

REVISITING THE STANDING DEBATE BEFORE THE EFTA COURT THROUGH THE LENS OF POST-LISBON EU DEVELOPMENTS REGARDING *LOCUS STANDI*

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The Lisbon Treaty broadened and relaxed the standing requirements before the EU Court of Justice by adding a third class of acts amenable to judicial review. In the meantime, the EU has moreover been found in breach of the Aarhus Convention twice for shortcomings in access to justice for environmental organisations. Hence, the Aarhus Regulation, which implements the Aarhus Convention at Union level, was revised in 2021, and possible further amendments with regard to state aid decisions are being examined at the moment. The current standing requirements before the EFTA Court by contrast still reflect the situation prevailing in the European Union before those EU pillar evolutions. This article revisits four judgments of the EFTA Court in light of these developments and analyses how the EFTA Court has dealt with the existing discrepancies before, and might or might not be able to deal with them in the future.

1 INTRODUCTION

The EFTA States Norway, Iceland and Liechtenstein established the EFTA Court in order to ensure a uniform interpretation and application of EEA law throughout the whole EEA,¹ alongside the EU Court of Justice (CJEU) and the national courts. This was considered essential to attain the EEA Agreement's objective of extending the EU's internal market to the EEA EFTA States, and to create a dynamic and homogeneous European Economic Area.² Thereto, the EFTA Court was attributed powers similar to those of the CJEU.³ The Surveillance and Court Agreement (SCA) concluded by the EEA EFTA States attributes the EFTA Court in this regard, amongst others, the power to annul decisions taken by the EFTA Surveillance Authority (ESA),⁴ the European Commission's counterpart in the EFTA pillar. In order to ensure equivalent access for natural and legal persons to the EFTA Court compared to the EU pillar, the EEA EFTA States copied the standing requirements before the CJEU into the EFTA pillar judicial framework back in 1992.⁵ Despite the fact that these standing requirements have been broadened in the EU in the meantime, the EFTA pillar provisions with regard to *locus standi* have not been updated accordingly.

With the 2009 Treaty of Lisbon, the standing requirements before the CJEU were amended for reasons of effective judicial protection. Pre-Lisbon, natural or legal persons

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¹ Agreement on the European Economic Area [1994] OJ L1/3 (hereinafter EEA Agreement), recital 15; Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/1 (hereinafter SCA), recital 4.

² EEA Agreement (n 1) recitals 4-5.

³ In this regard, article 108 of the EEA Agreement (n 1) requires the EEA EFTA States to establish 'procedures similar to those existing in the Community'.

⁴ SCA (n 1) Art 36.

⁵ *ibid* Art 36(2).

could only institute an action for annulment before the CJEU when they were either the addressee of the contested act, or when they were directly and individually concerned by that act. The Lisbon Treaty introduced a third category of acts in order to relax the standing requirements for natural or legal persons,⁶ i.e., regulatory acts which are of direct concern to them and do not entail implementing measures.⁷ Article 36 SCA, which lays down the rules on legal standing for natural and legal persons in actions for annulment before the EFTA Court, has not been amended accordingly, and still reflects the more restrictive pre-Lisbon situation.

Even after the relaxation of the standing requirements post-Lisbon, the EU was condemned by the Compliance Committee of the Aarhus Convention twice with regard to access of environmental organisations to the CJEU. The 1998 Aarhus Convention was adopted under the auspices of the United Nations Economic Commission for Europe and has been ratified by 47 Parties (including the EU, its Member States, Norway and Iceland) in order to enhance public access to information, participation in decision-making, and access to justice in environmental matters.⁸ To ensure compliance with the provisions of the Aarhus Convention, the Parties established the Compliance Committee which is tasked with reviewing the Parties' compliance with the Convention, upon which the Meeting of the Parties may take a set of actions to bring about full compliance.⁹ For the purpose of implementing its obligations under the Convention, the EU adopted in 2006 the so-called Aarhus Regulation in order to translate its international obligations into the EU context.¹⁰

In 2017 the Compliance Committee nonetheless concluded that the CJEU's interpretation of its standing requirements failed to facilitate access of environmental organisations to the Court. In its findings, the Compliance Committee pointed out, amongst others, that the 'direct and individual concern' test was too severe to comply with the Aarhus Convention, and that the Aarhus Regulation did not compensate for the CJEU's strict interpretation.¹¹ The Compliance Committee's findings were subsequently endorsed by the Convention's Meeting of the Parties.¹² In a separate procedure, the Compliance Committee furthermore found that access to justice at EU level for environmental organisations also failed with regard to state aid decisions specifically,¹³ partly because state aid decisions were

⁶ See Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci* EU:C:2018:873 paras 22, 26 and 27; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:C:2013:625 para 60.

⁷ Art 263(4) *in fine* TFEU.

⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

⁹ See Aarhus Convention (n 8) Art 15, in combination with Decision I/7 concerning review of compliance, adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its first session (21-23 October 2002).

¹⁰ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13 (hereinafter Aarhus Regulation).

¹¹ Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union (17 March 2017), para 64.

¹² Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its seventh session (18-20 October 2021).

¹³ Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union (17 March 2021).

(and, for the moment,¹⁴ still are) excluded from the scope of the Aarhus Regulation.¹⁵ The latter has never been incorporated into the EEA Agreement. Nonetheless, it may be expected that environmental and climate change litigation will increase in the future, in general, but also with regard to climate-related state aid decisions specifically.¹⁶

Consequently, the conditions under which natural and legal persons may institute proceedings before the CJEU and the EFTA Court increasingly diverge. In environmental matters specifically, findings of non-compliance with the Aarhus Convention have urged the EU to broaden its rules on access of environmental NGOs to the CJEU laid down in the Aarhus Regulation, whereas that Regulation has not (yet) been incorporated in EEA law in the first place. Moreover, more generally, the broadened standing requirements in the EU post-Lisbon have not been followed-up by a similar update in the EFTA pillar. According to the preamble of the EEA Agreement, natural and legal persons play an essential role through the judicial defence of their EEA rights.¹⁷ As a consequence, the EFTA Court has ruled repeatedly that access to justice and effective judicial protection are essential elements of the EEA legal framework,¹⁸ and that therefore EEA EFTA citizens and EU citizens should enjoy equal access to the courts in both EEA pillars.¹⁹ Instead, the current differences between the EU and the EFTA pillar show that access to justice is increasingly *unequal* between those seeking access to the CJEU and those seeking access to the EFTA Court. This article demonstrates how these differences create uneven access to justice between both EEA pillars, and analyses how the EFTA Court has dealt with these discrepancies before, and might or might not be able to deal with them in the future.

The impact of the discrepancies in access to justice between the two EEA pillars, and the EFTA Court's response thereto, will be illustrated by revisiting four EFTA Court judgments. Firstly, the EFTA Court's 2008 *Private Barnebagers* judgment is analysed since it is put forward here that the contested decision constituted a regulatory act in the sense of the third limb of article 263(4) TFEU. This, in combination with recent case law of the CJEU, illustrates the possible impact of the Lisbon Treaty changes on individuals and economic operators in the EFTA pillar, and on the achievement of the EEA Agreement's objective of creating equal conditions of competition (section 2). Secondly, the 2015 and 2017 judgments in *Konkurrenten III* and *Konkurrenten IV* will be addressed since the applicant in these cases put forward several arguments to convince the EFTA Court to reconsider its interpretation of the standing requirements in light of the changes brought about by the Lisbon Treaty (section 3). Lastly, the EFTA Court's 2003 environmental protection related state aid

¹⁴ The European Commission started a public consultation assessing the options available to provide environmental NGOs adequate access to justice with regard to state aid decisions, one of the options being to allow review under the Aarhus Regulation.

¹⁵ Aarhus Regulation (n 10) Art 2(2)(a).

¹⁶ The (increasing) importance of state aid in the field of climate change, environmental protection and energy policy is evidenced by the European Commission's 2022 'Guidelines on State aid for climate, environmental protection and energy'. Similar guidelines have been issued by the EFTA Surveillance Authority. See: Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 [2022] OJ C80/1; EFTA Surveillance Authority Decision No 029/22/COL of 9 February 2022 amending the substantive rules in the field of State aid by introducing new Guidelines on State aid for climate, environmental protection and energy 2022 [2022] OJ L277/218.

¹⁷ EEA Agreement (n 1) recital 8.

¹⁸ Case E-3/11 *Pálmi Sigmarsson v Seðlabanki Íslands* [2011] para 29; Case E-5/10 *Dr. Joachim Kottke v Präsidiál Anstalt and Sweetyte Stiftung* [2010] para 26.

¹⁹ Case E-11/12 *Beatrix Koch, Dipl. Kfm. Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG* [2013] para 117; Case E-14/11 *DB Schenker v EFTA Surveillance Authority* [2012] para 77.

judgment in *Bellona* will be revisited to analyse the possible impact for the EFTA pillar of the (revision of the) Aarhus regulation and the findings of the Aarhus Convention's Compliance Committee. Even before the adoption of the Aarhus Regulation in the EU and the findings of the Compliance Committee, the applicant already argued in *Bellona* that a more flexible interpretation of the standing requirements would have been consistent with the Aarhus Convention (section 4).

2 PRIVATE BARNEHAGERS

In 2007 ESA adopted a decision declaring Norway's system of financing municipal kindergartens not to constitute state aid. In the EFTA Court's 2008 judgment of *Private Barnebagers Landsforbund v EFTA Surveillance Authority*, the applicant, a Norwegian organisation representing private kindergartens, put forward three arguments contesting the merits of the ESA's decision. In addition, the applicant claimed that ESA failed to initiate the formal investigation procedure. Since the applicant was not the addressee of ESA's decision, it first had to prove that it was directly and individually concerned by that decision pursuant to article 36(2) SCA. With regard to the plea relating to the alleged failure to initiate the formal investigation procedure, the EFTA Court found that the applicant had standing since the applicant sought to safeguard its procedural rights as a 'party concerned' within the meaning of Article 1(2) in Part I of Protocol 3 SCA.²⁰ Although ultimately the EFTA Court found the applicant's plea to be unfounded,²¹ a decision to the contrary could not unimportantly have resulted in a decision from the EFTA Court requiring ESA to nonetheless start a formal investigation into the alleged state aid. As regards the pleas relating to the merits of ESA's decision, the EFTA Court held the action to be inadmissible, since the applicant could not prove that either its members' or its own market position was substantially affected by the aid, and therefore failed to prove that it was individually concerned within the meaning of article 36(2) SCA.²²

Turning to the CJEU's post-Lisbon case law, the CJEU has acknowledged on multiple occasions that decisions of the Commission authorising or prohibiting a national aid scheme are of general application.²³ Consequently, certain Commission decisions in the field of state aid law may be considered to constitute regulatory acts which do not entail implementing measures in the sense of the third limb of article 263(4) TFEU.²⁴ In such circumstances, applicants only have to prove that they are directly concerned by the Commission's decision, and will not have to pass the burdensome test of being individually concerned.

In *Verband Deutscher Alten- und Behindertenhilfe and CarePool Hannover v Commission* the CJEU found a Commission decision qualifying a state aid scheme as 'existing aid' in the sense of article 108 TFEU, and thereby rejecting the complaints made by the applicants, to be a regulatory act not entailing implementing measures in the sense of article 263(4) *in fine*

²⁰ Case E-5/07 *Private Barnebagers Landsforbund v EFTA Surveillance Authority* [2008] paras 61-64.

²¹ *ibid* paras 74-84.

²² *ibid* paras 45-53.

²³ Case T-522/20 *Carpatair v Commission* EU:T:2023:51 paras 48-49; Case C-99/21 P *Danske Slagtermestre v Commission* EU:C:2022:510 para 66.

²⁴ Case T-69/18 *Verband Deutscher Alten- und Behindertenhilfe and CarePool Hannover v Commission* EU:T:2021:189 paras 133-169; Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) paras 22-33 and paras 63-67.

TFEU.²⁵ The applicants were consequently able to contest that Commission decision on the merits provided they could prove that they were directly concerned by that decision – which they *in casu* could.²⁶

In *Scuola Elementare Maria Montessori and Ferracci v Commission* the CJEU furthermore found that a Commission decision declaring a national aid scheme not to constitute state aid was a decision of general application which did not entail implementing measures since the Commission's approval did not require the Member State to take any further action.²⁷ The contested Commission decision moreover declared another part of the national aid scheme to be illegal but did not require the Member State concerned to recover the state aid from the beneficiaries. According to the CJEU, that part of the decision also constituted a regulatory act not requiring implementing measures as the state aid scheme applied to an indeterminate number of persons envisaged in a general and abstract manner, and the national authorities were not required to adopt any measure since they were not obliged to recover the unlawful state aid.²⁸

The latter may be the case if recovery would be contrary to general principles of EU law,²⁹ if the Commission is of the opinion that recovery would be 'absolutely impossible' for the State,³⁰ or if the aid has been granted to the beneficiary more than ten years before the European Commission takes action.³¹ These grounds for non-recovery of unlawful state aid have also been recognised in EEA law and in the case law of the EFTA Court. Firstly, Article 14 of Protocol 3 to the SCA stipulates in a general fashion that the ESA 'shall not require recovery of the aid if this would be contrary to a general principle of EEA law'. In this regard, the EFTA Court has specified that particularly the existence of legitimate expectations may prevent the recovery of state aid.³² Secondly, although so far the EFTA Court has only ruled on the invocation of the 'absolute impossibility' plea with regard to EEA EFTA States' failure to recover state aid,³³ nothing suggests that the ESA would not also be allowed to find in an earlier stage that recovery of unlawful aid is not necessary if it is 'absolutely impossible' for the EEA EFTA State concerned. Lastly, Art. 15 of Protocol 3 to the SCA stipulates that ESA cannot recover state aid more than ten years after it has been awarded.

It follows from the above that quite some situations may arise in which ESA decisions in the field of state aid would meet the loosened requirements following from the third limb of article 263(4) TFEU. As mentioned before, so far, the standing requirements laid down in article 36(2) SCA have not been adapted to the situation prevailing in the EU pillar since the Lisbon Treaty. Natural or legal persons will consequently not be able to rely

²⁵ Case T-69/18 *Verband Deutscher Alten- und Behindertenhilfe* (n 24) paras 142-152 and paras 162-169.

²⁶ *ibid* paras 153-161.

²⁷ Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) paras 22-33 and paras 63-67.

²⁸ *ibid* paras 34-38 and 62.

²⁹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9 (hereinafter Regulation on rules of application of Art 108 TFEU), Art 16.

³⁰ Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) para 32.

³¹ Regulation on rules of application of Art 108 TFEU (n 29) Art 17.

³² Joined Cases E-17/10 and E-6/11 *The Principality of Liechtenstein and VTM Fundmanagement v EFTA Surveillance Authority* [2012] para 94; Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority* [2011] para 118.

³³ Case E-25/15 *EFTA Surveillance Authority v Iceland* [2016] para 49; Case E-2/05 *EFTA Surveillance Authority v The Republic of Iceland* [2005] para 38.

before the EFTA Court on the less restrictive test for legal standing introduced by the Lisbon Treaty, and will have to argue that they meet the more burdensome test of being directly and individually concerned in case ESA adopts similar state aid decisions.

In *Private Barnebagers*, the decision adopted by ESA arguably met the requirements of being a regulatory act not entailing implementing measures which was of direct concern to the applicant. As mentioned above, in *Scuola Elementare Maria Montessori and Ferracci v Commission*, the CJEU found that the applicants had legal standing on the basis of article 263(4) *in fine* TFEU. According to the CJEU, the Commission decision declaring that the national aid scheme at hand did not constitute state aid was of general application.³⁴ The CJEU furthermore found that the aid scheme only entailed implementing measures with regard to the beneficiaries of the aid, but not with regard to competitors of the beneficiaries, such as the applicants, since they were not eligible for the aid.³⁵ Similarly, the beneficiaries of the national measure in *Private Barnebagers* were also defined in a general and abstract manner, namely all Norwegian municipal kindergartens, and ESA's decision approving Norway's system of financing municipal kindergartens did not require implementing measures *vis-à-vis* the applicant or its members. Since the private kindergartens were direct competitors of the beneficiaries of the aid, i.e., the municipal kindergartens, and the national measure was therefore liable to place them in an unfavourable competitive position, they were furthermore directly concerned by the ESA decision.³⁶

The question consequently arises how the EFTA Court will deal with future cases post-Lisbon regarding decisions similar to the one in *Private Barnebagers*, and, by extension, with regard to ESA decisions in the field of state aid similar to the ones found to be regulatory acts in the sense of article 263(4) *in fine* TFEU by the CJEU. If the EFTA Court refuses to change its interpretation of the current (more restrictive) standing requirements, EEA undertakings might find it in certain circumstances harder – if not impossible – to challenge ESA decisions on state aid in the EFTA pillar, compared to (competing) EEA undertakings seeking the annulment of a similar Commission decision in the EU pillar. The question consequently arises how this finding is reconcilable with the EEA's main objective of establishing a homogeneous European Economic Area, based on common rules and equal conditions of competition.³⁷ Especially since the EFTA Court has held before that '[t]his can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars'.³⁸ Since almost 15 years have passed since the entry into force of the Lisbon Treaty, and the EEA (EFTA) States do not seem inclined to adapt the standing requirements in the EFTA pillar, it is interesting to examine the EFTA Court's post-Lisbon response to a clear call for reinterpretation of its standing requirements by the applicant in *Konkurrenten III* and *Konkurrenten IV*.

³⁴ Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) paras 22-33.

³⁵ *ibid* paras 63-67.

³⁶ See Case T-522/20 *Carpatair* (n 23) paras 87-89; Case T-238/21 *Ryanair v Commission (SAS II; COVID-19)* EU:T:2023:247 para 23.

³⁷ EEA Agreement (n 1) recital 4.

³⁸ Case E-11/12 *Beatrix Koch* (n 19) paras 116-117. See similarly Case E-14/11 *DB Schenker* (n 19) para 77.

3 KONKURRENTEN III AND IV

3.1 INTRODUCTION

The issue of admissibility of actions for annulment was at the forefront of the discussions in the two latest EFTA Court cases involving the Norwegian transport company Konkurrenten.no AS (Konkurrenten). In 2006, Konkurrenten filed a complaint with ESA regarding alleged state aid its competitor Sporveien Oslo AS (Sporveien) received from the Norwegian government. ESA concluded in 2010, without starting a formal investigation, that no further measures had to be taken since the alleged state aid had been terminated as of 30 March 2008.³⁹ Konkurrenten brought an action for annulment before the EFTA Court, upon which the EFTA Court annulled ESA's decision (*Konkurrenten I*).⁴⁰ Following the EFTA Court's judgment, Konkurrenten filed a new complaint with ESA in 2011, both regarding the aid Sporveien received before 30 March 2008, and the aid it received afterwards. In the context of that procedure, Konkurrenten requested access to certain documents. In 2012, a second case was brought before the EFTA Court regarding ESA's refusal to disclose these documents (*Konkurrenten II*), but was found inadmissible.⁴¹ At the end of 2012, ESA issued a new decision regarding the complaint made by Konkurrenten in 2006.⁴² In May 2013 a second decision was issued in response to Konkurrenten's complaint of 2011.⁴³ In both decisions ESA concluded that part of the challenged measures did not constitute state aid, and part of the measures constituted lawful 'existing aid'. Subsequent to both decisions, Konkurrenten started another action for annulment before the EFTA Court (*Konkurrenten III*). The EFTA Court concluded that the application was inadmissible since Konkurrenten lacked *locus standi*.⁴⁴ In the meantime, Konkurrenten had also filed a state aid complaint with ESA in 2011 regarding another competitor, Nettbuss AS. ESA concluded in 2015 that part of the aid Nettbuss AS benefitted from was granted on the basis of an aid scheme existing before the entry into force of the EEA Agreement and was therefore compatible with EEA law, and found that the part of the aid that fell outside the aid scheme was unlawful and should be recovered.⁴⁵ At the beginning of 2017, Konkurrenten lodged yet another action for annulment against ESA's decision, which was also held inadmissible by the EFTA Court due to a lack of legal standing (*Konkurrenten IV*).⁴⁶

In *Konkurrenten III*, Konkurrenten put forward that the contested decisions constituted regulatory acts not entailing implementing measures which were of direct concern to Konkurrenten.⁴⁷ Therefore, Konkurrenten interestingly requested the EFTA Court to reinterpret the admissibility requirements of article 36 SCA and to reconsider its

³⁹ Decision of the EFTA Surveillance Authority No 254/10/COL of 21 June 2010 regarding AS Oslo Sporveier and AS Sporveisbussene.

⁴⁰ Case E-14/10 *Konkurrenten.no AS v EFTA Surveillance Authority* (Konkurrenten I).

⁴¹ Joined Cases E-4/12 and E-5/12 *Risdal Touring AS, Konkurrenten.no AS v EFTA Surveillance Authority* (Konkurrenten II).

⁴² Decision of the EFTA Surveillance Authority No 519/12/COL of 19 December 2012 closing the formal investigation procedure into potential aid to AS Oslo Sporveier and AS Sporveisbussene (Norway).

⁴³ Decision of the EFTA Surveillance Authority No 181/13/COL of 8 May 2013 on alleged aid to Kollektivtransportproduksjon AS ('KTP'), Oslo Vognselskap AS and Unibuss AS.

⁴⁴ Case E-19/13 *Konkurrenten.no AS v EFTA Surveillance Authority* (Konkurrenten III).

⁴⁵ Decision of the EFTA Surveillance Authority No 179/15/COL of 7 May 2015 on aid to public bus transport in the County of Aust-Agder (Norway) [2016/1890].

⁴⁶ Case E-1/17 *Konkurrenten.no AS v EFTA Surveillance Authority* (Konkurrenten IV).

⁴⁷ Case E-19/13 *Konkurrenten III* (n 44) para 65.

traditional test for legal standing in light of the broadened standing rules of article 263(4) TFEU post-Lisbon.⁴⁸ The EFTA Court was able to easily circumvent the question posed by *Konkurrenten* and observed that, contrary to what *Konkurrenten* claimed, the contested decisions did not constitute regulatory acts in the sense of article 263(4) *in fine* TFEU.⁴⁹ Hence, the EFTA Court proceeded by asserting whether *Konkurrenten* met the requirements of direct and individual concern laid down in article 36(2) SCA. In doing so, the EFTA Court stuck with its previous case law and followed the CJEU's *Plaumann* case law on the interpretation of the requirements of direct and individual concern.⁵⁰ Although the EFTA Court rightfully found that the contested decisions did not constitute regulatory acts, and held the case to be inadmissible, it is nonetheless interesting to scrutinise the arguments put forward by the different parties to the dispute. *Konkurrenten*'s arguments in both *Konkurrenten III* and *IV* may generally be bundled as being based on the principle of homogeneity, on the one hand (section 3.2), and the right to effective judicial protection, on the other hand (section 3.3).

3.2 THE PRINCIPLE OF HOMOGENEITY

A first strand of arguments put forward by *Konkurrenten* relates to the principle of homogeneity. In this regard, *Konkurrenten* contended in *Konkurrenten III* that 'a gap has been opened that must be closed by means of dynamic interpretation'.⁵¹ In *Konkurrenten IV*, *Konkurrenten* similarly put forward that not recognising that it had standing would 'run counter to the interests of genuine reciprocity and homogeneity'.⁵²

The EFTA Court's reliance on the CJEU's *Plaumann* test for determining whether an individual meets the requirements of direct and individual concern is, according to the EFTA Court, based on reasons of homogeneity.⁵³ Even though the EFTA Court is formally not bound to follow the CJEU's case law with regard to the procedural provisions laid down in the SCA,⁵⁴ the EFTA Court considers such procedural homogeneity to be important to ensure equal access to justice in both EEA pillars.⁵⁵ After all, according to the EFTA Court, the objectives of the EEA Agreement can only be achieved if EEA EFTA citizens and EU citizens enjoy the same rights in both the EU and the EFTA pillar, including equal access to the courts in both pillars.⁵⁶

But what if the EFTA Court's reliance on the CJEU's case law for the interpretation of its procedural provisions *de facto* leads to unequal judicial protection between the two EEA pillars? Although the CJEU until today insists on its strict interpretation of the requirements of direct and individual concern,⁵⁷ it cannot be disregarded that in the EU pillar the Lisbon

⁴⁸ *ibid* para 64.

⁴⁹ *ibid* para 91.

⁵⁰ *ibid* paras 92-122.

⁵¹ *ibid* para 64.

⁵² Case E-1/17 *Konkurrenten IV* (n 46) para 48.

⁵³ Case E-2/13 *Bentzen Transport AS v EFTA Surveillance Authority* [2013] paras 37-38; Joined Cases E-5/04, E-6/04, and E-7/04 *Fesil ASA and Finnjord Smelteverk AS, Prosessindustriens Landsforening and others, The Kingdom of Norway v EFTA Surveillance Authority* [2005] paras 53-54.

⁵⁴ Case E-5/16 *Norwegian Board of Appeal for Industrial Property Rights – appeal from the municipality of Oslo* [2017] para 37; Case E-13/10 *Aleris Ungblan AS v EFTA Surveillance Authority* [2011] para 24.

⁵⁵ Case E-11/12 *Beatrix Koch* (n 19) para 117; Case E-2/13 *Bentzen Transport AS* (n 53) para 37.

⁵⁶ Case E-11/12 *Beatrix Koch* (n 19) paras 116-117; Case E-14/11 *DB Schenker* (n 19) para 118.

⁵⁷ Case T-522/20 *Carpatair* (n 23) para 54; Case C-284/21 P *Commission v Braesch and Others* EU:C:2023:58.

Treaty broadened the rules on legal standing by adding a third limb to article 263(4) TFEU. The third limb was specifically added to article 263(4) TFEU to provide an answer to situations in which individuals first had to break the law in order to gain access to a(n EU) court.⁵⁸ When EU law requires the Member States to take further implementing measures, individuals may challenge the national measure before the national courts, who may in turn refer a question on the validity of the underlying EU act to the CJEU. On the other hand, when EU law does not require implementing measures at the national level, individuals would be obliged to first breach EU law, in order to be able to raise its invalidity in the national proceedings started against that person for breaching that law.⁵⁹ Similar considerations play a role in the field of state aid law, where the CJEU has held before that, when a competitor wants to challenge the validity of a Commission decision approving an aid scheme, it would be artificial to first require that competitor to request the national authorities to grant him the aid (so to obtain an implementing measure), and then to contest the refusal before a national court, upon which the national court could make a reference to the CJEU on the validity of the Commission decision.⁶⁰ Therefore, the third limb of article 263(4) TFEU now allows natural and legal persons to challenge such acts of EU law directly before the CJEU.

In the EFTA pillar, on the other hand, the SCA has not been adapted in this regard and still reflects the (more restrictive) pre-Lisbon situation. By lack of an EEA equivalent to the third limb of article 263(4) TFEU, certain measures which may be challenged before the CJEU under that limb, are necessarily excluded from review by the EFTA Court, or would require natural or legal persons to wriggle themselves in artificial situations in order to obtain judicial redress (see section 2 for examples in this regard). As long as the EEA EFTA States refuse to update article 36(2) SCA, the EFTA Court facilitates the current situation of procedural heterogeneity (rather than homogeneity) between the two EEA pillars by holding on to the CJEU's strict interpretation of the requirements of direct and individual concern.⁶¹

In this regard, Konkurrenten argued in *Konkurrenten III* and *IV* that there is nothing to assume that there is less need for legal scrutiny of state aid decisions of ESA, compared to Commission decisions in this field, especially in light of the EEA Agreement's objective to establish a homogeneous economic area based on equal conditions of competition.⁶² Accordingly, Konkurrenten argued that nothing suggests that the parties to the EEA Agreement did not intend for the EFTA Court's jurisdiction to evolve dynamically with that of the CJEU.⁶³ Indeed, although the Contracting Parties did not provide for an explicit obligation for the EFTA Court to take into account the CJEU's case law with regard to the interpretation of its procedural rules,⁶⁴ the EFTA Court nonetheless takes into account the

⁵⁸ As may be derived from the *travaux préparatoires* relating to the draft Treaty establishing a Constitution for Europe, the content of which has been copied in the Lisbon Treaty. See for example: Cover Note from the Praesidium to the European Convention (CONV 734/03) of 12 May 2003, 20; Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:T:2011:419 para 50.

⁵⁹ As already put forward in 2002 by AG Jacobs in his opinion to Case C-50/00 P *Unión de Pequeños Agricultores v Council* EU:C:2002:197 (see para 43 of the opinion).

⁶⁰ Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori* (n 6) para 66.

⁶¹ See in a similar vein: Patricia Wiater, *Internationale Individualkläger: ein Vergleich des Zugangs zu Gericht im Wirtschaftsvölkerrecht* (Mohr Siebeck 2020) 206–208.

⁶² Case E-19/13 *Konkurrenten III* (n 44) para 66; Case E-1/17 *Konkurrenten IV* (n 46) para 48.

⁶³ Case E-19/13 *Konkurrenten III* (n 44) para 66.

⁶⁴ EEA Agreement (n 1) Art 6 and SCA (n 1) Art 3 only provide in such an obligation with regard to the substantive rules of EEA law.

CJEU's case law in this regard,⁶⁵ with the approval of the Contracting Parties.⁶⁶ However, in *Konkurrenten III*, the Norwegian government countered Konkurrenten's argument that the EFTA Court's jurisdiction should evolve dynamically with the CJEU's jurisdiction by putting forward that EEA law is a *sui generis* legal system.⁶⁷ Norway's claim in this regard seems to be based on and resonates the EFTA Court's seminal statement in *Sveinbjörnsdóttir* that 'the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own'.⁶⁸ Since the EFTA Court considered it essential for the proper functioning of the EEA Agreement that individuals and economic operators can rely on the rights conferred upon them by EEA law, it took that statement as a starting point to read into the EEA Agreement a right which was not explicitly provided for in the Agreement, namely the right to compensation for loss and damage by incorrect implementation of a directive. It is remarkable to see how the Norwegian government in *Konkurrenten III* likewise relies on the *sui generis* nature of EEA law, but this time in order to *restrict* the (procedural) rights of individuals and economic operators in the EFTA pillar.

In this respect it seems important to differentiate between EU pillar changes in the standing requirements due to evolutions in the CJEU's case law or following treaty changes. Whereas the Contracting Parties seem to accept the idea that the EFTA Court follows the CJEU's case law on *locus standi*, it appears a step too far if the EFTA Court were to pursue its endeavour of preserving homogeneity by also taking into account EU pillar treaty changes. This reluctance may be explained by reference to the delicate balance between international cooperation and sovereignty the EEA Agreement aims to accommodate.⁶⁹ Whereas the EEA EFTA States have accepted that the EFTA Court's case law dynamically evolves in line with the case law of the CJEU in article 6 EEA Agreement and article 3 SCA,⁷⁰ they have not consented to the changes to the standing requirements introduced by the Lisbon Treaty. A similar reluctance for sovereignty reasons may be seen in cases such as *Criminal proceedings against A* and *Enes Deveci*. In *Criminal proceedings against A*, Iceland argued that the principles of direct effect and primacy of EU law were not made part of the EEA Agreement and that the EFTA Court could not derive these principles from the EEA Agreement 'without putting the fundamental principles of the EEA Agreement at risk and changing its foundation of respect for State sovereignty'.⁷¹ Similarly, Norway argued in *Enes Deveci* that 'an automatic application of the Charter, which is not incorporated in the EEA Agreement, would challenge State sovereignty and the principle of consent as the source of international legal obligations'.⁷²

⁶⁵ See Case E-8/19 *Scanteam AS v The Norwegian Government* [2020] para 45; Case E-2/12 INT *HOB-vín ehf.* [2012] para 9.

⁶⁶ See for example Norway's submission in *Bellona*: 'It is submitted that Articles 3(1) and (2) of the Surveillance and Court Agreement and Article 6 of the EEA are directly applicable in the case at hand, mainly because the assessment of *locus standi* is so closely linked to substantial rules that it in reality is a matter of an interpretation of these substantial rules'. See: report of the hearing in Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v E.S.A.*, para 38.

⁶⁷ Case E-19/13 *Konkurrenten III* (n 44) para 87.

⁶⁸ Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] para 59.

⁶⁹ For more on the concept of sovereignty in the EEA: Mads Andenas, 'Sovereignty' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer International Publishing 2017).

⁷⁰ Although the homogeneity principle in article 6 EEA Agreement (n 1) and SCA (n 1) Art 3 does not cover the procedural provisions of the SCA, the EEA EFTA States have accepted the EFTA Court's application of that principle to these provisions too. See for example: report of the hearing in *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v E.S.A.*, E-2/02, para 38.

⁷¹ Report for the hearing in Case E-1/07 *Criminal proceedings against A*, paras 26 and 29.

⁷² Case E-10/14 *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden* [2014] para 44.

Notwithstanding, taking into account the changes brought about by the Lisbon Treaty would rather be in line with the EFTA Court's consistent statements that access to justice and effective judicial protection are essential elements of the EEA legal framework,⁷³ and that therefore EEA EFTA citizens and EU citizens should enjoy equal access to the courts in both EEA pillars.⁷⁴ Such an approach would furthermore fit within the EFTA Court's effects-based conception of the principle of homogeneity. As acknowledged by the EFTA Court itself, due to certain discrepancies between the EEA Agreement and the (post-Lisbon) EU Treaties, the EFTA Court is sometimes simply unable to apply the same reasoning as applied by the CJEU:

The Court notes that a gap between the two EEA pillars has emerged since the signing of the EEA Agreement in 1992. This gap has widened over the years. The EU treaties have been amended four times since then, while the EEA Main Agreement has remained substantially unchanged. This development has created certain discrepancies at the level of primary law. Depending on the circumstances, this fact may have an impact on the interpretation of the EEA Agreement.⁷⁵

Through an effects-based conception of the homogeneity principle the EFTA Court nevertheless aims to obtain the same outcome/effects in the EFTA pillar as compared to the EU pillar, albeit inevitably based on a different reasoning and/or different provisions than the CJEU.⁷⁶ In *Jabbi* and *Campbell* for example the question was raised by the referring national court whether a third country national who is a family member of an EEA EFTA citizen, enjoys a derived right of residence in the home state of that EEA EFTA citizen if the latter returns to his home state from another EEA State.⁷⁷ The same question had already been raised before the CJEU in *O. and B.*⁷⁸ In *O. and B.* the CJEU had come to the conclusion that such derived right of residence for third country nationals in the home state of an EU citizen was based on that citizen's free movement rights as an EU citizen *ex* article 21(1) TFEU.⁷⁹ Since the EEA Agreement does not provide an EEA equivalent of EU citizenship,⁸⁰ the EFTA Court could not apply the same reasoning.⁸¹ Eventually, the EFTA Court nonetheless managed to come to the same conclusion as the CJEU, albeit based

⁷³ Case E-3/11 *Pálmi Sigmarsson* (n 18) para 29; Case E-5/10 *Dr. Joachim Kottke* (n 18) para 26.

⁷⁴ Case E-11/12 *Beatrix Koch* (n 19) para 117.

⁷⁵ Case E-28/15 *Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board* [2016] para 62.

⁷⁶ For more on the different aspects of the principle of homogeneity (substantive, procedural and effects-based), see: Christa Tobler, 'Free Movement of Persons in the EU v. in the EEA: Of Effect-Related Homogeneity and a Reversed Polydor Principle' in Nathan Cambien, Dmitry Kochenov and Elise Muir (eds), *European Citizenship under Stress* (Brill Nijhoff 2020); Philipp Speitler, 'Judicial Homogeneity as a Fundamental Principle of the EEA' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer International Publishing 2017); Carl Baudenbacher, 'The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together' in Court of Justice of the European Union (ed), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013).

⁷⁷ Case E-4/19 *Campbell v The Norwegian Government* [2020]; Case E-28/15 *Yankuba Jabbi* (n 75).

⁷⁸ Case C-456/12 *O. and B.* EU:C:2014:135.

⁷⁹ *ibid* para 61.

⁸⁰ See Joint Declaration by the Contracting Parties to Decision No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement [2008] OJ L124/20: 'The concept of Union Citizenship as introduced by the Treaty of Maastricht [...] has no equivalent in the EEA Agreement'.

⁸¹ Case E-28/15 *Yankuba Jabbi* (n 75) para 68: 'The case at hand must be distinguished from *O. and B.* to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law'. See also Case E-4/19 *Campbell* (n 77) para 57.

on the Citizenship Directive and the right to free movement,⁸² which is remarkable since the CJEU explicitly ruled out the applicability of the Citizenship Directive in this context in *O. and B.*⁸³

This effects-based conception of the homogeneity principle has also been applied by the EFTA Court to the procedural provisions of the EEA Agreement. Article 267(3) TFEU imposes an obligation on the highest courts of the EU States to refer a request for a preliminary ruling to the CJEU when a question arises in the domestic proceedings with regard to the interpretation or validity of EU law. Unlike article 267 TFEU, article 34 SCA does not require apex courts to refer a request for an advisory opinion to the EFTA Court where a question is raised regarding the interpretation of EEA law. Although the EFTA Court acknowledged this clear difference between both procedures, in *Irish Bank* it nonetheless argued that apex courts should duly take into account the fact that they are bound by the duty of loyal cooperation *ex* article 3 EEA Agreement, adding that EEA EFTA citizens and economic operators do benefit from the obligation to refer imposed on apex courts in the EU pillar.⁸⁴ In *Jonsson*, the EFTA Court further clarified the latter by stating that it is important that use is made of article 34 SCA when a legal situation lacks clarity in order to ensure coherence and reciprocity between the rights enjoyed in the EFTA and the EU pillar.⁸⁵ Moreover, the EFTA Court added in *Irish Bank* that the procedural provisions of the SCA should be interpreted in line with fundamental rights, and therefore it could not be excluded that a refusal to refer would be in breach of article 6 of the European Convention on Human Rights (ECHR).⁸⁶ Despite the clear difference in wording between article 267 TFEU and article 34 SCA, the EFTA Court hereby tried to bridge the gap, to a certain extent, between the EU pillar preliminary ruling procedure and the EFTA pillar advisory opinion procedure, driven by considerations of homogeneity and equal access to justice.

Since, so far, the EEA EFTA States have not broadened the standing requirements by adding the class of acts included in the third limb of article 263(4) TFEU, it appears hard to claim that the EFTA Court should interpret article 36(2) SCA so as to include a provision similar to that limb. The EFTA Court has held before that it cannot apply non-incorporated primary and secondary EU law by analogy.⁸⁷ The EFTA Court, however, is not bound by the CJEU's interpretation of its procedural provisions,⁸⁸ and is therefore free to provide its own interpretation of article 36(2) SCA in order to ensure equivalent access to justice across both EEA pillars. This holds especially true since the EFTA Court's introduction of the principle of procedural homogeneity was precisely intended to ensure *equal* access to justice for individuals and economic operators throughout the EEA.⁸⁹ The main objective of the

⁸² Case E-4/19 *Campbell* (n 77) paras 57-59; Case E-28/15 *Yankuba Jabbi* (n 75) paras 77-79.

⁸³ Case C-456/12 *O. and B.* (n 78) paras 35-43.

⁸⁴ Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupping hf* [2012] paras 57-58.

⁸⁵ Case E-3/12 *Staten v/ Arbeidsdepartementet v Stig Arne Jonsson* [2013] para 60.

⁸⁶ Case E-18/11 *Irish Bank* (n 84) paras 63-64.

⁸⁷ See for instance: Case E-1/02 *EFTA Surveillance Authority v The Kingdom of Norway* [2003] para 55; Case E-1/01 *Hörður Einarsson v The Icelandic State* [2002] para 43.

⁸⁸ Case E-5/16 *Norwegian Board of Appeal for Industrial Property Rights* (n 54) para 37; Case E-13/10 *Aleris Ungplan AS* (n 54) para 24.

⁸⁹ Case E-14/11 *DB Schenker* (n 19) paras 77-78: 'The Court has recognised the procedural branch of the principle of homogeneity and referred in particular to considerations of equal access to justice [...] the need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA [...].'

EEA Agreement is not to obtain a homogeneous interpretation of EEA law in and of itself,⁹⁰ but rather to create a homogeneous European Economic Area in which common rules and equal conditions of competition apply.⁹¹ Homogeneous interpretation of EEA law is in this regard only a means to an end, from which under certain conditions may be deviated in order to ensure a homogeneous outcome for individuals.⁹²

Several elements advocate in favour of such an approach and could (jointly) serve as a basis and justification for reinterpreting the current standing requirements. Article 108 EEA Agreement first of all stipulates that the (judicial) procedures established by the EEA EFTA States should be ‘similar to those existing in the Community’.⁹³ In addition, recital 8 of the EEA Agreement attributes individuals an important role in the development of the EEA through the judicial defence of their EEA rights. Therefrom it follows, according to the EFTA Court, that access to justice and effective judicial protection are essential elements of the EEA legal framework,⁹⁴ and that the principle of effective judicial protection constitutes a general principle of EEA law.⁹⁵ As a consequence, the EFTA Court held that its procedural rules should be interpreted in light of the principle of effective judicial protection.⁹⁶ In order to ensure a homogeneous EEA based on common rules and equal conditions of competition, the EFTA Court considers it furthermore important that EEA EFTA citizens and EU citizens enjoy equal access to the courts in both EEA pillars.⁹⁷

In light of all these elements, it is argued that the EFTA Court is able to reinterpret its standing requirements as they stand now, in order to ensure that individuals enjoy effective and equivalent access to justice compared to their EU counterparts, not by applying the third limb of article 263(4) TFEU by analogy, but rather by reinterpreting its current standing requirements on the basis of the (above described considerations underlying the) EEA Agreement.⁹⁸ Just as the EFTA Court invoked the right to free movement as a right lying at the heart of the EEA Agreement to broaden the scope of the Citizenship Directive, the principle of effective judicial protection could, as a general principle of EEA law, justify a broader understanding of the current standing requirements, in order to guarantee the full effectiveness and homogeneity of EEA law.⁹⁹ After all, unequal access to justice between

⁹⁰ EEA Agreement (n 1) recital 15 and Art 105(1) indicate that (one of) the objective(s) of the Contracting Parties is not only to arrive at, and maintain, a uniform interpretation of EEA law, but also to arrive at, and maintain, a uniform *application* of EEA law. The aim of a uniform application of EEA law corresponds with the idea of creating a homogeneous European Economic Area, and appears to support the idea of an effects-based conception of the principle of homogeneity. See similarly: Finn Arnesen and Halvard Haukeland Fredriksen, ‘Preamble’ in Finn Arnesen and others (eds), *Agreement on the European Economic Area - A Commentary* (Nomos Verlagsgesellschaft 2018) 167–168.

⁹¹ EEA Agreement (n 1) recital 4 and Art 1(1).

⁹² As evidenced by amongst others: Case E-4/19 *Campbell* (n 77); Case E-28/15 *Yankuba Jabbi* (n 75).

⁹³ EEA Agreement (n 1) Art 108(1).

⁹⁴ E-3/11 *Pálmi Sigmarsson* (n 18) para 29; Case E-5/10 *Dr. Joachim Kottke* (n 18) para 26.

⁹⁵ Case E-12/20 *Telenor ASA and Telenor Norge AS v EFTA Surveillance Authority* [2022] para 75; Joined Cases E-11/19 and E-12/19 *Adpublisher AG v J & K* [2020] para 50.

⁹⁶ Case E-18/11 *Irish Bank* (n 84) paras 63-64; Case E-2/03 *Ákarwaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* [2003] para 23.

⁹⁷ Case E-11/12 *Beatrix Koch* (n 19) para 117; Case E-14/11 *DB Schenker* (n 19) para 77.

⁹⁸ In *Jabbi* for instance, the EFTA Court found that it could not give the same interpretation to EEA law as the CJEU did to EU law by lack of an EEA equivalent of EU citizenship. Because of the different legal context, the EFTA Court therefore held that ‘it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement’. Consequently, by relying on sources included in the EEA Agreement (a general right to free movement) the EFTA Court was able to obtain the same outcome as in the EU, albeit necessarily based on a different argumentation. See Case E-28/15 *Yankuba Jabbi* (n 75).

⁹⁹ Case E-4/19 *Campbell* (n 77) para 55: ‘To ensure effectiveness and to achieve homogeneity in the area of the free movement of persons, the Court similarly ruled in *Jabbi* that when an EEA national, not considered a worker, has created or strengthened

both EEA pillars would hamper the achievement of the EEA Agreement's aim of the fullest possible realisation of the internal market in the whole European Economic Area, based on common rules and equal conditions of competition.¹⁰⁰

Rather than judicially copy-pasting the third limb of article 263(4) TFEU into article 36(2) SCA in a general manner, the EFTA Court should instead, by applying a contextual and teleological interpretation, determine to what extent the principles of homogeneity, effective judicial protection and effectiveness of EEA law justify, in the specific case before it, a broader or more flexible reading of its standing requirements. Although admittedly this may initially raise questions of legal certainty, nothing prevents that a general line of reasoning emerges after a couple of judgments will have been decided. In light of the current state of EEA law and the developments in the EU pillar, this seems to be a necessary evil in order to ensure a well-functioning EEA, based on common rules and (equal) access to justice. This would especially be the case if in the EU pillar the applicant(s) would be granted standing before the CJEU on the basis of the third limb of article 263(4) TFEU, whereas they would not be granted standing before the EFTA Court if the current standing test were to be applied. It is particularly important in this regard to be mindful of the *raison d'être* of the third limb of article 263(4) TFEU, namely to prevent individuals from having to break the law or put themselves in artificial situations first in order to gain access to justice (see *supra*).

It remains to be seen whether the EFTA Court will be willing to extend its effects-based conception of homogeneity to the standing requirements of article 36 SCA. It should be noted, however, that the EFTA Court held in *Konkurrenten III* that it found no reason to address the applicant's submission regarding the changes to article 263(4) TFEU, but not for the reason one would suspect. One would expect the EFTA Court to refuse considering the post-Lisbon changes to article 263(4) TFEU simply because the corresponding article 36 SCA has not been updated accordingly by the EEA EFTA States. Instead, the EFTA Court considered the rationale behind the third limb of article 263(4) TFEU and found that the considerations underlying that provision did not apply 'in this case' (next to the fact that the decisions at hand did not constitute regulatory acts).¹⁰¹ Although drawing grand conclusions from this may be premature, the EFTA Court appeared to leave the door open for a contextual and teleological reinterpretation of its standing rules, as suggested above, if the considerations at the basis of the changes to article 263(4) TFEU would apply to the case before it.

3.3 THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION

A second line of argumentation put forward by *Konkurrenten* to persuade the EFTA Court to reconsider its interpretation of article 36 SCA was based on the fundamental right to effective judicial protection.¹⁰² More specifically, *Konkurrenten* contended that EEA law does not provide for a complete system of legal remedies and procedures as provided for in

family life with a third-country national during genuine residence in another EEA State, the provisions of the Directive apply when that EEA national returns to their EEA State of origin' (emphasis added).

¹⁰⁰ EEA Agreement (n 1) recitals 4, 5 and 15.

¹⁰¹ Case E-19/13 *Konkurrenten III* (n 44) para 91.

¹⁰² *ibid* para 64; Case E-1/17 *Konkurrenten IV* (n 46) para 46.

the EU.¹⁰³ Although *Konkurrenten* did not further elaborate on this claim in *Konkurrenten III*, this statement should be read in light of the CJEU's case law on legal standing for individuals in the context of an action for annulment. The CJEU's refusal of a broader understanding of the requirements of direct and individual concern is primarily based on the premise that the EU Treaties already provide for a complete system of legal remedies and procedures,¹⁰⁴ through the combination of the action for annulment, the preliminary rulings procedure and the possibility to raise a plea of illegality before the EU judiciary in proceedings for acts of general application.¹⁰⁵ According to this proposition, these three avenues of judicial redress are complementary to each other and each avenue compensates for the others:

[I]t should be borne in mind that in the complete system of legal remedies and procedures established by the FEU Treaty with a view to ensuring judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU, directly challenge acts of the European Union of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the EU judicature under Article 277 TFEU or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.¹⁰⁶

The argument of lacking a complete system of legal remedies and procedures in EEA law was further elaborated upon by *Konkurrenten* in *Konkurrenten IV*. In *Konkurrenten IV*, *Konkurrenten* put forward that it should be granted standing pursuant to the right to effective judicial protection under EEA law and article 6 ECHR, because it had no other venue to challenge the validity of ESA's decision.¹⁰⁷ *Konkurrenten* argued that there is no obligation on the national courts of the EEA EFTA States to refer a question to the EFTA Court and, even if they do so, the opinions of the EFTA Court are not binding on them.¹⁰⁸ In addition, *Konkurrenten* put forward that, in any event, the EFTA Court is not empowered to rule on the validity of an ESA decision in the context of an advisory opinion procedure.¹⁰⁹

Nonetheless, ESA's former version of its guidelines on the enforcement of state aid law by national courts repeatedly stipulated that national courts should rely on the advisory opinion procedure *ex* article 34 SCA where the issues raised at national level concern the validity of a state aid decision by ESA.¹¹⁰ However, as put forward by *Konkurrenten*,

¹⁰³ Case E-19/13 *Konkurrenten III* (n 44) para 65.

¹⁰⁴ The idea that the EU legal order provides for a 'complete system of legal remedies and procedures' was first introduced by the CJEU in *Les Verts*. See Case C-294/83 *Les Verts v Parliament* EU:C:1986:166 para 23.

¹⁰⁵ See especially Case C-50/00 P *Unión de Pequeños Agricultores v Council* EU:C:2002:462 paras 39-41. More recently: Case T-721/21 *Sunrise Medical and Sunrise Medical Logistics v Commission* EU:T:2022:791 paras 31-32.

¹⁰⁶ Case C-59/11 *Association Kokopelli* EU:C:2012:447, para 34. This proposition has been criticised. See Opinion of AG Bobek in Case C-352/19 P *Région de Bruxelles-Capitale v Commission* EU:C:2020:588 paras 139-140; Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* (n 59) paras 36-48.

¹⁰⁷ Case E-1/17 *Konkurrenten IV* (n 46) para 46.

¹⁰⁸ *ibid* para 47.

¹⁰⁹ *ibid*.

¹¹⁰ EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts [2011] OJ L115/13, points 14, 64 and 78.

article 34 SCA only explicitly allows the EFTA Court to interpret EEA law, and not to rule on the validity of EEA law in general or ESA decisions in particular. Arguably, in *CIBA*, the EFTA Court framed questions of competence as a matter of interpretation of the EEA Agreement, and not as a matter of validity of the contested decision.¹¹¹ But what if the contested state aid decision is contested on the merits instead of on procedural/competence grounds? Since the EFTA Court is similarly competent to interpret the substantive provisions of EEA law in the context of an advisory opinion procedure,¹¹² it seems likely that the EFTA Court would adopt a similar approach. Implicitly, this may perhaps be deduced from the EFTA Court's statement in *Posten Norge* that an action for annulment is the 'primary form of judicial protection against decisions of ESA',¹¹³ suggesting that other avenues of judicial redress (such as the advisory opinion procedure) exist. In the absence of a clear precedent, the foregoing remains second-guessing, however.

In spite of this uncertainty, ESA nonetheless perceived this to be a valid alternative to make up for the gap created by the addition of a third limb to 263(4) TFEU, by insisting that national EFTA courts should in particular refer a question to the EFTA Court in case 'the measure was an aid scheme with a wide coverage for which the claimant may not be able to demonstrate an individual concern'.¹¹⁴ Remarkably, ESA revised its guidelines on 31 May 2023 and omitted all references to the role of the advisory opinion procedure where the validity of its state aid decisions is concerned. Instead, the updated guidelines now explicitly state that the EFTA Court has jurisdiction to give advisory opinions on the interpretation of the state aid rules, '[h]owever, in order to seek the annulment of a State aid decision adopted by the ESA, an application for annulment (*sic*) must be brought under Article 36 SCA'.¹¹⁵ Either this confirms that, as pointed out above, the EFTA Court can indeed not directly rule on the validity of ESA decisions in an advisory opinion and can merely provide an interpretation of the relevant provisions, leaving it up to the national court to draw the necessary conclusions. Alternatively, it means that ESA does not consider the advisory opinion as a valid option to assess the validity of state aid decisions, complementary to the annulment procedure.

Considering the above, it remains uncertain whether the EFTA pillar truly provides for a complete and complementary system of legal remedies with regard to (state aid) decisions of ESA, as compared to the EU, in light of the uncertainty surrounding the powers of the EFTA Court in the advisory opinion procedure. It should be noted, however, that in the EU state aid decisions are only very rarely (successfully) contested via a preliminary ruling procedure.¹¹⁶ This observation is a consequence of the CJEU's *TWD* doctrine. In *TWD*, the CJEU ruled that recipients of state aid forming the subject-matter of a Commission decision

¹¹¹ Case E-6/01 *CIBA Speciality Chemicals Water Treatment Ltd and Others v The Norwegian State, represented by the Ministry of Labour and Government Administration* [2002] paras 20-23.

¹¹² *ibid* para 22.

¹¹³ Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* [2012] para 87 (emphasis added).

¹¹⁴ EFTA Surveillance Authority Decision No 254/09/COL of 10 June 2009 amending, for the 71st time, the procedural and substantive rules in the field of state aid by introducing a new chapter on enforcement of state aid law by national courts [2011] OJ L115/13, point 64.

¹¹⁵ EFTA Surveillance Authority Decision No 081/23/COL of 31 May 2023 amending the procedural and substantive rules in the field of State aid by introducing revised Guidelines on the enforcement of State aid rules by national courts [2023], point 27.

¹¹⁶ Although rare, a state aid decision by the Commission was successfully challenged via the preliminary ruling procedure in Case C-212/19 *Compagnie des pêches de Saint-Malo* EU:C:2020:726.

cannot challenge the validity of such a decision via the preliminary reference procedure if the recipient could undoubtedly have challenged that decision via a direct action for annulment *ex* article 263(4) TFEU.¹¹⁷ So far, the EFTA Court has only confirmed the applicability of the *TWD* doctrine in EEA law once, in an infringement action in which Iceland claimed the invalidity of an ESA decision requiring Iceland to terminate and recover unlawful state aid. Since Iceland failed to institute an action for annulment within the time limits laid down in article 36 SCA, it could not claim the invalidity of the decision during the infringement action anymore.¹¹⁸ If the EFTA Court would confirm its applicability to the advisory opinion procedure too, the application of the *TWD* doctrine could mean that, in light of the more restrictive standing rules for actions for annulment, in theory, less applicants are barred from challenging the validity of ESA decisions via the advisory opinion procedure, in comparison to their EU counterparts before the CJEU. Whether this is a good thing and would compensate for the more restrictive standing rules, of course depends on the EFTA Court's (for now unclear) powers as regards the validity of ESA decisions in the context of such a procedure.

In *Konkurrenten IV*, Konkurrenten contended that it should have been granted standing because it had no other venue to challenge the validity of ESA's decision than via an action for annulment.¹¹⁹ Claims concerning the unavailability of an effective remedy have not been able to persuade the CJEU to reconsider the interpretation of its standing requirements. According to the CJEU, the right to effective judicial protection cannot lead to a change of the legal framework or the setting aside of the conditions for legal standing laid down in the Treaties, such a reform being up to the Member States.¹²⁰ The EFTA Court's stance on this seems to be a bit more nuanced and less firm. Similar to the CJEU, in *Konkurrenten IV*, the EFTA Court firstly responded to Konkurrenten's claim for standing based on the right to effective judicial protection that 'the requirements of standing are a recognised part of a judicial procedure'.¹²¹ This might have been a sign that the EFTA Court would follow the hard line followed by the CJEU in this regard, were it not that the EFTA Court added that 'Konkurrenten has not presented any argument that could persuade the Court to conclude that the application of the requirements of article 36 SCA is *in the present case* in breach of the fundamental right to effective judicial protection under EEA law, as interpreted in light of the ECHR'.¹²² Unlike the CJEU, the EFTA Court hereby seemed to leave the door open for a reinterpretation of its standing requirements in light of the right to effective judicial protection, if persuasive arguments thereto would be presented. Here too, at first sight the EFTA Court appears to leave open the possibility of a contextual and teleological reinterpretation of its standing rules, as suggested above (see section 3.2).

The EFTA Court considered it furthermore necessary to reiterate that the right to effective judicial protection should be interpreted in light of the ECHR. Consequently, it could be assumed that the EFTA Court would at least have to agree with a more liberal interpretation of its standing requirements if the ECtHR would come to the conclusion that

¹¹⁷ Case C-188/92 *TWD* EU:C:1994:90 para 17.

¹¹⁸ Case E-2/05 *EFTA Surveillance Authority v The Republic of Iceland* (n 33) paras 17 and 20.

¹¹⁹ Case E-1/17 *Konkurrenten IV* (n 46) para 46.

¹²⁰ Case C-263/02 P *Commission v Jégo-Quéré* EU:C:2004:210 paras 29-36; Case C-50/00 P *Unión de Pequeños Agricultores* (n 105) paras 33-41.

¹²¹ Case E-1/17 *Konkurrenten IV* (n 46) para 64.

¹²² *ibid* (emphasis added).

the current interpretation of the requirements of direct and individual concern constitutes a breach of the ECHR. After all, the EFTA Court recurrently held that its procedural rules should be interpreted in light of fundamental rights,¹²³ which in turn should be interpreted in light of the ECHR and the case law of the ECtHR.¹²⁴ Particularly interesting in this regard is the fact that, in the wake of the EFTA Court's judgment in *Konkurrenten III*, Konkurrenten lodged a complaint with the ECtHR in September 2015, specifically with regard to the requirements on legal standing.¹²⁵ Although the ECtHR did not find a breach of article 6 ECHR on the right to a fair trial,¹²⁶ caution is warranted and neither general nor definitive conclusions can be drawn from the ECtHR's judgment. The ECtHR did not address whether the EFTA Court's interpretation of the *locus standi* requirements is or is not in line with article 6 ECHR, but only addressed the questions whether the EFTA Court sufficiently examined Konkurrenten's arguments and whether its decision was adequately reasoned.¹²⁷ It thus remains to be seen how the ECtHR would rule when confronted with the explicit question whether the EFTA Court's interpretation of its standing requirements in and of itself is in line with article 6 ECHR, and what impact this may have on the EFTA Court's case law in this regard. After all, the ECtHR has repeatedly found strict interpretations of procedural rules by courts, preventing an applicant's action from being examined on the merits, to be in breach of article 6 ECHR.¹²⁸ In addition, the ECtHR has held before that no one can be required to breach the law first in order to obtain protection of his or her civil rights in line with article 6 ECHR.¹²⁹ Interestingly, article 263(4) TFEU was amended and a third limb was added precisely in order to prevent individuals from having to infringe the law in order to have access to the court¹³⁰ - an amendment which has not been followed in the EFTA pillar. It is therefore interesting to see how the EFTA Court, despite the lack of an EEA equivalent, recognised the *ratio legis* behind the introduction of the third limb in *Konkurrenten III*, but found that these considerations did not apply 'in this case'.¹³¹ The EFTA Court thus seemed to leave open the possibility of accepting such considerations, and to reinterpret its standing rules in the light thereof, if the specific case before it would require so. In any event, this issue is not merely hypothetical and will most likely arise sooner or later, as demonstrated above in section 2.

In light of the increased importance of state aid in the field of climate, the environment and energy,¹³² similar questions will most likely arise in these fields too. Added to this,

¹²³ Case E-18/11 *Irish Bank* (n 84) para 63; Case E-15/10 *Posten Norge AS* (n 113) para 110.

¹²⁴ Case E-12/20 *Telenor ASA* (n 95) para 75; Joined cases E-3/13 and E-20/13 *Fred. Olsen and Others v the Norwegian State* [2014] para 224.

¹²⁵ *Konkurrenten.no v Norway* App no 47341/15 (ECtHR, 5 November 2019).

¹²⁶ *ibid* para 48.

¹²⁷ *ibid* paras 46-47.

¹²⁸ *Gil Sanjuan v Spain* App no 48297/15 (ECtHR, 26 May 2020) para 31; *Zubac v Croatia* App no 40160/12 (ECtHR, 5 April 2018) para 97.

¹²⁹ *Posti and Rahko v Finland* App no 27824/95 (ECtHR, 24 September 2002) para 64; *Stark and Others v Finland* App no 39559/02 (ECtHR, 9 October 2007).

¹³⁰ As may be derived from the *travaux préparatoires* relating to the draft Treaty establishing a Constitution for Europe, the content of which has been copied in the Lisbon Treaty. See for example: Cover Note from the Praesidium to the European Convention (CONV 734/03) of 12 May 2003, 20; Case T-18/10 *Inuit Tapiriit Kanatami* (n 58) para 50.

¹³¹ Case E-19/13 *Konkurrenten III* (n 44) para 91. In addition, the EFTA Court found that the contested decisions did not constitute regulatory acts in the sense of the third limb of article 263(4) TFEU.

¹³² The (increasing) importance of state aid in the field of climate change, environmental protection and energy policy is evidenced by the European Commission's 2022 'Guidelines on State aid for climate, environmental protection and energy'. Similar guidelines have been issued by the EFTA Surveillance Authority. See: Communication from the Commission –

environmental NGOs have faced considerable – and perhaps even greater – obstacles in meeting the standing requirements before the CJEU and the EFTA Court. In the meantime, the EU pillar has undergone (and is still undergoing) certain developments in order to facilitate access of environmental NGOs to the CJEU. It is therefore important to analyse how the EFTA Court will deal with these EU pillar developments with regard to *locus standi* for environmental NGOs, especially since no similar developments have taken place in the EFTA pillar. The EFTA Court’s judgment in *Bellona* serves as a starting point for this analysis.

4 BELLONA

In *Bellona*, the applicants, a German consultancy firm within the field of renewable energy and a non-profit environmental foundation, lodged an appeal before the EFTA Court against a by ESA approved Norwegian tax measure which allowed all new large-scale LNG facilities within a certain geographical area to benefit from increased depreciation rates. ESA had been of the opinion that the aid constituted “regional aid” within the meaning of article 61(3)(c) EEA Agreement. Hence, the Norwegian aid was not considered to be in violation of the EEA Agreement.¹³³ The application for annulment against ESA’s decision was declared inadmissible by the EFTA Court since the applicants did not have the necessary *locus standi*.

According to article 36(2) SCA, natural and legal persons may institute an action for annulment against ESA decisions provided they are either the addressee of that decision, or if they are directly and individually concerned by the decision. As mentioned before, the EFTA Court in principle adheres to the CJEU’s *Plaumann* case law for the interpretation of the notions ‘direct concern’ and ‘individual concern’. In *Bellona*, the applicants asked the EFTA Court nonetheless to adopt a flexible interpretation of the rules on legal standing laid down in article 36(2) SCA, since application of the CJEU’s *Plaumann* test did not allow them to obtain appropriate judicial redress *in casu*.¹³⁴ To reinforce their claim, the applicants referred to articles 6 and 13 ECHR, article 47 of the EU Charter of Fundamental Rights, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.¹³⁵ In hindsight, the latter reference is especially interesting in light of the decision taken by the Meeting of the Parties to the Aarhus Convention in October 2021, endorsing the findings of the Convention’s Compliance Committee.¹³⁶ In its Decision VII/8f, the Meeting of the Parties concluded that the CJEU’s interpretation of the notions of direct and individual concern is not in compliance with the obligation of article 9(3) and (4) of the Aarhus Convention to provide for effective access to

Guidelines on State aid for climate, environmental protection and energy 2022 [2022] OJ C80/1; EFTA Surveillance Authority Decision No 029/22/COL of 9 February 2022 amending the substantive rules in the field of State aid by introducing new Guidelines on State aid for climate, environmental protection and energy 2022 [2022/2072] OJ L277/218.

¹³³ For the facts of the case, see Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* [2003] paras 1-7.

¹³⁴ *ibid* paras 24 and 28.

¹³⁵ *ibid* para 28.

¹³⁶ For an appraisal of the legal value of decisions by the Meeting of the Parties to the Aarhus Convention and the reports of the Compliance Committee, see: Gor Samvel, ‘Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice’ (2020) 9(2) *Transnational Environmental Law* 211, 17–25; Elena Fasoli and Alistair McGlone, ‘The Non-Compliance Mechanism Under the Aarhus Convention as “Soft” Enforcement of International Environmental Law: Not So Soft After All!’ (2018) 65 *Netherlands International Law Review* 27.

justice for the protection of the environment.¹³⁷ In a separate procedure, the Compliance Committee further found that access to justice at EU level for environmental organisations also failed with regard to state aid decisions specifically.¹³⁸ Although endorsement of the latter was postponed by the Meeting of the Parties, it is noteworthy that Norway unmistakably declared that it expects the EU to follow up on its commitments under the Aarhus Convention.¹³⁹

Despite the applicants' attempt to obtain a more liberal interpretation of the rules on legal standing, the EFTA Court nonetheless stuck with the case law of the (then) European Court of Justice (ECJ). The EFTA Court's reluctance to deviate from the ECJ's case law should be seen in its pre-Lisbon context. In 2002 Advocate General (AG) Jacobs advocated in *UPA* that the ECJ should reconsider its case law on the requirement of individual concern, in order to relax the conditions for individuals to institute an action for annulment since, otherwise, the applicant would have been deprived of any remedy.¹⁴⁰ Only two months later, in *Jégo-Quééré*, the (then) Court of First Instance (CFI) followed AG Jacobs in his reasoning that the strict interpretation of the requirement of individual concern should be reconsidered and abandoned.¹⁴¹ Another two months later, the ECJ refused to follow AG Jacobs's plea for a broader interpretation of the rules on legal standing in *UPA* by stating that, if necessary, it is for the Member States, and not for the Court, to reform the system of judicial protection and, accordingly, the rules on legal standing.¹⁴² Following its clear stance on the issue in *UPA*, the ECJ ruled on appeal in *Jégo-Quééré* that the CFI erred in law where it deviated from the ECJ's *Plaumann* test.¹⁴³ The EFTA Court acknowledged that it was aware of the ongoing debate between the AG, the CFI and the ECJ, but nonetheless it found it opportune to stick with the ECJ's *Plaumann* test in light of the uncertainty surrounding the discussion.¹⁴⁴

Whilst the EFTA Court's reluctance in *Bellona* may be understandable in light of the ambivalent situation in the Community back then, it remains to be seen whether the EFTA Court is able to maintain this position if confronted with a similar issue today. Not only have the rules on legal standing been broadened by the Lisbon Treaty (see *supra*),¹⁴⁵ in the EU the

¹³⁷ Decision VII/8f concerning compliance by the European Union with its obligations under the Convention, adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its seventh session (18-20 October 2021) para 3. Decision VII/8f was based on a report by the Aarhus Convention's Compliance Committee, see: Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017) para 66: '[...] the restrictions to access to justice imposed by the direct and individual concern test are too severe to comply with the Convention'.

¹³⁸ Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union (17 March 2021).

¹³⁹ Report ECE/MP.PP/2021/2 of the seventh session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (18-20 October 2021), 11.

¹⁴⁰ Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* (n 59).

¹⁴¹ Case T-177/01 *Jégo-Quééré v Commission* EU:T:2002:112 paras 49-50.

¹⁴² Case C-50/00 P *Unión de Pequeños Agricultores* (n 105) paras 44-45.

¹⁴³ Case C-263/02 P *Commission v Jégo-Quééré* (n 120) paras 29-39.

¹⁴⁴ Case E-2/02 *Bellona* (n 133) para 37.

¹⁴⁵ For the reasons set out in section 2, the approval by ESA of the aid scheme in *Bellona* may be considered a regulatory act not entailing implementing measures in the sense of article 263(4) TFEU. However, as the Aarhus Convention's Compliance Committee found, in light of the CJEU's current interpretation, it is practically impossible for an environmental NGO to prove that it is directly concerned by that measure when it purely acts for the purpose of promoting environmental protection. Therefore, a similar broadening of the standing requirements in the EFTA pillar would not suffice, unless the EFTA Court adopts a different interpretation than the CJEU. See: Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017) para 73.

Aarhus Regulation has been adopted to implement the Aarhus Convention at Union level and facilitate access to the CJEU for environmental organisations. The Aarhus Regulation provides for the possibility for NGOs and other members of the public to make a request for internal review to EU institutions and bodies of administrative acts allegedly adopted in breach of environmental law.¹⁴⁶ Subsequently, a decision by the EU institution or body rejecting the request for review may be brought before the CJEU via an action for annulment.¹⁴⁷ In this regard, the parties concerned will not have to prove anymore that they are directly and individually concerned since they will be the addressee of the review decision and can therefore rely on the first limb of article 263(4) TFEU.¹⁴⁸ The purpose of this measure is to compensate for the insurmountable obstacles environmental organisations face to prove that they are directly and individually concerned by EU acts impacting the environment.¹⁴⁹

The Aarhus Regulation has, by contrast, not been incorporated in EEA law. In the first place, this may be explained by the fact that, although Liechtenstein has signed the Aarhus Convention, it has not ratified the Convention. In addition, the EEA Agreement is and remains primarily focused on economic and commercial cooperation, and has not known a similar broadening in scope as the EU. Nonetheless, it cannot be neglected that the EEA Agreement stipulates in its preamble that the Contracting Parties are determined ‘to preserve, protect and improve the quality of the environment’, and to take, in the development of EEA law, a high level of protection regarding the environment as a basis.¹⁵⁰ Not only does the EEA Agreement provide for a provision setting out the objectives and principles to be taken into account when the Parties adopt action relevant to the four freedoms in the field of the environment,¹⁵¹ it further lists the environment as an area in which the Contracting Parties shall strengthen and broaden their cooperation outside these freedoms.¹⁵² In addition, EU acts which essentially aim at implementing the Aarhus Convention, such as Directives 2003/4/EC and 2008/1/EC,¹⁵³ have been incorporated in EEA law without any reservations, and this despite Liechtenstein’s non-ratification of the Convention.¹⁵⁴ Lastly, Liechtenstein did not ratify the Aarhus Convention *inter alia* due to limited human resources,¹⁵⁵ though it could be argued that incorporation of the Aarhus Regulation would only create rights and obligations at EEA level and would not burden Liechtenstein’s

¹⁴⁶ Aarhus Regulation (n 10) Arts 10-11.

¹⁴⁷ *ibid* Art 12.

¹⁴⁸ Case T-569/20 *Stichting Comité N 65 Ondergronds Helvoirt v Commission* EU:T:2021:892 para 59; Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 53.

¹⁴⁹ Opinion of AG Kokott in Case C-212/21 P *EIB v ClientEarth* EU:C:2022:1003 paras 48-52; Case T-569/20 *Stichting Comité N 65* (n 148) para 59.

¹⁵⁰ EEA Agreement (n 1) recitals 9-10. See also EEA Agreement (n 1) Art. 1(2)(f), which stipulates that the objectives of the EEA Agreement shall be obtained through closer cooperation as regards, amongst others, the environment.

¹⁵¹ EEA Agreement Art. 1(2)(f), Art 73.

¹⁵² *ibid* Art 78.

¹⁵³ Art 1 of Directive 2008/1/EC even explicitly stipulates that the objective of the Directive is ‘to contribute to the implementation of the obligations arising under the Aarhus Convention’. This has remained unchanged in the version incorporated in EEA law. Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) [2008] OJ L24/8.

¹⁵⁴ Decision of the EEA Joint Committee No 123/2003 of 26 September 2003 amending Annex XX (Environment) to the EEA Agreement [2003] OJ L331/50; Decision of the EEA Joint Committee No 28/2012 of 10 February 2012 amending Annex XX (Environment) to the EEA Agreement [2012] OJ L161/34.

¹⁵⁵ See UNECE, ‘International environmental agreements ratified and signed by Liechtenstein’ <<https://aarhusclearinghouse.unep.org/resources/international-environmental-agreements-ratified-and-signed-liechtenstein>> accessed 7 September 2023.

administration. A case could therefore be made for incorporation of the Aarhus Regulation in EEA law by the EEA States.

Admittedly, in cases concerning state aid decisions of ESA, such as in *Bellona*, the Aarhus Regulation would not offer a solution since the Regulation explicitly excludes decisions taken in the field of competition law from its scope.¹⁵⁶ It should be noted, however, that the European Commission has conducted a public consultation to analyse the implications of the findings of the Aarhus Convention's Compliance Committee on state aid and to assess the options to resolve the issue. The solution the Commission proposes is to either amend the scope of application of the Aarhus Regulation to include state aid decisions or to amend other instruments to provide for an internal review process similar to the one under the Aarhus Regulation.¹⁵⁷ In any event, regardless of what measure will be adopted, its aim will be to facilitate access to the CJEU with regard to state aid decisions possibly having a negative impact on the environment and climate. This evolution will once again broaden the gap in judicial protection between the two EEA pillars if the EFTA pillar does not catch up.

As a consequence, ESA approved state aid schemes, which are possibly harmful for the environment and climate, will be practically shielded from judicial review in the EFTA pillar, contrary to similar state aid measures in the EU. Norway's unequivocal statement that it expects the EU to follow up on its commitments under the Aarhus Convention with regard to access to justice of environmental NGOs against state aid decisions,¹⁵⁸ sounds rather hollow in the context thereof. Not only may this broadening gap be considered alarming from the perspective of environmental and climate protection, it is clear that such an evolution also runs counter to the EEA Agreement's objective of creating equal conditions of competition throughout the whole EEA.¹⁵⁹ It remains to be seen how the EFTA Court will react to the evolutions that have taken place in the EU on a primary and secondary law level when confronted with the issue more than 20 years after *Bellona*. Uncontestably, the legal landscape has changed drastically within the EU pillar. Norway, as the biggest EEA EFTA country, plays a crucial and central role in the EU's and EEA's climate transition and energy policy, which increases the chance of cases being brought before the EFTA Court.

On the one hand, one could argue that the EFTA Court cannot deny the clear findings of the Aarhus Convention's Compliance Committee, endorsed by the Meeting of the Parties to that Convention, that 'the restrictions to access to justice imposed by the direct and individual concern test are too severe to comply with the Convention'.¹⁶⁰ The same holds true for the Compliance Committee's findings with regard to state aid decisions in particular, and Norway's unambiguous statement that it expects the EU to comply with the Aarhus Convention in this regard. On the other hand, it should be noted that the Aarhus Convention

¹⁵⁶ Aarhus Regulation (n 10) Art 2(2)(a).

¹⁵⁷ Commission Communication COM(2023) 307 final of 17 May 2023 on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available.

¹⁵⁸ Report ECE/MP.PP/2021/2 of the seventh session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (18-20 October 2021), 11.

¹⁵⁹ EEA Agreement (n 1) recital 4.

¹⁶⁰ Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017), para 66.

has only been ratified by Norway and Iceland, but not by Liechtenstein,¹⁶¹ and can thus not be relied on by the EFTA Court as a common standard to all the EEA EFTA States for the interpretation of EEA law, as it does with regard to the ECHR. The fact that all three EEA EFTA States are a party to the ECHR namely serves as a justification for the EFTA Court's interpretation of EEA law in light of the ECHR, and this despite the fact that the Convention is not incorporated in EEA law.¹⁶²

Interestingly, in this regard is ESA's argument in *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* that Directive 2011/92/EU should have been interpreted in light of the Aarhus Convention for reasons of homogeneity between both EEA pillars, and this notwithstanding the fact that Liechtenstein is not a party to the Aarhus Convention and is thus not bound by that Convention under public international law.¹⁶³ Although the EFTA Court did not explicitly dwell on this issue, it nevertheless referred to the case of *Gemeinde Altrip and Others*, in which the CJEU interpreted the Directive in light of the objectives of the Aarhus Convention.¹⁶⁴ From this, it cannot be inferred with certainty, however, that the EFTA Court would now also be inclined to re-interpret its standing requirements in light of the Aarhus Convention. In *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz*, the EFTA Court's interpretation was probably rather driven by homogeneity reasons, to ensure a homogeneous interpretation of Directive 2011/92/EU throughout the whole EEA, especially since the EFTA Court did not explicitly mention the Aarhus Convention itself in its reasoning.

The CJEU from its side persistently refuses to change its interpretation of the requirements of direct and individual concern in light of the Aarhus Convention and sticks with its *Plaumann* test.¹⁶⁵ Although the CJEU's case law in this regard predates Decision VII/8f of the Meeting of the Parties to the Aarhus Convention, it remains to be seen whether the CJEU will be inclined to reconsider its *Plaumann* test in environmental matters in light of that decision. In *Région de Bruxelles-Capitale v Commission*, the CJEU namely stipulated that, although international agreements concluded by the EU are binding upon the Union institutions, the Aarhus Convention cannot change the conditions of admissibility laid down in article 263(4) TFEU since that Convention cannot prevail over primary EU law.¹⁶⁶ Reiterating its statement in *UPA*, the CJEU held in *Sabo and Others* that it would therefore be up to the Member States to reform the current judicial framework laid down in the Treaties in order to facilitate access of environmental organisations to the Court, in line with the Aarhus Convention.¹⁶⁷ Arguably, the Treaties should not necessarily be changed in order to comply with the Aarhus Convention; it would suffice if the CJEU re-interpreted the rules on legal standing in a more liberal fashion. In the end, the current restrictive approach does not *per se* follow from the wording of article 263(4) TFEU itself, but rather from the way in which

¹⁶¹ See Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* [2015] para 19.

¹⁶² Case E-4/11 *Arnulf Clauder* [2011] para 49.

¹⁶³ See report for the hearing in Case E-3/15 *Liechtensteinische Gesellschaft für Umweltschutz v Gemeinde Vaduz* paras 48-49.

¹⁶⁴ In para 62 the EFTA Court referred to Case C-72/12 *Gemeinde Altrip and Others* EU:C:2013:712 para 28.

¹⁶⁵ Case C-297/20 P *Sabo and Others v Parliament and Council* EU:C:2021:24 paras 31-32; Case C-352/19 P *Région de Bruxelles-Capitale v Commission* EU:C:2020:978, paras 25-26.

¹⁶⁶ Case C-352/19 P *Région de Bruxelles-Capitale* (n 165) paras 25-26. See also: Case T-600/15 *PAN Europe and Others v Commission* EU:T:2016:601 paras 53-56.

¹⁶⁷ Case C-297/20 P *Sabo* (n 165) para 33.

the CJEU interprets that provision.¹⁶⁸ In this regard, it is worthwhile quoting AG Bobek's stance on this matter in *Région de Bruxelles-Capitale v Commission*:

115. The Court has held that *national courts* must 'interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable [environmental protection organisations] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law [...]

116. Although the Court has not yet had an opportunity to make similar statements with regard to the EU judicial procedures, I see no reason why those principles should not be equally valid. The Commission is right that international treaties cannot derogate or prevail over primary EU law. However, primary law can and should be interpreted, where appropriate and as far as possible, in conformity with international law.¹⁶⁹

Since international agreements concluded by the Union are binding upon its institutions,¹⁷⁰ including the CJEU,¹⁷¹ it could therefore be argued that the CJEU is under an obligation to re-interpret the requirements of direct and individual concern in light of the Aarhus Convention, especially since the adoption of Decision VII/8f by the Meeting of the Parties to that Convention. In doing so, the CJEU would not change the relevant provisions of primary EU law, but rather change the mere interpretation of these provisions in compliance with the Union's international obligations. A more liberal reading of the requirements of direct and individual concern would furthermore be in line with the CJEU's case law that EU law should be interpreted in a manner consistent with international law.¹⁷² Moreover, it would be consistent with previous statements of the CJEU that the Union legislator aims for a wide access to justice in the field of environmental protection, since the public should play an active role in the preservation, protection and improvement of the quality of the environment.¹⁷³ Notwithstanding, as mentioned above already, AG Bobek's call for a broader interpretation of the rules on legal standing in light of the Aarhus Convention, was met with an outright rejection by the CJEU in *Région de Bruxelles-Capitale v Commission*.¹⁷⁴

Although in *Konkurrenten III* and *IV* the EFTA Court seemed to leave open the door for a reinterpretation of its standing requirements if circumstances require so (see section 3),

¹⁶⁸ Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* (n 59) para 75. See also: Ami Barav, *Judicial Enforcement and Implementation of European Union Law* (Bruylant 2017) 63–64; Laurence Gormley, 'Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?' (2013) 5 *Fordham International Law Journal* 1169, 1174–1175.

¹⁶⁹ Opinion of AG Bobek in Case C-352/19 P *Région de Bruxelles-Capitale* (n 106) paras 115–116.

¹⁷⁰ Article 216(2) TFEU. See also: Case T-194/20 *JF v EUCAP Somalia* EU:T:2022:454 para 129; Case C-352/19 P *Région de Bruxelles-Capitale* (n 165) para 25.

¹⁷¹ On the basis of Art 13(1) TEU the CJEU is considered to be an institution of the EU and therefore the CJEU is also bound by the international agreements concluded by the Union.

¹⁷² Case C-515/19 *Entelsat* EU:C:2021:273 para 62; Case T-381/15 *RENV IMG v Commission* EU:T:2020:406 para 77.

¹⁷³ Case T-9/19 *ClientEarth v EIB* EU:T:2021:42 para 107; Case C-167/17 *Klobn* EU:C:2018:833 para 35.

¹⁷⁴ Case C-352/19 P *Région de Bruxelles-Capitale* (n 165) paras 25–26.

as the EFTA Court is not bound by the CJEU's interpretation of its procedural rules,¹⁷⁵ it cannot be ruled out right away that the EFTA Court would come to a similar conclusion. Even more so since not all EEA EFTA States are a party to the Aarhus Convention (i.e., Liechtenstein). On the other hand, the considerations of (equal) access to justice set out in section 3.2 likewise apply as regards access of environmental NGOs to the EFTA Court. In combination with the EEA Agreement's objective to preserve, protect and improve the quality of the environment, an argument could nonetheless be made for a broader understanding of the rules on *locus standi* by the EFTA Court.

In the EU, the issue of access to justice for environmental NGOs may also be resolved through the 2021 revised version of the Aarhus Regulation and the future amendments currently being assessed by the Commission. If the scope of the Aarhus Regulation were to be extended to state aid decisions, as one of the solutions proposed by the Commission, the CJEU would not even be required anymore to reconsider its interpretation of the standing requirements at all. Environmental NGOs would then be able to request the Commission for an internal review of a state aid decision *ex* article 10 of the Aarhus Regulation. Consequently, a negative decision may easily be challenged before the CJEU since the environmental NGO(s) concerned are then the addressee(s) of that decision in the sense of the first limb of article 263(4) TFEU.¹⁷⁶ The same approach would be followed in the other proposals for similar amendments to other EU law instruments.¹⁷⁷

Arguably, the EFTA Court's approach will most likely depend on what steps will be taken next in the EU pillar. For now, it can be expected that the EFTA Court will only accept a more liberal approach to the standing rules in environmental matters if the CJEU goes first, which it can then justify under the pretext of (procedural) homogeneity or considerations of (equal) access to justice,¹⁷⁸ without having to rely on the Aarhus Convention. If the European Commission instead proceeds with the proposals made in light of the public consultation, and the Aarhus Regulation or other instruments are amended in order to facilitate access for environmental organisations to the CJEU in the field of state aid, more resistance may be expected from the EEA EFTA States if the EFTA Court were to follow-up on this evolution by reinterpreting its standing requirements. As shown above already, although the Contracting Parties seem to accept the idea that the EFTA Court follows the CJEU's case law on *locus standi*, it might go a step too far if the EFTA Court were to pursue its endeavour of preserving homogeneity by also taking into account legislative EU pillar changes impacting the standing requirements. Inevitably, if it does so, a broadening of the standing rules would necessarily have to be based on sources intrinsic to EEA law and the specific legal context of the EEA Agreement.¹⁷⁹ Instead, it would perhaps be better if the Contracting Parties

¹⁷⁵ Case E-8/19 *Scanteam AS* (n 65) para 45; Case E-2/12 *INT HOB-nín ehf.* (n 65) para 9.

¹⁷⁶ Aarhus Regulation (n 10) Arts 10-12.

¹⁷⁷ See: Commission Communication COM(2023) 307 final of 17 May 2023 on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available.

¹⁷⁸ In case it concerns a reinterpretation of the part of article 263(4) TFEU that is identical to article 36(2) SCA, the EFTA Court can rely on the principle of procedural homogeneity. If it instead concerns a reinterpretation of the third limb of article 263(4) TFEU, the EFTA Court will – by lack of an EEA equivalent – necessarily have to base itself on a source found in EEA law, such as considerations of (equal) access to justice and effective judicial protection underlying the EEA Agreement (see section 3.2).

¹⁷⁹ Because of a lack of Union citizenship in EEA law, the EFTA Court therefore also found in *Jabbi* that 'it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement'. See Case E-28/15 *Yankuba Jabbi* (n 75) para 68.

relieved the EFTA Court of this thorny issue (to reinterpret or not to reinterpret) by incorporating the (revised) Aarhus Regulation in EEA law themselves.

5 CONCLUSION

Over the past 15 years, the EU has been subject to a number of legal developments regarding access of individuals and economic operators to the CJEU. On the one hand, the 2009 Lisbon Treaty has broadened the requirements of standing enshrined in article 263(4) TFEU, extending the class of acts amenable to review by the CJEU to regulatory acts not entailing implementing measures which are of direct concern to the applicant(s). On the other hand, with regard to access to the CJEU for environmental organisations specifically, the EU has been found in breach of the Aarhus Convention by the Convention's Compliance Committee twice. These findings have prompted the EU to revise its Aarhus Regulation in 2021, another revision with regard to state aid decisions being examined at the moment. At the same time, similar legislative and treaty-making developments have not taken place in the EFTA pillar of the EEA.

When it comes to the standing requirements before the EFTA Court, both for individuals and economic operators in general, and for environmental organisations in particular, the EFTA pillar situation still reflects the more restrictive pre-Lisbon situation. In light of the earlier and ongoing EU pillar advancements, this stalemate in the EFTA pillar is liable to broaden the gap in judicial protection between both EEA pillars. Such divergence in judicial protection is detrimental to the EEA Agreement's main objective of establishing a homogeneous European Economic Area, based on common rules and equal conditions of competition.¹⁸⁰ Such equal conditions of competition may only be achieved if individuals and economic operators cannot only *effectively* defend their EEA rights at the judicial level, but also if everyone is *equally* entitled to do so throughout the whole EEA. The EEA States and the EU subscribed to this idea at the time the EEA Agreement was signed where its preamble states that individuals will play an important role in the EEA through the judicial defence of their EEA rights.¹⁸¹ Thereto, the EEA EFTA States established judicial procedures 'similar to those existing in the Community'.¹⁸² However, as a consequence of EU law developments analysed in this article, this supposed similarity is more and more under threat as regards the standing requirements.

Since the EEA EFTA States have so far not adapted the EFTA pillar judicial framework to bridge the gaps created by these EU pillar advancements, the EFTA Court will increasingly be confronted with issues of unequal access to justice between both EEA pillars. The question arises whether and how the EFTA Court will be able to reconcile this issue with its recurrent statements that equal access to justice is a prerequisite to the good functioning of the EEA, on the one hand, and the limits of its judicial powers, on the other hand. Although, so far, the EFTA Court has been able to avoid having to re-interpret its standing requirements in light of the abovementioned EU legal developments, this article has shown that situations will arise most likely sooner than later in which the EFTA Court will have to tackle the issue. In *Konkurrenten III* and *IV*, the EFTA Court seems to have left

¹⁸⁰ EEA Agreement (n 1) recitals 4 and 15.

¹⁸¹ *ibid* recital 8.

¹⁸² *ibid* Art 108(1).

the door open for a reinterpretation of its standing requirements if confronted with a regulatory act in the sense of article 263(4) *in fine* TFEU,¹⁸³ or if the strict interpretation and application of its standing requirements would lead to a breach of fundamental rights.¹⁸⁴ Caution is nonetheless warranted until the EFTA Court pronounces itself on the matter again. The EFTA Court's possible response regarding access to justice for environmental organisations, especially with regard to state aid decisions by ESA, is surrounded by even more uncertainty, and will most likely depend on whether a judicial or legislative solution will be pursued in the EU. Regardless of how the EFTA Court will proceed and how its case law on *locus standi* will evolve, it will without a doubt be accompanied by the necessary (academic and political) debate, opposition and contestation.

¹⁸³ Case E-19/13 *Konkurrenten III* (n 44) para 91.

¹⁸⁴ Case E-1/17 *Konkurrenten IV* (n 46) para 64.

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