in agencies may familiarize counterparts with EU *acquis* and best practices, enhance cooperation, and lead to effective export of Union norms. As such, participation may be a valuable "stepping stone" in enlargement processes or other forms of association with the Union, allowing affiliated states, sector by sector, to develop towards the Union's legal and political system.[187] For instance, states like Albania, Bosnia and Herzegovina, Georgia, and Moldova engage in deep sectoral cooperation with the Union in the field of aviation, and participate in EASA as observers.[188] Even the United Kingdom, which has left the Union, is eyeing continuous participation in selected agencies, such as ECHA, EASA, EMA – with an aim to influence the Union *acquis* through the provision of expertise and capacity.[189] Yet, as deeply integrated members of the internal market, the EFTA States are the most probable participants.[190]

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182 Vos (2016) p. 206. See also Bekkedal (2019b) p. 371.

183 Article 1 EEA.

184 Bekkedal (2019a) p. 382.

185 See e.g., Article 43 ACER (ex Article 31 Regulation 713/2009), Articles 106 and 120 REACH, Article 75 EBA, EIOPA, and ESMA.

186 Öberg (2019) p. 204.

187 Ibid. pp. 204–210 for an analysis.

188 The European Union Aviation Safety Agency. Öberg (2019) p. 209.

189 Ibid. p. 219 with further references.

190 As noted by the ECJ in C-431/11 *UK v Council* para. 49, the EEA Agreement establishes a close association based on "special, privileged links between the parties concerned", cited in Bekkedal (2019a) p. 385.

From the EU's perspective, external participation contributes to export of *acquis*. Participatory clauses typically foresee passive forms of participation, e.g. a right to observe and partake, but without voting rights.[191] In a way, one may compare external participation with the conventional approach taken in other EEA relations, i.e. a one way street of obligations leading from the EU to the EFTA States.[192] As the internal market extends across the entirety of the Economic Area, it is in the interest of the Union that application and enforcement is uniform, i.e. the incentive to include the EFTA States in *agencification* cannot be overstated.[193]

From the EFTA States' perspective, the arguments for agency participation essentially overlap with the broader arguments for membership in the EEA, i.e. access to the internal market. The work of agencies is inherently linked to the overall EEA cooperation, and participation has become a precondition for including Union acts and policy into the EEA Agreement.[194] As such, legal homogeneity is impossible without participation. Participation ensures that businesses from the EFTA States compete and engage in the internal market on an equal footing.[195] Further, participation may fulfill certain practical needs. In an ever-more specialized internal market, the tasks of national authorities have become increasingly more challenging, especially where multinational companies are as resourceful as the authorities of certain states.[196]

Moreover, participation may be an arena for influencing EU law and policy, and perhaps even enhance the democratic legitimacy of the EEA Agreement. This is because participation ensures presence, insight, and relative influence.[197] Even in the absence of voting rights, third states may exert influence in the work of agencies, e.g. through information sharing, consultation, and providing expertise. The weight of their impact is linked to their power in the relevant field and access to venues and actors. For instance, some have argued that Norway and Switzerland exert greater influence over EU energy policy than some Member States with voting rights.[198]

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191 The EFTA States generally have the right to observe, speak, submit proposals, and participate in debates, but not to vote, see e.g. Article 1(5) litra a in JCD 93/2017 (ACER). From the viewpoint of the EFTA States, voting rights would redeem problematic aspects of external participation, see Bekkedal (2019a) p. 416 and Eriksen/Fredriksen (2019) p. 170.

192 Öberg (2019) p. 204 and 210.

193 Ibid. pp. 212–213.

194 See, *inter alia*, Bekkedal (2019a) p. 382, noting that "novel EU legislation cannot be fully adopted by third countries in the absence of a prior arrangement on participation in relevant agencies".

195 Prop. 100 S (2015–2016) pp. 11–12.

196 Eriksen/Fredriksen (2019) pp. 14–15.

197 Öberg (2019) p. 210 and 219.

198 Hofmann, Jevnaker, and Thaler (2019) pp. 157–159.

As established, *agencification* has led to a shift in the Union's decision-shaping arenas. The transposing of important discussions from main institutions to expert entities challenges the EFTA States' decision-shaping rights as envisaged in the EEA Agreement. For instance, the EFTA States enjoy a right to participate in preparatory stages of legislative proposals and in the Union's comitology system.[199] With important discussions now taking place within agencies, the EFTA States' participation is crucial to counterbalance and compensate for the loss of influence that the shift entails.

The Norwegian Government's EU Strategy for 2018-2021 recognizes agency participation as a channel for political lobbying.[200] Influencing EU law and policy as an outsider is more likely in the preparatory stages before the Commission and agencies than during negotiations in the European Parliament or the Council.[201] Another pragmatic argument is that participation may bridge potential gaps between the EU and the EFTA States at an early stage, which may in turn pave the way for reaching consensus in subsequent discussions in the EEA Joint Committee.[202]

Yet, although there are benefits to participation, the potential influence must not be overstated. First, the absence of voting rights reduces the weight of the EFTA State position. Interestingly, the Norwegian Government has stated that full participation without voting rights is the objective in its present and future relations to European agencies.[203] Second, although agencies are key to producing EU law and policy, their contribution in the greater landscape of Union legislation is only a drop in the ocean.[204] Thus, it is not self-evident that informal influence counterbalances the lack of formal voting rights. On the other hand, even if agencies operate in specific fields, certain fields may be politically sensitive for various reasons, e.g. the energy sector and railways in Norway. Ultimately, *agencification* challenges the system of the EEA Agreement and is "likely to increase the asymmetrical balance of power" between the EU and the EFTA pillars.[205]

4.3 Underpinnings of EFTA Participation

As the EEA Agreement does not foresee agencies, participation is a result of case-by-case negotiations.[206] Due to variations in composition, mandates, and powers of agencies, the

199 Articles 99–100 EEA.

200 Norway's EU Strategy 2018–2021 p. 20

201 Ibid.

202 Öberg (2019) p. 211.

203 E.g. Prop. 100 S (2015–2016) p. 12 and Prop. 4 S (2017–2018) p. 24.

204 Öberg (2019) p. 221.

205 Leonhardsen (2015) p. 1.

206 NOU 2012:2 p. 176 and 859.

arrangements for participation are highly pluralistic. Each arrangement is based on unique, sector-specific negotiations and adaptations.

Yet, it would be delusory to assume that the Union is willing to give great concessions each time the question of participation arises. In fact, the Commission expressed its discontentment with lengthy negotiations with the EFTA States, suggesting a horizontal approach to "ensure consistency and avoid negotiations on an ad hoc basis".[207] It remains to be seen how "Brexit" will impact the EFTA States' position in negotiations, but there is little reason to believe that the Union is willing to accept full participation in its systems without requiring concession to its supranational control regimes.[208]

As explained, the Constitutions of Norway and Iceland prevent transfer of decision-making competences.[209] Constitutional constraints do *not* prevent the EFTA States from participating fully in the non-binding work of agencies.[210]

Underpinning any modality of participation is the two-pillar structure of the EEA. The two pillars preserve the autonomy of the Union and the formal sovereignty of the EFTA States while simultaneously ensuring substantive homogeneity.[211] Participation is made possible through decisions by the EEA Joint Committee ("JCD").[212] JCDs typically include horizontal adaptations in accordance with Protocol 1 EEA, e.g. extending the territorial reach of Union acts to the EFTA States.

The following sections examine how decisions which have their origin in EU agencies make their way into the national legal orders of the EFTA States through various actors and procedures. The examination is necessary to provide a backdrop for examining questions pertaining to administrative and judicial review in chapters 6 and 7. Logically, the origin of a decision is determinative for the possibilities of scrutinizing that decision.

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207 COM SWD (2012) 425 final, p. 10.

208 Fredriksen (2018a) p. 11.

209 Section 1.3.

210 E.g. Article 1(5) litra a JCD 93/2017: "national regulatory authorities of the EFTA States shall participate fully in the work of the [ACER] ... and all preparatory bodies, including working groups, committees and task forces of the Agency, the Administrative Board and the Board of Regulators, without the right to vote."

211 Bekkedal (2019a) p. 385 and Baur (2016) pp. 45–47.

212 In the EFTA pillar, the JCDs fulfill the same function as the founding regulations in the EU. Article 98 EEA is the sole basis for participation in agencies, see Bekkedal (2019a) p. 391.

Table 1 is an illustration of how one may view participation in selected agencies and bodies. The second column illustrates that there are mainly three solutions for decision-making in the EFTA pillar: Through national authorities, ESA, or an EU entity.[213]

	DECISION-MAKING BODY EU	DECISION-MAKING BODY EFTA	ADDRESSEE WITHIN EFTA PILLAR	SUBSEQUENT ADDRESSEE
1	COMMISSION (ECHA)	NATIONAL AUTHORITY	PRIVATE PARTIES	–
2	ACER, EBA, EIOPA, ESMA	ESA	NATIONAL AUTHORITIES (BOTH SECTORS) OR PRIVATE PARTIES (ONLY FINANCIAL SECTOR)	PRIVATE PARTIES
3	EDPB	EDPB	NATIONAL AUTHORITIES	PRIVATE PARTIES

TABLE 1

The following explores this three-way divide, and is inspired by certain observations made by Bekkedal.[214] Chapters 6 and 7 are structured along the same divide.

4.4 National Authorities

In certain arrangements, national authorities implement *acquis* directly.[215] The arrangements for participation in ECHA provide an example. The "founding regulation" in the EFTA pillar is JCD 25/2008, which incorporates the REACH Regulation into the EEA Agreement.[216] As explained, in the EU pillar, ECHA and the Commission are granted various decision-making powers vis-à-vis private parties, e.g. in authorization cases as stipulated in Articles 60-64 REACH.

The EEA-adapted version of Article 64(8) REACH reads: "When the Commission takes authorisation decisions, the EFTA States will simultaneously and within 30 days of the Community Decision, take corresponding decisions".[217] Thus, the JCD envisages a system of national implementation on the sole basis of a preceding Commission decision.

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213 This three-way divide has been recognized by many, e.g. the EEA Review Committee, see NOU 2012:2 p. 240.

214 Bekkedal identifies four models. Our second model (ESA) overlaps with two of Bekkedal's models, Bekkedal (2019a) pp. 381–416.

215 The EEA Agreement rests upon the two-step procedure of (1) incorporation through a JCD, and (2) domestic implementation, see Articles 98 and 104 EEA. Participation in ECHA effectively eliminates the first step. Bekkedal (2019a) pp. 394–395.

216 See FOR-2008-05-30-516 for Norwegian legal basis. Pursuant to Sections 4–6, the Norwegian Environment Agency (Miljødirektoratet) is responsible to enact decisions in accordance with the Commission's decisions.

217 Annex 1(1) litra g JCD 25/2008, amending Article 64(8) REACH.

Participation in the European Medicines Agency (EMA) seems to be construed along comparable lines.[218] Pursuant to the EEA-adapted text, the EFTA States shall after the Commission's approval of medicinal products in the EU pillar, "take corresponding decisions on the basis of the relevant acts".[219]

These arrangements represent the favored position of the EFTA States, as implementation becomes a matter solely for domestic authorities.[220] While pragmatic and simple, it seems that domestic authorities are simply expected to "rubber-stamp" decisions from the EU.[221] Further, the prospect of administrative and judicial review seems diminished. These questions are the subject-matter of chapters 6 and 7.

4.5 The EFTA Surveillance Authority

4.5.1 External Decision-Making

Although indirect administration is the preferred position of the EFTA States, the Union has increasingly insisted on external decision-making.[222] Arrangements for participation in ACER, EBA, EIOPA, and ESMA determine that ESA shall have the "mirroring" tasks and responsibilities of relevant agencies. As follows, JCD 93/2017[223] determines that ESA shall enact binding decisions in the EFTA pillar in cross-border cases relating to the Third Energy Package.[224] Likewise, in the financial sector, ESA shall adopt decisions in the EFTA pillar where the financial supervisory authorities would adopt decisions in the EU pillar.[225]

There are at least three noteworthy observations to ESA's roles. *First*, although ESA formally enacts decisions, Union agencies provide instructions. *Second*, ESA enacts decisions addressed to national authorities, which create obligations for subsequent domestic implementation. *Third*, ESA shall occasionally enact decisions directly *vis-à-vis* private parties. For pragmatic reasons, it is valuable to examine participation in the four agencies (ACER, EBA, EIOPA, ESMA) by analyzing these observations in some detail.

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218 JCD 61/2009. See Baur (2016) pp. 48–49 and Tynes (2018) p. 853.

219 Section 1 of the Annex to JCD 61/2009.

220 Bekkedal (2019a) p. 394.

221 Ibid. p. 398 and Fredriksen/Franklin (2015) p. 677.

222 E.g. Prop. 100 S (2015–2016) p. 13.

223 JCD 93/2017, incorporating Regulation (EU) 713/2009.

224 E.g. Article 1(5) litra d JCD 93/2017. In March 2019, Iceland and the Union reached a joint understanding that the provisions of the ACER "will not have any tangible impact on Iceland's sovereign decision-making on energy matters" because the Icelandic electricity system is not connected to the EU's energy market. See European Commission (2019).

225 Protocol 8 SCA, and JCDs 199/2016, 200/2016, and 201/2016. See Prop. 100 S (2015–2016) p. 14.

4.5.2 Draft Decisions and Parallel Decisions

A commonality between the arrangements chosen for the four agencies is the direct involvement of relevant Union agencies in the ESA's decision-making procedure. Involvement has been considered necessary to ensure homogeneity, uniformity, and coordination. Further, the Contracting Parties agree that one should utilize the expertise of European agencies in the EFTA pillar.[226] Homogeneity entails that very often, ESA adopts a parallel decision or a "mirror-decision" in the EFTA pillar, which corresponds to an agency decision in the EU pillar. Moreover, ESA's decisions are based on drafts from the relevant agency.

An example may be taken from the energy sector. Where there is disagreement between the Nordic countries concerning a cross-border issue, ACER will adopt a decision against the regulatory authorities in Sweden, Denmark, and Finland. Based on ACER's draft, ESA will adopt a corresponding decision addressed to a regulatory authority (RME) in Norway. The combined effect of the decisions of ACER and ESA is that there is uniformity across the Nordic countries.

Therefore, while the formal enactment of decisions rests upon ESA, ESA is not completely autonomous. In the energy sector, decisions by ESA "shall, without undue delay, be adopted on the basis of drafts prepared by the [ACER]".[227] Similarly, ESA's decisions in the financial sector "shall, without undue delay, be adopted on the basis of drafts" provided by the relevant financial agency.[228]

Drafts are not legally binding *per se.* Drafts will not place ESA under a formal legal obligation to adopt decisions with a certain content.[229] As such, Protocol 8 SCA emphasizes that ESA "shall act in full independence".[230] The Norwegian Government has underscored that, in principle, ESA may decide not to enact a corresponding decision.[231]

At the same time, the Government highlights that an underlying precondition in the negotiated model is that ESA *shall* adopt a decision which is identical or close-to-identical to the draft.[232] On its face, the statutory language suggests that ESA shall decide within parameters defined by

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226 Prop. 100 S (2015–2016) p. 14 and Prop. 4 S (2017–2018) p. 24.

227 Article 1(5) litra d(iv) JCD 93/2017.

228 Article 3(1) Protocol 8 to the SCA.

229 Prop. 100 S (2015–2016) p. 14 and 55, Prop. 101 S (2015–2016) p. 4.

230 Article 3(1) Protocol 8 SCA, see Article 25a SCA.

231 Prop. 100 S (2015–2016) p. 55.

232 See Prop. 4 S (2017–2018) p. 28, Prop. 100 S (2015–2016) p. 55, and Prop. 101 S (2015–2016) p. 4.

a relevant EU agency.[233] The arrangements suggest that Union agencies hold the ultimate control of decision-*shaping*, and that ESA "must act upon and within the draft".[234] In practice, one may question whether ESA's task is only to "rubber-stamp" draft decisions.[235] As Bjørgan puts it, "it is obvious that the real decision making competence remains with the European Supervisory Authority".[236]

A comparison between an agency draft and ESA's final decision could provide valuable insight in whether the arrangements merely require "copying and paste". As of June 2020, there have been two ACER-cases relating to the EFTA pillar, but none provide answers to the question. In the first case, ACER enacted Decision 16/2019 concerning approval of the Nordic TSOs' proposal for long-term capacity calculation methodology. This was prior to the incorporation of the Third Energy Package into the EEA Agreement, and thus, the case is not of relevance in our context.

The second case has already been mentioned under section 3.4.2.2, and concerns disagreement between the Nordic regulatory authorities on a proposal submitted by their respective TSOs. The case has been sent to ACER for a final decision. In the EFTA pillar, ESA will on the basis of a draft produced by ACER enact a decision towards the Norwegian regulatory authority (RME). It remains to be seen how, or if, ESA's decision differs from ACER's.

Further, ESA has enacted two decisions relating to the ESFS. In the first case, ESA approved a company as a credit rating agency based on a draft produced by ESMA.[237] Certain scholars have faced difficulty accessing drafts. ESA, ESMA, and even the Norwegian financial supervisory authority seem to practice non-disclosure of draft decisions, holding that they constitute confidential and internal preparatory correspondence.[238]

In the wake of the outbreak of covid-19, ESA adopted a decision on 16 March 2020 to temporarily lower notification thresholds for disclosure of net short positions.[239] Upon a request submitted to ESA in early May 2020 regarding access to the ESMA draft, I personally experienced the same practice of non-disclosure. Such practices impair any prospect for

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233 The wording "shall, without undue delay, be adopted" does not seem to provide ESA with discretion. See in this direction, Bekkedal (2019a) p. 405.

234 Bekkedal (2019a) p. 405 and Fredriksen (2018a) p. 6.

235 See Bekkedal (2019a) pp. 401–405. See also Fredriksen/Franklin (2015) p. 679.

236 Bjørgan (2018) p. 1018. The statement predates the incorporation of the Third Energy Package into the EEA Agreement. However, the identical statutory language in JCDs pertaining to the ACER and the ESFS suggest that the same applies within the energy sector.

237 ESA Decision No. 071/18/COL.

238 Barlund (2020).

239 ESA Decision No. 020/20/COL.

outsiders to understand and raise questions about the model. Logically, certain degrees of accessibility and transparency constitute preconditions for control, as they provide potential control forums with guidance as to which issues to raise and how to review.[240] Interestingly, however, ESA's decision came the very same day as ESMA issued its equivalent decision applicable to EU markets.[241] Without access, it is a matter for speculation whether ESA conducted an independent appraisal or merely duplicated the decision into the EFTA pillar.

4.5.3 Decisions *vis-à-vis* National Authorities

The following section focuses on arrangements for the energy sector, but arrangements for the financial sector are built on the same principles.[242]

ESA's decision-making follows a two-step procedure. First, ESA enacts decisions based on drafts, as explained above. JCD 93/2017 stipulates that ESA's decisions shall be "addressed to the national regulatory authorities of the concerned EFTA State(s)". [243] Therefore, contrary to ACER in the EU pillar, ESA may *not* adopt decisions addressed to private parties (the TSOs).

Second, addressee authorities must implement ESA's decision. Implementation is formally a question which must be addressed within the national legal order.[244] However, domestic autonomy is contrary to the purpose of ACER, which is to ensure coordination and uniformity through external, centralized decision-making.[245] For this reason, JCD 93/2017 foresees that the addressee national authority is responsible to implement ESA's decisions, and if necessary, to enact subsequent decisions addressed to private parties.[246]

In Norway, this body is the Norwegian Energy Regulatory Authority ("RME"), which is an independent branch within the Norwegian Water Resources and Energy Directorate ("NVE").[247] Provisions in the Third Energy Package stipulate that the national regulatory authority shall be independent.[248] For this reason, decisions of domestic authorities like RME are not subject to appeal before a Directorate, Ministry, or any other part of the governmental

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240 Scholten (2020) p. 7.

241 ESMA70-155-9546.

242 Prop. 4 S (2017–2018) p. 24. ESA's decisions in the financial sector are addressed to Finanstilsynet (the Norwegian Financial Supervisory Authority).

243 Article 1(5) litra d JCD 93/2017.

244 Graver (2018) p. 41.

245 Bekkedal (2019a) p. 402.

246 Prop. 4 S (2017–2018) p. 24.

247 Prop. 4 S (2017–2018) p. 24, 26, and 30.

248 E.g. Article 35 no. 4 and 5 Electricity Directive (2009/72/EC) and Article 39 Gas Directive (2009/73/EC). See Prop. 4 S (2017–2018) p. 13 and 16.

branch.[249] Instead, decisions may be brought before an independent appeals body in the national legal order.[250]

ESA's decisions create obligations *vis-à-vis* national regulatory authorities.[251] The Norwegian Government's stance is that ESA's decisions addressed to national authorities merely create international obligations, and that Norwegian authorities have the "last say" in implementation of relevant *acquis*.[252] Suffice it to say here that irrespective of formal arrangements, there are clear ties that link substantive aspects of a decision from ACER to ESA, and ESA to RME.

4.5.4 Decisions *vis-à-vis* Private Parties

In the negotiations for participation in the ESFS, the Union held that the supranational competence to adopt decisions towards supervised institutions (private parties) was a core function of the financial agencies.[253] However, as constitutional constraints barred the EFTA States from transferring decision-making competences to international organizations in which they are not members (i.e. Union bodies), the JCDs concerning participation in EBA, EIOPA, and ESMA instead opt for decision-making *vis-á-vis* private parties through ESA.[254]

With the move, the EFTA States have disembarked from the traditional approach of indirect administration, and ESA becomes quite parallel to proper EU agencies. The empowerment of ESA is arguably in contrast to the spirit of the EEA Agreement, which is founded on preservation of formal sovereignty.[255] The transfer sparked the adoption of a novel Article 25a and Protocol 8 to the SCA.[256]

4.6 European Union Entities

Instead of participating in agencies indirectly through the "mirroring" empowerment of domestic authorities or ESA, a possible gateway is direct participation.[257] This type of integrated participation is rather unprecedented in the EFTA pillar due to constitutional

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249 JDLOV-2016-2442-3 para. 1.4.

250 Prop. 4 S (2017–2018) p. 30.

251 Graver (2018) p. 5.

252 JDLOV-2016-2442-3 para. 2.4.3. See also Prop. 4 S (2017–2018) p. 28. This is not undisputed, see e.g. Graver (2018) p. 41. See section 7.2.1 for some elaboration.

253 Prop. 100 S (2015–2016) p. 13.

254 JCDs 199/2016, 200/2016, and 201/2016. See Article 25a SCA and Protocol 8.

255 Yet, the move is not completely unprecedented, as ESA is empowered to take certain binding action against private parties in competition cases, and in practice, state aid cases. Fredriksen/Mathisen (2018) pp. 172–176.

256 The Clean Energy Package foresees increased powers to issue fines. As the package is not incorporated into the EEA, it is unclear whether ESA's powers will be adjusted accordingly. See Bjørnebye (2020) pp. 37–40.

257 NOU 2012:2 p. 240.

constraints. According to a report issued by the Norwegian Ministry of Justice and Public Security, direct participation has been employed, *inter alia*, in the cases of EASA and EDPB.[258] Further, a report issued by the Norwegian Ministry of Transport in May 2020 suggests that arrangements for participation in ERA shall be construed along similar lines.[259] The following addresses certain questions relating to EDPB, but recent developments with ERA illustrate that certain remarks may have general application to future adaptations.

In accordance with JCD 154/2018, the EFTA States shall participate fully in the work of EDPB, albeit without the right to vote.[260] GDPR shall apply as in the Union, including EDPB's binding powers.[261] The EFTA States agreed to deviate from the two-pillar structure because direct participation ensures increased influence and ESA does not possess the necessary expertise in data protection law.[262] In a Joint Declaration, the Contracting Parties emphasize that one shall "take note of" the fact that decisions of EDPB are addressed to national supervisory authorities [and not private parties], and that the solution "does not create a precedence for future adaptations".[263] Interestingly, the recently proposed arrangements for participation in ERA deviate from the declaration, and even foresee that ERA may enact decisions directly vis-á-vis private parties in the EFTA pillar.[264]

As explained, in the EU, EDPB may enact decisions addressed to national authorities (DPAs).[265] Decisions against DPAs create obligations for the addressee DPAs, which "shall adopt its final decision" on the basis of EDPB decision.[266] Therefore, decisions of EDPB navigate into the domestic legal order, and is likely to spark the adoption of domestic decisions addressed to private parties. With the "one-pillar" system, the same applies in the EFTA pillar, meaning that EDPB decisions *effectively* create rights and obligations for private parties in the EFTA pillar, although decisions are formally addressed to national authorities.

4.7 Concluding Remarks

Various arrangements have been employed to participate in European agencies. Generally, the arrangements reveal the EFTA States' apprehension to duplicate agencies in the EFTA

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258 Prop. 56 LS (2017–2018) p. 201.

259 Prop. 101 LS (2019–2020) pp. 15–18 and 54–56.

260 Article 1(1) JCD 154/2018.

261 Decision 154/2018 provides certain EEA-amendments, but does not alter the competences of EDPB (nor grant additional powers to ESA).

262 Prop. 56 LS (2017–2018) p. 204.

263 Joint Declaration attached to JCD 154/2018.

264 Prop. 101 LS (2019–2020) p. 55.

265 Article 65(1) litra a–c GDPR.

266 Article 65(6) GDPR.

architecture. Instead, the approach seems to be pragmatic solutions to fit *agencification* in the existing architecture, predominantly within the two-pillar structure.[267] To mirror the Union's system by creating specialized bodies in the EFTA pillar would contradict with the aim of achieving coordination and uniformity through EU agencies.[268]

Nonetheless, it is not self-evident that the increase of specialized bodies in the EU pillar should not have a parallel in the EFTA pillar, especially where agencies produce legal obligations for private parties. Ultimately, the lack of specialization and human resources in the EFTA pillar were key to the unusual arrangements for participation in EDPB.[269] Interestingly, such concerns were not central in the financial and energy sectors, although ESA does not possess expertise in these sectors either. Yet, attempts to empower ESA with corresponding competences to those of EU agencies seem to provide unsatisfactory results because of ESA's limited influence over decisions, as exemplified above. Further, ESA's responsibility covers multiple sectors, while EU agencies are dedicated to distinct fields. The difference inevitably creates an imbalance between the two pillars. Due to limited empirical experiences with how agency drafts are treated by ESA, it is challenging to examine the extent to which ESA independently enacts decisions.

Even where implementation is contained within domestic authorities, the parameters of implementation are largely or completely defined by Union bodies. More than anything, innovative solutions seem to prolong the EFTA States' continuous stance since the inception of the EEA Agreement, i.e. structures that preserve formal sovereignty, but which require implementation of relevant *acquis* without formal influence. From this viewpoint, certain arrangements indeed strike one as formalistic.[270]

Existing structures affect rights and obligations of various parties, who have reasonable expectations of protection of rights. We now turn to examining how agency decisions are subject to review within the Union in chapter 5, before examining equivalent sections in the EFTA pillar in chapters 6 and 7.

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267 During negotiations for participation in the ESFS, the Norwegian Government underscored the impracticalities of creating a corresponding hierarchy in the EFTA pillar, see Prop. 100 S (2015–2016) p. 12.

268 Prop. 100 S (2015–2016) p. 12.

269 Prop. 56 LS (2017–2018) p. 204.

270 Fredriksen/Franklin (2015) p. 677.

5 Avenues for Protection of Rights in the EU Pillar

5.1 Overview

The following chapter examines avenues for *ex post* control of agency decisions in the EU pillar, i.e. administrative and judicial review. This is an important backdrop for the equivalent exercise that will be conducted in chapters 6-7 pertaining to the EFTA pillar. Before addressing questions of *ex post* control, the following section addresses the Union's comprehensive system of avenues.

5.2 Multidimensional Control of Agencies

In a Union founded on the rule of law[271], it is paramount that affected parties have access to mechanisms for control and accountability[272], ensuring counter-balancing and protection of rights.[273] The Union's legislative framework envisages various avenues to control the work of agencies, including political, financial, judicial, and extra-judicial. One may divide avenues along various phases of decision-making, i.e. institutional control for general overview, controlling decisions *ex ante* (before enactment), control during enactment, and *ex post* control of decisions.[274] The combined effect of multiple control avenues enable comprehensive and effective scrutiny of agency decisions in the EU pillar.

First, the Union's Founding Treaties and the constituent acts of agencies foresee institutional control. For instance, budgetary provisions constitute important control mechanisms, as the activities and impact of agencies hinge on available resources.[275] Further, reporting requirements, periodic reviews, and evaluations allow for control by the Commission, the European Parliament, the Council, and the Court of Auditors.[276] In addition, the European Ombudsman is empowered to review the acts of Union bodies and agencies.[277]

Second, *ex ante* control typically includes the creation and development of secondary law which provides for the agencies' powers.[278] Thus, the Commission exerts control through submitting

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271 E.g. Article 2 TEU. See Craig (2018) p. 269.

272 The terms "accountability" and "control" are be used interchangeably in this paper. See Cleynenbreugel (2019) pp. 157–158 for a discussion.

273 See e.g. Lenaerts (2007) p. 1626, stressing that effective judicial protection and judicial review are "intrinsic components" of the rule of law.

274 Bekkedal/Hertzberg (2018b) p. 207. See also Graver (2018) p. 45.

275 E.g. Articles 96–99 REACH, Articles 31–37 ACER, common Articles 62–65 EBA, EIOPA, and ESMA. For a discussion, see Leonhardsen (2015) pp. 9–11.

276 E.g. Article 117 REACH, Article 43 ACER, Articles 97–98 GDPR, and Article 81 in EBA, EIOPA, and ESMA. The Court of Auditors examines revenue and expenditure, see Articles 285–287 TFEU.

277 Article 228 TFEU and Article 43 CFR.

278 See Bekkedal/Hertzberg (2018b) p. 208.

legislative proposals, and Member States through their legislative competences in the European Parliament and the Council.[279] Institutional and *ex ante* control mechanisms are unique to the Union, and not available in the EFTA pillar.[280]

As for control *during enactment* of decisions, participation of national representatives in agencies constitutes an important mechanism. Although most founding regulations stipulate that representatives shall be impartial and independent, their participation provide democratic legitimacy, and hence, democratic control.[281] By contrast, the EFTA States generally participate in every aspect of the work of agencies and make financial contributions, yet have not been granted voting rights in any agency.[282] From this perspective, it is a paradox that the two-pillar model's aim of ensuring sovereignty in fact eliminates national influence and control in decision-making processes in the EFTA pillar.[283]

Finally, the avenues for administrative and judicial review enable *ex post* control of decisions. An effective regime of judicial control presupposes "the existence of a rational judicial architecture", which embraces the ECJ, GC, national courts, and agency boards of appeal.[284] In the following, it will be demonstrated that the Union's framework foresees a "layered system" to ensure protection of rights.[285] The assessment is structured along two enquiries: Access and scope of review. Thereafter, chapters 6 and 7 examine the extent to which the same streamlined system is available in the EFTA pillar. As the other abovementioned avenues for control are not available to parties in the EFTA pillar, recourse to administrative and judicial review constitutes the only avenue to challenge agency decisions.[286]

5.3 Administrative Review

5.3.1 Overview

Unlike traditional structures where administrative review is conducted by an external, independent, or superior body, European agencies have introduced an integrated model for complaints and redress, i.e. the internal Boards of Appeal ("BoA").[287] The Union has

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279 E.g. Articles 14–18 TEU and 289–291 TFEU.

280 The EFTA States enjoy certain access to legislative processes in the Union, see Articles 99–100 EEA.

281 Bekkedal/Hertzberg (2018b) pp. 214–215.

282 Baur (2016) p. 51 and Eriksen/Fredriksen (2019) p. 170.

283 Contrary to the decision-making process in agencies, representatives of national authorities do not vote over acts to be taken by ESA. See Bekkedal/Hertzberg (2018b) p. 215.

284 Craig (2018) p. 280.

285 E.g. Leonhardsen (2015) p. 14.

286 Ibid.

287 Mendes (2018) pp. 285–287.

established BoAs for ECHA and ACER, and a Joint BoA for EBA, EIOPA, and ESMA.[288] There is no BoA for EDPB. As BoAs have been established to meet specific sectoral needs, there is great diversity in their mandates, competences, and qualifications of their members.[289] Generally, BoAs are founded for reasons of procedural economy and to ensure recourse to necessary remedies.[290]

In the following, I will examine the added value of administrative review through BoAs. At least four reasons make the examination timely. First, official EU documents provide that the BoA-model should become the standard mechanism for protection of rights *vis-à-vis* agencies, and thus one can only assume that their relevance will be elevated in the years to come.[291] Second, as BoAs have been introduced to ensure protection of rights, the *absence* of equivalent BoAs in the EFTA-pillar provides for an interesting point of discussion. Third, following amendments in the Statue of the ECJ, BoAs constitute a filtering mechanism for appeals before Union Courts.[292] Finally, examining the benefit of review within BoAs highlights (the lack of) avenues for protection of rights *vis-à-vis* EDPB, where the EU has not established a BoA.

5.3.2 In Between Administration and Judiciary

As a preliminary point, BoAs are not specialized courts[293] and cannot be classified as tribunals.[294] Further, while the ECJ has regarded the BoAs as "quasi-jurisdictional bodies"[295], the Boards neither have judicial competences, nor are their members regarded as judges.[296] Nevertheless, depicting BoAs as mere administrative bodies would undermine their function and purpose.[297] The exact classification of BoAs notwithstanding, BoAs offer a hybrid between administration and judiciary.[298]

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288 See Article 25 ACER, Article 89 REACH, and common Article 58 EBA, EIOPA, and ESMA. For an account, see Chirulli/De Lucia (2015) pp. 832–857, Navin-Jones (2015) pp.143–168, and Bolzonello (2016) p. 569–582.

289 De Lucia (2019) p. 814.

290 See Recital 34 ACER, common Recital 58 in EBA, EIOPA, and ESMA, and Recital 106 REACH.

291 See De Lucia (2019) p. 813 with further references.

292 See sections 5.3.2 and 5.4.4.

293 As regulated in Article 257 TFEU.

294 T-63/01 *Procter & Gamble* para. 23, cited in De Lucia (2019) p. 818. Appeal to the ECJ was dismissed, see C-107/03 P *Procter & Gamble.*

295 Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09 *Schräder II* para. 137 and 190.

296 Craig (2018) p. 283. See also Chirulli/De Lucia (2015) p. 836.

297 Navin-Jones (2015) p. 145.

298 Lamandini/Ramos Muñoz (2020) p. 120.

Proceedings before BoAs are more accessible, cost-effective, and expeditious than court proceedings. For example, fees are lower and parties do not need legal representation.[299] Further, BoAs are composed of lawyers or specialists, providing necessary expertise and knowledge to assess both law, facts, and evidence.[300]

However, the integrated BoA-model may place its members at odds with requirements of impartiality and independence.[301] Firstly, the BoAs are offices within the agencies whose decisions they are to review and an appellant cannot rely on a right to a fair hearing.[302] The dual role of providing protection of rights while simultaneously expressing the agency's final position places the BoAs between two tensions.[303] Further, the management board of an agency typically appoints members of the BoAs, reaffirming the sense of mixture between decision-making and scrutiny.[304]

Appeals before a BoA may influence proceedings before Union Courts. First, access to Union Courts is contingent on exhaustion of remedies before BoAs. As such, constituent regulations provide that the ECJ's jurisdiction is limited to actions challenging the decisions of a BoA, or decisions of agencies where there is no right to appeal before a BoA.[305] As noted by the Court in *Puškár*, requirements of exhaustion of remedies is desirable for reasons of procedural economy and do not by virtue of their existence contradict with the right to effective judicial protection.[306]

Second, distribution of cases between specialized BoAs reduce the Union Courts' workload.[307] It would simply be impossible for the Courts to review all agency decisions in addition to their other influx of cases.[308] In 2019, the Union passed Regulation (EU) 2019/629, which introduces a filtering mechanism in novel Article 58a to the Statute of the ECJ. Article 58a provides that

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299 Chamon (2016) pp. 342–343.

300 E.g. Article 25(2) ACER, Article 89(3) REACH and common Article 58(2) EBA, EIOPA, and ESMA.

301 Members shall be independent and impartial, both from the Member States and bodies within the respective agency, see Article 26(2) ACER, Article 90(2)(3) REACH, and Article 59 EBA, EIOPA, and ESMA.

302 T-63/01 *Procter & Gamble* para. 23, cited in De Lucia (2019) p. 818. See also Chirulli/De Lucia (2015) p. 836.

303 Chirulli/De Lucia (2015) p. 839.

304 De Lucia (2019) p. 818.

305 Article 29 ACER, Article 94 REACH, and common Article 61 EBA, EIOPA, and ESMA.

306 C-73/16 *Puškár* para. 64–67. The ECJ ruled on requirements set out in Articles 47 and 51 CFR, which both national authorities and the Union's bodies must respect. See Lamandini/Ramos Muñoz (2020) p. 148.

307 See, *inter alia*, Craig (2018) p. 284.

308 Chamon (2016) p. 340.

actions challenging General Court decisions concerning decisions of selected BoAs, shall not proceed to the ECJ unless the ECJ provides its consent.[309]

5.3.3 Access to BoAs

The criteria for accessing various BoAs are essentially the same. First, BoAs only review "decisions" of agencies.[310] BoAs do not conduct a general review of soft law measures such as drafts, guidelines, or recommendations.[311] Further, the constituent acts specifically list the "decisions" which are admissible for appeal.[312]

Second, natural and legal persons may appeal decisions "addressed" to them, or decisions of "direct and individual concern".[313] The statutory language corresponds to the requirements for direct annulment actions before the ECJ.[314] Thus, it may be presumed that in interpreting the criteria, practice and case-law pertaining to Article 263(4) are of relevance.[315] As will be explained later, the threshold for accessing as non-addressees is high.

5.3.4 Scope of Review

5.3.4.1 Beyond Legality and onto Rationality

The constituent regulations of agencies define the competences of each BoA. For instance, the ECHA BoA is competent to conduct an "examination of the grounds" of a decision, while the Joint BoA for EBA, EIOPA, and ESMA and the ACER BoA shall "examine whether [the decision] is well-founded".[316] By contrast, the Union Courts shall review the "legality" of acts.[317]

The difference in wording suggests that BoAs' review go beyond a mere legality control.[318] Generally, it has been assumed that BoAs conduct a more extensive review and apply different

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309 See section 5.4.4 on certain implications of Article 58a in the context of judicial review.

310 See Article 28(1) ACER, Article 91(1) REACH, and common Article 60(1) EBA, EIOPA, and ESMA. By contrast, the ECJ's jurisdiction covers "reviewable acts", see section 5.4.2.2.

311 See distinction e.g. in Article 288(4)(5) TFEU.

312 E.g., common Article 60 (1) EBA, EIOPA, and ESMA, and Article 91(1) REACH.

313 Article 28(1) ACER, Article 92(1) REACH, and common Article 60(1) EBA, EIOPA, and ESMA.

314 Article 263(4) TFEU.

315 See section 5.4.2.3 for an elaboration on standing before the ECJ.

316 Article 93(2) REACH, common Article 60(5) EBA, EIOPA, and ESMA, and Article 28(4) ACER.

317 Article 263(1) TFEU.

318 See e.g. Chiti (2018) p. 769 and Craig (2018) p. 283.

standards than those of the Union Courts. One could say that while the ECJ controls *legality*, administrative review allows for an assessment of the *rationality*[319] of a decision.[320]

BoAs represent an integrated part of their associated agency, reaffirming the sense of continuity between the initial agency decision and that of the BoA.[321] Because a BoA decision represents the final decision of the agency, it has been assumed that BoAs may reexamine the contested question as a whole, including new circumstances.[322] Therefore, review before a BoA will address both law and facts, and BoAs may admit new evidence.[323]

5.3.4.2 Diversity in Review Competences

The above starting points merit certain nuances. As the BoAs have been established for specific mandates, they have diversified, sector-specific roles and functions.

One may sort BoAs into two categories. The BoAs in the first category are typically granted the same far-reaching competences as their associated agencies and thus, a BoA may alter or substitute the initial agency decision. The BoAs in the second category may only confirm or remit a decision for further action by the agency. A BoA decision remitting the case to the agency creates a *ratio decidendi*, i.e. the agency is bound to take action in accordance with the BoA decision, but the BoA may not *replace* a decision with its own.[324]

The ECHA BoA provides an example of the first category. Article 93(3) REACH stipulates that the ECHA BoA may exercise "any power within the competence" of ECHA or remit the case to the competent agency. Therefore, the ECHA BoA may modify or substitute a decision with its own decision. Wide competences as to the results suggest that ECHA BoA is also competent to conduct a *full* review of ECHA's decisions.

In my view, if the BoA may alter or replace a decision, it should also be competent to consider new evidence and newly arisen circumstances. The alternative would be that the BoA may alter or substitute a decision, but within the constraints as defined by ECHA's initial decision. Such a solution would entail that the BoA has to consider whether to alter a decision on its merits, without being able to consider new evidence and circumstances. In my view, this solution is inconsistent because altering a decision without considering "the full picture" may lead to

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319 Chiti (2018) p. 769.

320 Craig (2018) p. 284.

321 See Chamon (2016) p. 338 and Craig (2018) p. 284.

322 De Lucia (2019) pp. 821–822.

323 Craig (2018) p. 284.

324 Ibid. See Chamon (2016) p. 343.

undesirable results. Chirulli and De Lucia seem to interpret the competence of the ECHA BoA in the same manner.[325]

The ECHA BoA case of *Honeywell* illustrates the BoA's wide competences.[326] In its review, the BoA emphasized that it "possesses certain technical and scientific expertise" which enable it to conduct a more thorough review than the EU Courts.[327] Further, contrary to the Courts, the ECHA BoA is not limited to establishing whether a decision suffers from a "manifest error" or a misuse of powers.[328] As noted by De Lucia, the BoA should not limit itself to reviewing legality, but "must re-examine the controversial issue as a whole and in light of any new circumstances that have arisen".[329]

As an opposite to the wide powers of the ECHA BoA, the second category of BoAs seem to carry more limited review competences. The Joint BoA for the supervisory financial authorities provides an example. Because the Joint BoA may only confirm a decision or remit the case to the competent authority for further action[330], the Joint BoA presumably conducts a more limited review compared to e.g. the ECHA BoA. The Joint BoA does not "second-guess the agency's determination, but ensure[s] the legality of its actions, as courts typically do".[331]

There are contending views on the exact scope of the Joint BoA's review. While some scholars argue that the Joint BoA conducts an unlimited review, others hold that the BoA appraises whether there has been an error in the agency decision.[332] In the absence of explicit statutory language, "the precise intensity of review is still elusive", and it is for the ECJ to provide necessary guidance.[333] The following will not examine this debate any further.

In its former regulation, the ACER BoA was competent to "exercise any power" within the competence of ACER, i.e. in line with BoAs such as the ECHA BoA.[334] Therefore, the statutory language suggested a full review. Nevertheless, in its cases, the ACER BoA has consistently

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325 Chirulli/De Lucia (2015) p. 837.

326 A-005-2011 *Honeywell*, cited in Chamon (2016) pp. 350–352.

327 A-005-2011 *Honeywell* para. 117. See section 5.4.2.4 for the Union Courts' limited review.

328 The EU Courts have highlighted the difference between the ECHA BoA and the Courts' review on multiple occasions; see e.g. T-125/17 *BASF Grenzach GmbH* para. 87–89 and T-755/17 *Germany v ECHA* para. 192–194.

329 De Lucia (2019) p. 822.

330 Common Article 60(5) EBA, EIOPA, and ESMA.

331 Lamandini/Ramos Muñoz (2020) p. 149.

332 Ibid. p. 154.

333 Ibid.

334 Article 19(5) Regulation (EC) 713/2009.

limited its review, noting that "when complex economic and technical issues are involved, the appraisal of the facts is subject to more limited review upon appeal".[335] Pursuant to the revised Regulation of the Clean Energy Package, the ACER BoA may only confirm a decision or remit the case to ACER.[336] Therefore, its current scope of review likely equals that of the Joint BoA. In February 2020, the ACER BoA upheld its previous reasoning, noting, "the only advisable and possible level of control (given resources and timeframe) that it can exercise is limited to a control of legality".[337]

5.3.5 Concluding Remarks

As demonstrated, review within a BoA offers "accuracy, experience, sectoral knowledge, expeditiousness, [and] informality".[338] Further, recent reforms display the BoAs' potential place in the wider system of protection of rights in the Union. The growing number of agencies and bodies with decision-making competences calls for solutions that capture the additional caseload before the judiciary while also ensuring sufficient safeguards.[339]

As for EDPB, GDPR does not establish a BoA or other complaints body. The above assessment highlighted the many advantages of BoAs. Logically, these advantages are lost for parties affected by decisions adopted by EDPB. With the heterogeneous groups of parties that are directly or indirectly affected by EDPB decisions, one could argue that there is a particular need for accessible review. Parties affected by decisions taken by ECHA, ACER, or the financial supervisory authorities, often operate in that field of expertise on a frequent basis, and occasionally they even represent national authorities. Data protection regulations and decisions, on the other hand, permeate all sectors and affect big corporations, small businesses, independent entrepreneurs, and individuals alike. Even if private parties are not the direct addressees of EDPB's decisions, it is not self-evident that cost- and resource-effective measures such as BoAs should be out of their reach.

Nonetheless, it will be argued that the Union Courts are likely to scrutinize EDPB decisions more strictly than other decisions in the agency context. As such, greater judicial review could compensate for the absence of administrative remedies.[340] We now turn to review of agency decisions within the Union Courts.

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335 A-001-2018 *AQUIND* para. 51–52 and A-002-2018 *Prisma* para. 62–63, cited in Askhaven (2019) pp. 157–158.

336 Article 28(5) ACER.

337 A-006-2019 *Operator Gazociągów* para. 52–56.

338 Chirulli/De Lucia (2015) p. 855.

339 See remarks on the filtering mechanism in section 5.4.4.

340 Section 5.4.2.4.

5.4 Judicial Review

5.4.1 A Complete System of Legal Remedies

Article 47 CFR lays down the right to an effective remedy and fair trial, and reaffirms the principle of effective judicial protection.[341] The provision of effective judicial protection hinges on the Union's "*complete* system of legal remedies and procedures"[342], which encompasses both the Union Courts and national courts.[343] In essence, the "complete system" requires that when judicial review is not possible directly before the Union Courts due to rules of inadmissibility, there must be a gateway to the ECJ by way of indirect actions.[344] Further, the EU constitutes a "*coherent* system of judicial protection", i.e. there are direct and indirect avenues, both of which fulfill important, albeit dissimilar functions.[345]

The principle of effective judicial protection applies no less in the context of European agencies.[346] In its pivotal ruling in *Les Verts*, the ECJ stated that "neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty".[347] In *Sogelma*, the ECJ applied the same principles in the context of agencies, holding that "the situation of Community bodies endowed with the power to take measures intended to produce legal effects *vis-à-vis* third parties is identical to the situation which led to the *Les Verts* judgment: it cannot be acceptable, in a Community based on the rule of law, that such acts escape judicial review".[348] Thus, protection of rights *vis-à-vis* agencies encompasses the totality of direct and indirect actions.

5.4.2 Direct Actions

5.4.2.1 Jurisdiction

Article 263 TFEU is the main gateway for direct actions.[349] Article 263(1) confirms the principles laid down in the *Les Verts* and *Sogelma* rulings, i.e. the ECJ shall review the legality

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341 C-72/15 *Rosneft* para. 73.

342 Case 294/83 *Les Verts* para. 23, and T-411/06 *Sogelma* para. 36.

343 Lenaerts (2007) p. 1625.

344 Lenaerts (2007) pp. 1626–1627.

345 Case 314/85 *Foto-Frost* para. 17.

346 Article 51 CFR declares that the provisions in the CFR are addressed to EU bodies, including agencies.

347 Case 294/83 *Les Verts* para. 23.

348 T-411/06 *Sogelma* para. 37.

349 Article 265 extends the ECJ's jurisdiction to include review of the legality of the EU institutions, offices, agencies, and bodies' *failure to act*.

of acts of Union bodies, offices, and agencies[350] intended to produce legal effects *vis-à-vis* third parties.

Pursuant to Article 263(5), specific conditions or arrangements for bringing direct actions may be prescribed in the constituent acts of agencies. In the regulations establishing ECHA, ACER, and the financial supervisory authorities, there is simply a reference to either Article 263 or its equivalent, former Article 230 EC.[351] However, access to the ECJ hinges on exhaustion of administrative remedies, i.e. appeals to a BoA where available.[352] Therefore, parties must challenge the decisions of a BoA. Yet, in its appraisal, the ECJ may take the initial agency decision into consideration.[353] As for decisions by EDPB, Recital 143 of the GDPR Preamble declares that natural and legal persons shall have the right to bring proceedings before Union Courts under the conditions in Article 263 TFEU.

5.4.2.2 *Reviewable Acts*

Article 263(1) declares that the ECJ shall review "acts" which produce "legal effects", i.e. so-called reviewable acts.[354] In accordance with Article 288 TFEU, regulations, directives, and decisions have binding force, while recommendations and opinions do not. This paper revolves around the *binding decisions* of agencies, which the ECJ unquestionably has jurisdiction to review.

As identified, a characteristic with *agencification* is how certain agencies produce drafts and advice, based on which the Commission adopts formal decisions (e.g. ECHA, EMA).[355] While the formal classification of a measure is not determinative, such drafts generally do not in themselves bring a "distinct change" in a party's legal position.[356] Where the contested act is part of a procedure involving multiple stages, it is not reviewable if it is merely a "provisional measure intended to pave the way for the final decision".[357] Even though provisional measures may indicate the potential outcome of a process, they do not alter the legal position of their addressees. Thus, drafts may only be reviewed as part of the ECJ's appraisal of the (subsequent)

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350 Article 263 TFEU expressly provides that agencies have passive *locus standi*. The possibility for agencies to bring actions to safeguard their prerogatives will not be commented (active *locus standi*). See Chamon (2016) pp. 362–363.

351 Article 94 REACH, Article 29 ACER, and common Article 61 EBA, EIOPA, and ESMA.

352 Section 5.3.2.

353 See section 5.4.2.4.

354 Hartley (2014) p. 406.

355 See section 3.3 on authorization schemes.

356 Case 60/81 *IBM* para. 9 and C-22/70 *ERTA* para. 42.

357 Case 60/81 *IBM* para. 10. See also T-123/03 *Pfizer v Commission* para. 22, T-326/99 and *Olivieri* para. 51–53.

reviewable act.[358] As follows, the non-binding acts of agencies are primarily controlled *vis-á-vis* the Commission, and not through the judiciary.[359]

As such, decisions by e.g. ACER, EBA, EIOPA, and ESMA are reviewable in the EU pillar. In the EFTA pillar, however, the very same agencies perform *instrumental* functions by producing drafts to ESA.[360] Section 7.3.3 addresses how the requirement of "reviewable act" may have certain ramifications for parties seeking protection of rights.

5.4.2.3 Standing

Pursuant to Article 263(1), EU institutions and Member States do not need to satisfy legal interest to challenge Union acts. By contrast, natural and legal persons must satisfy the requirements reiterated in Article 263(4). A plaintiff has standing where a decision is "addressed" to that person, e.g. manufacturers whose authorization application was rejected by ECHA, the TSOs subject to decisions adopted by ACER, or addressee supervised institutions of decisions enacted by the financial supervisory authorities.

Further, non-addressees must demonstrate that the contested act is of "direct and individual concern" to them. In accordance with settled case-law, a plaintiff must *inter alia* satisfy the rigorous *Plaumann* test.[361] The standing criteria create a high threshold for bringing direct actions.[362] In principle, a company affected by a subsequent domestic decision which implements a preceding agency decision, may have standing to challenge the preceding decision before Union Courts – if they can satisfy that they are individually and directly affected. However, such plaintiffs may typically challenge preceding agency decisions by way of indirect actions.[363] Therefore, the criteria for direct action are likely to be interpreted strictly.[364]

5.4.2.4 Scope of Review

Contrary to the agency Boards of Appeal, the ECJ's review is constrained by specific categories of review, i.e. lack of competence, infringement of essential procedural requirements,

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358 Case 60/81 *IBM* para. 12. See remarks on the *Artegodan*-ruling further below.

359 Cleyenbreugel (2019) p. 159.

360 As explained in section 4.5.2.

361 Case 25/62 *Plaumann* p. 107, requiring that the plaintiff is affected "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".

362 Craig (2018) p. 286.

363 See section 5.4.3, and section 7.2.2 for an example.

364 In this direction, Magnússon (2014) p. 118. See section 5.4.3 for indirect actions.

infringement of Union law, or misuse of powers.[365] As such, review before the Union Courts is a *legality* review.

As a preliminary point, where Union bodies and authorities enjoy broad discretion, particularly to complex matters which require technical knowledge or scientific expertise, the Union Courts conduct a limited review. In such cases, the Courts typically do not second-guess complex assessments.[366] Rather, it is settled case-law that the Courts confine their review to verifying whether the contested act suffers from a manifest error, whether the duty to state reasons has been infringed, and questions pertaining to misuse and excess of powers.[367] Further, where Union bodies are required to make complex assessments, their discretion applies – to a certain extent – to the establishment of facts.[368] As the outer limits of the Courts' review are flexible and ambiguous, they provide leeway to adjust the intensity of review.[369] Limited review may be viewed as an extension of the separation of powers stipulated in the Union's Treaties.[370] In this system, the ECJ's task is not to scrutinize every move and find "the best solution", but to ensure the legality of acts.[371]

The Union Courts have consistently employed standards of limited review, e.g. in their review of acts issued by the Commission, the Union's Community Plant Variety Office ("CPVO"), and the European Central Bank ("ECB").[372] In 2019, the GC decided on two cases relating to ECHA, both in which the GC reaffirmed the Court's limited review.[373] In my view, the Union Courts are likely to employ the same standards of review in all cases pertaining to complex assessments conducted by EU agencies, such as ECHA, ACER, EBA, EIOPA, and ESMA.

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365 Article 263(2) TFEU. Generally, the review is limited by the pleas raised in the action. This section will not discuss the Court's review *ex officio*.

366 C-491/01 *British American Tobacco* para. 123, cited in Craig (2018) p. 645. See also T-96/10 *Rütgers* para. 99.

367 Hereinafter referred to as "limited review". E.g. C-15/10 *Etimine* para. 60, T-13/99 *Pfizer Animal Health v Council* para. 166, and T-96/10 *Rütgers* para. 99.

368 T-13/99 *Pfizer Animal Health v Council* para. 168.

369 Baran (2017) p. 297.

370 See e.g. Articles 17 and 19 TEU.

371 Baran (2017) p. 309.

372 See C-199/11 *Otis* and C-15/10 *Etimine* (the Commission), T-187/06 *Schräder 1* (CPVO), and C-62/14 *Gauweiler* (ECB).

373 T-125/17 *BASF Grenzach GmbH* para. 87–89 and T-755/17 *Germany v ECHA* para. 192–194. See also T-96/10 *Rütgers* para. 99 and T-95/10 *Cindu Chemicals BV* para. 105, in which the Courts conducted a limited review of ECHA's decisions.

In October 2019, the GC ruled on two cases pertaining to decisions enacted by ACER.[374] As the cases did *not* raise the issue of reviewing ACER's complex decisions, the GC did not expressly reiterate the principles for limited review. Instead, the GC conducted a traditional legality review – which the Courts always have jurisdiction to do – and appraised whether relevant legislative acts vested ACER with the powers in question.[375] On the basis of settled case-law, however, it must be clear that the Courts are likely to conduct a limited review in the energy sector, if faced with the task of appraising substantive aspects of ACER's decisions. Decisions enacted by ACER typically raise complex issues relating to the energy sector, e.g. on the use of specific methods.

The Union Courts have not decided on any cases relating to decisions enacted by EBA, EIOPA, or ESMA. In *Gauweiler*, the ECJ employed the standard of limited review in a case pertaining to the ECB, noting that the ECB's decisions require complex economic assessments.[376] As the ECB forms part of the same European System of Financial Supervision as EBA, EIOPA, and ESMA, and all entities enact decisions which raise complex economic issues, it may be argued that the *Gauweiler*-reasoning for limited review is applicable to the financial supervisory authorities.[377]

Nonetheless, limited review does not entail non-existent review. In fact, where discretion is extensive and review is constrained, procedural safeguards become more important.[378] In *Otis*, the Court stated that even where the Commission is vested with certain discretionary powers or the issue presupposes complex economic assessments, the Court is not excluded from conducting a review.[379] While the Union Courts shall not substitute the initial complex assessment, they must establish whether the evidence is factually accurate, reliable, and consistent, and whether the relevant body sufficiently stated reasons, including an explanation of factors taken into account.[380] The ECJ has confirmed this stance in various sectors, e.g. in cases pertaining to mergers and abuse of dominant position in EU competition law, see *Tetra Laval* and *Microsoft Corp*.[381]

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374 T-332/17 *Energie-Control Austria* and T-333/17 *Austrian Power Grid*.

375 Ibid. para. 51 and para. 60, respectively.

376 C-62/14 *Gauweiler* para. 68 and 74.

377 Article 2 EBA, EIOPA, and ESMA. Bekkedal/Hertzberg (2018b) p. 221.

378 See e.g. C-62/14 *Gauweiler* para. 69.

379 C-199/11 *Otis* para. 59–62. See also Lamandini/Ramos Muñoz (2020) p. 155.

380 C-199/11 *Otis* para. 59–61. See also T-475/07 *Dow AgroSciences Ltd* para. 151–153.

381 C-12/03 P *Tetra Laval* para. 39 and Case 201/04 *Microsoft Corp.* para. 88–89, cited in Craig (2018) pp. 456–460.

Certain agency structures add a layer of complexity. As explained in section 3.3, agencies such as ECHA and EMA prepare draft decisions for authorization, which the Commission formally enacts. In such structures, it is clear that the operative decision is made by the agency. For review to be effective, it is necessary to not only review the Commission's formal decision, but to venture beyond formalities and review the agency's reasoning.[382]

In *Artegodan*, the Commission had adopted a decision withdrawing an authorization based on scientific findings made by a committee within EMA. The CFI found that the Court could review the agency's reasoning.[383] Although the Court may not substitute EMA or the Commission's view, Union Courts have jurisdiction to review whether there is an understandable link between the reasons presented and the conclusions drawn. Following *Artegodan*, it seems that the Union Courts are prepared to go beyond formal structures and assess the underlying substance of decisions in order to ensure effective protection of rights. I interpret the Court's remarks in *IBM* in the same direction.[384] As such, the Union Courts are not confined to the final, formal enactment, but may review operative stages of the decision-making process. In chapters 6 and 7, it will be argued that formal structures and an unwillingness to go beyond formalities might create certain discrepancies in the EFTA pillar. This may be the case where ACER, EBA, EIOPA, and ESMA prepare drafts for ESA's decisions.[385]

As for EDPB, its decisions typically relate to questions of compliance with GDPR. In contrast to agencies, EDPB is not expected to conduct complex economic or scientific assessments, although certain decisions may raise issues pertaining to technology.[386] In fact, protection of personal data is recognized as a fundamental *legal* right in Article 8 CFR, which courts are to safeguard in accordance with Article 47 CFR. Certain case-law provides evidence that the Union Courts will conduct a high-intensity review in cases relating to fundamental rights.[387] Further, as provisions in GDPR hold a legal character, it is well within the ECJ's jurisdiction to review compliance with GDPR.[388] This is supported by the fact that in cases relating to the previous Data Protection Directive (superseded by GDPR), the Courts generally did not confine

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382 Craig (2018) p. 176.

383 Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, and T-141/00 *Artegodan* para. 198–201, cited in Craig (2018) pp. 176–177.

384 Case 60/81 *IBM* para. 12; "whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step".

385 E.g. sections 6.2.3 and 7.2.2

386 Åsbø (2020) p. 85.

387 Craig (2018) p. 460–463, citing C-584, 593 and 595/10 *Kadi*. See also Baran (2017) p. 312-314.

388 Third limb of Article 263(2) and Article 288(2) TFEU.

their review.[389] As a result, high-intensity review before the Courts may compensate for the lack of avenues to appeal decisions of EDPB to an administrative review body, such as the agency Boards of Appeal.

5.4.3 Indirect Actions

The Union's complete system of legal remedies reaffirms the deeper idea of unity on which the Union is founded.[390] In accordance with Article 267(1b) TFEU, domestic courts and tribunals may request a preliminary ruling from the ECJ on the interpretation of Union law or validity of acts adopted by Union entities, such as agencies. The procedure ensures uniform application and enforcement of EU law, and that the EU Courts are accessible to any plaintiff across the Union.[391] Thus, the high threshold for direct actions is counterbalanced by indirect access.

As agencies are EU entities, the ECJ enjoys exclusive jurisdiction to rule on the invalidity of their acts.[392] While the *Foto-Frost* principle excludes domestic courts from ruling on the *invalidity* of a decision, domestic courts may rule on validity.[393]

In principle, the preliminary ruling procedure enables an applicant to contest any EU act before national courts and indirectly access the ECJ, including agency decisions. Indirect actions are typically well-suited where domestic measures implement acts adopted by EU bodies or agencies, e.g. where EDPB or the financial supervisory authorities adopt decisions towards national authorities, which then prompts subsequent domestic action against private parties. In such instances, affected parties may bring proceedings before their domestic courts, and indirectly access the ECJ.[394]

5.4.4 Discrepancies and Bridging the Gaps

5.4.4.1 An Incomplete and Incoherent System?

The interlocking jurisdictions of Union Courts and domestic courts create the Union's complete and coherent system of legal remedies. However, over the years, a lacuna in protection of rights

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389 Directive (EC) 1995/46, e.g. C-40/17 *Fashion ID* para. 84–85, cited in Åsbø (2020) p. 86.

390 E.g. 13th Recital of the TEU Preamble. See also Article 13(3) litra b and Lenaerts (2007) p. 1625.

391 Craig/de Búrca (2015) p. 464–465.

392 Case 314/85 *Foto-Frost* para. 17–20. The principle has been confirmed in subsequent cases, e.g. C-199/11 *Otis* para. 53. As late as May 2020, the ECJ reiterated the *Foto-Frost* doctrine in a press release following a controversial ruling in the German Constitutional Court concerning the European Central Bank. See ECJ Press Release No 58/20.

393 Case 314/85 *Foto-Frost* para. 14.

394 See section 7.2.2 for an example.

has become apparent. The development culminated in Advocate General Jacobs' Opinion in *UPA*, in which he identifies certain discrepancies.[395]

For instance, Union case-law has created a high and complex threshold for direct actions.[396] Further, the remedy – the preliminary ruling procedure – does not adequately rectify limited direct access. Because domestic courts are precluded from deciding on the invalidity of an act and referrals are oftentimes at the domestic court's leniency, accessing judicial protection through EU Courts is not necessarily straightforward.[397] Alas, in its ruling in *UPA*, the ECJ did not endorse the AG Opinion, declaring that it is for domestic courts to circumvent hindrances to indirect action in their domestic systems.[398] The ECJ upheld this line of reasoning in its subsequent ruling in *Jégo-Quéré*.[399]

The ECJ's reluctance to address discrepancies ultimately renders the question of whether the system is as complete and coherent as proclaimed by the Courts. Although amendments brought by the Lisbon Treaty sought to address some discrepancies[400], most direct actions by natural and legal persons are rendered inadmissible due to the rigorous standing criteria, which has been described as "an almost insurmountable block".[401]

An assessment of discrepancies in the EU Courts is beyond the scope of this paper, but the abovementioned considerations illustrate that there are certain inconsistences in the EU pillar. This is interesting in our context because a main contention in this paper is that certain discrepancies in the EFTA pillar may be redeemed through cross-pillar access to the ECJ. Yet, natural and legal persons do not necessarily enjoy comprehensive protection beyond the possibility for indirect actions. As will be discussed, parties in the EFTA pillar do not benefit from this system. In the agency context, this is somewhat paradoxical because Union entities such as agencies *de facto* influence the rights and obligations of parties in the EFTA pillar.[402]

In the following, we will examine how certain elements related to the agency boards of appeal fit into the greater system of the EU judicature.

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395 C-50/00 P *UPA* AG Jacobs Opinion.

396 Ibid. para. 100.

397 Ibid. para. 102.

398 C-50/00 P *UPA* ECJ para. 41–42.

399 C-263/02 P *Jégo-Quéré.*

400 Pursuant to Article 263(4), actions challenging "regulatory acts" which does not "entail implementing measures" need only satisfy the "direct" criterion. See e.g. C-583/11 *Inuit*.

401 Craig (2018) p. 347.

402 See discussions in section 6.2.4 and 7.2.3.

5.4.4.2 BoAs: Part of the EU Judiciary?

As mentioned, Regulation (EU) 2019/629 introduced a new Article 58a in the Statute of the ECJ, which envisages a filtering mechanism for actions challenging certain GC decisions. Pursuant to Article 58a(1), appeals against GC decisions concerning the decisions of certain BoAs shall not proceed to the ECJ unless the ECJ provides its consent. The reform expressly applies to actions challenging the BoA decisions of four offices and agencies, including the ECHA BoA and the EASA BoA. Article 58a does not expressly list the ACER BoA nor the Joint BoA for the financial supervisory authorities.

A normal course of action would entail administrative review by a BoA, whose decision would proceed to the GC, followed by subsequent appraisal by the ECJ. The reform effectively eliminates the prospect of a second review by the EU Courts. As the novel mechanism excludes review of certain actions by the highest court, it is pertinent to ask whether the Union considers review within selected BoAs as providing sufficient safeguards *à la* review within the Courts.[403] In the affirmative, the reform could implicate an elevation of certain BoAs from the administrative sphere to forming part of the EU judicature. Such an elevation would surely run counter to the ECJ's continuous reluctance to acknowledge BoAs as tribunals, and as noted, the BoAs have not been established as specialized courts pursuant to Article 257 TFEU.[404]

Further, the reform suggests that the omitted BoAs may not offer adequate protection of rights, such as the ACER BoA or the Joint BoA.[405] A distinction between the included and omitted BoAs could perhaps correspond to the extent of protection of rights provided by them. As demonstrated above, the ECHA BoA's scope of review is presumably wider than that of the ACER BoA and the Joint BoA. Therefore, perhaps one could assume that protection of rights is more adequate in the former compared to the latter. However, the absence of an express reference to the omitted BoAs may have other reasons, for instance that their caseload is significantly smaller and does not warrant filtering, or that they are relatively new and that a filtering mechanism for these BoAs would be premature.[406]

Regardless, the reform reveals a fascinating, or perhaps even problematic, advance in the context of European agencies. With the reform, certain BoAs effectively operate as a "court of first instance", to which a final appeal proceeds to the GC. Yet, as explained, an applicant may not rely on a right to a fair hearing before a BoA, and there are certain concerns over the BoAs'

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403 Lamandini/Ramos Muñoz (2020) p. 120.

404 E.g. Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09 *Schräder II* para. 137 and 190.

405 Lamandini/Ramos Muñoz (2020) p. 121.

406 Ibid. p. 121, 128.

independence and impartiality, especially the BoAs which are in "functional continuity" with their associated agencies, such as the ECHA BoA.[407]

The ECJ has persistently held the requirements of independence and impartiality as enshrined in Article 47 CFR in high regard, e.g. in *ASJP* and more recently in *Commission v Poland*.[408] As suggested, one might view the reform as covertly transforming certain BoAs into a "court of first instance". For reasons of legal certainty, such BoAs should not escape the fundamental requirements of independence and impartiality that apply to courts and tribunals.

However, because BoAs are not formal courts, they are only subject to the principle of good administration under Article 41 CFR, while courts are bound by the more rigorous requirements of fair trial pursuant to Article 47 CFR.[409] Within the Union's system, claims of maladministration may be addressed by the European Ombudsman, who is competent to initiate inquires, investigate, and has certain remedial powers. However, in normative terms, it is clear that the Ombudsman's primary task is to reach "friendly settlements" and that their decisions are not legally binding.[410]

Regrettably, the reform places itself in an incessant line of tendencies which seem symptomatic to the agency context, i.e. pragmatic solutions to meet a certain practical need (here: caseload reduction), presumably at the neglect of other pressing matters, such as judicial protection. Interestingly, this tendency is especially evident in the EFTA States' participation in agencies, see chapters 3 and 6–7.

5.4.4.3 Extension of the Preliminary Ruling Procedure

BoAs exercise great adjudicating influence, and the ramifications of their decisions are presumably even greater after the introduction of the abovementioned filtering mechanism. BoAs might need to balance certain broad issues, including issues on which they are not competent or legitimized to rule. As such, some have proposed that BoAs should be allowed to partake in judicial dialogue via the preliminary ruling procedure.[411]

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407 See section 5.3.2.

408 C-64/16 *ASPJ* para. 41–44 and C-192/18 *Commission v Poland* para. 106, noting that the requirement of independence is "inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected".

409 Lamandini/Ramos Muñoz (2020) p. 153.

410 Craig (2018) pp. 808–809.

411 Lamandini/Ramos Muñoz (2020) pp. 147f.

In essence, two requirements in Article 267 TFEU prevent dialogue. First, BoAs are not considered "courts or tribunals". In *Procter & Gamble*, the CFI held that because BoAs enjoy "the same powers as the examiner" and a BoA decision therefore "forms part of the administrative registration procedure", they cannot be classified as tribunals.[412] As explained, this is especially the case for the ECHA BoA, while the concept of functional continuity might not apply to the ACER BoA or the Joint BoA. Second, Article 267 TFEU stipulates that the procedure is available to courts or tribunals of "Member States". Evidently, BoAs do not meet this condition as they are EU entities established through EU regulations.

Irrespective of the above limitations, it is somewhat a paradox that certain BoAs are viewed as competent enough to perform as *de facto* courts of first instance, while at the same time, they are excluded from verifying that the premise of their decisions is correct through a preliminary ruling reference.[413]

5.5 Concluding Remarks

Limited review does not correspond well to the *Meroni* and *Short-selling* doctrines, as agencies have been empowered on the precondition that they are subject to control. A judicial architecture which encompasses the Union Courts, domestic courts, and agency boards of appeal provides for several avenues to ensure protection of rights.

As discussed, the internal BoAs represent a unique contribution to adjudication in the EU context, while judicial review of agency decisions for the most part is aligned with review of other administrative decisions that raise complex issues. Further, while chapters 2 and 3 highlighted the many commonalities between EDPB and the selected agencies (ECHA, ACER, EBA, EIOPA, and ESMA), the differences in avenues to administrative and judicial review highlight the distinct nature of the former as a "board", and not an agency.

Certain discrepancies have been discussed, e.g. the BoA's unclear scope of review, or potential loopholes in the "complete" system of legal remedies. The reformed role of BoAs in the greater landscape of the EU judiciary also merits mention. A covert inclusion of BoAs into the judicial architecture might create more confusion than clarity. Reasons of legal certainty and the desire to endow BoA decisions with legitimacy might call for a greater political discussion on the role and powers of BoAs.

The above considerations are not unique to the EU, however. Discrepancies in the EU pillar inherently make their way into the EFTA pillar, e.g. where EFTA citizens or companies seek

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412 T-63/01 *Procter & Gamble v OHIM* para. 21–23.

413 Lamandini/Ramos Muñoz (2020) p. 150.

cross-pillar access. Further, the special modes of external agency participation create additional discrepancies, which is precisely the subject-matter of chapters 6 and 7, to which we now turn.

6 Administrative Review in the EFTA Pillar

6.1 Overview

As explained in chapter 5, Boards of Appeal are an important innovation to meet the increased specialization generated by *agencification* in the EU. Further, as more accessible than the Union Courts, BoAs constitute a primary gatekeeper of the legality of agency decisions.[414] The following chapter examines administrative review in the EFTA pillar. A main contention is that arrangements for agency participation seem to impede the prospect of attaining the same level of protection of rights as in the EU pillar.

Agencification in the EFTA pillar hinges on the multilevel involvement of various actors. Depending on the modalities of participation, enactment of decisions may be at the hands of national authorities, ESA, or an EU entity. The following examination is structured along this three-way divide. The aim is to examine how and to what extent affected parties may seek administrative review in the EFTA pillar. As in chapter 5, the assessments are construed along two enquiries: (1) access to review; and where available, (2) scope of review.

As participation in agencies is a relatively recent venture for the EFTA States and the number of enacted decisions is limited, the analysis focuses primarily on the legal framework, which I seek to conceptualize by employing certain case studies. The aim is to not only address the situation *de lege lata*, but to identify potential discrepancies and utilize the existing framework to delve into certain *de lege ferenda* discussions.

6.2 National Authorities

6.2.1 Introductory Remarks

As a preliminary point, domestic action is the primary form of implementation and enforcement of EEA *acquis.*[415] The principle of indirect administration applies in the context of agency participation as well. Chapter 4 examined how national authorities of the EFTA States are involved in implementation and enforcement of decisions in all of the selected agencies and bodies, although the chain of origin may differ. As such, national authorities may implement EU acts directly, or national authorities may as addressees of preceding decisions by various agencies or ESA, enact subsequent decisions in the domestic legal order. In many cases, therefore, market participants and other private parties are directly affected by the formal acts of national authorities, although such action substantively represents a continuance or duplicate of preceding EU or ESA acts.

414 Bekkedal/Hertzberg (2018b) p. 225.

415 NOU 2019:5 p. 745.

Table 2 illustrates how private parties, first and foremost, face decisions enacted by domestic authorities.

	EXTERNAL DECISION-MAKING	DOMESTIC DECISION-MAKING IN EFTA STATE	AFFECTED PARTY
1	(ECHA, EMA) COMMISSION	NATIONAL AUTHORITY (E.G. MILJØDIREKTORATET)	PRIVATE PARTIES
2	(ACER) ESA	REGULATORY AUTHORITY (E.G. RME)	
3	(EBA, EIOPA, ESMA) ESA	FINANCIAL AUTHORITY (E.G. FINANSTILSYNET)	
4	EDPB	DOMESTIC DPA (E.G. DATATILSYNET)	

TABLE 2

From this viewpoint, ESA's direct powers *vis-á-vis* private parties in the financial sector represent the only example in the EFTA pillar whereby external action in itself defines the rights and obligations of private parties.[416]

An analysis of various review bodies within the three EFTA States is beyond the scope of this paper. Arrangements vary between states and sectors. However, as Table 2 illustrates; the fundamental idea of primary domestic action is the same. In the following sections, it will be argued that some of the same discrepancies seem to appear across all of the selected arrangements.

6.2.2 Access to Review

The principle of institutional autonomy entails that the EFTA States enjoy discretion in creating arrangements for public administration.[417] Thus, a party's right to lodge complaints hinges on whether domestic legislative acts envisage an institutional framework to receive and decide on complaints. Administrative bodies are typically vested with the competence to enact individual decisions within their area of expertise, and there is typically a review body or appellate instance. Review bodies may be boards, tribunals, integrated hybrid bodies, quasi-jurisdictional bodies, and even ministries.[418] Administrative review bodies constitute imperative safeguards, as they are more accessible, less costly, and more time-efficient than the judiciary.[419] Administrative review bodies play an important role in *legality control* in addition to providing second assessments on scientific contentions.

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416 See section 6.3.

417 Eriksen/Fredriksen (2019) p. 13. See Pòltorak (2015) pp. 23–26.

418 The following does not place emphasis on the distinction, although not all review bodies perform the same functions. NOU 2019:5 pp. 521–527.

419 NOU 2012:2 p. 203–204.

In the following, the examination of purely internal matters will be limited to addressing key aspects. In order to provide context, the analysis will revolve around Norwegian arrangements. In principle, however, the same EEA law requirements apply to the other EFTA States as well.[420]

The question of access to review normally does not pose particular challenges in Norway. The Norwegian Act on Public Administration applies cross-sector, although certain sectoral arrangements exist.[421] The Act stipulates that persons who have a legal interest, may appeal individual administrative decisions to appellate instances.[422] As follows, in the financial sector, decisions of the Norwegian Financial Supervisory Authority (Finanstilsynet) may be appealed to the Ministry of Finance. In the area of chemical products, decisions of the Norwegian Environment Agency (Miljødirektoratet) are reviewed by the Ministry of Climate and Environment.[423]

Despite the nation-state's institutional autonomy, the EU *acquis* places certain restrictions.[424] Particularly interesting in the agency context are Union law requirements pertaining to independence of national authorities that engage in or are integrated into supranational cooperation.[425] EEA law typically requires independence from the nation-state, and not from EU or EFTA entities.[426] Requirements of independence may exclude review bodies from substituting a decision with its own, from giving instructions, or may even place limits on access to administrative review.[427] The following paragraphs illustrate how requirements of independence may create certain asymmetrical arrangements, e.g. the energy sector (ACER) compared to data protection (EDPB).

As explained, based on drafts from ACER, ESA shall enact decisions addressed to an independent national regulatory authority in the EFTA States, which is RME in Norway.[428] ESA's decision may in turn require the enactment of subsequent decisions addressed to private

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420 As suggested under chapter 1, Liechtenstein may be in a special position because of its monist legal system.

421 The Norwegian Public Administration Act (1967).

422 Sections 2(b), 28 and 34 in the Norwegian Public Administration Act.

423 Section 28(2) in the Norwegian Public Administration and NOU 2019:5 p. 367. See also Section 7 in FOR-2008-05-30-516 (Regulations implementing REACH).

424 NOU 2019:5 pp. 779–780.

425 As there is no uniform definition of the term "independence", its content varies. Generally, independence refers to the absence of ordinary control or instructions by superior bodies. See NOU 2019:5 p. 779.

426 Graver (2018) p. 37.

427 See e.g. NOU 2019:5 p. 516 for EU law requirements of independent administration, and pp. 518–519 on preclusion from substituting decisions.

428 Section 4.5.3.

parties, e.g. to the Norwegian TSO, Statskraft.[429] As for administrative review, provisions in the Third Energy Package stipulate that Member States shall ensure that "suitable mechanisms" are in place at national level, which grants parties "a right of appeal to a body *independent* of the parties involved and of any government".[430] Therefore, contrary to decisions pertaining to chemical products and finances, the Ministries are not available avenues. Instead, subjects may appeal RME's decisions to an independent board specifically established to meet the above requirements, the Energy Complaints Board (Energiklagenemnda).[431]

By contrast, the special "one-pillar" arrangements for participation in EDPB seem to exclude access to domestic review altogether. As explained earlier, EDPB's decisions addressed to domestic DPAs may result in domestic decisions addressed to various private parties.[432] In Norway, parties may bring decisions enacted by the Norwegian DPA (Datatilsynet) before an independent Norwegian Privacy Appeals Board (Personvernnemnda).[433] However, parties may *not* appeal DPA decisions based on a preceding decision by EDPB before the Privacy Appeals Board.[434] The rationale is that a national scheme whereby national review bodies are not bound by decisions of EDPB would impede coordination, and diminish the effectiveness of the "one-stop-shop" and consistency mechanisms envisaged in GDPR.[435] As a result, access to the Norwegian Privacy Appeals Board is only available for decisions which are "purely" domestic.

Apart from the area of data protection, it seems that agency participation does not impede access to review.

6.2.3 Scope of Review: Presenting the Issues

Pursuant to the Norwegian Act on Public Administration, review bodies may examine "all aspects of the case", e.g. lack of competence, misuse of powers, infringement of procedural rules, and infringement of Norwegian law.[436] Further, administrative review typically allows for scrutiny of discretionary powers, scientific and technical aspects, and appellate instances

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429 For internal legal basis, see e.g. Section 2-3 in the Norwegian Energy Act (1990) and Section 4 of the Act relating to Natural Gas (2002). Prop. 5 L (2017–2018) p. 62 and Prop. 6 L (2017–2018) p. 12 and 30.

430 Article 37 no. 17 Electricity Directive (2009/72/EC) and Article 41 no. 17 Gas Directive (2009/73/EC) (emphasis added).

431 Section 2-3 in the Norwegian Energy Act (1990) and Section 4 of the Act relating to Natural Gas (2002). The Norwegian word "nemnd" may be translated to council, tribunal, or board. I will refer to RME's review body as a board, but see section 6.2.4 the autonomous interpretation of "tribunal" within EEA law.

432 Article 65(6) GDPR.

433 Section 22 of the Norwegian Personal Data Act. See Prop. 56 LS (2017–2018) p. 160.

434 Section 22(2) of the Norwegian Personal Data Act, excluding decisions taken in accordance with Article 56 and Chapter VII GDPR (the consistency mechanism). See also Prop. 56 LS (2017–2018) p. 160 and 219.

435 Prop. 56 LS (2017–2018) p. 160. Åsbø (2020) p. 54 with further references.

436 Section 34(2) in the Norwegian Public Administration Act. I will refer to this as "legality control".

may take new circumstances into consideration. Review bodies typically possess expertise comparable to that of the initial decision-making body, and may reverse decisions.[437] In principle, these general remarks apply in all cases pertaining to administrative review in Norway, although there may be sectoral arrangements. From this viewpoint, review of domestic decisions is comparable – e.g. not weaker – to the level of protection of rights offered by the Boards of Appeal in the EU pillar. In fact, domestic administrative review might in some cases be more thorough than review before certain BoAs.[438]

However, agency participation adds certain layers of complexity. In the following, it will be argued that reviewing matters in purely isolated terms – solely reviewing the domestic decision without considering preceding steps – might impede protection of rights. On the other hand, conducting a review of acts of EU entities or ESA creates jurisdictional challenges. These matters will be substantiated and examined in more detail later. Before that, let us divert to contextualizing the issues with a few examples.[439]

The following analysis is specifically based on arrangements pertaining to the energy sector (ACER/ESA/RME). It must be noted that quantitatively, RME will presumably not adopt a large number of decisions and that most of its decisions will be purely technical. Thus, the following issues may be greater in theory than in practice. Yet, structural similarities with other models suggest that the same type of discrepancies appear in all of the models. Further, all probability suggests that the principle of indirect administration and the two-pillar structure will remain intact for the foreseeable future. Therefore, it is not unlikely that future adaptations to additional EU agencies may construed along similar lines; which may in turn result in equivalent discrepancies in additional sectors.[440] Lastly, certain agencies operate in politically controversial fields, e.g. the energy sector (ACER) or railways (ERA). This might call for greater emphasis on control, accountability, transparency, and legitimacy. For these reasons, the following assessment on protection of rights is both timely and relevant.

Case studies 1 and 2 are built on the same premise. The difference lies in whether the contested invalidating factor stems from ESA or an EU entity.

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437 Sections 34 and 35 in the Norwegian Public Administration Act.

438 As noted in section 5.3.4, BoAs have diversified powers. The ECHA BoA may typically review all aspects of the case, while the ACER and Joint BoAs have more limited review competences.

439 The following analysis applies to a great extent to the question of review before national courts. See sections 7.2.2–7.2.4.

440 As noted, the Contracting Parties to the EEA Agreement have emphasized that the "one-pillar" model chosen for EDPB shall not create precedence, see the Joint Declaration attached to JCD 154/2018.

CASE STUDY 1
Based on a draft from ACER, ESA has adopted a decision addressed to RME. Norwegian Company X is affected by a subsequent decision enacted by RME (ACER-ESA-RME-Company X).

Company X appeals RME's decision to the Energy Complaints Board. The problem does not lie with RME's decision in isolated terms, but Company X argues that *ESA* erred in its preceding decision. Company X contends that ESA's decision was enacted unlawfully. E.g. the decision addresses questions relating to tariffs (beyond competence), or does not sufficiently state its reasons (breach of procedural requirements).

As a consequence, Company X argues that the Energy Complaints Board must invalidate or reverse RME's final decision.

CASE STUDY 2
The same facts apply here, with a modification: On appeal, Company Y contends that *ACER* erred in its draft decision, e.g. overstepped its powers or breached procedural requirements. Company Y argues that the subsequent domestic decision is invalid.

In both these cases, the Energy Complaints Board is faced with the issue of *de facto* reviewing acts of external entities, either ESA (case study 1) or an EU agency (case study 2).

It is not self-evident how the Energy Complaints Board would examine these questions, or how other domestic review bodies would examine equivalent questions within their respective arrangements. In analyzing the Energy Complaint Board's scope of review, a natural point of departure is examining its previous decisions. However, as of June 2020, the Board has not decided on any appeals.[441]

In accordance with conventional Norwegian administrative law, the Energy Complaints Board will presumably review all aspects of a decision, i.e. facts, discretion, and legality ("full review").[442] In the following, it will be argued that current arrangements for agency participation constitute a limitation on the Board's full review. The main contention is that *de facto* reviewing preceding acts constitutes an infringement of jurisdictional delineations. For this reason, domestic review bodies are excluded from reviewing the acts of external entities, whether contentions relate to legality, facts, or discretion. Following this logic, the same limitation should apply to any domestic administrative body conducting a *de facto* review of external action.

Contentions pertaining to legality

In case studies 1 and 2, the parties presented contentions that ESA and ACER had acted on unlawful basis, e.g. beyond competence or in breach of procedural requirements. These are questions of legality, which administrative review bodies in Norway are presumed to review.

[441] Energiklagenemnda (2020).

[442] Sections 34 and 35 in the Norwegian Public Administration Act.

There is a possibility that the Energy Complaints Board will solve questions of legality as purely internal matters, i.e. an examination of whether Norwegian law confers upon RME the competence in question. One could argue that potential deficiencies in preceding stages within ACER and ESA do not taint decisions enacted by RME, provided that RME is competent to enact the contested decision in accordance with national law. In other words, lawful basis in national law would rectify previous errors. In principle, this line of reasoning should apply across all arrangements in the agency context.

However, it is clear that an isolated legality review of the final, formal decision does not in itself eliminate preceding breaches, nor does it provide effective review. A prerequisite for effective judicial protection is that the entity that issued *the operative decision*, must also be subject to checks and balances.[443] The alternative is to allow institutions to shape decisions, to facilitate transposing of decisions through formal channels, and ultimately exclude the operative action from review. Further – irrespective of the actual probability for misuse – from the viewpoint of affected parties and the public, it is necessary that operative stages of decision-making are transparent and subject to control. It will be recalled from chapter 5 that the ECJ's ruling in *Artegodan* was given on this exact notion: Even where the Commission enacts the formal decision, review is only effective if the agency which prepared the decision (here: EMA) is also "susceptible to review".[444]

In my view, the same should apply in the EFTA pillar. As explained in chapter 4, it is obvious that the true decision-making process takes place within the EU pillar. Decisions are then transposed into the EFTA pillar, either through certain direct channels (e.g. the Commission, ECHA, EMA) or through the use of ESA as an intermediary (ACER, EBA, EIOPA, ESMA). Because the true decision-making process takes place within external bodies, it is essential that there are avenues to control their legality. As explained, parties in the EU pillar are afforded various avenues for *ex post* control, including avenues that go beyond formalities as in *Artegodan*. Should parties in the EFTA pillar not have a corresponding opportunity to control operative stages of decision-making; a type of control that is not limited to the formal, duplicate domestic enactment? And further, should domestic review bodies in the EFTA States uphold decisions where parties present well-founded evidence that preceding stages have been tainted with unlawfulness?

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443 Craig (2018) pp. 176–177.

444 Craig (2018) p. 176. See more under section 5.4.2.4.

However, domestic review bodies like the Energy Complaints Board may encounter jurisdictional challenges. As a preliminary point, it must be clear that national review bodies in the EFTA States do not have jurisdiction to review the acts of the EU Commission, EU agencies, or ESA. Such review competences are prerogatives of the EU and EFTA institutions.[445] The constituent regulations of agencies and corresponding EEA-adapted JCDs do not alter this separation. For this reason, the Board in case studies 1 and 2 does not have jurisdiction to examine contentions pertaining to ACER's preparatory draft nor ESA's preceding decision.

In principle, jurisdictional limitations exclude *all* domestic review bodies from reviewing preceding acts by EU agencies or ESA. For instance, the arrangements for participation EBA, EIOPA, and ESMA are parallel to the ACER-model. In this model, "it is obvious" that the true decision-making powers are retained within the EU agencies.[446] As such, affected parties in the EFTA pillar seeking recourse within the national legal order may encounter a system which formally enacts decisions, but does not have jurisdiction to provide for full review of all stages of the process – and arguably, the most important stages.

Similar issues arise in the arrangements for ECHA and EMA, albeit without the involvement of ESA. As noted, after a Commission decision on authorization, relevant authorities in the EFTA States shall enact corresponding decisions. Where review takes place, the same jurisdictional challenges arise. Where a national body has acted within national provisions, everything should be permissible in the formal sense. However, claimants that have contentions about preceding acts cannot rely on full, proper, and effective appraisal. Proper appraisal would overstep the Union's *Foto-Frost* doctrine.[447]

Where domestic review bodies invalidate a national decision based on a *de facto* review of external action, such review bodies effectively block *agencification* within the disputed EFTA State. For example, if the Energy Complaints Board rules that RME's decision is invalid, the Board forces RME to *not* respect its obligation to implement ESA's decision. A discussion of these matters follows in section 6.2.5.

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445 Case 314/85 *Foto-Frost* para. 17–20. Further, ESA's acts may only be reviewed by the EFTA Court, see Article 36 SCA.

446 Bjørgan (2018) p. 1018. See comments under section 4.5.2.

447 Case 314/85 *Foto-Frost*. See section 5.4.3.

Contentions pertaining to facts, scientific foundation, and discretion

Parties may argue that a decision is based on incorrect facts, unfounded scientific assessments, or that a decision is unreasonable. Also in these cases, domestic review bodies within the EFTA States do not have jurisdiction to review acts of external entities.

Administrative review bodies within Norway are presumably not less able to make scientific assessments than European BoAs. In both systems, review bodies have been established for reasons for procedural economy, to control administration, and protection of rights. However, it seems that only parties in the EU pillar may effectively challenge the scientific ground of a decision. By contrast, parties in the EFTA pillar may encounter jurisdictional limits, which may lead to certain irrational results. For example, if the Commission has granted authorization for a chemical product in the EU, the arrangements for participation in ECHA provide that the Norwegian Environment Agency shall enact a corresponding decision in Norway. Where affected parties have successfully argued that the authorization in the EU was in fact based on an inadequate scientific ground, the domestic review body (the Ministry of Climate and Environment) might agree. If that is the case, it would be irrational for the Ministry to uphold the domestic decision. However, invalidating the domestic decision would force Norway to breach its international obligations – obligations that the Ministry might have clear political and legal incentives to respect.

As follows, the above considerations illustrate that domestic review bodies may encounter jurisdictional challenges due to complex arrangements for agency participation. In some cases, administrative review bodies may be confronted with the choice of either ensuring protection of rights to private parties, or respecting jurisdictional delineations. We now turn to assessing whether there exist procedural avenues to remedy the situation.

6.2.4 Bridging Jurisdictional Gaps?

The following section introduces key elements relevant for administrative review, while section 7.2.3 elaborates on equivalent questions that arise before national courts.

If contentions relate to deficiencies with *ESA's preceding decision*, the question is whether national review bodies may request advisory opinions from the EFTA Court. Article 34(2) SCA provides that "any court or tribunal" in an EFTA State may request an advisory opinion.

For these purposes, it is necessary to establish whether the review body in question, e.g. the Energy Complaints Board, is a "court or tribunal" within the meaning of Article 34 SCA. The EFTA Court has previously held that the provision must be given an autonomous interpretation

and that national classifications are not determinative.[448] Further, a number of factors may be relevant, e.g. whether the body is "established by law, has a permanent existence, exercises binding jurisdiction, applies the rule of law and is independent".[449] Generally, Article 34 SCA does not require a narrow or strict interpretation of "court" and "tribunal".[450]

As of June 2020, there is a case pending before the EFTA Court regarding the right of the Norwegian Complaints Board for Public Procurement ("KOFA") to request advisory opinions.[451] It is not self-evident that the result of the KOFA-case will create precedence for the Energy Complaints Board. However, both bodies are specialized review bodies, they form part of a greater hierarchy of boards and tribunals in Norway, and even share a secretariat.[452] In the hearing for the KOFA-case, the Norwegian Government argued that KOFA "does not fulfil the criterion of independence".[453] Without discussing these matters further, it is worth mentioning again that provisions in the Third Energy Package require the Energy Complaints Board to be independent.

Nevertheless, even where domestic review bodies have access to the EFTA Court, it is not self-evident that access offers protection. Article 34(1) SCA only provides for opinions on the "interpretation of the EEA Agreement", and not rulings on the *validity of individual decisions* enacted by ESA.[454] Therefore, parties are reverted to direct actions before the EFTA Court in order to invalidate ESA's decision.[455]

Where contentions relate to deficiencies with the decision-making process *in the EU pillar*, e.g. the Commission, ECHA, ACER, EBA, EIOPA, ESMA, the question is whether domestic review bodies may request preliminary rulings from the ECJ. The current legislative framework does not envisage such access, although Article 107 EEA foresees access as a theoretical prospect. Yet, because the EFTA States have not activated the provision, Article 107 EEA does not increase protection of rights for parties in the EFTA pillar. Section 7.2.3 provides elaboration.

An additional control avenue is appealing the preceding act directly before European BoAs. However, certain admissibility criteria exclude parties in the EFTA pillar from enjoying the

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448 Christiansen (2018) pp. 1034–1035 with further references.

449 E-5/16 *Municipality of Oslo* para. 38, cited in Christiansen (2018) pp. 1034–1035.

450 E-9/14 *Otto Kaufmann* para. 28, cited in Christiansen (2018) p. 1035.

451 E-8/19 *Scanteam AS v The Norwegian Government*.

452 Klagenemndssekretariatet (2020).

453 Report for the hearing in E-8/19 *Scanteam AS v The Norwegian Government* para. 64.

454 See discussion in see section 7.2.3 (equivalent questions before national courts).

455 Direct actions to the EFTA Court are discussed in section 7.3.

same access and protection of rights as their EU counterparts. First, BoAs may only review specific "decisions" of agencies, and not draft decisions.[456] As such, where ACER, EBA, EIOPA, or ESMA have breached procedural requirements in preparation of *drafts* to ESA, there is no "decision" to appeal to respective BoAs.[457] Paradoxically, such drafts constitute the operative aspect of ESA's decisions. The same applies in the context of ECHA, whereby the Commission enacts formal authorization decisions based on drafts. Further, the BoAs do not have jurisdiction to review the Commission's formal decisions either.

Second, the rigorous standing criteria may also prevent access. For example, does a party have sufficient legal interest to review preceding acts of agencies if they may have recourse to review subsequent decisions in the national legal order?

The question of access to BoAs is especially relevant in the context of ESA's decisions.[458] Suffice it to say here that access to BoAs does not seem like a viable prospect. In addition, a scheme whereby parties in the EFTA pillar must access BoAs in the EU pillar to review preceding acts of EU entities – to annul subsequent national decisions – is a highly complex structure which impedes the simplicity and attainability of administrative review. Indeed, instead of enhancing protection of rights, such structures might even dissipate the practical ability of parties to access safeguards.

6.2.5 What about Protection of Rights?

As suggested, national review bodies may effectively block its State from respecting international obligations and thus, block *agencification* from becoming effective within the EFTA States.

Review within a national review body could run counter to the aim of achieving homogeneity, uniformity, and coordination.[459] At the outset, it is clear that the structures for agency participation were created to facilitate effective and homogeneous implementation of relevant EU *acquis* into the EFTA States, and yet respect constitutional limits. As discussed in chapter 4, all of the arrangements are built on the notion of coordination and uniformity, and to create systems which allow decisions to move from the EU pillar and into the EFTA pillar.

Yet, uniformity may be lost where domestic authorities in the EFTA States face instructions from two holds; from the EU agencies or ESA *contra* from domestic review bodies. To provide an example, the Energy Complaints Board would effectively block RME from implementing a

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456 Section 5.3.3.

457 See section 5.3.3.

458 See section 6.3.2.

459 Bekkedal (2019a) 402.

decision deriving from ACER/ESA. Accordingly, review within national bodies may undermine the very purpose of agency participation.

Interestingly, considerations of uniformity and coordination resulted in the absence of domestic review in the context of data protection.[460] The arrangements for participation in EDPB carry certain particularities, e.g. the "one-pillar" system, one-stop-shop regime, and consistency mechanism. Therefore, it is not a given that its arrangements are comparable to the other models. However, all of the models are built on the same premise of coordination and uniformity. In my view, much of the reality remains the same; compliance with a domestic review body's invalidating decision might require disregarding acts of agencies.

However, limited review competences do not align well with fundamental tenets of protection of rights, nor with what legitimizes agencies in the first place. As discussed in chapter 3, a prerequisite for conferring powers onto agencies is that they are subject to control. Further, it must be clear that parties in the EFTA pillar should enjoy an equivalent level of protection of rights as their Union counterparts. It is difficult to accept that well-founded claims are rejected, e.g. where parties provide evidence of excess of powers in preceding stages within ESA or EU agencies. As illustrated, rejecting claims due to jurisdictional limitations might create loopholes, impede transparency and control, and ultimately, prevent parties from obtaining effective protection of rights. A common attribute across various arrangements for agency participation seems to be the facilitation of enactment of decisions without a possibility to control all stages of the process. This is especially problematic in the EFTA context, given that the preceding stages *are* the most important stages of decision-making.

From the viewpoint of private parties, it is difficult to present compelling, justifiable reasons for constraining effective protection of rights. Administrative review bodies have not been created to facilitate mechanical "rubber-stamping" of decisions. Indeed, review bodies have been established for the purpose of protecting the rights.[461] Surely, should affected parties not be able to rely on them? Ultimately, if domestic review bodies cannot ensure satisfactory protection of rights, is their existence as gatekeepers illusory?

In my view, where a party has presented well-founded contentions on breaches in preceding stages, a more satisfactory outcome is invalidating the final decision. This should apply even where the final decision – in isolated terms – may not at the outset suffer from deficiencies. As a preliminary point, it must be clear that national bodies are fully responsible for their actions.[462]

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460 Instead, domestic decisions based on acts by EDPB shall be addressed within the consistency mechanism as envisaged in Articles 60–64 GDPR, see Prop. 56 LS (2017–2018) p. 160.

461 See e.g. NOU 2012:2 p. 203–204 on the role of national administration as a control avenue in the EEA context.

462 In this direction, Leonhardsen (2015) p. 18.

There is no logical reason why this should not apply where national bodies enact decisions in the agency context.

From the perspective of private parties, one could argue that holding national authorities to account for deficiencies originating in EU or EFTA entities is merely a consequence of the complex arrangements to which the EFTA States have agreed in order to avoid transfer of formal powers.[463] Why should private parties suffer from a scheme where their rights and obligations are affected by external action, yet they are excluded from attaining proper and adequate protection of rights due to formalistic arrangements? As follows, the most satisfactory solution is arguably to invoke responsibility onto national authorities, even if they do not hold corresponding authority.[464]

Evidently, the discussion easily transcends into political considerations and questions, e.g. are domestic review bodies prepared or even intended to block relevant *acquis* from being implemented?[465] Interestingly, *agencification* has gained traction within the Union precisely to divert from political considerations, to enhance credibility and legitimacy, and to increase accountability.[466] In this section, I have argued that by "outsourcing" decision-making to external actors and creating arrangements for domestic implementation, it seems that there is actually less control, credibility, transparency, and legitimacy – at least in the EFTA pillar.

Lastly, a timely question is how one should balance uniformity and coordination *contra* protection of rights, and whether these considerations are mutually exclusive. There is only a risk of non-uniformity in cases where a party's claims are well-founded, e.g. that the external actor indeed acted beyond its competence.[467] If that is the case, should it not follow from the logic of the legal system itself that one ought not to allow the need for uniformity override the need for protection of rights?[468] The argument that parties in the EFTA pillar should enjoy weaker protection than parties in the EU pillar in order to achieve uniform decision-making, is difficult to accept. One could also argue in the opposite direction, e.g. that homogeneity requires equal and genuine protection of rights on both sides of the pillars.

The absence of domestic administrative review eliminates the above concerns. E.g., the Norwegian Privacy Appeals Board needs not potentially overstep jurisdictions to provide sufficient safeguards. Yet, circumventing problems with jurisdiction does not equal

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463 Eriksen/Fredriksen (2019) p. 167.

464 Leonhardsen (2015) p. 18.

465 Fredriksen/Mathisen (2018) pp. 287–288.

466 As discussed in section 3.2.

467 See in this direction, Bekkedal/Hertzberg (2018b) pp. 219–220.

468 Ibid.

circumventing problems with protection of rights. It would be counterintuitive to argue that the *absence* of an accessible review body within the domestic legal order in fact enhances protection of rights. Evidently, it does not. Yet, the arrangements for participation in EDPB at least reveal a candid reality which the other models do not, namely the lack of avenues to ensure full and adequate protection of rights through administrative review in the domestic legal order.

6.3 The EFTA Surveillance Authority

6.3.1 Access to Review

As explained, ESA only plays a role in decision-making processes pertaining to participation in ACER and the financial supervisory authorities. As ESA is not involved in processes pertaining to ECHA, EMA, or EDPB, nor do questions of review of ESA's acts arise in such cases. Further, although indirect administration is the preferred position of the EFTA States, the Union is opting for increased empowerment of ESA.[469] Thus, while the following section examines current structures, certain observations might constitute a valuable backdrop for future arrangements.

The EEA Agreement and the SCA establish two primary institutions for decision-making and review in the EFTA pillar: ESA and the EFTA Court.[470] As follows, neither Agreement establishes a designated Board of Appeal to review decisions enacted by ESA. A review body has not been established through specific EEA Joint Committee decisions either.[471]

In accordance with a white paper issued by the Norwegian Government, the creation of an EFTA review body was considered impractical.[472] First, the Government assumes that there is limited need for a designated review body because ESA will "seldom" enact decisions. Second, an EFTA review body may undermine homogeneity.[473] Third, the Government highlights the possibility of bringing actions before the EFTA Court.[474] The arguments reveal the EFTA States' clear ambition to adapt and create pragmatic solutions to make *agencification* a reality in the EFTA pillar.

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469 Einarsson/Fredriksen (2018) p. 862.

470 Article 108 EEA, and Articles 4 and 27 and Protocols 5 and 8 SCA. See also the EEA Council and the EEA Joint Committee in Articles 89–104 EEA.

471 JCDs 93/2017, 199/2016, 200/2016, and 201/2016.

472 Prop. 100 S (2015–2016) p. 15. These works refer to negotiations on participation in the ESFS, but the arguments have general application as there has not been established an EFTA BoA for other arrangements either.

473 Prop. 100 S (2015–2016) p. 15.

474 Ibid. See also Prop. 101 S (2015–2016) pp. 4–5. For direct actions, see in section 7.3.

Yet, it is not easy to accept that pragmatism should override any other interest, and particularly so if approaches are inconsistent. Bekkedal and Hertzberg have pointed out the paradox that ESA's direct competence *vis-à-vis* private parties in the financial sector was seen as encroaching enough as to necessitate concessions in accordance with Article 115 in the Norwegian Constitution – although it was assumed that ESA would not issue many decisions.[475] Thus, with questions pertaining to sovereignty, there was no room for pragmatism. However, in the question of effective protection of rights for the same private parties, it seems that the EFTA States have accepted pragmatic solutions to ensure uniformity. Further, if one should allow for inconsistencies, it should probably be the opposite: A nation-state's affiliations to international organizations should seek pragmatic solutions to enable cooperation, while protection of rights for private parties should be treated as an area where there is less room for compromise.[476]

Nonetheless, as a *de lege ferenda* remark, it must be noted that the creation of an EFTA review body would not eliminate the fundamental tension that exists between homogeneity on the one hand, and effective protection of rights on the other. Even if an EFTA review body were to exist, structural arrangements seem to impede protection of rights. Because the true decision-shaping procedure takes place in the EU pillar, i.e. through the agencies' draft decisions, it is not a given that review of a "duplicate" ESA decision will enhance protection of rights. In fact, a main contention in this paper is that ensuring proper review in the EFTA pillar seems impossible without also encroaching on the separation of the two pillars. In my view, the creation of an EFTA review body is likely to spark a discussion similar to the one above on review within the domestic sphere: May affected parties rely on genuine review or are arrangements formalistic?

Not only would a body of this nature face jurisdictional challenges due to the inherent proximity between ESA's decision and a preceding agency draft, but practical limitations need to be addressed too. The gap between the vast Union hierarchy and its modest EFTA counterpart seems to create a gap in protection of rights. Equal protection of rights and genuine review in the EFTA pillar seem to presuppose that a potential EFTA body has necessary resources, expertise, and review competences. The first two presuppose upscaling financial contributions to the EFTA Organization, while the latter presupposes cutting the cord with the EU pillar and retaining decision-shaping and decision-making competences – both in the formal and substantive senses – in the EFTA pillar.

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475 Bekkedal/Hertzberg (2018b) pp. 219–220. See chapter 1.

476 Ibid.

Yet, creating a mirror-image of the Union's system in the EFTA pillar undoubtedly raises a host of questions, such as: How does one ensure the purpose of uniformity and coordination if ESA and its EFTA review body account for a distinct and independent system of "agencies"? An EFTA mirror-image risks undermining the very rationale for external participation in agencies. Further, the negotiations for EEA-adaptations to the EU's financial system illustrate the Union's strict stance on uniformity, and primarily that external participants shall adapt to the Union's system.[477] Therefore, there is little reason to believe that the Union is willing to accept solutions that deviate from the one-way-street of uniformity.

Thus, there is no administrative review body in the EFTA pillar, and it is challenging to find pragmatic ways of creating one without undermining the very purpose of European agencies.

Despite the above discrepancies, there are certain alternate control mechanisms in the EFTA pillar. For instance, in the energy sector, national authorities may request ESA to reconsider its initial decision. Upon such a request, ESA shall forward the request to ACER, which shall consider preparing a new draft.[478] As such, ACER becomes an "informal complaints body" of the EFTA pillar.[479] While diplomatic[480] and pragmatic, such a request system falls short compared to a scheme whereby parties enjoy indisputable rights to review and there is an external review body to generate protection of rights.

6.3.2 Access to European BoAs?

As opposed to a theoretical EFTA review body, European BoAs do not lack technical expertise and they need not overstep jurisdictional delineations to ensure sufficient safeguards. For these reasons, a next question is whether parties in the EFTA pillar have or should have access to BoAs.

6.3.2.1 Review of ESA's Decisions

As a preliminary point, the two-pillar system precludes EU entities from reviewing ESA's decisions. The two pillars create a strict separation of competences and prerogatives.[481] Therefore, affected parties do not enjoy direct access to EU BoAs to review ESA's decisions.

As to the question of whether cross-pillar review *should* be allowed, such a practice could raise more issues and complications than they solve. For instance, where a BoA reviews decisions of

[477] See Prop. 100 S (2015–2016) p. 13.

[478] Article 1(1) litra b(iv), (3) litra h(iv), and (5) litra d(iv) JCD 93/2017. See also Prop. 4 S (2017–2018) p. 24.

[479] Bekkedal (2019a) p. 402.

[480] Ibid.

[481] Ibid. See also Fredriksen (2018a) p. 6.

ESA, the BoA decision could be appealed to the ECJ as identified in chapter 5. In effect, the ECJ would become an authority over ESA. This scenario certainly contradicts the very basis of the EEA cooperation, i.e. separation between the two pillars.

6.3.2.2 Review of Union Agency Drafts

As established, ESA issues decisions based on draft decisions from ACER, EBA, EIOPA, and ESMA. Because "it is obvious" that the real decision-making competences remain with the relevant EU agency[482], it is pertinent to examine the possibility of reviewing drafts. Regrettably, the current legislative framework does not allow for such review. As noted in section 5.3.3, an admissibility criterion for access to BoA is that the case concerns a "decision" of an agency.[483]

However, as a *de lege ferenda* remark, review of draft decisions could be valuable. While the EU and the EFTA States agree that one shall utilize the expertise of agencies cross-sector, the same sentiment has not gained traction as far as BoAs are concerned. In my view, utilizing the Union's expertise not only in the decision-making phase, but also in *ex post* control of decisions, could fill a certain lacuna between the two pillars. A scheme that allows affected parties in the EFTA pillar to access cross-pillar review carries the potential to enhance protection of rights. First, cross-pillar access would enable review of operative stages of a decision (drafts), and thus, eliminate some of the structural intricacies that exhaust the possibilities for proper review in the EFTA pillar. Second, cross-pillar access eliminates the need to create a mirror image of the BoAs in the EFTA pillar, and respects the agenda of centralized decision-making within the Union's bodies.

Needless to say, cross-pillar access to review drafts would give rise to many a question, e.g. what separates a draft from other provisionary measures, and should BoAs even spend their time and resources on reviewing drafts? Perhaps most pressing in our context, review of draft decisions do not entail a review of *ESA's* decisions. In principle, one could imagine a situation where ESA's decision goes beyond an agency draft.[484] There is a risk of creating additional fragmentation in cases where a BoA assessment only addresses a limited part of ESA's decision (the agency draft), leaving the remainder parts unaddressed.

Further, if a BoA were to invalidate a draft decision, the legislative framework ought to address ESA's position. A logical consequence should be the issuing of a new draft by the relevant agency, which should be followed by a subsequent ESA decision. While not necessarily

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[482] Bjørgan (2018) p. 1018.

[483] See Article 28(1) ACER, Article 91(1) REACH, and common Article 60(1) EBA, EIOPA, and ESMA.

[484] As noted in section 4.5.2, this remains only a matter for speculation as relevant bodies are practicing non-disclosure of drafts.

pragmatic, such a system would ensure effective review while simultaneously preserving homogeneity. As such, cross-pillar review of drafts could be favorable for the Union as well.

It must be noted that increased cross-pillar review risks undermining the EEA Agreement's fundamental separation of the two pillars. In effect, ESA would not only receive instructions (albeit, non-binding) from agencies, but its decisions (or more precisely, the basis of its decisions) would face scrutiny from EU entities. Ultimately, these are political questions. *Prima facie*, it may seem odd to argue for increased convergence between the pillars. Still, the contention here is that convergence has already taken place, yet in an unsatisfactory and fragmented manner. By agreeing to the draft-to-decision model, convergence has become a reality and ESA is expected to adopt decisions rather mechanically based on agency drafts. The EFTA States have agreed to such a model because it preserves formal sovereignty, yet ensures homogeneity. From the perspective of affected parties, allowing cross-pillar review of drafts seems to provide a more satisfactory outcome. Then, parties may seek recourse. Frankly speaking, is receiving indirect instructions from EU BoAs really more encroaching than current draft-to-decision arrangements? For the sake of consistency, the focal point should be on formal sovereignty and homogeneity, on which cross-pillar review of drafts would not encroach to a larger degree than the current draft-to-decision model.

6.3.2.3 Challenging Parallel Union Decisions

As explained, there is no EFTA review body, and the BoAs may neither review ESA's decision nor agency drafts. However, may affected parties challenge a *parallel* decision taken by the agency in the EU pillar, in an attempt to annul the underlying foundation of ESA's decision? The following will examine arrangements for ACER to provide context.

There are certain provisions that envisage cross-pillar access to the ACER BoA. JCD 93/2017 provides amendments to Article 19 Regulation (EC) 713/2009, which is the provision to bring appeals before the ACER BoA in the EU pillar.[485] The *original* Article 19 provides that any legal or natural person may appeal decisions to the ACER BoA if they have standing.[486] Case study 3 provides context.

CASE STUDY 3
Upon disagreement between the regulatory authorities in the Nordic countries, ACER has adopted a decision which is binding on the Swedish, Danish, and Finnish regulatory authorities. Based on a draft from ACER, ESA has issued a corresponding decision addressed to Norway (RME). The Finnish regulatory authority has contentions against ACER's decision, and appeals the case to the ACER BoA.

[485] Article 19 Regulation (EC) 713/2009 corresponds to the new Article 28 ACER.

[486] Article 19(1) Regulation (EC) 713/2009. Equivalent wording is found in Article 28(1) ACER.

Being the addressee of a decision by ACER, the Finnish regulatory authority has standing.[487]

As for the EFTA pillar, the sole provision in JCD 93/2017 pertaining to BoAs reads as follows:

> *The provisions of Article 19 shall be replaced by the following:*
> *"If the appeal concerns a decision of the Agency in a case where the disagreement also involves the national regulatory authorities of one or more EFTA States, the Board of Appeal shall invite the national regulatory authorities of the EFTA State(s) involved to file observations on communications from parties affected by the appeal proceedings, within specified time limits. [...] Where the Board of Appeal amends, suspends or terminates any decision parallel to the decision adopted by the EFTA Surveillance Authority, the Agency shall without undue delay prepare a draft decision to the same effect for the EFTA Surveillance Authority."* [488]

The JCD provision prescribes that parties in the EFTA pillar may access the ACER BoA in certain cases. Cross-pillar access is logical, given that the outcome of the BoA proceedings will *effectively* affect the Norwegian RME through the ACER-ESA structure. Therefore, RME or other parties in the EFTA pillar may *indirectly* access the ACER BoA where parties have appealed a parallel decision, e.g. the Finnish regulatory authority as in case study 3.

A next question is whether parties in the EFTA pillar may appeal parallel decisions independently. Case study 4 provides context.

CASE STUDY 4
The same facts as the previous case study apply, but without the appeal of the Finnish authority. Instead, RME or a private party in the EFTA pillar has contentions about ESA's decision, which is a parallel to an ACER decision that applies in Sweden, Denmark, and Finland. May RME or a private party in the EFTA pillar appeal ACER's decision to the ACER BoA?

The amended provision in JCD 93/2017 does not provide clarification. The express wording suggests that parties in the EFTA pillar may not bring proceedings themselves, but may only present their views if there is already a case before the BoA. The wording "provisions of Article 19 shall be replaced", suggests that the ordinary standing criteria in the original Article 19 shall *not* apply in the EFTA pillar. The consequence of such an interpretation would be that *even where* parties in the EFTA pillar satisfy that they have standing, there is no access to the ACER BoA. The wording does not clarify whether the replacement is only meant to preclude parties from bringing *ESA's* acts before the ACER BoA, or whether the replacement eliminates access of parties from the EFTA pillar altogether, with the exception of certain indirect access.

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[487] See section 5.3.3 on admissibility before BoAs.

[488] Article 1(5) litra g JCD 93/2017 (emphasis added).

Irrespective of the interpretation of the JCD provision, this is in fact a question of interpretation of Union regulations. If one were to interpret the JCD as excluding appeals to the BoA, it would entail amending the competences of an EU entity through a JCD. In accordance with its constituent regulation, the ACER BoA *shall* have jurisdiction to review decisions brought by parties who have standing, irrespective of their nationality. As the JCD does not address these questions expressly, my interpretation is that the amendments are not meant to limit the competences of the ACER BoA, but only provide that ESA's decisions may not be appealed to the BoA. As such, where parties in the EFTA pillar manage to satisfy the standing criteria, they will have access. Whether that is a viable prospect, however, remains an issue for speculation.

De lege ferenda, a scheme whereby affected parties in the EFTA pillar may appeal parallel agency decisions, could increase or compensate for the lack of protection of rights in the EFTA pillar. The many advantages of reviewing draft decisions apply in the question for parallel decisions, particularly that one may utilize expertise cross-sector and review is allowed to move beyond scratching the surface of formalities.

However, there are certain downsides to reviewing parallel decisions. First, review of a parallel EU decision does not produce legal effects for parties in the EFTA pillar, who are only subject to ESA's corresponding decision. Second, review within certain BoAs seem to be limited, e.g. within the ACER BoA and the Joint BoA for ESMA, EIOPA, and ESMA.[489] Lastly, these structures are very complex and hardly attainable for private parties.

6.4 European Union Entities

The following section addresses certain questions of administrative review within direct forms of participation in the Union's administrative system. The main contention here is that employing a model which integrates external participants may also generate increased protection of rights. Although politically undesirable, direct participation eliminates many of the structural discrepancies that arise with other forms of participation. Full integration of the EFTA States into the Union's system of remedies carries many advantages for private parties, e.g. the prospect of utilizing technical expertise cross-pillar and of invalidating preceding acts. Most importantly for the purposes of this paper, arrangements for direct participation are the only structures that do not seem to disproportionately affect parties in the EFTA pillar.[490] As the above discussions demonstrate, certain other arrangements seem to give priority to pragmatic solutions at the expense of proper administrative review.

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[489] See section 5.3.4.

[490] Fredriksen/Franklin (2015) p. 678.

The arrangements for participation in EDPB are characterized by their unique, direct integration of the EFTA States. With the exception of voting rights, the EFTA States participate on an equal footing with their Union counterparts, and EDPB may enact decisions directly against DPAs in the EFTA States. Regrettably, the value of the arrangements do not extend to the questions administrative review. As discussed in section 5.3.5, there is no Board of Appeal or other complaints body in the EU pillar to review decisions of EDPB. In addition, review bodies in national legal orders are precluded from reviewing domestic decisions in which EDPB has been involved.[491] Therefore, questions of scope of review do not arise.

There is arguably a need for an accessible review body in the field of data protection because such decisions may affect any natural or legal person. It is perplexing that the legislative framework excludes review within domestic bodies and simultaneously does not compensate through the creation of its own review body. As such, in the area of data protection, the preservation of safeguards is moved into the judiciary. Nonetheless, as opposed to decisions taken by agencies in highly specialized sectors (chemicals, energy, finances), the judiciary may prove less apprehensive about appraising questions relating to data protection.[492]

Although there is no administrative review of EDPB decisions, the theoretical possibilities are intriguing. While direct participation is at odds with the two pillars, full integration carries potential as far as protection of rights is concerned. If such a body were to exist in the context of EDPB, parties in the EFTA pillar would presumably have access to the same protection of rights as parties in the EU pillar.

There are examples that turn these ideas to reality. For instance, the EFTA States' participation in EASA are construed along similar lines of direct integration.[493] As follows, EASA may issue approvals and authorizations directly vis-à-vis aircraft companies (private parties) in the EFTA pillar as in the EU pillar. Similarly, undertakings in the EFTA pillar may access the EASA BoA and the ECJ on the same terms as their Union counterparts.[494] Such access does not undermine the two-pillar divide because the EASA BoA and the ECJ appraise decisions taken by *EU entities*, and not by ESA. Interestingly, the Norwegian Government is eyeing the same type of direct participation in the context of ERA (railways). The white paper prescribes that where

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491 Section 6.2.2.

492 See sections 5.4.2.4 and 7.4.

493 Prop. 27 S (2012–2013) p. 6. The arrangements for EASA are an institutional hybrid. Where there is a question of imposing fines or periodic penalty payments, it is ESA's responsibility to enact decisions. This will not be commented any further, but see Fredriksen/Franklin (2015) p. 678.

494 Prop. 27 S (2012–2013) p. 6.

ERA enacts decisions against private parties in the EFTA pillar, parties enjoy direct and comprehensive access to the ERA BoA and to the ECJ.[495]

6.5 Concluding Remarks

While arrangements for participation in the Union's system are not streamlined into a single, monolithic model, all of the chosen arrangements seem to create certain obstacles to attaining administrative review. With the high threshold for bringing court proceedings, administrative review may constitute the only genuine avenue to provide safeguards. From the viewpoint of private parties, discrepancies in the only genuinely available avenue is problematic.

In some arrangements, there is no review body, e.g. in the area of data protection. Further, even where there is formal access, the scope of review seems to be limited. First, review in the EFTA pillar might run counter to the very purpose of participation, namely coordination and homogeneity. Second, it is challenging to provide for proper review without also encroaching on jurisdictional delineations. Third, the gap between the Union's resourceful system and the EFTA's modest arrangements inevitably creates a gap in resources, expertise, and ultimately, protection of rights. Table 3 summarizes some of the main findings.

	DECISION-MAKING BODY EFTA PILLAR	**ACCESS TO REVIEW**	**SCOPE OF REVIEW**	**DISCREPANCIES**
1	NATIONAL AUTHORITIES	HINGES ON NATIONAL LEGISLATION. OFTEN ACCESS	TYPICALLY POSSESS EXPERTISE, YET LIMITS	JURISDICTION. DECISIONS ARE BASED ON ACTS BY ESA OR EU ENTITIES
2	ESA	NO ACCESS. NO EFTA REVIEW BODY	–	JURISDICTION. DECISIONS BASED ON EU AGENCY DRAFTS
3	EU ENTITY	HINGES ON CREATION OF COMPLAINTS BODY. NO BODY FOR EDPB	–	–

TABLE 3

Certain remedies may possibly be found in increased cross-pillar dialogue and review. This chapter has argued that although cross-pillar review challenges the very system of the EEA Agreement, the Contracting Parties have already exerted great flexibility in ensuring homogeneity and formal sovereignty in decision-making processes. Considerations of rights protection might call for an equivalent level of flexibility to ensure the interests of affected parties, especially private parties. If the low quantitative number of decisions is an argument to allow transfer of powers, should the argument not also allow for tailor-made solutions?

[495] Prop. 101 LS (2019–2020) p. 55.

Further, with reference to coordination, homogeneity, pragmatism, and diplomacy, current structures seem to provide – put somewhat extremely – a *carte blanche* opportunity to create rights and obligations without any corresponding avenues to control the process. Irrespective of the actual danger of misuse, an absence of sufficient avenues to review surely deprives parties of any possibility to control the process; and arguably, the most important stages of the process.

7 Judicial Review in the EFTA Pillar

7.1 Overview

Building on the observations made in chapter 6, the following chapter examines parallel questions that arise before the judiciary. Due to discrepancies in the system of administrative review, recourse to the courts may constitute the only viable prospect of scrutinizing a decision further.[496] The EFTA Court has recognized the right of effective judicial protection as a principle of EEA law, i.e. as an overriding principle which should protect parties at any level.[497]

We will employ the same three-way divide as in chapter 6, i.e. national authority, ESA, or EU entity. As previously, the focus is on two questions; access to review, and if available, the scope of review.

7.2 National Authorities

7.2.1 Access to National Courts

As Table 2 in section 6.2.1 illustrates, private parties in the EFTA States primarily face decisions of national administration, although such action may represent a continuance of external action. This merits examination of judicial review before national courts. The main objective of the following section is to examine questions that arise *specifically* in the agency context. The following focuses on Norwegian arrangements. In principle, the same EEA law requirements apply similarly across the three EFTA States, presumably giving rise to equivalent concerns in Liechtenstein and Iceland.

As a preliminary point, EEA law does not infringe on the concept of procedural autonomy, which allows Member States to authorize national rules pertaining to access to court.[498] Therefore, a party's access to national courts is determined by national law. In Norway, access hinges on various criteria relating to procedural capacity and the existence of a legal claim.[499] In addition, exhaustion of administrative remedies is often a precondition for court proceedings.[500] As such, the system within Norway mirrors the Union's system of primary administrative review (BoAs) and subsequent access to the Courts.[501]

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496 In this direction, Leonhardsen (2015) p. 14.

497 See chapter 2.

498 Pòltorak (2015) p. 30.

499 E.g. Sections 2-1, 2-2, and 1-3 in the Norwegian Dispute Act (2005).

500 Section 27b in the Norwegian Act on Public Administration.

501 See sections 5.3.2 and 5.4.2.

Norwegian legislation foresees that affected parties may challenge administrative decisions before Norwegian courts.[502] For example, parties affected by decisions of RME (more precisely, decisions of the Energy Complaints Board) or domestic DPAs may bring actions.[503] Questions pertaining to scientific assessments do not in themselves constitute "legal claims" within the meaning of Norwegian procedural law.[504] The question of access to domestic courts is usually not problematic, provided the criteria are satisfied.

An interesting question in the agency context is whether private parties may challenge the *inaction* or *incorrect implementation* of decisions addressed to national authorities. In other words, do preceding decisions enacted by the Commission, EU agencies, or ESA addressed to national authorities create legal rights for private parties? Case study 5 provides context. Although the section specifically examines arrangements pertaining to the energy sector (ACER), certain remarks are generally applicable to other arrangements due to structural similarities.

CASE STUDY 5
Based on an ACER draft, ESA has enacted a decision addressed to RME, which creates an obligation for domestic enactment. Yet, RME has decided not to implement the decision, e.g. because RME considers that their practice already complies.

Norwegian Company X considers non-implementation unfavorable. After exhausting administrative remedies, Company X brings proceedings, contending that RME is in breach of the EEA Agreement.

According to the Legislation Department of the Norwegian Ministry of Justice and Security, ESA's decisions addressed to RME do not produce rights and obligations for private parties.[505] The Norwegian Government has expressed the same position in the context of data protection (EDPB) and finances (EBA, EIOPA, and ESMA).[506] The rationale is that Norwegian law is built on a dualist legal system. Acts which are incorporated into the EEA Agreement, but not implemented into the domestic legal order through legislation or administrative action, do *not* produce internal legal effects. Thus, such decisions do not constitute legal claims that third parties may enforce through court proceedings.[507]

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502 See e.g. Section 1-5 in the Dispute Act (2005).

503 Section 3 of FOR-2019-10-24-1420 (RME's Energy Complaints Board), and Sections 22 and 25 of the Norwegian Personal Data Act (2018).

504 Skoghøy (2017) pp. 416, 419–420.

505 JDLOV-2016-2442-3 para. 2.4.3.

506 Prop. 100 S (2015–2016) p. 30 and Prop. 56 LS (2017–2018) pp. 201–202.

507 JDLOV-2016-2442-3 para. 2.4.3, Prop. 100 S (2015–2016) p. 30, and Prop. 56 LS (2017–2018) pp. 201–202.

In accordance with the Norwegian Government's stance, Company X in case study 5 may not bring proceedings. Therefore, potential breaches of RME must be addressed within the mechanisms envisaged in the EEA Agreement, e.g. Article 109 EEA on ESA's monitoring of conformity with the EEA Agreement and Article 31 SCA on ESA's infringement actions against an EFTA State. As ESA enjoys discretion in instigating infringement proceedings, parties affected by an alleged Member State breach may only submit complaints to ESA, but may not challenge a refusal by ESA before the EFTA Court.[508]

Nevertheless, scholars have presented certain contending views. As these questions are internal issues, the following is limited to addressing certain key elements.[509]

Graver argues that because relevant acts in the Third Energy Package have been implemented into the domestic legal order, the obligations produce internal legal effects. Further, Section 2 of the Norwegian EEA Act (1992) determines that implemented EEA provisions take precedence over Norwegian legislation in case of conflict. As a result, RME's obligation to implement an ESA decision takes precedence.[510]

I interpret Fredriksen in a similar direction. As Fredriksen submits, the Norwegian Government has previously held that Norwegian courts may declare invalid domestic administrative decisions that breach the EEA Agreement, even if the contested EEA obligations have not been implemented.[511] Moreover, the Government's stance is challenged by the principles of EEA-consistent interpretation of national law and state liability for non-implementation of incorporated acts.[512] It is settled case-law that parties may seek compensation for damage and loss incurred by non-implementation where the conditions are satisfied.[513]

As a general rebuttal, it may be argued that Section 2 of the Norwegian EEA Act does not apply to *individual decisions* issued by ESA. Section 2 implements Protocol 35 to the EEA Agreement, both of which provide that "implemented EEA rules" shall prevail over domestic

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508 Article 109(4) EEA, Article 31(1) SCA. Christiansen (2018) p. 1026.

509 Interestingly, the monist legal system in Liechtenstein may negate the whole discussion. As Iceland's legal system is dualist like Norway's, equivalent concerns should appear there. As noted, this will *not* apply in the case of ACER, as Iceland and the EU have reached a joint understanding that the Third Energy Package will not apply in Iceland. However, equivalent concerns might arise in other structures.

510 Graver (2018) pp. 40–41.

511 Fredriksen (2018a) p. 7, Ot.prp. nr. 79 (1991–1992), p. 4.

512 Rt-2000-1811 and Rt-2005-1365 *Finanger I and II*.

513 E-18/10 *ESA v Norway* para. 28, E-9/97 *Sveinbjörnsdóttir* para. 62, E-4/01 *Karlsson* para. 25 and 37–48.

statutory rules.[514] Bjørnebye seems to take a similar view in his recent report of the Clean Energy Package.[515]

7.2.2 Scope of Review

Agency participation may affect courts' scope of review in various ways. It may be useful to distinguish between concerns that *generally* arise in review of administrative acts, and concerns which are *specific* to the agency context. As for the former, two aspects merit mention.

First, judges are generalists. There is an ongoing debate in Norway on reform of the judiciary and the prospect of specialization. Yet, the idea that adjudication shall be undertaken by generalist judges has strong support.[516] Even where moderate specialization takes place, judges specialize in legal matters.[517] It goes without saying that such specialization differs vastly from the specialization required to *truly* appraise complex, scientific assessments conducted by agencies. Contrary to states like Germany, France, and Sweden, judicial review of administrative decisions in Norway is not placed within specialized courts.[518]

Second, courts are set to solve legal issues. The courts' power and duty to review the legality of administrative decisions is well-established.[519] Because limits for judicial control are vague and ambiguous, Norwegian courts have leeway to vary the intensity of control.[520] Where administration is afforded discretion, courts typically restrain their review. Courts may always review whether a decision is *ultra vires*, i.e. whether a body has respected limits to its competence.[521] Further, courts may typically not consider facts that have arisen *post* enactment.[522]

As in the Union Courts, limited review may be viewed as an extension of the constitutional separation of powers.[523] Therefore, courts may typically not assess the rationality or

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514 Sole Article of Protocol 35 EEA (Protocol on the implementation of EEA rules).

515 Bjørnebye (2020) pp. 33–34.

516 E.g. NOU 2019:17 p. 78.

517 Ibid. pp. 78–80.

518 Eckhoff/Smith (2018) p. 521.

519 Articles 89 and 95 in the Norwegian Constitution. The ECHR is implemented through the Norwegian Human Rights Act (1992). Pursuant to Section 3 of the Act, provisions in the ECHR take precedence over Norwegian legislation in case of conflict.

520 Eckhoff/Smith (2018) p. 524.

521 Ibid.

522 See e.g. Rt-2015-1388, Rt-2012-1985, and Rt-2012-2039. By contrast, administrative review bodies may examine all aspects of a decision, see section 6.2.3.

523 Section 5.4.2.4

reasonableness of a decision.[524] In addition, Norwegian courts have exercised restraint where they *in principle* may be competent, which has led to certain doubts as to what may be achieved through court proceedings.[525]

Questions of the judiciary's review of scientifically complex decisions are not unique to the agency context. Norwegian courts typically do not conduct a review of contentions pertaining to scientific and technical assessments. Rather, their review is a *legality* review, in which courts may examine law, limits for discretion, and facts. As data protection is considered a "legal concept", courts are likely to review contentions relating to EDPB more thoroughly than contentions pertaining to e.g. ACER, ESMA, or ECHA.[526] *Prima facie*, review before Norwegian courts is comparable to review of agency decisions in the EU pillar. As explained, the ECJ also conducts a limited review when faced with questions pertaining to complex assessments.[527]

However, arrangements for agency participation add to the complexity. The *difference* between judicial review within national courts in the EFTA States compared to judicial review within the EU pillar, is that the latter offers a comprehensive system to ensure protection of rights. By contrast, arrangements for EFTA participation seem to impede legality control of preceding decision-making acts.[528]

In order to enhance differences, let us revert back to the Union's system. EU agencies may enact decisions addressed to national authorities, which then prompt subsequent domestic decisions. For example, ESMA enacts a decision addressed to the German financial supervisory authority, which prompts a domestic decision addressed to Company X. Depending on national procedural rules, Company X may challenge the subsequent decision before German courts. If the case raises questions about ESMA's preparation (e.g. excess of powers), the German court may request a preliminary ruling from the ECJ pursuant to Article 267(1b) TFEU. The ECJ may either uphold or invalidate the agency's preceding decision. In turn, German courts may rule accordingly in an appraisal of the German authority's decision. As such, the Union offers a comprehensive system to scrutinize the legality of all steps of the process of decision-making while respecting jurisdictional delineations.

Matters are not as straightforward in the EFTA pillar. As a starting point, Norwegian courts should have no problem conducting a legality review. However, Norwegian courts encounter

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524 Eckhoff/Smith (2018) p. 526.

525 E.g. Rt-1975-603, Rt-1995-1427, Rt-2000-591, and Rt-2015-1388. See Vangsnes (2014) for an analysis.

526 See equivalent remarks in section 5.4.2.4 (the ECJ).

527 Section 5.4.2.4.

528 See parallel assessment in section 6.2.3.

limits to their jurisdiction if parties present contentions pertaining to preceding action. As noted, Norwegian courts do not have jurisdiction to review the legality of acts by ESA, EU agencies and bodies, nor the Commission. ESA's decisions may only be challenged before the EFTA Court, and the Union's *Foto-Frost* principle reaffirms the ECJ's prerogatives to rule on the invalidity of Union acts. Admittedly, the *Foto-Frost* doctrine only applies to *invalidity*, because declaring acts valid does not "[call] into question the existence of the [Union] measure".[529]

As will be recalled from section 6.2.3, parallel discrepancies may be identified in cases pertaining to administrative review. For this reason, most remarks from sections 6.2.3–6.2.5 apply equally here. The following addresses specific questions that arise before the courts.

7.2.3 Bridging Jurisdictional Gaps?

The following examines whether national courts in the EFTA States may engage in judicial dialogue to eliminate discrepancies caused by jurisdictional loopholes. The question is timely because the effective and cohesive functioning of the EEA Agreement hinges on individuals and market operators' access to review before national courts of the EFTA States.[530] Further, the principle of effective judicial protection may simultaneously call for access, albeit indirect, to courts which are competent to eliminate discrepancies and give final rulings on rights and obligations under EEA law.[531]

Where contentions concern *ESA's preceding action*, the question is whether the EFTA Court is an available avenue. In accordance with Article 34 SCA, national courts may request advisory opinions "on the interpretation of the EEA Agreement".[532] The statutory language does not expressly provide that the EFTA Court may rule on the validity of ESA's *individual decisions*. By contrast, the ECJ may rule on the validity of acts of agencies in its preliminary rulings.[533] As Article 34 SCA is the EFTA "replica" of Article 267 TFEU, it is logical to interpret the omission of review in the SCA as precluding the EFTA Court from ruling on validity in advisory opinion procedures. As such, Article 34 only prescribes *interpretations* of the EEA

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529 Case 314/85 *Foto-Frost* para. 14. The statements expressly relate to national courts of the Union, but the principle must apply generally for reasons of consistency. National courts of the EFTA States do not "call into question" the existence of Union measures by finding them valid.

530 Magnússon (2014) p. 120.

531 Ibid.

532 See Article 1(a) SCA. Christiansen (2018) p. 1032 argues that the Court is competent to interpret provisions of the SCA as well, and not solely the EEA Agreement.

533 Article 267(1b) TFEU.

Agreement, while *judicial review* of ESA's decisions is strictly reserved for direct actions under Articles 36-37 SCA.[534]

Nonetheless, certain case-law suggests that the EFTA Court may consider its interpretative competences widely. For instance, in *CIBA*, the EFTA Court found that it had jurisdiction to interpret the validity of a decision by the EEA Joint Committee although Article 34 does not expressly refer to such decisions.[535] The rationale was that rules governing the competence of the EEA Joint Committee are laid down in the EEA Agreement, and thus, the EFTA Court may give an opinion on interpretation.[536] While the Court's finding is not uncontroversial[537], it may give ground for arguing that the Court *at least* may examine whether ESA's acts are *ultra vires*. In contrast to decisions by the EEA Joint Committee, there are multiple provisions in the SCA that expressly provide the EFTA Court with the competence to review acts of ESA.[538] As the EFTA Court already has such competences in direct actions, a pragmatic solution would foresee such competences in advisory opinions as well. Such an interpretation would also strengthen the rationale behind Article 34, namely to ensure homogeneity, coherence, and reciprocity through dialogue between the EFTA Court and domestic courts.[539]

Where contentions relate to deficiencies in *preceding acts by EU entities*, such as EU agencies, EDPB, or the Commission, the EFTA Court is not an available avenue. Article 34 neither provides for such jurisdiction, nor are there other provisions in the EEA Agreement or the SCA that may be interpreted contextually as to provide such basis. In accordance with the *Foto-Frost* principle, the ECJ's exclusive jurisdiction precludes review through the EFTA Court. For this reason, the prospect of accessing the ECJ merits examination.

Access to the ECJ is presupposed in Article 107 and Protocol 34 EEA, which provide that the EFTA States may allow its courts and tribunals to request an interpretation from the ECJ. However, none of the EFTA States have activated the provision, leaving access as a purely theoretical prospect.[540]

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534 See in this direction, Wennerås (2018) p. 225 and Christiansen (2018) p. 1034. See section 7.3 for direct actions.

535 E-6/01 *CIBA* para. 21–24, cited in Wennerås (2018) p. 225.

536 Christiansen (2018) p. 1034.

537 Wennerås (2015) p. 225 and Fredriksen/Franklin (2015) p. 682.

538 E.g. Articles 35–37 SCA.

539 E.g. E-3/12 *Jonsson* para. 60.

540 Eckhoff/Smith (2018) p. 524, Fredriksen (2018b) p. 839.

Agencification has arguably laid the groundwork for activating the provision, as parties in the EFTA pillar face an increasing number of decisions whose substantive aspects derive from the EU pillar.[541] However, pursuant to the current wording of Protocol 34, the ECJ may only provide *interpretations*.[542] In order to extend the success of the preliminary rulings procedure onto the EFTA pillar, Protocol 34 should stipulate that the ECJ may rule on the *validity* of acts of Union bodies and agencies, i.e. mirror its competence pursuant to Article 267(1b) TFEU.

The EFTA States' apprehension against activating Article 107 EEA arguably stems from an assumption that judicial dialogue infringes on constitutional constraints.[543] However, it has been argued that preliminary rulings from the ECJ do not entail a transfer of power because "national jurisdiction remains vested in the national judiciary".[544] As such, it is up to the referring court to make final inferences on the consequences of a ruling from the ECJ that either upholds or invalidates an EU act.[545] Similarly, the existing procedure in Article 34 SCA – which does not infringe on constitutional constraints – prescribes that the EFTA Court shall give guidelines, while it is for the national courts to then apply EEA law.[546]

7.2.4 Considerations of Protection of Rights

It follows from the above assessment that national courts in the EFTA States have limited access to remedy jurisdictional gaps through judicial dialogue with the EFTA Court and the ECJ. For this reason, courts may be confronted with the choice of ensuring effective protection of rights at the expense of the respective state's international obligations. Most remarks from the analysis in section 6.2.5 apply in this section as well. The following therefore concentrates on key issues.

In my view, it is probable that Norwegian courts would seek to pragmatically resolve these questions as purely internal issues in all of the chosen arrangements, provided there is an administrative decision enacted by a national authority.[547] Courts may find that lawful domestic enactment redeems deficiencies in preceding stages. For instance, irrespective of ECHA or ACER's alleged breaches, Norwegian courts could limit their review to appraising whether the subsequent decision enacted by Norwegian administration was lawful, and in the affirmative, such a decision would effectively rectify mistakes from earlier stages. Although formalistic, the rationale is that there is little for domestic courts to review if the contested domestic decision

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541 See discussion in Fredriksen (2018b) p. 839.

542 Article 1 Protocol 34 EEA.

543 Eckhoff/Smith (2018) p. 524

544 Magnússon (2014) p. 126, fn. 39.

545 See Fredriksen (2018b) p. 839 in the same direction.

546 E-14/15 *Holship* para. 37 and E-8/00 *LO* para. 48.

547 Such a solution is parallel to the proposed solution to case studies 1 and 2, see section 6.2.

has been issued legally in the domestic legal order, and domestic courts do not have jurisdiction to *de facto* review acts of EU entities or ESA.

However, it is not self-evident that such a solution respects the fundamental tenets of effective judicial protection. The ramifications of a narrow review – confined to the formal, final act – may in fact prove to be quite dramatic. This applies, for instance, if a party contends that an agency decision has been enacted in breach of essential requirements, e.g. neglecting to state reasons, misuse of powers, or the relevant body exceeded its competence. Although there is no general reason to believe that agencies or other external entities willingly breach essential requirements, a narrow review would negate the prospect of even appraising potential claims. Without a prospect to review operative stages of the process, arrangements for participation in agencies might enable seamless and mechanical transposition of decisions from the EU pillar into the EFTA pillar. Granted, seamless decision-making is the whole purpose of participation in agencies. However, it seems that parties in the EFTA pillar do not enjoy the same channels as their EU counterparts to ensure robust decisions, which includes reviewing the operative stages of a decision.

For review to be effective, it is of the essence that review moves beyond formal structures and that operative stages of decision-making are scrutinized.[548] From the viewpoint of private parties, there is little comfort in reviewing the formal domestic decision if there are deficiencies in preceding stages. If parties are denied the prospect of controlling the legality of operative acts, their protection of rights hinges on the leniency of the domestic actor that implements the decision. This means that domestic authorities must themselves control the decisions that they are obliged to implement. Admittedly, such confidence in administration is very optimistic, especially given the function of national administration as rule-takers in the agency context.

As a consequence of the above considerations, a more satisfactory outcome for private parties would be to hold national authorities responsible for preceding steps, even where national authorities do not in fact possess corresponding authority.[549] Considerations of effective judicial protection advocate that such a result is a reasonable consequence of the structures to which the EFTA States have agreed in order to avoid transfer of formal powers.[550] In principle, one could argue that courts are not entities whose task it is to facilitate mechanical decision-making. Certainly, their role as gatekeepers cannot be overstated.

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548 As noted, the ECJ has recognized this in the agency context in the EU pillar, see section 5.4.2.4

549 In this direction, Leonhardsen (2015) p. 19.

550 Eriksen/Fredriksen (2019) p. 167.

If domestic courts indeed annul a domestic action based on a *de facto* review of preceding acts, domestic courts effectively rule on the limits of *agencification*. It remains to be seen how the Union will respond to such blocking action by the EFTA States.[551] Interestingly, the effective and cohesive functioning of certain arrangements seem to rest on the presumption that national courts in the EFTA States will *not* exercise their right and duty to review administrative decisions to their fullest extent.[552] From a Norwegian, constitutional viewpoint, it is hard to permit reduced or non-existent protection of rights under reference to international obligations.[553] The foundational, unwavering notion must be that national authorities are fully responsible for their actions, and that parties may rely on courts to control decisions that have an effect within their jurisdiction.[554] Although there is no general reason to suspect malpractice, the prospect of control through the judiciary generates accountability, legitimacy, transparency, and trust. Whether Norwegian courts are willing to assert such control over decisions, however, remains unclear and a matter for speculation.

Due to their role as gatekeepers, the courts of the EFTA pillar could perhaps draw certain inspiration from other unyielding courts, e.g. the German Constitutional Court (BVerfG). In its landmark *Solange*-saga, the *Bundesverfassungsgericht* famously made a clear delineation to Union law, stating that it would not exercise its jurisdiction to give close scrutiny *so long as* the Union provides for effective protection of fundamental rights.[555] This delicate balance between respecting the Union's prerogatives while simultaneously ensuring a minimum level domestic protection of rights is perhaps what is needed to redeem the concerns identified in this paper.[556] Needless to say, national courts are still bound by their duty of loyalty, and must rule in accordance with what they faithfully perceive as correct EEA law.[557] However, because courts of the EFTA States are non-members of the Union's complete system of legal remedies, a "Solange"-approach may be more justified in the EFTA system.

In practice, courts may refrain from turning words into action. In May 2020, the BVerfG caused an uproar when it decided that a measure by the European Central Bank was *ultra vires*.[558] The

551 In this direction, Fredriksen (2018a) p. 9.

552 Fredriksen (2018a) p. 9.

553 Eriksen/Fredriksen (2019) p. 167.

554 In this direction, Leonhardsen (2015) pp. 18–19.

555 BVerfGE *Solange I, II, and II*.

556 In this direction, Leonhardsen (2015) p. 26.

557 Article 3 EEA. See NOU 2012:2 p. 206.

558 Karnitschnig (2020) and BVerfG (2020) 859/15.

judgment was immediately followed by a press release, where the ECJ underscored its exclusive jurisdiction to rule on acts of EU entities.[559]

Ultimately, Norwegian courts are not very likely to annul a domestic "copy"-decision on the notion that the initial agency act was unlawful.[560] Better yet, if the practice of non-disclosure of drafts by relevant EU agencies, ESA, and Norwegian authorities persists, such a practice reduces the likelihood that parties will even be able to present contentions relating to drafts.[561]

7.3 The EFTA Surveillance Authority

7.3.1 Access to the EFTA Court

This section addresses questions pertaining to judicial review of decisions enacted by ESA in the agency context, i.e. within financial supervision and the energy sector.[562] As will be recalled from section 6.3, an EFTA review body has not been established. Instead, the Norwegian Government has highlighted that affected parties may access the EFTA Court.[563] Thus, the EFTA Court's stance in *Posten Norge* holds true even in the agency context, namely that judicial review before the Court constitutes the primary avenue to ensure protection of rights *vis-à-vis* ESA.[564]

Article 36 SCA provides for direct actions, and essentially corresponds to Article 263(1) TFEU.[565] However, Article 36 SCA predates the Lisbon Treaty, and thus, predates the inclusion of the ECJ's express jurisdiction to review the acts of Union's agencies and bodies. Yet, it must be clear that parties may challenge ESA's "decisions" in accordance with Article 36 SCA, including its decisions in the agency context. The provisions of access are replicated in relevant JCDs and Protocol 8 SCA[566], underscoring the key role of the Court in providing judicial protection in the agency context.[567]

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559 ECJ (2020) No 58/20.

560 Fredriksen/Mathisen (2018) p. 288.

561 As identified in section 4.5.2, the lack of transparency reduces the chance to exercise control.

562 ESA is not involved in decision-making processes relating to the ECHA, EDPB, and EMA. Nonetheless, it is ESA's responsibility to monitor the EFTA States' application and implementation. For instance, in E-9/16 *ESA v Norway (REACH)*, ESA instigated infringement proceedings against Norway in accordance with Article 31 SCA for an alleged breach of the REACH Regulation.

563 Prop. 100 S (2015–2016) p. 15 and Prop. 101 S (2015–2016) pp. 4–5.

564 E-15/10 *Posten Norge AS* para. 87.

565 Baudenbacher (2016) p. 165.

566 E.g. Article 1(b)(vi) JCD 93/2017 (energy) and Article 6 Protocol 8 SCA (financial supervision).

567 Prop. 4 S (2017–2018) p. 24 and Prop. 100 S (2015–2016) p. 15.

Pursuant to Article 36(1), an EFTA State may challenge a "decision" by ESA without demonstrating legal interest (standing). By contrast, natural and legal persons may only bring proceedings if the contested decision is either addressed to or of direct and individual concern to them.[568] The EFTA Court has embraced the ECJ's *Plaumann*-doctrine and related case-law, reaffirming the strict interpretation of the criteria.[569] Strict interpretation of *locus standi* is conventionally justified on the ground that affected parties may seek recourse through domestic courts.[570]

However, it will be recalled from section 7.2.3 that indirect access to the EFTA Court is limited to *interpretations* of the EEA Agreement, and does not include rulings on the *validity* of ESA's decisions. In theory, certain parties may therefore (1) not invalidate a decision in national courts due to jurisdictional delineations, (2) have insufficient indirect access to the EFTA Court, and (3) have their attempts at direct actions rejected. However, there is also case-law that demonstrates the EFTA Court's liberal and pragmatic tendency of granting access when in doubt.[571] The close proximity between an ESA decision and subsequent domestic decisions might be an argument to prove "individual and direct concern".

7.3.2 Scope of Review

Pursuant to Article 36(1) SCA, the EFTA Court's jurisdiction is limited to reviewing lack of competence, infringement of essential procedural requirements, infringement of EEA law, and misuse of powers. By contrast, in actions pertaining to penalties, Article 35 SCA stipulates that the Court has "unlimited jurisdiction". Therefore, should ESA issue penalties in its new tasks within the energy sector or finances, the EFTA Court may review all aspects. As noted in Protocol 8, the Court may "annul, reduce or increase the fine or periodic penalty payment imposed".[572] The following examines the Court's review in other actions than penalties.

As of June 2020, the EFTA Court has not decided on any cases relating to the agency subject-matter.[573]

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568 Article 36(1)(2) SCA.

569 E-23/14 *Kimek Offshore* para. 61, cited in Christiansen (2018) p. 1043. See also E-5/*07 Private Barnehagers Landsforbund* para. 45–53.

570 In this direction, Magnússon (2014) p. 118.

571 E.g. E-2/02 *Bellona* para. 37. Baudenbacher (2016) p. 167 interprets recent case-law as a liberalization, while Magnússon (2014) p. 131 states that the EFTA Court has kept access "strict notwithstanding some pressure to the contrary".

572 Article 6(3) Protocol 8 SCA.

573 The EFTA Court (2020).

Even though there is no case-law directly applicable to the agency context, the Court's *modus operandi* in questions pertaining to complex, technical assessments is well-established. For example, in *Iceland v ESA*, the EFTA Court stated in a state aid case that judicial review must be limited to verifying whether ESA complied with relevant "rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers".[574]

The Court has consistently employed this standard of review in matters of complex, technical assessments, e.g. in *Asker Brygge*, *Hurtigruten*, and *Norwegian Bankers' Association*.[575] The EFTA Court's approach is undoubtedly inspired by the approach taken by the ECJ in equivalent subject-matters, both because they apply identical standards of review, and also because the EFTA Court occasionally refers directly to case-law from the ECJ.[576]

In my view, the EFTA Court is likely to apply the abovementioned standards of review when appraising ESA's decisions in the energy and financial sectors. In a white paper for accession to the ESFS, the Norwegian Government highlights that the EFTA Court's review should mirror that of the ECJ in equivalent situations, i.e. the EFTA Court is not to review technical assessments, but to control the legality of ESA's decisions.[577] Thus, although the EFTA Court was granted additional tasks with accession to ACER, EBA, EIOPA, and ESMA, the increase relates to additional *sectors* and not to additional *qualitative* tasks.[578]

A common denominator in the above-mentioned case-law is the use of complex economic assessments, to which ESA's decisions in the financial sector are clear parallels. Although decisions in the energy sector may not raise the same questions of *economic* assessments, there is little reason to believe that the Court is equipped to review decisions based on ACER-drafts more thoroughly than equivalent decisions based on drafts from ESMA, EIOPA, or EBA. The statutory language is identical in the JCDs in both sectors[579], reaffirming the idea that review should be the same. Considering these matters isolated, judicial protection before the EFTA Court is not necessarily weaker than before the ECJ.

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574 E-9/12 *Iceland v ESA* para. 63–64, cited in Christiansen (2018) p. 1042.

575 E-10/11-11 *Hurtigruten ASA, the Kingdom of Norway v ESA* para. 156, E-12/11 *Asker Brygge AS v ESA* para. 80, and E-4/97 *Norwegian Bankers' Association v ESA* para. 40.

576 E.g. E-4/97 *Norwegian Bankers' Association* para. 40, referring to C-225/91 *Matra v Commission* para. 24.

577 Prop. 100 S (2015–2016) p. 15.

578 Ibid. p. 60.

579 Compare e.g. Article 1(b)(vi) JCD 93/2017 (energy) and Article 6 Protocol 8 SCA (financial supervision).

Nonetheless, structural deficiencies with agency participation transcend into the questions of review. These weaknesses may entail that overall, protection is weaker than in the EU pillar. The following will introduce a few issues that might be of concern.

First, it is recalled that there is no administrative complaints body in the EFTA pillar. Conversely, exhaustion of administrative remedies is a precondition for accessing the ECJ in the EU pillar. The combined effect of the BoAs' thorough review in addition to a second legality control before the Union Courts provide for multilayered avenues to ensure effective judicial protection. From this viewpoint, it may be argued that parties in the EFTA pillar face a less cohesive institutional framework to ensure protection of rights.

Second, the legal nature of "drafts" might create some uncertainties. For example, should the EFTA Court review the extent to which ESA's decision complies with the initial draft decision?[580] In the affirmative, does not holding an agency draft as a standard for ESA's decision also entail that the draft decision is *de facto* legally binding upon ESA?

Third, agency participation seems to exhaust legality review in the EFTA Court. As noted, drafts produced by ACER, EBA, EIOPA, and ESMA do not produce legal obligations for ESA. Yet, in practice, it is within drafts that rights and obligations are shaped. Where parties have contentions about agency drafts, the EFTA Court would encounter the same jurisdictional challenges as national courts, see section 7.2.2. The Union's *Foto-Frost* principle prevents the EFTA Court from invalidating acts of EU agencies, including their drafts.[581] However, it is not self-evident that the EFTA Court provides effective review if its review is confined to ESA's formal, duplicate enactment. For review to be effective, it may be necessary to scrutinize the *operative* decision. Conversely, an absence of control avenues may fertilize the ground for misuse and maladministration. Irrespective of the actual danger for misuse, the importance of institutional checks and balances cannot be overstated. Considerations of judicial protection advocate that the EFTA States' ambition to participate in agencies should not burden private parties. Rather, it is a state responsibility to create arrangements which provide for adequate protection, even if such measures are costly.[582]

There is no provision in the EEA Agreement or the SCA prescribing that the EFTA Court may request preliminary rulings from the ECJ. For this reason, there is no way for the EFTA Court to properly address contentions pertaining to deficiencies in preceding steps. Fredriksen has

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580 Similarly, see Bekkedal/Hertzberg (2018b) p. 223.

581 See also Fredriksen/Mathisen (2018) p. 170.

582 See equivalent remarks in sections 6.2.5 and 7.2.4.

submitted a proposal to amend Article 107 EEA as to provide such inter-judiciary dialogue.[583] A solution of this nature is timely because the EEA Agreement rests upon the idea of conferring rights on individuals and market participants. Structures that impede cross-pillar control where there is cross-pillar decision-making may inevitably become a problem for private parties in the EFTA pillar.[584]

Interestingly, the former President of the EFTA Court has submitted that the Court would simply not apply a legal act that suffers from a "serious flaw".[585] A safeguard of this nature is in line with the idea behind the above comments on *Solange*, and might constitute an imperative shelter for parties in the EFTA pillar given the lack of cross-pillar access to invalidate decisions.[586] Yet, even assuming that the EFTA Court has leeway to "interpret away" the problem, it remains to be seen whether the Court in fact is ready to take such a step.[587]

7.3.3 Draft Decisions and Parallel Decisions

As jurisdictional challenges prevent the EFTA Court from invalidating draft decisions, it is pertinent to examine whether drafts may be challenged directly before the ECJ. Moreover, the question of reviewing parallel decisions is timely. For a general discussion on advantages of cross-pillar access, see equivalent remarks of administrative review in section 6.3.2.

Draft Decisions

As explained in section 5.4.2.2, Article 263(1) TFEU stipulates that parties may only challenge "reviewable acts", which typically does not include drafts. Where non-addressees bring actions, the question of whether the act is "reviewable" overlaps with the standing conditions laid down in Article 263(4).[588] In other words, where a plaintiff can demonstrate that the contested act has a direct and individual concern, the act is reviewable. It may be challenging for private parties in the EFTA pillar to argue that an agency draft has affected them individually and directly. This is especially the case if the party could have challenged ESA's (duplicate) decision, or a corresponding domestic decision which implements ESA's decision.

It is recalled that in the EU pillar, drafts produced by ECHA and EMA may be subject to review by the ECJ as part of an action challenging the final decision, e.g. a decision by the

583 Fredriksen (2018b) p. 839. See also Fredriksen/Franklin (2015) p. 683.

584 In this direction, Fredriksen (2018c) p. 869.

585 Baudenbacher (2016) pp. 165–166.

586 See remarks in section 7.2.4.

587 Fredriksen/Franklin (2015) p. 682.

588 Joined Cases C-463/10 P and C-475/10 P *Deutsche Post* para. 38, see Lenaerts (2014) p. 315.

Commission.[589] Further, by either endorsing or rejecting drafts, the Commission exerts control over the agency in question.[590]

As a preliminary point, it must be clear that drafts from ACER, EBA, EIOPA, and ESMA to ESA do not produce legal effects, and may not be challenged independently before the Courts. This is in line with the abovementioned rulings.[591] In my view, however, certain characteristics distinguish these drafts to ESA from other agency drafts to the Commission.

Drafts produced by agencies to *ESA* are not subject to the same control regimes as drafts from ECHA and EMA to the Commission. Further, the EFTA Court may not review the underlying foundation of ESA's formal decision (the drafts), like the ECJ may in the equivalent situation within the EU pillar as in *Artegodan*. Moreover, it is clear that ESA's control with drafts will be limited. In fact, a precondition for the whole draft-to-decision model is that the true decision-making powers lie within the agency, not ESA.

With rulings such as *Artegodan*, the Union Courts have demonstrated a willingness to review drafts where they have resulted in a formal decision affecting the rights and obligations of parties. For such cases, the Union offers sophisticated mechanisms of ensuring substantive judicial review. However, as for the parallel situation where drafts produce *de facto* effects in the EFTA pillar, such drafts seem to escape every avenue for scrutiny. Yet again, this imbalance generates a less cohesive framework for protection of rights in the EFTA pillar than in the EU pillar.

Parallel Decisions

As ESA's decisions in the energy and financial sectors often correspond to equivalent agency decisions in the EU pillar, the question of challenging parallel decisions before the ECJ merits examination. In principle, this is simply a question on standing pursuant to Article 263(4) TFEU. Where parties satisfy that they are directly and individually affected by parallel decisions enacted by ACER, EBA, EIOPA, or ESMA, they may access the ECJ. As explained, the standing criteria is challenging for natural and legal persons to satisfy. This is especially the case where parties may have recourse within their own jurisdiction, e.g. to challenge ESA's corresponding decision, which is inherently closer to parties in the EFTA pillar. Further, because the ECJ's ruling will only address the particular agency decision in question, a ruling will not automatically produce rights and obligations for parties in the EFTA pillar. Thus, the

589 Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, and T -141/00 *Artegodan* para. 198–201.

590 Cleyenbreugel (2019) p. 159.

591 Case 60/81 *IBM* para. 10. See also T-123/03 *Pfizer v Commission* para. 22, T-326/99 and *Olivieri* para. 51–53.

position of plaintiffs in the EFTA pillar would hinge on whether ESA accordingly adapts its corresponding decision if the ECJ invalidates a parallel decision.

7.4 European Union Entities

7.4.1 Access to the ECJ

This section examines how the unique arrangements for participation in EDPB may have an impact on protection of rights for parties in the EFTA pillar. As noted, EDPB has been vested with "one-pillar" competences *vis-á-vis* national authorities in the EFTA States.

The "one-pillar" arrangements essentially foresee equal access to the ECJ for parties on both sides of the pillars. In the following, we will examine how parties in the EFTA pillar may challenge a decision enacted by EDPB addressed to a DPA in an EFTA State, e.g. the Norwegian DPA (Datatilsynet). In principle, equivalent rules apply in Liechtenstein and Iceland.

Yet again, access to the ECJ is a question on the Court's jurisdiction to review decisions as defined in Article 263 TFEU. As "privileged plaintiffs" in Article 263(1) are limited to Member States of the Union, the EFTA States must satisfy the ordinary conditions in Article 263(4). Pursuant to the fourth paragraph, "any natural and legal person" to whom a decision is addressed may bring proceedings. In practice, addressee DPAs within the EFTA States may challenge a decision. An applicant's nationality is not of relevance as to the question of admissibility.[592]

As for affected private parties in the EFTA pillar, they are *not* addressees of EDPB's decisions.[593] For this reason, they must pass the rigorous standing criteria of direct and individual concern. As explained, the threshold is high, and it may be challenging for parties to argue that they are directly and individually affected by a decision addressed to national authorities. This is especially the case if parties may challenge corresponding domestic decisions addressed to them before national courts.[594] According to Eriksen and Fredriksen, direct access for private parties is not likely.[595]

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592 Successful actions brought by persons from non-Member States include e.g. T-143/06 *MTZ Polyfilms* (Indian applicant), T-122/09 *Zhejiang* (China), and T-262/10 *Microban* (one applicant established in the United States), cited in Lenaerts (2014) p. 313.

593 The Contracting Parties have emphasized that decisions of EDPB shall only be addressed to national authorities, see e.g. Joint Declaration attached to JCD 154/2018.

594 As prescribed in section 7.2.

595 Eriksen/Fredriksen (2019) pp. 167–168. See also NOU 2019:5 p. 776.

Theoretically speaking, however, there are some situations whereby parties may be individually and directly affected, and thus, that access would be reasonable. This may be the case if a decision by EDPB was sparked due to a cross-border issue concerning a particular company in one of the EFTA States. For example, let us suppose that Norway, Denmark, and Belgium are in dispute over which authority should be the lead authority for a given company that operates in all three states. Upon disagreement, EDPB shall enact a decision addressed to the DPAs of each state.[596] However, although the decision is addressed to DPAs, the decision is in fact directed at a specific, individual company. If EDPB decided that the Norwegian DPA should be the lead authority and the company disagrees, direct access to the ECJ may be reasonable.

Further, if strict interpretation of the criteria for direct action is built on the premise that parties have indirect access through national courts[597], such a notion should not apply to parties in the EFTA pillar. Regrettably, as the EFTA States are not part of the Union's complete system of legal remedies, parties in the EFTA pillar do not enjoy the protection of indirect access.[598] As will be recalled from section 7.2, precluding courts and tribunals in the EFTA pillar from requesting preliminary rulings might create certain undesirable results, e.g. that national courts may have to effectively block agency decisions from the EU pillar from implementation. *De lege ferenda*, permitting direct actions may seem like a more attractive solution than allowing domestic courts of the EFTA States have the last say in such a case.[599]

In comparable arrangements, EASA and ERA may take binding action addressed to private parties in the EFTA pillar, e.g. issue various certificates.[600] As direct addressees of agency decisions, such parties have equal access to both administrative review (BoAs) and judicial review as their Union counterparts.[601] Granted, a prerequisite for these models is that their powers are limited to very specific areas and the EFTA States do not have voting rights.[602] Politically, it may be challenging to extend the arrangements to other sectors. Theoretically, however, EASA and ERA prove that there exist pathways and possibilities to ensure an equal protection of rights on both pillars of the EEA.[603]

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596 Article 65(1b)(6) GDPR.

597 E.g. Magnússon (2014) p. 118.

598 Section 7.2.3.

599 As identified in sections 7.2.2–7.2.4.

600 Prop. 27 S (2012–2013) p. 2–6 and Prop. 101 LS (2019–2020) p. 24 and 55.

601 Ibid.

602 Ibid.

603 Fredriksen/Franklin (2015) p. 679, underscoring that parties would be better served "by the possibility of opposing unwelcome decisions of EU agencies before the EU courts".

7.4.2 Scope of Review

As will be recalled from chapter 5, the ECJ's review is usually limited where administrative bodies have been vested with discretionary powers. Nonetheless, data protection may be an area where the Union Courts appraise matters more thoroughly. Contentions relating to GDPR are legal questions, which the ECJ may review.[604]

In our context, the true novelty of "one-pillar" arrangements is the elimination of the discrepancies as defined in previous chapters. Provided that parties pass the rigorous standing criteria, the ECJ has jurisdiction to conduct a full legality review of preceding steps – a feature from which both national courts in the EFTA States and the EFTA Court seem precluded in parallel situations. Instead of having to convince national courts or the EFTA Courts of the politically unfeasible move of invalidating an EU act, "one-pillar" access grants parties in the EFTA pillar direct avenue to the ECJ. As such, parties in the EFTA pillar seem to enjoy the same level of protection of rights as their Union counterparts. Irrespective of the likelihood for misuse in other arrangements, the "one-pillar" model generates more resilient avenues to ensure control, which in turn generates increased safeguards, transparency, and legitimacy.

7.5 Concluding Remarks

Chapter 7 has examined various avenues that affected parties may take to challenge decisions in the agency context, either before national courts, the EFTA Court, or the ECJ. Across all three levels, there is a legal framework for *access to court*. Access typically hinges on the existence of "clear-cut" decisions. While the judiciary may have comprehensive tools to ensure protection of rights, parties are hardly afforded genuine protection if access points are too narrowly construed.[605] Therefore, without genuine prospects to access courts, rights are of little worth.[606]

As for *scope of review*, it may seem that the judiciary at all three levels provide a comparable level of protection. In all three systems, the judiciary focuses on *legal matters*, restraining the review of complex, technical assessments to certain standards of limited review. Due to the highly specialized decisions of agencies, this feature is likely to persevere in any level of judiciary, be it the ECJ, the EFTA Court, or national courts. At first glance, therefore, national courts and the EFTA Court may offer an equivalent level of protection of rights as their Union counterparts.

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[604] Third limb of Article 263(2) and Article 288(2) TFEU. See assessment in section 5.4.2.4.

[605] Craig (2018) p. 311.

[606] Ellingsen (2018) p. 1880.

However, there are certain differences. The greatest weakness in the EFTA pillar seems to be the inability of national courts and the EFTA Court to provide comprehensive safeguards where contentions relate to preceding agency acts. Even if most agency acts are drafts and non-binding, it is obvious that the true decision-shaping process ensues precisely through such non-binding measures. From this perspective, it is a paradox that the concept of "drafts" may seem non-encroaching, when in fact, operating with clear-cut *decisions* with rights and obligations could possibly encroach more, but at least provide clear avenues for control. Out of the models examined in this paper, the innovations with the "one-pillar" structure for ERA, EASA, and EDPB seem to provide the most homogeneous and equal protection of rights. This is somewhat a paradox because constitutional constraints are typically in place to safeguard their citizens. Yet, *agencification* proves that constitutional constraints might have the opposite effect.

Table 4 summarizes some of the main findings of this chapter.

	DECISION-MAKING BODY EFTA PILLAR	**ACCESS TO REVIEW**	**SCOPE OF REVIEW**	**DISCREPANCIES**
1	NATIONAL AUTHORITIES	NATIONAL COURTS. ACCESS HINGES ON DOMESTIC ARRANGEMENTS	TYPICALLY LIMITED, LEGALITY REVIEW	DECISIONS BASED ON PRECEDING ACTS BY ESA OR EU ENTITIES
2	ESA	EFTA COURT. STANDING REQUIREMENTS	STANDARDS OF REVIEW	DECISIONS BASED ON EU AGENCY DRAFTS
3	EU ENTITY	ECJ. STANDING REQUIREMENTS	STANDARDS OF REVIEW	EFTA PARTIES GRANTED FULL LEGALITY CONTROL

TABLE 4

8 Closing Remarks

Throughout this paper, we have examined how certain arrangements for participation in EU agencies seem to impede prospects to attain review in the EFTA pillar. In sum, parties in the EFTA pillar enjoy weaker protection of rights than their Union counterparts because they are precluded from invalidating the underlying acts of various agencies. At the outset, this observation may seem of limited value, e.g. because agency drafts are non-binding, due to the low quantitative number of decisions, because agencies operate in specialized fields, or the low probability for misuse. However, effective protection of rights is an intrinsic part of the EEA Agreement. Only through a critical viewpoint is it possible to control whether these fundamental tenets are respected. Further, control regimes do not exist only for the benefit of individual parties, but play an overarching role of providing transparency, legitimacy, and trust.[607] Lastly, *agencification* is not confined to niche markets, but increasingly covers politically sensitive sectors, e.g. energy, finances, and railways.

The analysis has primarily focused on commonalities between various models, and not on particularities which might modify the above considerations. Yet, as the Union is likely to establish additional agencies for the internal market, an overarching discussion may enhance which models should be promoted. As discussed, certain arrangements seem to presuppose that parties in the EFTA pillar shall *not* be granted full protection of rights.[608]

To a certain degree, imbalance has been an incessant aspect of the EEA Agreement since its inception. As noted in chapter 2, parties in the EFTA pillar do not enjoy the same right to challenge secondary legislation as their Union counterparts, creating a "lacuna in the EFTA pillar".[609] However, the existence of discrepancies in one area does not justify discrepancies in other areas. Further, certain characteristics distinguish individual decisions from other secondary legislation. As opposed regulations and directives, the scope of an agency decision is narrow, and decisions create rights and obligations for specific parties. Further, incorporation of directives and regulations is subject to case-by-case scrutiny by the EEA Joint Committee, endowing each JCD with democratic legitimacy. By contrast, agency decisions are transposed into the EFTA pillar without the continuous involvement of the EEA Joint Committee. Further, the EFTA States do not have any voting rights in agencies, and ESA's independence precludes the EFTA States from influencing ESA's "copy"-decisions.[610] As follows, decisions in the EFTA pillar are effectively taken within arenas in which their Member States have no influence.

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607 See e.g. Busuioc (2010) p. 39, noting that from a democratic viewpoint, accountability enables public appraisal of "the propriety and effectiveness of government conduct". Further, from a constitutional viewpoint, accountability prevents concentration and abuse of powers.

608 Eriksen/Fredriksen (2019) p. 167.

609 Wennerås (2018) p. 226.

610 Article 4 SCA.

A noteworthy aspect of *agencification* within the EFTA pillar is the apparent lack of control mechanisms. As will be recalled, the Union proffers a comprehensive, multilayered system to control agencies, e.g. institutional, financial, political, extrajudicial, or judicial. In fact, the very prerequisite for their existence is that decision-making agencies are subject to control. For parties in the EFTA pillar, *ex post* control is the only available avenue. Ultimately, if there are discrepancies to the only control mechanism available, such discrepancies become increasingly more alarming.

Throughout this paper, I have discussed how to redeem aspects of the asymmetrical protection of rights. To summarize, greater cross-pillar access may provide safeguards while respecting the jurisdiction of the Union's bodies. One alternative is to allow for judicial dialogue through activating Article 107 EEA, and perhaps include the EFTA Court through amendment.[611] Another alternative is to increase the possibility of challenging agency drafts, either through the European Boards of Appeal or the Union Courts. Granted, this proposal is contrary to the ECJ's continuous stance on not reviewing provisionary measures. However, the notion that parties may challenge a final, formal enactment seems to only benefit parties in the EU pillar. Due to the ECJ's exclusive jurisdiction, parties in the EFTA pillar are precluded from attaining the same level of protection. At the same time, it must be clear that drafts effectively and ultimately create rights and obligations for parties in the EFTA pillar. The Union has consistently insisted on models that facilitate "copy-and-paste"-decisions. Further, the Contracting Parties have exerted flexibility and willingness to find pragmatic solutions to enable seamless transposing of decisions. From this viewpoint, it is perplexing that a corresponding level of flexibility has not been exerted to generate protection of rights for private parties.

For the sake of consistency, it must be mentioned that the Contracting Parties may revise the main part of the EEA Agreement. As noted in chapter 1, the Agreement's institutional framework was never intended or prepared for the challenges that *agencification* has brought. At the same time, the dynamic nature and expansive development of the Agreement have been underlying ideas of the cooperation all along. Lastly, amending the Constitutions of Norway (and Iceland) is also a possibility, although politically challenging. Paradoxically, arrangements that respect formal constitutional constraints seem to preclude parties in the EFTA pillar from attaining the same level of protection as their Union counterparts. By contrast, arrangements that opt for increased convergence and cross-pillar access, i.e. "one-pillar" models, generate increased protection of rights.

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[611] As discussed in sections 7.2.3 and 7.3.3.

There is room for contending views on whether the many advantages of access to the internal market and the possibility of "cherry-picking"[612] counterbalance the EFTA States' lack of genuine influence in agencies. Evidently, that is a *political* discussion. As is the case with many other EEA-related matters, the EFTA States may be on the receiving end of criticism no matter how they conduct their affairs – whether they choose pragmatism and create formalistic structures, whether investing in a more specialized institutional hierarchy is sound or unrewarding, or whether to insist on influence and risk the repercussions that a veto entails.

Ultimately, any rational discussion on agencies must be tied to an overarching discussion on the internal market. *Agencification* is not an encroaching phenomenon that seeks to infringe on national sovereignty. Rather, EU agencies have emerged as a response to increased specialization and to operationalize the functioning of the internal market for *the Union*, with seemingly little regard to the EFTA States. However, if the EFTA States continue to consider their position as both "insiders and outsiders" to the Union as beneficial, creating sustainable arrangements for partaking in *agencification* is the only possible move. In that case, the creation of avenues to vindicate protection of rights should be an obvious point of departure.

[612] See Arnesen (2018) p. 9.

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C-491/01 *British American Tobacco*	Judgment of the Court of 10 December 2002. The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd. ECLI:EU:C:2002:741
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C-12/03 P *Tetra Laval*	Judgment of the Court (Grand Chamber) of 15 February 2005. Commission of the European Communities v Tetra Laval BV. ECLI:EU:C:2005:87
C-107/03 P *Procter & Gamble* [ECJ]	Judgment - 23/09/2004 - Procter & Gamble v OHIM ECLI:EU:C:2004:554
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T-143/06 *MTZ Polyfilms*	Judgment of the Court of First Instance (Third Chamber) of 17 November 2009. MTZ Polyfilms Ltd v Council of the European Union. ECLI:EU:T:2009:441
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C-40/17 *Fashion ID*	Judgment of the Court (Second Chamber) of 29 July 2019 Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV ECLI:EU:C:2019:629
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T-332/17 *Energie-Control Austria*	Judgment of the General Court (Seventh Chamber) of 24 October 2019 Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v European Union Agency for the Cooperation of Energy Regulators ECLI:EU:T:2019:761
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All cases available at eftacourt.int

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A-001-2018 *AQUIND*	17 October 2018	ACER Board of Appeal
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A-002-2018 *Prisma*	14 February 2019	ACER Board of Appeal
A-006-2019 *Operator Gazociągów*	17 February 2020	ACER Board of Appeal
ESA Decision No. 020/20/COL	16 March 2020 Decision to temporarily lower the notification thresholds of net short positions in relation to the issued share capital of companies whose shares are admitted to trading on a regulated market of the EEA EFTA States	EFTA Surveillance Authority
ESMA70-155-9546	16 March 2020 Decision to require natural or legal persons who have net short positions to temporarily	ESMA

	lower the notification thresholds of net short positions in relation to the issued shares capital of companies whose shares are admitted to trading on a regulated market above a certain threshold to notify the competent authorties

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1967	The Norwegian Act on Public Administration Act	Lov 10. februar 1967 om behandlingsmåten i forvaltningssaker (forvaltningsloven)
1990	The Norwegian Energy Act	Lov 29. juni 1990 om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m. (energiloven)
1992	The Norwegian EEA Act	Lov 27. november 1992 om gjennomføring i norsk rett av hoveddelen i

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2002	The Norwegian Act relating to Natural Gas	Lov 28. juni 2002 om felles regler for det indre marked for naturgass (naturgassloven)
2005	The Norwegian Dispute Act	Lov 17. juni 2005 om mekling og rettergang i sivile tvister (tvisteloven)
2008	FOR-2008-05-30-516 Regulations implementing REACH	Forskrift 30. mai 2008 om registrering, vurdering, godkjenning og begrensning av kjemikalier (REACH-forskriften)
2018	The Norwegian Personal Data Act	Lov 15. juni 2018 om behandling av personopplysninger (personopplysningsloven)
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Prop. 100 S (2015–2016)	Samtykke til 1) deltakelse i åtte beslutninger i EØS-komiteen om innlemmelse i EØS-avtalen av rettsaktene som etablerer EUs finanstilsynssystem og enkelte andre rettsakter, 2) overføring av myndighet til å utøve beføyelser med direkte virkning i Norge til EFTAs overvåkingsorgan og EFTA-domstolen ved fremtidig innlemmelse i EØS-avtalen av forordning (EU) nr. 600/2014, forordning (EU) nr. 1286/2014 og forordning (EU) nr. 2015/2365
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