ON THE EDGE: LESSONS ON GOOD GOVERNANCE IN THE BORDERLANDS OF EU LAW

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In 2019, it became publicly known that Norwegian social security legislation had been applied in violation of the right to receive services in the internal market and the EU social security coordination regulations. The misapplication had persisted since 1994 and we argue that it could have been discovered earlier if the relevant authorities had conducted analyses of the potential ripple effects of relevant case law, avoided secrecy of their legal opinions, and focused less on 'litigation risk' and 'wiggle room' in their legal assessments. This article examines what the Norwegian public administration can learn from this scandal, with the aim of also providing lessons relevant to administrative authorities in the EU member states.

1 INTRODUCTION

In 2021, the grand chamber of the Norwegian Supreme Court decided that Norwegian social security legislation had been applied in a way which violated the right to receive services in the internal market and the EU social security coordination regulations (SSC Regulations).[1] Although Norway is not a member of the EU, Norwegian authorities are obliged to respect the internal market rules, including the right to receive services and the SSC Regulations. Both are incorporated into the European Economic Area (EEA) Agreement, to which Norway is a party.

In its 2021 ruling, the Norwegian Supreme Court found that a 'stay in Norway' requirement for the entitlement to certain sickness benefits under Norwegian social security legislation constituted an unlawful restriction on the right to receive services under Article 36 EEA, which corresponds to Article 56 of the Treaty on the Functioning of the European Union (TFEU). Moreover, the Supreme Court found that the requirement was also contrary to Articles 21 and 7 of Regulation 883/2004 on the coordination of social security systems.[2]

While the ruling of the Supreme Court applied to one individual case, its interpretation of the law clarified the extent to which a wider administrative practice had been in error. As a result of the way in which the Supreme Court interpreted EU law, as incorporated into the EEA Agreement and thus Norwegian law, it was evident that the Norwegian Labour and Welfare Administration (NAV), the Public Prosecution Offices and the Norwegian courts – including the Supreme Court itself – had adopted a number of wrongful decisions.

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[1] The Norwegian Supreme Court, HR-2021-1453-S. The judgement has been translated into English and available here: <https://www.domstol.no/globalassets/upload/hret/translated-rulings/hr-2021-1453-s.pdf>.

[2] ibid.

In thousands of cases since the EEA Agreement entered into force in 1994, these bodies had denied or reduced benefits, or demanded the repayment of benefits, sometimes going so far as to convict for welfare fraud, on the basis of a legal provision which, as it now transpired, violated the right to receive services in the internal market and the SSC Regulations. According to internal investigations into NAV, at least 7,510 persons had received wrongful decisions concerning the denial or reduction of benefits, demands for the repayment of benefits already received, or both. In addition, at least 64 criminal convictions had been affected by the error. Many of these were re-opened, eventually leading to full or partial acquittals. The erroneous application of the right to receive services and the SSC Regulations in all of these cases is known as 'the social security scandal', or the 'NAV-scandal'. This article analyses what can be learnt from this scandal, with the aim of also providing lessons which may be of relevance to administrative authorities in other states where the right to receive services and the SSC Regulations apply.

While Norway is not a member of the EU, we argue that the lessons from the Norwegian social security scandal for the Norwegian public administration will also be of relevance to administrative authorities in EU Member States. The scandal is a case of misapplication of legal rules that apply both in Norway and in the EU Member States.

However, the particular legal relation between Norway and the EU raises questions of terminology. Norway and two other EFTA states have accepted to implement the rules of internal market, including the SSC Regulations, as parties to the EEA Agreement. While the EEA Agreement has certain provisions which are not identical in substance to provisions in the EU treaties, its material content is EU-law. In addition, the EEA EFTA states have also set up a surveillance authority (the EFTA Surveillance Authority, ESA) and a court (the EFTA court), to ensure that obligations under the EEA Agreement are enforced and complied with in the same way in the EEA EFTA states as in the EU. For the purposes of this article, it is not necessary to go further into the details about the differences between EU and EEA law.[3] In the following, we refer to Norway's obligations under the EEA Agreement to respect the right to free movement in the internal market and the SSC Regulations as obligations to respect EU law.[4]

As a backdrop for our analysis, a brief presentation of the context of the scandal, the subsequent inquiries and the foundational legal misapplication is required.

The social security scandal shook Norwegian society. Media abounded with stories of the severe consequences experienced by those affected: Disturbance of family life, sale of homes, psychological distress, and time in prison. The government initiated a Public Inquiry

[3] However, with regard to the right to move freely within the internal market, the Agreement on the European Economic Area EEA [1994] OJ L1/3 (hereafter the EEA Agreement), does not include a provision similar in substance to the (Consolidated Version of) the Treaty on the Functioning of the European Union [2012] OJ C326/13 (hereafter TFEU), Article 21. In effect, other internal market rules which are included in the EEA Agreement and provide citizens with the right to travel across borders, such as the prohibition against restrictions to provide services, may gain more attention in the EEA than in the EU.

[4] See along the same lines: Norwegian Public Commission, *Utenfor og innenfor — Norges avtaler med EU* (NOU 2012:2) 37 <https://www.regjeringen.no/no/dokumenter/nou-2012-2/id669368/> accessed 1 May 2025. However, when we refer to documents and literature using the term EEA law, we follow their terminology.

into the causes of the scandal,[5] and later set up a Public Commission to propose legislative changes to reduce the risk of future failures.[6] The Parliament's Standing Committee on Scrutiny and Constitutional Affairs held hearings, and the Parliament strongly criticised the executive branch.

The foundational legal misinterpretation in the case is fairly simple to explain. The Norwegian National Insurance Act (NIA) included a requirement that recipients of sickness benefits in cash remain present in Norway in order to receive the benefit.[7] This 'stay in Norway' requirement applied to all three Norwegian benefits recognised as 'sickness benefits in cash' under EU law: Sick pay,[8] work assessment allowance, and attendance allowance. Exceptions were only granted within strict limitations and after prior application. Recipients who had shorter or longer visits abroad without prior approval – whether shopping in neighbouring Sweden, meeting family in Germany, or relaxing in Spain – were considered to have violated this requirement. However, EU law establishes a general freedom to receive services abroad,[9] and specifically regulates the right to receive sickness benefits in cash when residing or staying in other Member States than the state responsible for the payment.[10] Under EU law, recipients therefore had the right to travel abroad without prior approval. As the Norwegian legal system gave these EU rules preference in cases of conflict with the NIA, the requirement of stay in Norway should not have been applied to beneficiaries who remained within the EEA area, that is the Member States of the EU in addition to the three EEA EFTA states of Norway, Iceland and Liechtenstein.

Not surprisingly, the erroneous application of EU law resulted in increased attention being paid to how EU law is implanted in Norway through the EEA Agreement. How could it be that NAV, the Ministry of Labour and Social Inclusion (hereafter, the Ministry), the government, the prosecution authorities, defence lawyers, courts, and academia for years had not detected that social security rules had been applied in violation of the EEA Agreement's obligations to respect EU law? Extensive public debate on the matter followed the scandal.

Rather than focusing on normative content,[11] or insisting on locating legal responsibility, we address the following question in this article: How should administrative authorities act to avoid misinterpreting EU law?

Several answers to this question have been suggested in the Norwegian context. In the report published by the government appointed Public Inquiry into the social security scandal,

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[5] Norwegian Public Commission, *Blindsonen. Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området* (NOU 2020:9) <https://www.regjeringen.no/no/dokumenter/nou-2020-9/id2723776/> accessed 1 May 2025.

[6] Norwegian Public Commission, *Trygd over landegrensene. Gjennomføring og synliggjøring av Norges trygdekoordineringsforpliktelser* (NOU 2021:8) <https://www.regjeringen.no/no/dokumenter/nou-2021-8/id2860696/> accessed 1 May 2025.

[7] *Lov om folketrygd (folketrygdloven)* (LOV-1997-02-28-19).

[8] Sick pay is sometimes referred to as 'sickness benefit' in English. We use the term 'sick pay' in order to distinguish between the national benefit ('sick pay') and the legal term in EU law ('sickness benefit'), which covers all three benefits.

[9] The EEA Agreement (n 3), Article 36.

[10] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1 (hereafter the Social Security Regulation), Article 21(1).

[11] See eg Tarjei Bekkedal, 'On an equal footing. The EFTA Court's ruling in the Norwegian Social Security scandal: Criminal proceedings against N' (2022) 59(1) Common Market Law Review 223; Tarjei Bekkedal, 'The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal' (2020) 7(3) Oslo Law Review 145.

several learning points were highlighted.[12] The Committee's report was entitled 'The blind spot', indicating that almost all parties involved were insufficiently aware of the significance of EU law.[13] From this, one might conclude that the solution to problems of misapplication might be to hire more experts in EU law, such that EU rules are removed from the blind spot and brought into the field of vision. To some extent, this aligns with the Committee's recommendations, which suggested that 'competence in EEA law' should be strengthened within the Ministry, NAV, the National Insurance Court, and the ordinary courts, and that the Ministry must 'thoroughly explain the EEA law of significance for the application of national law, in preparatory works for proposals to amend the National Insurance Act'.[14]

The Minister of Labour and Social Affairs at the time touched on the same point in a presentation detailing three measures aimed at preventing errors of the sort that triggered the social security scandal.[15] One of the three measures was 'increased EEA competence', and he noted that the Ministry had 'already advertised four positions in EEA law to strengthen this competence'.[16] A report written by a cabinet appointed working group, tasked with making suggestions to improve how the ministries worked on EU- and EEA-related matters, pointed out several learning points.[17] Amongst these, the report recommended that 'digital EEA courses' be developed and that 'EEA competence in the ministries should be strengthened' and 'given greater weight in recruitment, both at the caseworker and leadership levels'.[18]

Similarly, one of the main recommendations from the final report by a government appointed commission, which evaluated Norwegian experiences with the EEA Agreement from 2014 to 2024, was that more must be done 'to preserve and further develop EEA competence in the central administration, directorates, county municipalities, and municipalities'.[19]

However, bringing EU law into the field of vision through increased EU competence is hardly sufficient in itself to avoid misapplication of EU rules incorporated via the EEA Agreement. Both the Public Inquiry and other studies showed that EU law was not necessarily a blind spot for all relevant authorities. Between the entry into force of the EEA Agreement in 1994 and 2019 (when the scandal was revealed to the public), the relevant ministry was involved in numerous investigations, procedures, and decisions involving

[12] NOU 2020:9 (n 5).
[13] ibid 24.
[14] ibid 250. Unofficial translation by the authors, as is also the case for all other English quotes from Norwegian documents which have not been translated into English.
[15] Torbjørn Røe Isaksen, 'Den samme feilen må ikke skje på ny. Slik skal vi følge opp EØS-saken' (*Aftenposten*, 17 August 2020) <https://www.aftenposten.no/meninger/kronikk/i/wPMeLL/den-samme-feilen-maa-ikke-skje-paa-ny-slik-skal-vi-foelge-opp-eoes-saken-torbjoern-roee-isaksen> accessed 9 January 2025.
[16] ibid.
[17] Interministerial working group, 'Departementenes EØS-arbeid: Rapport fra en interdepartemental arbeidsgruppe' (2021) <https://www.regjeringen.no/contentassets/66bfc3cfe6564edfb3d0de236aa328cb/departementenes-eos-arbeid.pdf>.
[18] ibid 14.
[19] See, Norwegian Public Commission, *Norge og EØS: Utvikling og erfaringer* (NOU 2024:7) 14 <https://www.regjeringen.no/no/dokumenter/nou-2024-7/id3033576/> accessed 1 May 2025.

EU law, many of which touched upon the misinterpreted and misapplied legal rules.[20]

Another apparent obstacle to the correct application of EU law, besides the lack of relevant competence, was the fact that Norwegian legislation placed NAV at the edge of EU law. That is, the National Insurance Administration (later NAV) occupied a position where their task was to interpret and apply legal norms that, according to the law, flirted with the limits of what was legally permissible under EU law.

In this article, we look at what administrative authorities can learn about how they should act in such situations. We aim to complement the investigations conducted by the Public Inquiry, the government appointed Working Group that suggested measures to improve how the ministries work on EU and EEA related matters, and the report by the Commission evaluating the experiences with the EEA Agreement, with our own analysis of the role that NAV's control system played in making the error as extensive as it became.[21]

Little attention has so far been paid to the administration's role in interpreting and applying legislation that comes so close to the limit of what EU law allows. In this article, we use the Norwegian scandal as a point of departure to analyse what constitutes good governance in cases where domestic regulations flirt with the limits of EU law.[22]

Our examination is based on a review of all publicly available material on the administration's consideration of the implications of EU rules for the requirements of stay in the NIA. We have examined instances where traditional approaches to working with EU rules were not suited to achieving the objective of legally correct decisions. We have analysed the work carried out by the administration to ensure sufficient knowledge of applicable EU rules (including by engaging with the continuous flow of new EU case-law), and the administration's own analytical work in the field of EU law.

Our review of the available materials is presented in the form of a three-part analysis of the administration's work with EU rules, focusing on the administration's approach to monitoring and interpreting relevant EU case law, openness and transparency concerning the administration's analyses of the content of EU rules, and the use of 'wiggle room'[23] and 'litigation risk' to frame how EU law should be applied in Norway.

In Section 2, we provide a specific example in which the significance of EU law for the requirements of stay in the NIA was *not* overlooked by the administration. Rather, the

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[20] See particularly NOU 2020:9 (n 5) Chapter 14. See also the report from the internal audit of NAV, Directorate of Work and Welfare, 'Kartlegging av fakta i EØS-saken' (2019) <https://www.nav.no/_/attachment/download/a2294ca2-348b-49f4-9e15-42544aef1541:809c3790c76e4da1d66fe60c82262dee952ba99c/E%C3%98S-Saken%20Internrevisjons%20rapport.pdf> accessed 9 January 2025; Ingunn Ikdahl and Christoffer C Eriksen, 'Ingen blindsone? Departementets kjennskap til gråsonen' (2020) <https://www.jus.uio.no/om/aktuelt/retten-i-trygdeskandalen/departementetsrolledel1.html> accessed 9 January 2025.

[21] Ingunn Ikdahl and Christoffer C Eriksen, 'NAVs kontrollsystem og trygdeskandalen' (2023) 19(4) Tidsskrift for erstatningsrett, forsikringsrett og trygderett 186.

[22] The term 'good governance' may refer to different meanings, such as the principles in Council of Europe, 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration and the right to good administration' (2007) <https://rm.coe.int/16807096b9> accessed 1 May 2025, or according to the Charter of Fundamental Rights of the European Union [2016] OJ C202/389 Article 41. The recommendations we make in this article are means to achieve a core element of various concepts of good administration according to these European standards, namely that the administration should make legally correct decisions and avoid the misinterpretation of legal rules.

[23] This phenomenon is also described by other terms, such as 'room for manoeuvre' ('*handlingsrom*' in Norwegian).

administration took note of EU law and concluded that the Norwegian rules skimmed the edge of what EU law permitted while remaining just within the realm of the permissible. In Section 3, we go on to clarify what we mean by national rules that test the limits of what EU law allows, why we focus on such rules, and how this pertains to the requirements of stay in the NIA. Subsequently, in Sections 4, 5, and 6, we delve deeper into three recommendations for good administration when dealing with areas of domestic law that flirt with the limits of EU law.

2 AN ILLUSTRATION OF MISSED OPPORTUNITIES

The government's Public Inquiry found that 'the question of the relationship between the requirement of stay in the National Insurance Act and the [SSC Regulations] has been repeatedly raised by the Ministry and the Labour and Welfare Administration since the year 2000'.[24] The Ministry's involvement in cases where the welfare administration's practice was incorrect can be understood as missed opportunities to uncover and correct the erroneous practice. Each of these missed opportunities provides learning opportunities.

One such missed opportunity arose in 2010. On 7 June, the Director of Labour and Welfare sent a letter to the Ministry of Labour about a case where NAV had rejected a claim for unemployment benefits.[25] The rejection was based on the fact that the person did not meet the requirement of stay in Norway under § 4-2 NIA.[26] The National Insurance Court had overturned the decision, reasoning that it was contrary to Regulation 1408/71 to apply the requirement of stay in such a way that the recipient lost the right to the benefit when staying in another EEA country. Thus, the Director of Labour and Welfare sought clarification on whether the practice should be changed. The letter concluded with a question that went beyond the specific benefit at issue:

> If NAV changes the practice of the requirement of stay in the National Insurance Act § 4-2, it should be considered whether this has ripple effects on other benefits, primarily work assessment allowance (WAA) where the starting point [according to § 11-3 NIA] is also that the user must stay in Norway to be entitled to WAA.[27]

The National Insurance Court's decision that had prompted the Director of Labour and Welfare's question concerned a person who had worked in Norway but was residing in another EEA country; it did not involve persons residing in Norway who were on vacation or other temporary stays in other EEA countries. However, in the Ministry's handling of the Director's letter, it appears that the relevant department in the Ministry raised questions about the scope of the decision beyond the specific group of people with which the case was directly concerned. In an internal memorandum, the said department noted that they did 'not rule out the possibility that the National Insurance Court's interpretation in this instance could potentially include all EEA citizens receiving unemployment benefits (including

[24] NOU 2020:9 (n 5) 197.
[25] See, The National Insurance Court, TRR-2009-2265, available at: <https://lovdata.no/pro/#document/TRR/avgjorelse/trr-2009-226>
[26] Letter from Labour and Welfare Administration by the Director of Labour and Welfare to the Ministry of Labour and Social Inclusion, 'Dagpenger – EØS. Kjennelse fra Trygderetten' (7 June 2010) 10/5685. On file with the authors.
[27] ibid 2.

Norwegians)'.[28] On this basis, the department recommended that the Attorney General provide a legal opinion assessing 'the impact this decision could have regarding the general requirement of stay in the National Insurance Act § 4-2'.[29] The Ministry's own notes indicate that the National Insurance Court's decision was understood as potentially affecting the application of the requirement of stay to 'Norwegians who are on vacation in a European country', and others who have been 'residing in Norway'.[30] However, it seems the Ministry was only concerned with unemployment benefits; it does not appear to have considered the potential impact of the National Insurance Court's decision on the application of the requirement of stay for WAA, whether for persons residing in or outside of Norway.

The decision by the National Insurance Court was later brought before the Court of Appeal, which requested an Advisory Opinion from the EFTA Court. The case is now known as E-3/12 *Jonsson*. In March 2013, as returned to in further detail below, the EFTA Court confirmed the 2010 decision by the National Insurance Court. Following the EFTA Court's decision, Norway, represented by the Ministry of Labour, decided to withdraw the lawsuit.[31]

The letter penned by the Director of Labour and Welfare in 2010 is not mentioned in the Public Inquiry Committee's report. However, it clearly illustrates that NAV was walking the tightrope in terms of what EU law allowed, but also that both NAV and the Ministry were aware of this concern.[32] The questions in the Director's letter could have been followed up with a thorough assessment of the potential ripple effects of the National Insurance Court's decision, for WAA in particular. This opportunity to uncover and stop the misapplication well before 2019 was, however, lost.

3 NATIONAL REGULATION AT THE LIMIT OF WHAT IS LEGALLY PERMISSIBLE UNDER EU LAW

3.1 STRATEGIES FOR DESIGNING NATIONAL REGULATION WITHIN THE FRAMEWORK OF EU LAW

[28] Memorandum from the Department of Labour Market in the Ministry of Labour and Social Inclusion to the Minister by the State Secretary and the Permanent Secretary (1 July 2010), regarding the National Insurance Court's decision dated 12 March 2010.

[29] ibid. The Ministry's record of documents suggests that the Attorney General was asked to provide a legal opinion, after which the Ministry decided to bring the case to the Court of Appeal. However, we were not granted access to the assessments of the Attorney General.

[30] See respectively Memorandum (n 28) 2; Letter from the Ministry of Labour and Social Inclusion to the Labour and Welfare Administration (20 October 2010) regarding the National Insurance Court's decision dated 12 March 2010.

[31] See Borgarting Court of Appeal, 10-149956FØR-BORG/03. According to the court decision, the parties reached an out-of-court settlement regarding the legal costs after the state withdrew the case. The court then dismissed the case.

[32] Through other individual cases, the Ministry had become aware that not only were the requirements of stay in the National Insurance Act close to the limit of what was permitted by EU law, but that it was also possible that the requirements were applied in violation of EU law. In 2011, the Social Insurance Court heard a case in which a person residing in Norway was denied sick pay while staying in Spain, see Social Insurance Court, TRR-2011-1098. The insured person then took the case to the Court of Appeal. According to NOU 2020:9 (n 5), NAV reversed the decision and granted sick pay based on 'contact with the Ministry regarding the case, and assistance from the Attorney General's office in preparing the case for the Court of Appeal'. The rationale for the reversal was that the insured person was nevertheless entitled to sick pay under the rules of the four freedoms, see NOU 2020:9 (n 5) 147.

This article focuses on situations where national administrative authorities subject to EU law must interpret and apply national legislation at the edge of what EU law allows. What EU law permits is fundamentally an either/or matter. In this sense, national legislation cannot be more or less at the limit of EU law: Either legislation is within its bounds, or it is not. Nevertheless, it is both possible and appropriate to identify legislation that lies at the limit of what EU law allows. Here we explain how and why we adopt this approach in analysing the Norwegian Social Security Scandal.

When adopting national legislation in areas covered by EU law, various 'adaptation strategies' can be considered to ensure that national administrative authorities remain within the bounds of the latter. In areas covered by the rules on free movement, there are two strategic extremes: One is to design national legislation in accordance with the main obligations to remove restrictions on free movement across borders. The other is to design national legislation that may hinder the exercise of fundamental freedoms or make free movement less attractive, but which nevertheless complies with EU law insofar as it pursues an objective that is in the public interest, is appropriate for ensuring the attainment of that objective and does not go beyond what is necessary to attain that objective (the principle of proportionality).

If the national authorities know the precise content of EU law and the limits it imposes on national regulation, neither of these options poses a greater risk of violating EU rules. In some cases, the content of EU law appears clear and precise to national administrative bodies. In such instances, they may develop measures that patently restrict free movement but which can obviously be justified as proportionate measures to safeguard public interests. This may also be the case where unambiguous provisions exist in secondary EU legislation or specific legal issues have been clarified by the Court of Justice of the European Union (CJEU) or, as the case may be for the three EFTA states party to the EEA Agreement, the EFTA Court.

However, it is not always easy to know with certainty how legal questions should be answered. This is well known in legal philosophy and is exemplified by Ronald Dworkin's imaginary judge Hercules, who has superhuman intellectual capacities and unlimited time at his disposal.[33] Thorough analyses of all the relevant sources can provide a basis for identifying one, and only one, correct answer to a legal question. In practice, however, there is often uncertainty about how legal questions should be resolved until they are addressed by the highest courts.

This also applies to EU law. Even with ample time and the best EU law expertise available, it is challenging to analyse all the relevant legal questions so thoroughly that no doubt about the solution subsists.

It is in situations where the content of EU rules remains vague that the choice of adaptation strategies becomes relevant when considering the authorities' ability to ensure that practices are consistent with EU law. In some cases, designing national legislation based on the EU exception rules may pose little or no risk of violation. This is, for example, the case if freedoms and rights granted by general treaty provisions are restricted through

[33] See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986). Hercules is introduced on page 239.

secondary legislation.[34]

However, the risk of inconsistency with EU law will usually be lower if national legislation simply adheres to the rules on free movement. Where there are no indications that the rules of free movement are restricted through secondary legislation, they are safe to follow. Similarly, in instances where it is unclear whether national law falls within the bounds of justifiable exceptions to the founding treaties of the EU, it will be safer to follow the main rules than to rely on possible exceptions.

Adapting national regulations to the main rules of EU law can be compared to following a marked ski trail in safe terrain. Conversely, when national rules are based on exceptions, in many areas they will stray to the edge of what EU law allows. This can be compared to walking along the edge of a snow cornice; such trails require extra attention.[35]

3.2 THE REQUIREMENT OF STAY IN THE NATIONAL INSURANCE ACT PLACED NAV AT THE EDGE OF EU LAW

Until 2022, the wording of the NIA stipulated that eligibility for sick pay, attendance allowance, and work assessment allowance required that the insured 'stay in Norway'. The requirements of stay in the NIA are examples of national regulation designed contrary to the goal of abolishing restrictions to the free movement of persons, services, and capital.[36] It could be argued that the requirements of stay did not violate the more specific rules on the right to free movement, or that EU law allowed the administration to set limitations on the right to receive a social security benefit during absence from the country, provided such limitations were non-discriminatory.[37] For example, one could claim, as the Norwegian government indeed did, that conditions for prior authorisation of stays abroad were justified for reasons of general public interest. Amongst these reasons, the government listed integration of excluded persons from the labour market and promotion of employment, monitoring compliance, prevention of abuse, the risk that the financial balance of the social security system would be undermined, and rules that were easily managed and supervised. They argued that national legislation was suitable to attain these objectives and did not go beyond what was necessary in order to attain them.[38] However, for anyone familiar with EU law, it must have been uncertain whether such arguments would succeed. The NIA was thus designed in such a way that the trail was close to the edge.

Formally, it was clear that the provisions of the law should not be applied in violation of EU law. Firstly, the Norwegian EEA Act stipulates that the Main Part of the EEA Agreement (including a provision which is in substance identical to Article 56 TFEU on the

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[34] Secondary legislation may oblige national authorities to restrict freedoms and rights granted by general treaty provisions, see e.g. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, Article 3(1).

[35] Christoffer C Eriksen and Ingunn Ikdahl, 'Tolkningstvil og tillit' (2020) 30(2) Stat og Styring 42.

[36] See eg The EEA Agreement (n 3) preamble para 6; TFEU (n 3) Article 26(2).

[37] See Interministerial working group, 'Eksport av velferdsytelser: En gjennomgang av problemstillinger knyttet til eksport av velferdsytelser' (2014) 35 <https://vgc.no/pdf/1fc8ab.pdf> accessed 1 May 2025.

[38] This was also asserted by Norwegian authorities after 2019, see e.g. Case E-8/20 *Criminal Proceedings against N* [2021] EFTA Court judgement of 5 May 2021, para 87; The EFTA Court, 'E-8/20-19 Report for the hearing in Case E-8/20' (2020), paras 21–22. The report is available at: <https://eftacourt.int/download/8-20-report-for-the-hearing/?wpdmdl=6920> accessed 1 May 2025.

free movement of services) applies as Norwegian law, with precedence over other Norwegian legislation.[39] Secondly, § 1-3 NIA stated that the King (i.e. the government) could enter into agreements with other countries that could make exceptions to the provisions of the law. Based on this provision, a statutory instrument determined that the SSC Regulations applied as Norwegian law and should take precedence over the provisions of the NIA in case of conflict.[40] Therefore, the requirements of stay in the NIA had to yield to the extent that they conflicted with EU law.

It had long been recognised that the requirements of stay established by the NIA were, in some cases, in conflict with the SSC Regulations. Thus, the requirements could not always be applied literally.[41] However, it was left to NAV to determine the cases in which the law should yield in order to comply with EU rules. The law did not allow for the requirements of stay (or associated conditions, such as the requirement of prior authorisation for stays abroad) to be relaxed beyond what was necessary to comply with EU law. To the extent that administrative circulars and practices addressed requirements of stay (or other measures intended to ensure that recipients of benefits stayed in Norway), these had to be drafted such that EU exception rules were respected. This is where NAV erred. In applying the requirements of stay contained in the NIA, NAV circulars and practices went further than what EU law allowed.

Based on the Advisory Opinion of the EFTA Court, the Norwegian Supreme Court has now established that applying the NIA's requirements of stay violated the obligation to remove restrictions on the free movement of services from the time the EEA Agreement entered into force in 1994. The requirement of stay not only constituted a restriction on the right to travel to another EEA state to receive a service there.[42] The requirement also went further than necessary to achieve the purpose of preventing abuse and ensuring that recipients of benefits fulfilled the requisite conditions.[43] The same applied to the requirement that travel to other EEA countries be approved before the trip was undertaken.[44]

Furthermore, the Norwegian Supreme Court established that denying the work assessment allowance on the grounds of a stay in another EEA state violated Articles 21 and 7 of Regulation 883/2004, which had entered into force in Norwegian law on 1 June 2012.[45] Finally, it was not permitted to have a scheme where exceptions to the stay requirements required prior authorisation,[46] and could only be granted for up to four weeks a year.[47]

The decisions of the EFTA Court and the Norwegian Supreme Court demonstrate that NAV applied the wording of the NIA beyond what could be justified.[48] The legislature's choice of adaptation strategy meant that NAV could not apply the wording of the NIA in cases involving stays in other EEA states, thus placing NAV on the edge of the EU legal cornice. This increased the risk of errors, with potentially significant consequences for a large

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[39] *Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det euopeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven)* (LOV-2014-04-11-11) (hereafter the EEA Act), section 1 and 2.
[40] *Forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen* (FOR-2012-06-22-585) (revoked).
[41] See e.g. the circular quoted in NOU 2020:9 (n 5) 63.
[42] HR-2021-1453-S (n 1) para 168.
[43] ibid para 176.
[44] ibid paras 168 and 176.
[45] ibid para 140.
[46] ibid para 141.
[47] ibid para 135.
[48] See *N* (n 38); HR-2021-1453-S (n 1).

number of people.

When drawing lessons from the social security scandal, something essential will be lost if one disregards the fact that the NIA was designed so that NAV's practice had to navigate the very edge of what EU law allowed. When moving along snow cornices, it is necessary to check the map and terrain more frequently and carefully than when following marked trails in safe terrain. In situations where domestic law places administrative authorities at the edge of EU rules, the importance of good governance is heightened. The Norwegian social security scandal can provide lessons as to what this entails. Sections 4–6 describe three such lessons.

4 ANALYSIS OF POTENTIAL 'RIPPLE EFFECTS' FROM LEGAL DEVELOPMENTS IN THE EU AND EEA

4.1 NAV'S MONITORING OF LEGAL DEVELOPMENTS

After the social security scandal, the Public Inquiry Committee's report highlighted the need for NAV to follow legal developments in the practices of the CJEU and EFTA court more closely.[49] Similarly, in 2024, the government appointed Commission which reviewed Norwegian experience with the EEA Agreement emphasised that the 'functions of clarifying and developing the law held by both the EFTA Court and the EU Court means that Norwegian authorities should have good knowledge of decisions made by these courts'.[50] However, neither report goes into detail about how to do this in areas where Norwegian legislation runs close to the limit of what is permissible under EU law.

Efforts to monitor legal developments can take various forms. Here, we focus on the ripple effects of decisions made by the EU and EFTA courts. By ripple effects, we mean the ways in which new decisions interpreting and applying certain provisions or principles can signal developments or clarifications of the correct legal interpretation of related yet distinct provisions and principles.[51]

To examine the question of what the Norwegian state can learn from the way the authorities have monitored legal developments in the CJEU and the EFTA Court, we look here at the Norwegian authorities' response to one specific case related to the social security scandal: the *Jonsson* case.[52]

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[49] NOU 2020:9 (n 5) 119–120.

[50] See NOU 2024:7 (n 19) 94.

[51] This seems to align with what the report on improvements to how ministries work on EU- and EEA-related matters refers to as 'case law of horizontal significance'. As the report points out, a decision related to one field can also have implications in other areas: 'This can be, for example, because the case concerns cross-sectoral rules, either in the main part of the EEA Agreement or in secondary legislation, or because it raises fundamental questions'. See Interministerial working group, 'Departementenes EØS-arbeid: Rapport fra en interdepartemental arbeidsgruppe' (2021) 104 <https://www.regjeringen.no/contentassets/66bfc3cfe6564edfb3d0de236aa328cb/departementenes-eos-arbeid.pdf> accessed 1 May 2025. However, the report does not provide specific examples of what kind of analyses may be necessary to map such cases or what the consequences of failing to conduct such analyses might be.

[52] We have examined the ministries' follow-up of other cases, such as Case C-430/15 *Secretary of State for Work and Pensions v Tolley* EU:C:2017:74, where the Norwegian State was not a party to the case, but submitted a statement. This presentation is limited to the *Jonsson* case (E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep 136), because it best illustrates what the administration can do differently in following up on relevant EU case law.

4.2 THE *JONSSON* CASE

As already mentioned, in the *Jonsson* case, the EFTA Court dealt with the question of whether the requirement of stay for unemployment benefits in the NIA violated the provisions concerning unemployment benefits in Regulation 1408/71. This regulation was incorporated into the EEA Agreement and applied in Norway from the time the EEA Agreement entered into force in 1994, until Regulation 883/2004 replaced it (in an EEA context) in 2012. Because the case involved a situation where the jobseeker was residing outside of Norway, the legal issues were different from those central to the social security scandal. However, the EFTA Court's reasoning included statements about requirements of stay that extended beyond the specific case at hand.

Article 71(1)(b) of Regulation 1408/71 on unemployment benefits stipulated that, for certain groups of people, it was prohibited to require that they reside in Norway (i.e. that Norway be their place of habitual residence). The Norwegian state accepted this, but argued that the right to unemployment benefits could still be conditional on physical presence in Norway.

The EFTA Court rejected this argument. It stated that making unemployment benefits dependent on physical presence in Norway made it 'unduly difficult for an unemployed person to seek employment opportunities in another EEA State'.[53] The Court held that in 'this context, a requirement of actual presence for entitlement to unemployment benefits is in fact more onerous than a residence requirement'.[54]

4.3 THE SIGNIFICANCE OF THE *JONSSON* CASE FOR THE INTERPRETATION OF REGULATION 883/2004

Read in isolation, the EFTA Court's decision only had significance for the interpretation of Regulation 1408/71 and its provisions on unemployment benefits. By the time it was delivered in 2013, Regulation 1408/71 had been repealed and replaced by Regulation 883/2004. This might suggest that the significance of the decision for later cases was limited.[55]

However, there were factors indicating that the decision in the *Jonsson* case had significance for the interpretation of provisions in the new Regulation 883/2004. When the EFTA Court concluded that Article 71(1)(b) of Regulation 1408/71 prevented Norway from requiring that individuals stay in the country to be entitled to Norwegian benefits, a new and more general interpretive question arose: Should the prohibition of residence requirements, in general, also be interpreted as prohibiting requirements of stay? As we will see, this question was essential to the interpretation of a central provision (Article 7) in the new Regulation 883/2004.

The EFTA Court did not address this question directly in the *Jonsson* case. However, parts of the reasoning were sufficiently general and principled to have some transferability.

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[53] *Jonsson* (n 52) para 72.
[54] ibid.
[55] The central provision in *Jonsson*, Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2, Article 71(1)(b), was not retained in the regulation's new chapter on unemployment benefits, see further, Norwegian Legal Commission, NOU 2021:8 (n 6) 53–54.

The consideration that requirements of stay would make it 'unduly difficult for an unemployed person to seek employment opportunities in another EEA State' applies regardless of whether a person is residing in Norway or another EEA country. And the rationale that requirements of stay in 'this context [would be] more onerous than a residence requirement' also had transferability to requirements of stay for other benefits. The burden of a requirement of physical presence does not only occur in situations where a person must reside somewhere other than their place of residence to be entitled to benefits. It is also onerous because requirements of stay undermine a person's ability to seek employment or perform other activities protected by EU law in other EEA countries, regardless of where he/she resides.

Based on such an analysis, one could already assume, when the EFTA Court's decision in the *Jonsson* case was delivered in 2013, that the court's interpretation of the prohibition of residence requirements in Regulation 1408/71 was relevant for the interpretation of the prohibition of residence requirements under the new Regulation 883/2004. Thus, the *Jonsson* case could shed light on the interpretation of one of the entirely new provisions in Regulation 883/2004: The general prohibition of residence requirements in Article 7.[56] The article states that, unless specific provisions say otherwise, no national social security scheme may suspend or reduce cash benefits on the grounds that the insured person or their family members reside in another EEA country. The provision applies not only to those receiving benefits from one country's social security scheme while residing in another country (as was the situation in *Jonsson*), but also to those who have earned social security rights in the country where they reside and stand to lose those benefits if they travel to another country. In light of the EFTA Court's findings in 2013 about the burden of presence requirements, one might legitimately ask whether Article 7 should have been interpreted as meaning that the right to social security benefits was protected not only for persons residing in a country other than the country where they have social security rights, but also for persons who – for shorter or longer periods – stay in EEA countries other than that where they have social security rights, regardless of where they reside.

Other provisions of Regulation 883/2004 also gave reason to believe that Article 7 would have special significance for cash benefits in case of sickness, such as Norwegian sick pay, WAA, and attendance allowances. This is because the new Regulation not only introduced a general prohibition of residence requirements, but also repealed several of the specific rules in Regulation 1408/71 concerning the right to receive benefits in case of illness during stays in other countries. Article 21 of the new Regulation 883/2004 stated that one had the right to receive cash benefits in case of illness during stays in other countries, in accordance with the legislation applicable to the relevant social security scheme. Unemployment benefits were the exception here. Regulation 883/2004 set out several special rules for receiving unemployment benefits during stays in other countries: Presence requirements for unemployment benefits for persons residing in Norway had to be assessed against other, more specific provisions.[57] Although the *Jonsson* case concerned the

[56] Regulation 1408/71 (n 55) Article 10 also prohibited residence requirements, but this prohibition only applied to certain benefits, such as benefits for old age and benefits for survivors of work accidents, etc.
[57] See Case E-13/20 *O v Arbeids- og velferdsdirektoratet* [2021] EFTA Court judgement of 30 June 2021; Case E-15/20 *Criminal Proceedings Against P* [2021] EFTA Court judgement of 30 June 2021; The Norwegian Supreme Court, HR-2023-301-A.

interpretation of the repealed Regulation 1408/71's provisions on unemployment benefits, paradoxically, there was reason to believe that it would be relevant to the interpretation of the new Regulation's provisions on benefits in case of illness.

However, we have not found any evidence that Norwegian authorities conducted specific assessments of the right to maintain presence requirements for recipients of benefits other than unemployment benefits in the months following the *Jonsson* decision. Thus, it appears that Norwegian authorities, in responding to the case, did not reconsider their interpretation of the new Article 7. Even after the EFTA Court's decision in the *Jonsson* case, NAV maintained that as long as the beneficiary's residence was in Norway, entitlement to cash benefits in case of illness depended on presence in Norway.

4.4 THE RIPPLE EFFECTS OF THE JONSSON CASE WERE ANALYSED – EVENTUALLY

The EFTA Court's decision was delivered shortly before an escalation in Norwegian policy efforts to limit the export of social security benefits. When the Solberg government took office in the Autumn of 2013, one of its stated intentions was that it would 'consider measures that will limit and bring to a halt the export of social security benefits, but that remain within the framework of Norway's binding international agreements'.[58] To implement this, the government established an interministerial working group in March 2014 to assess 'what limitations EEA rules place on Norway's wiggle room in introducing measures that can limit the export of Norwegian welfare benefits to other EEA countries'.[59] The working group presented its assessment in Autumn 2014, in a report entitled 'Export of Welfare Benefits', but the report was not made public at this time, and the government has later refused to grant access to it.

The working group analysed the limitations imposed by EU law with regard to the requirement that social security beneficiaries (including recipients of sick pay, attendance allowance, and WAA) stay in Norway. When assessing whether such requirements of stay could be imposed, not only for unemployment benefits but also for other benefits, the working group relied upon the *Jonsson* case. Thus, the ripple effects of the case were analysed. The content of the report and how the *Jonsson* case was used will be discussed further in Section 5 below.

When the social security scandal became known to the public, the implications of the *Jonsson* case for the interpretation of Article 7 of Regulation 883/2004 were again discussed. In 2021, as the EFTA Court had established in the *Jonsson* case, both the EFTA Court and the Norwegian Supreme Court noted that a requirement that excludes the right to benefits during short stays abroad is significantly more intrusive than a residence requirement.[60] In the case concerning a person residing in Norway, who had received WAA while staying in another EEA country, the Supreme Court justified its interpretation of Article 7 by quoting the EFTA Court:

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[58] Office of the Prime Minister, 'Political platform for a government formed by the Conservative Party and the Progress Party' (2013) 6 <https://www.regjeringen.no/en/historical-archive/solbergs-government/andre-dokumenter/smk/2013/political-platform/id743014/> accessed 9 January 2025.
[59] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 7.
[60] *N* (n 38) para 139; HR-2021-1453-S (n 1) paras 130–131.

> The Court notes that, in circumstances such as those of the main proceedings, a presence requirement, which excludes entitlement to sickness benefits during short stays abroad, is in fact significantly more restrictive than a residence requirement (see *Stig Arne Jonsson*, cited above, paragraphs 69 to 74). Article 7 provides that EEA States cannot make benefits conditional on residence. It follows that an EEA State cannot condition such benefits on continuous physical presence either.[61]

The reasoning in *Jonsson* was thus understood to mean that Article 7 of Regulation 883/2004 should not be interpreted in a narrow and literal manner. Precisely because requirements of continuous stay are more intrusive than residence requirements, a provision that prohibits residence requirements in the country providing social security benefits must also be interpreted as prohibiting requirements that recipients remain physically in the country.

4.5 SUMMARY

Although the *Jonsson* case involved unemployment benefits rather than sickness benefits, the EFTA Court's reasoning still had ripple effects for the latter. The judgment provided arguments suggesting that where residence requirements are illegal, requirements of stay are also problematic. In order to understand the implications of these arguments for requirements of stay for persons residing in the country where they have social security rights, however, this would require assessments of the ripple effects of the reasoning. This was not done when *Jonsson* was decided. The case illustrates the importance of analysing such ripple effects when national rules are set at the limit of what EU law allows. If one focuses only on the specific legal questions being resolved, without looking for possible ripple effects, court decisions in individual cases will appear to have only limited significance. To reduce the permanent risk of wrongful application of rules that lie at the limit of what EU law allows, attention to new case law from the CJEU and the EFTA Court should not be limited to the specific legal questions addressed by them. Attention should instead be directed to potential ripple effects of their decisions. This is a challenging task, but one which is necessary if the goal is to avoid misapplication of rules that lie at the limit of what EU law allows.

5 SECRECY OF LEGAL OPINIONS, MEMOS, AND REPORTS

5.1 LEGAL ADVICE AND REPORTS ON EU/EEA LAW PROVIDED TO THE GOVERNMENT AND MINISTRIES

Where national regulatory schemes are at the edge of what EU law permits, governments may mitigate the risk of wrongful practices by ensuring transparency when assessing the requirements of EU law as applicable in Norway through the EEA Agreement. Transparent legal assessments are especially important when legislative techniques make it difficult to see the significance of EU law for the application of national law. In such cases, the edge may become invisible.

The Public Inquiry Committee's report on the social security scandal emphasised that

[61] HR-2021-1453-S (n 1) para 130.

publicly available preparatory works to new legislation should include assessments of the relationship between the proposed legislation and EU law. If proposed legislation raises EU legal issues, these should be mentioned in the preparatory works, even if the solution is unclear.[62] Similarly, in 2024, the Commission appointed to evaluate experiences with the EEA Agreement also advocated for a certain level of transparency, stating that it will 'be easier to defend maintaining a national regulation where any uncertainty is made known to the public'.[63]

However, the Public Inquiry Committee was silent concerning the need to make legal opinions and other assessments of EU law that do not lead to legislative proposals available to the public. Nor was this explicitly mentioned by the Commission evaluating experiences with the EEA Agreement. Legal opinions and other assessments that do not lead to legislative proposals are drafted in various situations: In work on specific legislative and budget proposals that are later postponed or shelved, in preparatory work for parliamentary reports and policy development, and in work aimed at clarifying the state of current law following questions from subordinate agencies or in connection with ongoing legal cases.

Clearly, the administration needs to be able to work on cases, including EU legal investigations, without all parts of the work being shared with the public. Public access to all documents prepared by the administration for its own work can harm internal processes. This is acknowledged by § 14 of the Norwegian Freedom of Information Act, based on the consideration that the administration needs an internal sphere where information can be kept confidential.[64] Indeed, the government argued along these lines in its refusals to grant access to the 2014 report on the export of welfare benefits, suggesting that access could

> affect how advice and assessments are prepared and communicated internally, in an unfortunate way. It could, among other things, lead to reluctance to provide candid advice and assessments from the civil service to the political leadership.[65]

As part of our investigation into the omissions that played a significant role in allowing the misapplication of EU law to continue for so long, we reviewed all legal opinions and assessments of requirements of residence or stay from 1992 to 2019 that we have had access to.[66] The material shows that the significance of EU law for Norwegian social security rules was presented to or assessed by the ministries on several occasions, including in connection with the conclusion of the EEA Agreement in 1992,[67] the expansion of the EU in 2004,[68]

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[62] NOU 2020:9 (n 5) 107–109, 249–250.
[63] NOU 2024:7 (n 19) 97.
[64] *Lov om rett til innsyn i dokument i offentleg verksemd (offentleglova)* (LOV-2006-05-19-16).
[65] The Council of State, 'Kongelig Resolusjon – 6/2021' (2021) <https://www.jus.uio.no/om/aktuelt/retten-i-trygdeskandalen/kgl-res-6-2021.pdf> accessed 1 May 2025.
[66] We have worked systematically to identify legal reports and requested access to hundreds of documents. We were granted access to several, but also denied access to some documents that may contain legal assessments, including the 2014 report and several documents prepared by the Attorney General.
[67] Ministry of Foreign Affairs, 'St.prp. nr. 100 (1991–92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS), undertegnet i Oporto 2. mai 1992' (1992) 258–264 <https://www.regjeringen.no/no/dokumenter/stprp100_1991/id627296/> accessed 1 May 2025.
[68] Two reports from interministerial committees contain considerations of the role of EU law for social security schemes, see Ministry of Local Government and Regional Development, 'EU-utvidelsen, arbeidstakere og velferdsordninger: Rapport fra tverrdepartemental arbeidsgruppe' (2003) <https://www.regjeringen.no/globalassets/upload/kilde/krd/rap/2003/0018/ddd/pdfv/184339-

and by the commission appointed by the government to assess the impact of migration on Norwegian welfare (the Brochmann Commission) in 2011.[69]

Yet amongst all the materials that we had access to, the 2014 report on the export of welfare benefits is the most thorough legal assessment of the implications of EU law for the NIA's requirement of actual stay in Norway as a condition for entitlement to sickness benefits. This report was in part a legal opinion on the implications of EU law, and in part legal advice on various proposals for domestic policy. It was commissioned in 2014 by the then newly elected conservative government as part of its comprehensive political effort to reduce the export of social security benefits. However, the legal opinions and assessments in the 2014 report were not shared with the public. Nor were they shared with NAV, the prosecution authority, parliament, lawyers or social security beneficiaries.

5.2 THE CONTENT AND MANDATE OF THE 2014 REPORT

The government-appointed working group that prepared the 2014 report consisted of 13 members from various Norwegian ministries, including six people from the Ministry of Labour and Social Affairs and two lawyers from the Attorney General's Office. The existence of the report was first made publicly known in August 2020, when it was mentioned in the Public Inquiry Committee's report. Despite several requests for access from private individuals, and the fact that the Parliament's Standing Committee on Scrutiny and Constitutional Affairs repeatedly requested access to it as a part of its investigations into the causes of the scandal, the report is still not publicly available in its entirety.[70] However, parts of the report became known to some of the victims of the misapplication of EU law in connection with a lawsuit they filed against the state claiming compensation. As part of the case preparation, on 1 November 2022 the state, represented by the Ministry of Labour and Inclusion, submitted parts of the report in a procedural document.[71] These parts of the report were then published by the Norwegian newspaper *Aftenposten* some days later.[72]

The published parts of the report show that it is extensive – about 100 pages, in addition to two appendices. The published content further indicates that the main issue was 'what wiggle room national states have in their obligation to follow EU law with regard to making changes and adaptations to limit the export of social security benefits'.[73] Chapter 3 was entitled 'General discussion on the EEA Legal Wiggle Room', while Chapter 4 discussed whether the government had the wiggle room to impose various types of requirements on

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euutvidelsen.pdf> accessed 1 May 2025; Ministry of Local Government and Regional Development, 'EØS-utvidelsen og velferdsordninger: Oppfølgingsrapport fra en tverrdepartemental arbeidsgruppe' (2004) <https://www.regjeringen.no/globalassets/upload/kilde/krd/rap/2004/0012/ddd/pdfv/199393-februar-rapporten.pdf> accessed 1 May 2025.

[69] Norwegian Public Commission, *Velferd og migrasjon – Den norske modellens fremtid* (NOU 2011:7) 112 – 160, <https://www.regjeringen.no/no/dokumenter/nou-2011-07/id642496/> accessed 1 May 2025.

[70] The report is exempted from public disclosure by the Ministry of Labour and Inclusion because it is considered an internal document under the *Offentleglova* (n 64) (the Norwegian Freedom of Information Act), s 14. Despite appealing the exemption, the Ministry's decision was upheld, see The Council of State, 'Kongelig Resolusjon – 6/2021' (n 65).

[71] After the report was partially released, a dispute arose regarding access to the entire report, see Oslo District Court (21 December 2022); Borgarting Court of Appeal (3 February 2023).

[72] See Aftenposten <https://mm.aftenposten.no/2022/11/pdf/B001_Eksport_av_trygdeytelser__2014-rapporten__med_vedlegg_-_sladdet.pdf> accessed 10 January 2025.

[73] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 19.

recipients of social security benefits, including separate subchapters on both residence requirements and requirements of stay in Norway. Chapters 5–15 discussed possible changes and adaptations of the rules for a wide range of benefits, including sick pay (9), attendance allowance (10), and WAA (11).

The mandate for the working group specifically referred to recipients of benefits who were residing in another EEA country. This has contributed to doubts about the report's relevance to the social security scandal, where actual presence – rather than residence – outside of Norway were the problem. In a hearing before the Parliament's Standing Committee on Scrutiny and Constitutional Affairs, the head of the Public Inquiry Committee, has given the impression that this mandate meant that the report was not relevant to the social security scandal: '[T]he mandate for this report concerned payments to persons residing abroad […]. So it does not fall within the issue raised by the NAV case'.[74] In the hearing, the head of the Inquiry Committee elaborated, suggesting that the report dealt with 'topics that are outside the NAV case'. When asked if the report assessed anything outside of its mandate, he stated that '[i]t does not'.[75]

However, the published parts of the 2014 report provide a more nuanced picture. Part of the report explicitly addresses the issue raised by the social security scandal, namely the requirements of stay in Norway, which primarily affect people residing in Norway.[76] In addition, the legal sources the report is based on also suggest that it is relevant for those residing in Norway. For example, in the report, the working group draws on case law from the CJEU on the application of the SSC Regulations' provisions to persons residing in the country where they have social security rights,[77] and not just case law on persons residing in another country. The analyses of the ability to apply requirements of stay are not explicitly limited to persons residing outside Norway. The assessments appear to apply regardless of where the affected persons reside, so what the report says about requirements of stay can be read as also being relevant for persons residing in Norway.

5.3 STAY VS RESIDENCE: THE 2014 REPORT'S ANALYSIS OF ARTICLE 7 OF REGULATION 883/2004

In the aftermath of the social security scandal, it is particularly interesting that the report not only rejected the possibility of imposing *residence* requirements in Norway (cf Article 7), it also largely rejected the possibility of imposing requirements of actual *stay* in Norway as a condition for entitlement to sickness benefits. The report substantiates this position by analysing the relationship between residence requirements and requirements of stay. The

[74] Standing Committee on Scrutiny and Constitutional Affairs, 'Innst. 278 S (2020–2021) Innstilling fra kontroll- og konstitusjonskomiteen om Redegjørelse gitt i Stortinget 13. oktober 2020 av arbeids- og sosialministeren om Granskningsutvalgets rapport om EØS-saken, NOU 2020: 9' (2020) <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2020-2021/inns-202021-278s.pdf>, Appendix 7, 'Referat fra åpen høring i kontroll- og konstitusjonskomitéen om Redegjørelse av arbeids- og sosialministeren om Granskingsutvalgets rapport om EØS-saken, NOU 2020: 9' (2020) 5 <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2020-2021/inns-202021-278-vedlegg.pdf> accessed 1 May 2025.

[75] ibid 8.

[76] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 35.

[77] See eg references in the report made to Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* EU:C:2008:187 paras 21 and 27.

working group writes:

> The practice of the EU Court and the EFTA Court may indicate that a requirement of actual presence in Norway should not always be equated with a requirement of residence in Norway and that there may, in principle, be some wiggle room based on the principle of equal treatment and [EU] primary law. On the other hand, the group assumes that in most cases it is unrealistic to succeed with such an argument. This applies to both requirements of prior stay and requirements of continuing stay in the country to receive a benefit there.[78]

The working group found it 'unrealistic to succeed with' an argument that benefits can only be granted during periods when the person actually stays in Norway so that periods of stay in another country exclude rights to benefits. The reasoning is elaborated a paragraph further down. Here it states that it will generally be 'difficult to justify' a requirement of stay in Norway to be entitled to a benefit:

> If a strict requirement for continuous stay is imposed, for example, such that there is a requirement for stay throughout the period the benefit is paid, such a requirement may be considered a residence requirement that is prohibited under, among other things, Regulation Article 7.[79]

As mentioned above, the wording of Article 7 of Regulation 883/2004 prohibits social security benefits from being suspended or reduced because people reside in or move to another EEA state. In its presentation of this prohibition, the working group also refers to the EFTA Court's decision in the then relatively recent *Jonsson* case, decided in 2013. It reminds the reader that the Court had established that the requirement of actual stay in question was not a 'residence requirement that would have been directly prohibited under the [SSC Regulations], but it was a requirement that, in the EFTA Court's view, was at least as intrusive. It could not be justified under EEA law'.[80]

Although the working group's reasoning was not known to the public in 2021, the same reasoning was relied on by the EFTA Court in case E-8/20. Although case E-8/20 concerned a person residing in Norway (and thus differed from the *Jonsson* case), the EFTA Court referred to the latter as justification for interpreting Article 7 of Regulation 883/2004 as prohibiting the suspension of benefits because the recipient resides in another EEA country. One could therefore say that the EFTA Court in 2021 concurred with the 2014 working group on the significance of Article 7 for requirements of stay. This illustrates the relevance of the 2014 report's arguments and reasoning for cases concerning people residing in Norway. However, there is a difference between the 2014 report and the EFTA Court's decision: The report's conclusions were kept secret, whilst the EFTA Court's judgment in 2021 was made public.

The 2014 report also contained some comments that were explicitly aimed at the core of the social security scandal, namely the impact of requirements of stay in Norway on people who reside in Norway. The report states:

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[78] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 34.
[79] ibid.
[80] ibid.

> A special aspect of the requirement for actual stay in Norway concerns cases of absence from the country as a basis for the loss of a benefit, in practice, absence due to longer vacation stays or other stays abroad. The working group assumes that EEA law gives states relatively great freedom to set such limitations on the right to receive a social security benefit during absence from the country, provided that the regulation is designed in a non-discriminatory manner. However, the group assumes that a tightening here will primarily affect those who have membership in the social security system as residents of Norway and that it therefore will not be a good measure to reduce the export of social security benefits.[81]

The different arguments found in this paragraph are somewhat difficult to reconcile. On the one hand, states have 'relatively great freedom' to set limitations. On the other hand, limitations must be non-discriminatory. However, regardless of the lack of clarity on the specifics of legal conditions, this paragraph demonstrates awareness that national regulations, which require residents in Norway to stay in the country in order to receive social security benefits, were close to the edge.

5.4 WHAT HAPPENED TO THE 2014 REPORT?

The thorough assessments in the 2014 report were not shared openly. Unlike the interministerial reports with EU legal assessments of social security schemes from 2003 and 2004 mentioned in Section 5.1, this report was not published on the ministries' websites. There is also no information indicating that the report was shared with subordinate agencies, such as NAV, or with the National Insurance Court, the prosecution authority, or the courts.

However, several ministries were represented in the working group, and the internal documents archived on the case indicate that several ministers in the Solberg government were invited to a briefing on the report.[82] The report was part of the groundwork for the parliamentary report on Export of Norwegian Welfare Benefits.[83] In the general description of the significance of EU law, it was pointed out that the principle of exportability (Article 7) prevented the imposition of conditions that would require recipients of benefits to reside in Norway.[84] The fact that the working group had argued that requirements of continuous stay in Norway could be equated with residence requirements, however, was not mentioned. The report's specific discussion of the rules on short-term benefits (including the benefits involved in the social security scandal) similarly mentions the prohibition against stopping

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[81] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 35.

[82] Ministry of Labour and Social Affairs, 'Meld. St. 40 (2016–2017) Eksport av norske velferdsytelser' (2017) <https://www.regjeringen.no/no/dokumenter/meld.-st.-40-20162017/id2556627/> accessed 1 May 2025. According to the public service eInnsyn, case no. 2014/1600 *Eksport av velferdsytelser* include a record of a document with the title 'Memo regarding invitation to a meeting for several ministers regarding a follow-up of a report' ['Notat vedr. invitasjon til møte for div. statsråder som oppfølging av rapport'], 17 November 2014. Our request for access to this document was denied. The public service link to the document is available here: <https://www.einnsyn.no/saksmappe?id=http%3A%2F%2Fdata.einnsyn.no%2Fnoark4%2FSaksmappe--983887457--1600--2014&jid=http%3A%2F%2Fdata.einnsyn.no%2Fnoark4%2FJournalpost--983887457--2014--1600--7--2014> accessed 1 May 2025.

[83] See also statements by the Head of the Inquiry Committee, in Appendix 7 (n 74) 5.

[84] Ministry of Labour and Social Affairs, 'Meld. St. 40 (2016–2017) Eksport av norske velferdsytelser' (n 82) 15–17.

benefits due to residence abroad without commenting that this has implications for requirements of stay.[85] In contrast, requirements of stay related to several different benefits were discussed in more detail in Chapter 6 of the report, which described the recent tightening of the requirement of stay in Norway to receive attendance allowance.[86] Here, EU rules were not mentioned at all.

To provide an accurate picture of the legal situation, it would have been necessary for the parliamentary report to state that stay requirements could be considered equivalent to residence requirements, as indicated in the 2014 report. This should have been included both in the report's discussion of the prohibition under EU law of residence requirements, and in the presentation of the tightening of national requirements of stay, but it was not mentioned in either. The connection between requirements of stay and residence requirements – identified in the 2014 report – thus remained invisible to Parliament and to other readers of the parliamentary report in 2017.

The assessments made by the interministerial working group in 2014 concerning the significance of EU rules for requirements of stay turned out to be both more thorough and more accurate than the assessments made by NAV, the prosecution authorities and the courts.[87] It is therefore paradoxical that this report's analyses, carried out on behalf of the government, were not shared openly.

5.5 CONSEQUENCES OF SECRECY: THE 2014 REPORT

As many people have experienced at first hand, NAV, the National Insurance Court, the prosecution authorities, and the courts enforced a requirement of stay to receive sickness benefits both before and after 2014. Moreover, around 2014, NAV's control unit actively and systematically searched for violations of stay requirements,[88] and these violations were met with both civil repayment claims and criminal prosecution of cases referred to the prosecution authorities.

However, the fact that a working group in 2014 had assessed the requirement to be physically present in Norway to receive social security benefits against specific EU legal provisions was apparently unknown outside the ministries and government. The assessment constituted new knowledge, particularly in its analysis of the relationship to Article 7 of Regulation 883/2004 and its statements about the consequences for persons residing in Norway. Asking what impact this knowledge might have had if it been shared in 2014 would require a counterfactual history. However, statements from some of the relevant actors involved in the practice and enforcement of requirements of stay can shed light on the potential significance of their lack of knowledge of the report's assessments.

In January 2020, during the first hearing on the social security scandal, the Director of

[85] Ministry of Labour and Social Affairs, 'Meld. St. 40 (2016–2017) Eksport av norske velferdsytelser' (n 82) 7, 20.
[86] ibid 48.
[87] It appears that the report did not comment on all the issues that later became central to the EFTA Court and the Supreme Court cases on the malpractice in question. This applies to the Social Security Regulation (n 10) Article 21, the rules on freedom of service in the EEA Agreement (n 3) Article 36 and the issue of prior authorisations. However, the conclusion and premises on which the working group was based stood firm in 2014, as they do today, in 2025.
[88] Ingunn Ikdahl and Christoffer C. Eriksen, 'NAVs kontrollsystem og trygdeskandalen' (n 21) 186–230.

Public Prosecutions stated the following to the Committee on Scrutiny and Constitutional Affairs:

> Already during the press conference on October 28, last year, I noted that the prosecution authority would very much have liked to have been informed earlier about the doubt that spread within the NAV system in their reports about whether their legal application was correct […] [I] now insist that that information to us would, almost regardless of the timing, have triggered a duty to act and a duty to respond from our office – as illustrated by what we did on October 17, [2019], when we had something concrete to work with on the same day.[89]

At this point, it seems that the existence of the 2014 report was not known to the Director of Public Prosecutions or the Parliament's Committee on Scrutiny and Constitutional Affairs.

The NAV Director also pointed out that the unanimous support for their interpretation – from the legal text, lawyers, the National Insurance Court, and the Court of Appeal – contributed to NAV not following up on internal questions about EU law.[90] She stated:

> In this case, our practice had been confirmed year after year after year. That is part of this large, collective misinterpretation. There was no reason for NAV to raise it because we were in good faith about whether we were applying it correctly. So it was not until 2017, when rulings against us from the National Insurance Court began to come in, that we started looking at the topic. It simply was not an issue about which it seemed we could be wrong.[91]

It is difficult to know what would have happened if the 2014 report had been shared with all relevant actors at an early stage. However, the statements from the Director of Public Prosecutions and the NAV Director suggest that their lack of knowledge about the legal problems associated with enforcing requirements of stay while complying with Article 7 of Regulation 883/2004 was significant. If the 2014 report had been shared with the Director

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[89] Standing Committee on Scrutiny and Constitutional Affairs, 'Innst. 168 S (2019–2020) Innstilling fra kontroll- og konstitusjonskomiteen om Redegjørelse gitt I Stortinget 5. November 2019 av arbeids og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2019) <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s.pdf>, Appendix 44, 'Referat fra åpen høring i kontroll- og konstitusjonskomitéen om Redegjørelse av arbeids- og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2020) 2 <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s-vedlegg.pdf> accessed 1 May 2025.

[90] The report from the internal audit of NAV shows that questions about whether the practice conformed with EU law were raised long before 2019, Directorate of Work and Welfare, 'Kartlegging av fakta i EØS-saken" (n 20) 12, 18, 26ff, 29–31.

[91] Standing Committee on Scrutiny and Constitutional Affairs, 'Innst. 168 S (2019–2020) Innstilling fra kontroll- og konstitusjonskomiteen om Redegjørelse gitt i Stortinget 5. November 2019 av arbeids og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2019) <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s.pdf>, Appendix 45, 'Referat fra åpen høring i kontroll- og konstitusjonskomiteen om Redegjørelse av arbeids- og sosialministeren om praktiseringen av EUs trygdeforordning 883/2004 artikkel 21' (2020) 18 <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-168s-vedlegg.pdf> accessed 1 May 2025.

of Public Prosecutions, NAV, Parliament, or other relevant actors, they would have been aware that requirements of stay raised EU legal issues for both persons residing in Norway and abroad.

The 2014 report was not just an attempt to map the significance of EU law for requirements to reside or to stay in Norway. Looking back at the legal clarifications that came in the years after 2014, it is clear that it also identified with precision trails that lead close to the cornice. If the government, the Ministry, NAV, the National Insurance Court, the prosecution authorities, and the courts had followed this map from 2014 onwards, several thousand people could have avoided unjustified suspension of benefits they had a right to, erroneous repayment claims for sometimes very large amounts, and several dozen people could have avoided conviction and imprisonment.

Clearly, public administration needs an internal sphere where information can be kept confidential, and full transparency about all internal assessments may lead to some reluctance in the administration to provide 'candid advice and assessments from the civil service to the political leadership', as the government itself has feared. At the same time, it is not obvious that these considerations should weigh heavily when it comes to extensive legal investigations of the limits of EU law. When the state's best EU lawyers systematically work to map the limits EU law sets for the application of the NIA, and then present this in a systematic and well-prepared report, there is little reason to suggest that the full report should be reserved only for the highest levels of government. The parts that focus on the interpretation of EU law provide important information for others besides the government. The rule of law presupposes that legal rules are known. This will obviously be hindered if the government withholds detailed knowledge of the content of legal rules from administrative bodies, the prosecution authority, the courts, or citizens.

6 LITIGATION RISK AND WIGGLE ROOM AS A FRAME FOR ANALYSIS

The significance of EU rules for the requirement of stay in the NIA was not part of a 'blind spot' for the authors of the 2014 report presented in the previous Section. On the contrary, its analysis shed considerable light on legal arguments and case law of relevance. In the previous section, we argued that the lack of transparency concerning this report allowed wrongful practices to continue to develop.

However, questions can also be raised about the way the 2014 report analysed EU rules. The concepts of 'litigation risk' and 'wiggle room' were central. How suitable was this 'framing' of the analysis in clarifying the issues at stake for political decision-makers? And what effects was such a focus likely to produce in the social security administration and in the authorities prosecuting alleged welfare fraud? In this Section, we look at how the report's focus on litigation risk and wiggle room created specific types of weaknesses.

As noted above, the mandate for the 2014 report specifically requested an analysis of how much wiggle room EU law permitted in imposing limitations on the export of social security benefits. The risk of exceeding the available wiggle room was linked to litigation risk. The report states: 'For example, when it is described as very high risk or it is clear that there is significant risk with a possible measure, the working group considers that a potential

lawsuit is clearly more likely to be lost than won'.[92]

This approach to legal analysis of EU law can cause at least three types of problems. The first concerns visibility: The actual consequences of mistakes are made invisible. The second is more communicative in nature: A text highlighting possible 'wiggle room' – even where wiggle room is considered unlikely or unrealistic – can leave the reader with a distorted picture of how flexible the rules are. The third type of problem concerns the potential knock-on effects on openness: A report discussing wiggle room and litigation risk can make it appear tempting to keep the analyses secret, where, on the contrary, it would be particularly helpful to share these assessments with other actors to avoid misapplication of rules that lie at the limit of what EU law allow.

Firstly, the above quote reveals a narrow understanding of litigation risk, focused on the likelihood of losing lawsuits. The narrowness of this approach is evident when compared to scientific risk analysis and risk management approaches that emphasise the importance of assessing both likelihood *and* gravity of consequences. Adopting a broader understanding of risk as a point of departure, the assessment could instead be expressed as follows: Significant risk means that the measure is assessed as highly likely to lead to people losing rights, being unjustly deprived of necessary benefits in case of illness, being subjected to illegal demands for repayment of benefits, and also being convicted and required to serve sentences in violation of the decisions made by Parliament.

However, while the 2014 report pays sustained attention to possible wiggle room under EU law, it does not address who is affected, and how, if one pushes the rules too far. Nor is there any trace of risk assessments that consider both likelihood and gravity of consequences in any of the public documents in this case. Analysis of EU law could have been framed in ways that made visible the fact that authorities were at risk of acting illegally towards people entitled to benefits in case of illness. However, this dimension seems to have been overlooked by successive governments and in discussions by the Ministry about the adaptation of social security benefits to the EU context.

The parts of the 2014 report that are now publicly available thus reveal something paradoxical: Even in a systematic and thorough analysis of 'wiggle room', what lies beyond this space – and the potential consequences of crossing the line – remain invisible.

Secondly, assessments that focus on litigation risk and wiggle room can leave a skewed picture of the borderlands of EU law. When practices that are most likely illegal are presented as interpretations of EU rules that have a chance of success in a lawsuit, the rules can appear more flexible than they actually are. Again, this can be illustrated by the 2014 report. The report is so focused on exploring every available corner of wiggle room, that a non-specialist who reads individual quotes can get the impression that the room is larger than it is. Using the frame of litigation risk and wiggle room can thus increase the likelihood of decisions that push the boundaries of EU law. When decisions are made behind closed doors, it is not surprising that mistakes happen. The social security scandal shows that such mistakes can be very serious.

The first two observations suggest that assessments of EU law that focus on litigation risk and wiggle room are not well suited to clarifying what is at stake and reducing the likelihood of future mistakes. To make clear what is at stake and thereby reduce the risk of

[92] Interministerial working group, 'Eksport av velferdsytelser' (n 37) 29.

future mistakes, assessments should make politicians and other non-specialist readers aware of the risks involved in walking the tightrope of EU law. This would involve pointing out the consequences of violations by describing high litigation risk as what it is – namely a high risk of illegal practice – and by ensuring that the emphasis on potential wiggle room does not inflate the impression of the flexibility of EU law.[93]

The third observation is that the reliance on litigation risk in the framing of analyses can also make it tempting to keep legal assessments under wraps. This may be due to potential or upcoming lawsuits, or it may be due to concern about possible criticism given the questions being asked.

A possible connection between assessments of litigation risk and wiggle room, and a desire for secrecy, was formulated in Autumn 2020 at the hearing held by the Parliament's Standing Committee on Scrutiny and Constitutional Affairs. Here, the head of the Public Inquiry Committee stated:

> [I]n such interministerial groups, which are internal, where measures to be taken in the future are assessed, there will often be assessments related to litigation risk: If we do this, how likely is it that this will be challenged, and how likely is it that we will win? It may well be that even if the litigation risk is high, one chooses to try to challenge the boundaries of the wiggle room, and many will consider that completely legitimate, but there is no desire, reason, or wish to show such assessments in advance.[94]

But this conceals the significance such assessments can have for other actors in the legal system than those who litigate civil EU law cases on behalf of the state. Both public administrative bodies (which must assess their own practices), and the prosecution authority (which must decide whether to prosecute for violations of criminal provisions), may benefit from assessments of the wiggle room available in the administration's application of EU law in Norway.

As described in Section 3 above, the legislation related to requirements of stay meant that those in NAV who were deciding on practice, whether via circulars or in individual cases, had a challenging task. If circulars are written without knowledge of the limits of what EU law allows, there is a risk that obligations will be imposed on the recipients of benefits where there is insufficient legal basis for these obligations.

Because violations of obligations related to social security benefits can also be criminally sanctioned as fraud, individuals can end up being punished for violating obligations imposed based on a misinterpretation of EU law. Therefore, the prosecution authority also needs to be aware of any assessments carried out regarding the legal basis for enforcing the relevant obligations. Thorough investigations into EU legal boundaries can help clarify legal doubts over whether the prosecution authority should bring the issue to court.

The significance of the prosecution authority's responsibility to bring unresolved legal

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[93] Although this information may be present in other documents and presentations to politicians and beyond, such reports have a life of their own to some extent. For this reason, it is important to include such information in the reports as well.

[94] Appendix 7 (n 74) 6.

questions before the courts was addressed by the Director of Public Prosecutions during the Parliament's Committee on Scrutiny and Constitutional Affairs' hearing on the social security scandal. When asked whether the prosecuting authorities should have been informed about doubts that arose concerning the misapplication in connection with some rulings of the National Insurance Court in 2017, he replied:

> I would very much have liked to see that we were already involved from the summer of 2017 when decisions were made that raised questions about whether this could be correct. Criminal law requires [that the wording of statutes should satisfy] a certain level of clarity. It is not the case that the most likely interpretation should be assumed, and I believe – admittedly with the benefit of hindsight – that if we had received some warnings then, we would have gone heavily into this already in 2017.[95]

The Director of Public Prosecution's desire to be 'involved' is probably even greater if the government has chosen to 'challenge the boundaries of available wiggle room' by imposing obligations on private parties with full knowledge of the risk that the obligations may be considered in violation of EU law.

In the absence of transparency, the consequence can be, as in the social security scandal, that those who apply the rules challenge the boundaries of wiggle room without knowing that this is what they are doing. This applies to both the social security administration, through the rejection of benefit applications and demands for repayment; and the prosecution authority, who proceeded to prosecute, convict and punish benefit 'fraudsters'. The Director of Public Prosecution's statement illustrates how crucial it is for those handling criminal cases to have knowledge of doubt and risk. It shows that what the authors of the 2014 report deemed litigation risk, in an attempt to exploit the 'wiggle room' available within EU law, in reality, involved much more complex and serious issues.

7 CONCLUSION

The misapplication leading to the Norwegian social security scandal occurred in a situation where domestic rules walked the tightrope of what EU law allows. In this article, we have presented three distinct instances where other approaches to analysis and assessments of EU law in the public administration could have stopped the misapplication at earlier stages. The misapplication could have been halted if the administration had analysed the ripple effects of one of the EFTA Court's decisions in 2013. Wider knowledge of the 2014 report on the significance of EU law for the export of social security benefits could also have contributed to correcting application errors, and would have been particularly helpful had these assessments focused on more than just litigation risk and wiggle room. These findings show that the very late detection and correction of the illegal practice cannot be explained solely by a lack of EU legal competence within the administration. The way the administration worked with EU law also contributed to the misapplication not being stopped earlier.

Based on our discussion, we present three recommendations for good governance in

[95] Appendix 44 (n 89) 3.

the borderlands of EU law:

- The administration's analyses of case law should not be limited to the legal issues that the CJEU and EFTA Court explicitly address. Broad assessments should be conducted into the ripple effects that these courts' interpretative methods and reasoning in individual cases may have for rules other than those central to the decision.
- The government and the rest of the administration should not keep assessments of EU law secret – whether contained in legal opinions, reports, or memos – even if these assessments do not result in proposals for changes to Norwegian legislation.
- Analysis and assessment of EU law issues should not be limited to addressing the state's litigation risk and wiggle room. EU law is not a game in which the only possible downside is lost lawsuits, with binding cooperation with other states setting limits on domestic authorities' political wiggle room. A high risk of losing lawsuits also means a high risk of individuals losing their rights and being subjected to erroneous decisions or even convictions.

Following the recommendations we have outlined for good governance in cases where legislation is situated at the limit of what EU obligations allow will have both economic and political costs. However, the costs of *not* following these recommendations may be even higher. By not following these recommendations, authorities risk making mistakes that may lead to people losing their rights, being unjustly deprived of necessary subsistence benefits, being subjected to illegal demands for repayment of benefits, being convicted, and being required to serve sentences in violation of the decisions made by Parliament.

Although the social security scandal involved welfare legislation, the lessons to be learnt are not limited to this sector, nor even to EU law. In theory, any legislative provision may find itself on the edge of higher-order norms, including (but not limited to) constitutional norms. Regardless of the area in question, when navigating such borderlands there is a need to closely monitor the ripple effects of case law interpreting the higher-order norms, to share assessments of the legal boundaries openly, and for the civil service and administration to highlight what is at stake in case of misapplication, including for the individual. If the trail cleaves to the edge, there is a significant risk of errors unless the authorities follow these recommendations for good governance.

The choice of adaptation strategy when adopting national legislation in areas covered by EU law, constitutional law, or other higher-order norms is essentially a political choice. Whether national rules should cleave to what higher-order norms permit is thus a decision that lies primarily with politicians. But the choice has consequences, and the bureaucracy plays a key role in detecting, articulating and handling these. When analysis and assessments are conducted regarding the wiggle room available to the state when following obligations to obey higher-order legal norms, it is crucial that the politicians who make the final decisions are also made aware of what is required to exercise good governance in the borderlands of these norms and the human, economic, and rule-of-law costs of making mistakes. And to avoid mistakes, lawyers in the civil service should not limit their analysis of case law to the legal issues that the relevant courts explicitly address but should also conduct broad

assessments of the ripple effects that these courts' interpretative methods and reasoning in individual cases may have for rules beyond those with which the decision is explicitly concerned. Without such an approach, more scandals are likely to follow, as the risks then will increase for misapplication not merely of EU law, but also for constitutional law and every other norm of higher order. In effect, without taking the recommendations for good governance seriously, the prospects for the rule of law may diminish.

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