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The NAV Case in the EFTA Court and the Supreme Court of Norway

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I. Introduction

In the now 30-year history of the EFTA Court, its relationship to the courts of last instance of the EFTA Member States of the European Economic Area (EEA) has fluctuated from rather troubled to quite close.[1] As far as the relationship between the EFTA Court and the Supreme Court of Norway is concerned, the last 10 years

[1] See, e.g. HH Fredriksen and C. Franklin, ' Of Pragmatism and Principles: The EEA Agreement 20 Years on' (2015) 52 Common Market Law Review 629, 671 ff.

have seen a most welcome improvement.[2] At the time of the EFTA Court's twentieth anniversary in 2014, the relationship could only be described as chilly, with a dry spell of more than 10 years since the last referral of a case from the Supreme Court being topped by the (in)famous refusal in 2013 to follow the advisory opinion in the STX case without giving the EFTA Court the opportunity to express its view on novel arguments that the Supreme Court found to be convincing.[3] Ten years later, the Supreme Court has sent 11 cases to the EFTA Court – a much higher number than, for example, that of the referrals from the Supreme Court of Denmark to the Court of Justice of the European Union (CJEU) in the same period.[4] What is more, the Justices in Oslo have demonstrated in Fosen-Linjen and again in Campbell that in cases where they are not convinced by the reasoning of the EFTA Court, they will – 'in the interests of dialogue' – ask the EFTA Court for 'clarification and amplification, or possibly even reconsideration' before rendering their own judgment – a welcome change of course from STX.[5] To its credit, the EFTA Court has welcomed these 'rematches' by reiterating that it is 'important that questions on the interpretation of the EEA Agreement are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity' and stating that all it takes for a new request to be admissible is for the national court to submit 'new considerations which might lead to a different answer to a question submitted earlier'.[6] The EFTA Court's preparedness to let itself be convinced by such new considerations was demonstrated by the reconsideration of Fosen-Linjen I in Fosen-Linjen II.[7] However, as proved by Campbell, the EFTA Court will stand its ground if it considers the new considerations unconvincing, even if they are brought forward by the Supreme Court.[8]

A manifestation of the improved relationship between the Supreme Court of Norway and the EFTA Court is the judicial clearing-up of the Norwegian social security scandal, dubbed (rightly or wrongly) by many as the so-called NAV scandal, which shook the Norwegian legal community to its core when it was revealed in the autumn of 2019.[9] For reasons that have (and perhaps may) never fully been understood, the Norwegian Labour and Welfare Administration (NAV) considered EEA-based exportability of sickness benefits in cash to be limited to cases where the recipient transferred his or her residence to another EEA State, thus excluding all other shorter stays abroad (holidays, weekend trips etc). The

[2] As noted with satisfaction by the Registrar of the EFTA Court; see ÓJ Einarsson, 'The Advisory Opinion Procedure and the Relationship between the EFTA Court and the Norwegian Courts: Recent Developments', (2022) 61 Lov og Rett 221, 245.
[3] Fredriksen and Franklin (n 1) 671 and 674, with further references.
[4] According to the CJEU's InfoCuria database, as at October 2023, the Supreme Court of Denmark has only sent five requests for preliminary rulings from the CJEU since 2013.
[5] See Case E-7/18 Fosen-Linjen AS v AtB AS (Fosen-Linjen II), judgment of 1 August 2019, paras 37–38, presenting the request of the national court; and Case E-4/19 Campbell v Norway, Report for the Hearing, para 4, detailing the referring court's concerns.
[6] Case E-7/18 Fosen-Linjen II, paras 48–49.
[7] See further A Sanchez-Graells, ch 18 in this volume.
[8] Case E-4/19 Campbell, judgment of 13 May 2020, para 58.
[9] For an overview in the English language, see the summary provided by the investigative committee appointed by the government in Chapter 3 of its final report: NOU 2020:9 Blindsonen – Gransking av feilpraktiseringen av folketrygdlovens oppholdskrav ved reiser i EØS-området, 26–29, available at: www. regjeringen.no/no/dokumenter/nou-2020-9.

misinterpretation of the 2004 Social Security Regulation,[10] as well as the failure to consider other parts of EEA law, affected mainly (although not exclusively) Norwegian nationals who had never exercised their EEA rights, for example, to work or study in another EEA State, and whose cases were therefore (wrongfully) not classified as EEA cases to be considered by the EEA law specialists within NAV. The recipients of these benefits were met with hefty (and often ruinous) reimbursement claims in cases where the authorities revealed that they had stayed in other EEA States whilst receiving benefits. More than 40 cases resulted in criminal convictions for social security fraud, including 36 cases of imprisonment.

In this contribution to the EFTA Court's thirtieth anniversary, we will analyse in some detail the Supreme Court's referral of the NAV case to the EFTA Court, the EFTA Court's answers to the many questions put to it, and the Supreme Court's final judgment in the case.[11] Our aim is not only to document the case as such, but also to explain why we consider it a manifestation of a closer relationship between the EFTA Court and the Supreme Court of Norway.[12]

II. The Implication of the Supreme Court in the NAV Scandal and the Decision to refer the Case to the EFTA Court

In an intriguing twist, the Supreme Court itself was implicated in the NAV scandal as it had passed final judgment in one of the cases.[13] True enough, the question whether EEA law hindered the conviction for social security fraud of a man who had failed to inform NAV that he had spent several short-term stays in Italy whilst receiving a work assessment allowance was not an issue before the Supreme Court. However, as was subsequently acknowledged by the Supreme Court itself, any court passing sentence in a criminal case has an ex officio responsibility to ensure that there is a legal basis for the judgment (iura novit curia).[14] Although

[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, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 [2011] OJ L262/33. It entered into force on 1 June 2012 and is referred to at point 1 of Annex VI (Social Security) to the EEA Agreement.

[11] Case E-8/20 Criminal Proceedings against N, judgment of 5 May 2021, and HR-2021-1453-S The Public Prosecution Authority against A, respectively. An English translation of the Supreme Court's judgment is available at: www.domstol.no/en/supremecourt/rulings/2021/supreme-court-criminal-cases/ hr-2021-1453-s. For some reason, the defendant was anonymised as N in the EFTA Court and as A in the Supreme Court. We will simply refer to the case as the NAV case in the following.

[12] For the sake of good order, attention is drawn to the fact that both authors of this chapter were involved in the attempts to rights the wrongs in the NAV cases – Fredriksen as chair of the law commission that reviewed the EEA compatibility of the National Insurance Act and proposed numerous legislative amend- ments (NOU 2021:8 Trygd over landegrensene) and Franklin as special advisor to the Acting Director General of Public Prosecution as well as co-author of a report commissioned by NAV (I Ikdahl, C Franklin and M Hennig, Ikke stykkevis og delt – rapport om Arbeids- og velferdsetatens EØS-rettslige forpliktelser, 2020).

[13] HR-2017-560-A.

[14] HR-2021-1453-S, para 191.

the Supreme Court's role in causing the scandal was limited, it was significant as a matter of principle and attracted the attention of both the media and the investigative committee appointed by the government.[15]

The Supreme Court's complicity in the scandal had implications for the subsequent involvement of the EFTA Court. Under the Norwegian Criminal Procedure Act, the reopening of a criminal case by the independent Criminal Cases Review Commission will send the case back to the same level in the court hierarchy where final judgment was passed.[16] Thus, when the NAV case decided by the Supreme Court was reopened, it was sent directly to the Supreme Court. This enabled the Supreme Court to move quickly, without having to wait for one of the cases in the NAV complex to make its way through the court hierarchy. Indeed, it took only three- and-a-half months from when the case was reopened until a long and detailed request for an advisory opinion was sent, suggesting that the decision to involve the EFTA Court was taken more or less immediately after the reopening. The Supreme Court did not explain in any detail why it found it appropriate to refer the case to the EFTA Court, but it did state that the Social Security Regulations (both the 'new' one from 2004 and the 'old' one from 1971) [17] as well as other relevant EEA rules 'on certain points raises interpretative doubts', and later in the request added that clarification could only be achieved through the courts 'and preferably after interpretive opinions have been obtained from the EFTA Court on how EEA law should be understood'.[18] Whether the Supreme Court's own role in the case contributed to the decision – its first ever request in a criminal case – remains uncertain. But it would certainly have seemed rather striking if the Supreme Court had decided not to turn to the EFTA Court in this particular case.

The result was in any event a wide-ranging request that included not only the 1971 and the 2004 Social Security Regulations, but also Article 28 EEA on the free movement of workers, Article 36 EEA on the free movement of services and the Citizenship Directive.[19] However, the EFTA Court found that the 1971 Regulation, which remains applicable to facts occurring before 1 June 2012, only covers exportability of sickness benefits in cases where the recipient transferred his or her residence to another EEA State.[20] Furthermore, the EFTA Court saw no reason to deal with Article 28 EEA, as the description of the facts provided by the

[15] As to the latter, see the investigative committee report, NOU 2020:9 Blindsonen 28 (English summary) and, in more detail, 182 ff (in Norwegian only).
[16] Criminal Procedure Act of 22 May 1981 No 25, s 400.
[17] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ Spec Ed (II) 416, which was part of Annex VI (Social Security) to the EEA Agreement from its entry into force.
[18] Request from the Supreme Court of Norway for an advisory opinion from the EFTA Court, 30 June 2020, 1 and 9 (our translations).
[19] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. The Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 [2008] OJ L124/20, which adapted and added it at point 3 of Annex VIII, and points 1 and 2 of Annex V. The decision entered into force on 1 March 2009.
[20] Case E-8/20 N, para 67.

Supreme Court contained nothing to suggest that the freedom of movement for workers was relevant in the case.[21] Further still, as a result of the interpretation of the 2004 Social Security Regulation and Article 36 EEA, the EFTA Court decided to leave the question concerning the interpretation of the Citizenship Directive for another day.[22] Accordingly, we will focus on the 2004 Social Security Regulation and Article 36 EEA in the following section.

III. The 2004 Social Security Regulation

Since 1 June 2012, the exportability within the EEA of sickness benefits in cash has been regulated by the 2004 Social Security Regulation. This is the date on which the Regulation entered into force in the EEA, some two years after its entry into force in the EU.[23]

The questions put to the EFTA Court concerning the 2004 Regulation all concerned the interpretation of Article 21(1) of that Regulation, which states that an insured person (and members of his or her family) residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies.

A. Whether Article 21 (1) Encompasses Short-Term Stays in Other EEA States

The Norwegian Labour and Welfare Administration had originally understood the term 'staying' in Article 21 of the 2004 Regulation as not including short-term stays. The reason for this at first sight somewhat strained view was the specific definition of 'stay' in Article 1(k) of the Regulation. In the English version, 'stay' is defined as 'temporary residence'. The Norwegian version of the Regulation used similar language, defining 'stay' as 'midlertidig bosted'. The use of the term 'bosted' ('residence') in this definition caused NAV to believe that short-term stays were excluded. However, a teleological interpretation of Article 21 clearly suggested that the terms 'residing' and 'staying' in Article 21(1) together cover all forms of presence or resi- dence in another EEA State. Other language versions of Article 1(k) of the Regulation confirmed this, including the Danish ('midlertidigt ophold'), French ('séjour temporaire') and German ('vorübergehenden Aufenthalt') texts.[24] As NAV itself had come to the conclusion that its original understanding of Article 21 was wrong and that this view was

[21] ibid para 74. It was left to the Supreme Court to determine whether the facts of the case nevertheless made Art 28 EEA applicable, but the Supreme Court saw no need for this as Art 28 EEA was presumed to offer little in addition to Art 36 EEA; see HR-2021-1453-S, para 184. As will be explained in section IV.A below, the defence counsels' invocation of Art 28 EEA was misguided and could have harmed their client's case considerably if it had been picked up by the courts.

[22] N (n 20) para 130.

[23] It entered into force in the EU on 1 May 2010.

[24] However, the Swedish text is similar to the (then) Norwegian version, defining 'stay' as 'tillfällig bosättning'. The EFTA Court's reference to not only the Danish, French and German but also the Swedish text (N (n 20) para 133) in support of its interpretation of Art 21 is therefore not quite convincing.

shared by the Norwegian government, the EFTA Surveillance Authority (ESA) and the European Commission, there was little reason for the EFTA Court to elaborate on the rather unfortunate Norwegian version of the text. Accordingly, the EFTA Court simply stated that the juxtaposition of the terms 'residing' and 'stay- ing' in the wording of Article 21(1), as well as the definition of 'stay' in Article 1(k) ('temporary residence'), makes it clear that the term 'staying' in Article 21(1) must be understood as including short-term stays in another EEA State.[25] However, a some- what regrettable result of this approach is that the Norwegian version of the Advisory Opinion reads less well on this point. Even if the literal interpretation of 'temporary residence' in the English text is as straightforward as suggested by the EFTA Court, it is rather forced to consider it 'clear' that the Norwegian term 'midlertidig bosted' covered short-term stays.[26] In our opinion, it would have been better to explain to readers of the Norwegian version that other language versions as well as a systematic and teleological interpretation were decisive. It is telling that Norway subsequently, as part of the clearing-up after the NAV scandal, considered it necessary to correct the Norwegian definition of 'stay' in Article 1(k) from temporary 'bosted' ('residence') to temporary 'opphold' ('stay').[27]

Given the fact that the interpretation of the term 'staying' in Article 21 was no longer in dispute, the Supreme Court nevertheless endorsed the EFTA Court's view without further ado.[28]

B. Whether Article 21 (1) is Limited to Situations where a Medical Diagnosis is Given During a Stay in Another EEA State

An arguably rather more complicated question is whether Article 21(1) was intended by the EU legislator to cover only situations where the medical condition giving rise to sickness benefits in cash from the competent state appears during a stay in another EEA State. This question was raised by the Supreme Court as the result of an article written by a former member of that court, who argued that an interpretation of Article 21(1) in light of the subsequent paragraphs of that provision as well as the associated provisions of the 2009 Implementing Regulation,[29] and (some of) the predecessors of Article

[25] N (n 20) para 133.
[26] As neither the English nor the Norwegian version of Art 21 was called into question by the EFTA Court, neither appears in the other language version of the advisory opinion. This leaves the rather odd impression in the English version that the Court considered, eg, the Danish and Swedish texts, but not the Norwegian one, and the equally odd impression in the Norwegian version that that Court failed to consider the English text.
[27] See the Norwegian version of the EEA Supplement to the Official Journal of the European Union No 23/2022 p 728, available at: www.efta.int/publications/eea-supplements/supplements-2022-no.
[28] HR-2021-1453-S, para 117.
[29] Articles 27 and 28 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L284/1, which was

21(1) in the 1971 Regulation,[30] suggested an answer in the affirmative.[31] However, before the EFTA Court, all the participants to the proceedings agreed that Article 21(1) also covers situations where the medical condition giving rise to sickness benefits in cash from the competent state is recognised by the competent institution before departure. The EFTA Court thus confined itself to stating that it saw no basis in the wording of Article 21 for limiting its applicability to situations where a medical diagnosis is given during a stay in an EEA State other than the competent EEA State, and that there was nothing to suggest that the provision ought to be interpreted in any other way.[32]

The Supreme Court of Norway took note of the EFTA Court's answer and endorsed it without further ado.[33]

Whether the interpretation of Article 21(1) on this point is really so straightforward might be questioned,[34] yet the practical importance of the issue seems limited. In light of the general aim of the 2004 Regulation as a means to contribute to the free movement of persons within the EEA,[35] a narrow interpretation of Article 21(1) is only tenable if combined with a broad interpretation of Article 7 on the waiving of residence rules, so that the right to go to another EEA State for a shorter stay without losing sickness benefits in cash already granted is covered by the latter.[36] Interestingly, the EFTA Court later in its Advisory Opinion reasoned in favour of such an interpretation of Article 7, holding that a requirement of continuous physical presence in the competent EEA State, which excludes entitlement to sickness benefits during short stays abroad, is significantly more restrictive than a residence requirement and therefore caught by Article 7.[37] If this interpretation of Article 7 is accepted, then it might be possible to argue that Article 21(1) ought to be understood as a specific provision for situations where the medical condition giving rise to sickness benefits in cash arises during a stay in another EEA State. However, rather than elaborate on the relationship between Articles 7 and 21(1), the EFTA Court opted for a belt- and-braces approach, essentially merging the two provisions into one. According to the EFTA Court, the right to go to another EEA

incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 [2011] OJ L262/33. It entered into force on 1 June 2012, and is referred to at point 1 of Annex VI (Social Security) to the EEA Agreement.

[30] Articles 19 and 22(1)(a).

[31] KA Utgård, 'Trygdesaka – ein gjennomgang av dei grunnleggande rettsreglane', www.Rett24.no (19 February 2020).

[32] N (n 20) para 136

[33] HR-2021-1453-S, para 119.

[34] See the analysis of the law commission that reviewed the EEA compatibility of the National Insurance Act in NOU 2021:8, pp 70–71.

[35] As highlighted by the EFTA Court in N (n 20) para 46.

[36] This was overlooked by Utgård (n 31), who argued for a narrow interpretation of Art 21(1) and a literal interpretation of Art 7, confining the latter to cases where a recipient of a sickness benefit in cash moves to reside in another EEA State.

[37] N (n 20) para 139. This broad interpretation of Art 7 of the 2004 Regulation does not sit easily with the EFTA Court's literal interpretation of the transfer of residence requirement in Art 22(1)(b) of the 1971 Regulation; see paras 66–67. However, the latter provision requires authorisation by the competent state, so the Court's conclusion that it was inapplicable in the case at hand nevertheless seems sound.

State for a shorter stay without losing sickness benefits in cash already granted can be derived from both Article 7 and Article 21(1).[38]

The Supreme Court followed this up in its final judgment by referring to both Articles 7 and 21(1) when endorsing the EFTA Court's view that an insured person cannot be denied a work assessment allowance for the sole reason that he or she is residing or staying in another EEA State.[39]

C. Whether the Reference in Article 21(1) to the Legislation of the Competent EEA State Allows for National Restrictions on the Exportability of Sickness Benefits

The final question from the Supreme Court concerning the 2004 Regulation was whether the reference in Article 21(1) to the social security legislation of the competent EEA State[40] allows that state to: (i) limit the exportability to a maximum of four weeks per year; (ii) require any stay in other EEA States to be compatible with activity obligations and not to impede follow-up and control by the competent institution; and (iii) require the person concerned to obtain authorisation in advance. The essence of this question is whether Article 21(1) adds anything to the in any event applicable main rules on the free movement of persons in the EEA. Does Article 21(1) per se prevent requirements in national social security law that apply to the right to retain cash benefits while staying in another EEA State, or might such requirements be justified if they pursue a legitimate aim in accordance with the general EEA law principle of proportionality?

This question had been addressed by the investigative committee which was established by the government in the autumn of 2019. In its first report, issued in March 2020, the committee held that Article 21(1) cannot be understood as merely a reference back to the in any event applicable main rules on the free movement of persons in the EEA – Article 21(1) is an independent basis for an individual right to retain sickness benefits in cash while staying in another EEA State.[41] However, when it came to the content of this right, the committee was of the opinion that restrictions put upon that right might be justified in accordance with the general principles of EEA law as long as the restrictions are not imposed solely because the recipient was staying in another EEA State.[42] This led the committee to conclude that Article 21(1) allows for a prior authorisation scheme

[38] Even though the EFTA Court rather curiously did not return to Art 7 after para 139, the conclusions drawn from Art 7 in that paragraph and the subsequent conclusions as to the interpretation of Art 21 appear to concur, see the analysis of the law commission that reviewed the EEA compatibility of the National Insurance Act in NOU 2021:8, pp 71–72.
[39] HR-2021-1453-S, paras 135 and 140.
[40] Article 21(1) requires the competent institution to provide cash benefits 'in accordance with the legislation it applies', ie, with the social security legislation of the competent EEA State.
[41] Investigative committee report NOU 2020:9, s 4.2.3
[42] ibid s 4.2.6.

based on the need to control that the recipients fulfil all activity obligations and do not engage in undeclared work whilst abroad, but only if the scheme is limited to stays 'of a certain duration'.[43]

The EFTA Court saw this differently. In line with the pleadings of ESA and the European Commission, but contrary to those of the Norwegian government, the EFTA Court held that Article 21(1) does not provide a basis for derogating from the right to retain social security benefits when going to another EEA State.[44] According to the EFTA Court, a teleological interpretation of Article 21(1) requires a distinction to be drawn between 'the criteria for entitlement' to the sickness benefit in question and 'further conditions'[45] – whilst the former is left to national law (within the general limits of the general principles of EEA free movement law),[46] the latter is quite simply prohibited.[47]

As national social security law typically does not distinguish between 'criteria for entitlement' to a sickness benefit and 'further conditions' (for entitlement to the same benefit), the distinction introduced by the EFTA Court might at first seem strained. When read in light of the Court's earlier interpretation of Article 7 as well as the example given of one such 'further condition', namely a requirement of physical presence on the territory of the competent EEA State,[48] it becomes clear that the distinction is between general criteria/conditions for entitlement and any special criteria/conditions directly linked to the fact that the recipient stays, or wants to stay, in another EEA State. Thus, as suggested by the law commission that reviewed the EEA compatibility of the National Insurance Act,[49] and subsequently confirmed by the Supreme Court, the EFTA Court's interpretation of Article 21(1) does not preclude general criteria for entitlement in national law that indirectly restrict free movement, such as activity obligations or control measures requiring physical presence at a given place at a given time (for example, the local doctor or the local NAV office). As noted by the Supreme Court, Article 21(1) 'only' precludes 'special conditions connected to the right to retain cash benefits while staying in another EEA State'.[50]

However, as all the conditions at issue in the NAV case were linked to stays abroad and thus fell into the category of 'further conditions' prohibited by Article 21(1), the EFTA Court concluded that no further assessment of those conditions under other provisions of EEA law was necessary: not only the four-week limit but also the requirement of any stay in other EEA States to be compatible with activity obligations and the related authorisation scheme were deemed incompatible with the Regulation.

The EFTA Court's interpretation of Article 21(1) comes across as rather strict on

[43] ibid s 7.2.
[44] N (n 20) para 143.
[45] ibid.
[46] ibid para 142
[47] ibid paras 147–48.
[48] ibid para 143.
[49] NOU 2021:8, s 2.4.4.
[50] HR-2021-1453-S, paras 139 and 143.

this point, particularly as it effectively precludes a control regime adapted to the undeniable differences in the social security authorities' control possibilities at home and abroad.[51] However, before the Supreme Court, the Norwegian government accepted the stance taken by the EFTA Court. The Supreme Court saw no reason to disagree, thereby confirming an interpretation of Article 21(1) that essentially equates stays in the competent EEA State and in all other EEA States for the purpose of entitlement to sickness benefits.

IV. Article 36 EEA and the Right to receive Services in other EEA States

A. The Choice between Article 36 EEA and Other Possible Legal Basis

Before the entry into force within the EEA of the 2004 Regulation (1 June 2012), a right to retain sickness benefits in cash during stays abroad had to be based on more general EEA rules on free movement as the EFTA Court (as already mentioned) found that the 1971 Social Security Regulation only covers exportability of sickness benefits in cases where the recipient transferred his or her residence to another EEA State.[52]

For workers whose employment in the competent EEA State fell within the scope of Article 28 EEA, this provision provides an obvious first choice as a legal basis for a right to retain sickness benefits in cash during stays in other EEA States. Due to the cross-border requirement of Article 28 EEA, most workers in this category will be nationals of EEA States other than the competent EEA State, ie, 'EEA foreigners'. A typical example will be a worker from another EEA State who falls ill and who wants to spend time with his or her family in this other EEA State (or another EEA State) while recuperating. Article 28 EEA undoubtedly provides such a right. This also appears to have been understood all along by the Norwegian Labour and Welfare Administration (or at least by the EEA law specialists in the NAV international department)[53] – the NAV scandal primarily concerned Norwegian citizens whose employment in Norway was not covered by Article 28 EEA and who could not therefore fall back on this provision when NAV failed to recognise their rights under the 2004 Regulation.[54]

The case brought before the EFTA Court was a typical case of a Norwegian national who had never made use of his right to seek work in another EEA State before he fell ill. Before the Supreme Court as well as before the EFTA Court, the defence

[51] As highlighted by the investigative committee; see NOU 2020:9, Annex II, s 7.2
[52] See section II above.
[53] This department was responsible for EEA matters until it was closed down in 2016 as part of a reorganisation of NAV.
[54] There are cases in the NAV complex involving workers from other EEA States too, but here the problem seems to have been a failure by individual case handlers to identify the EEA dimension of the case and not a systemic failure by NAV to recognise that Art 28 EEA gives rise to a right to retain sickness benefits in cash during stays abroad.

counsels nevertheless argued that Article 28 EEA was applicable because their client had later, whilst receiving sickness benefits from NAV, allegedly worked remotely in at least some of the periods that he stayed in Italy.[55] Luckily for the defendant, this line of argument was not picked up by either court. If the defendant had indeed worked whilst staying in Italy, not only Article 28 EEA but also the choice-of-law rules of the Social Security Regulations would have been triggered, the latter making Italy the competent state and leaving the defendant without any claim for sickness benefits from Norway.[56]

For recipients of sickness benefits who cannot invoke Article 28 EEA, the Citizenship Directive might provide a possible legal basis for a right to retain the benefits during stays abroad. Arguably, Article 4 on the right of exit and/or Article 6 on right of residence for up to three months give rise to a general right to move freely within the EEA which can also be invoked against a home state whose national social security law hinders the right to leave it for shorter stays in other EEA States.[57] The Directive entered into force in the EEA on 1 March 2009, thus covering about three years more than the 2004 Social Security Regulation. For cases extending further back, it might be supplemented by a general, unwritten EEA law principle of free movement for all EEA citizens, whose existence was suggested by the EFTA Court in Campbell and reiterated in L, but whose status and reach remains unclear.[58]

However, as already identified in section II above, the EFTA Court decided to leave the question concerning the interpretation of the Citizenship Directive for another day, focusing instead on Article 36 EEA and the right enshrined in this provision to go to other EEA States in order to receive services there. This prioritising of the possible legal bases was in line with that of the investigative committee as well as the Supreme Court in its referral of the case. It had the advantage of exceeding the temporal limit of the Citizenship Directive and allowed for an early endorsement of the CJEU's judgment in IN, where the CJEU confirmed that Article 36 EEA is to be interpreted in line with Article 56 TFEU and therefore offers citizens of the EEA/EFTA States the same protection as recipients of services in EU Member States as Union citizens.[59]

Still, the decision to rely on Article 36 EEA in the NAV case required a rather liberal approach to the notion of a service recipient. In the case before the EFTA Court,

[55] See N (n 20) para 74, and HR-2021-1453-S, para 44.
[56] Based on the information provided by the Supreme Court in para 9 of its final judgment, it appears that the 'work' done by the defendant was part of a work fitness programme under the auspices of NAV. Who the employer was, if any, remains unclear.
57 The question was raised by the investigative committee, but no answer was provided; see NOU 2020:9, Annex II, s 1.2.4.
[58] Case E-4/19 Campbell, para 48; and Case E-2/20 L, para 24. See further C Franklin and HH Fredriksen, 'Differentiated Citizenship in the European Economic Area' in D Kostakopoulou and D Thym (eds), European Citizenship Law and Policy (Cheltenham, Edward Elgar, 2022) 297–319, at 298f.
[59] Case C-897/19 *IN* ECLI:EU:C:2020:262, paras 52–53.

the defendant could reasonably be considered as a recipient of tourist services,[60] but in several of the other cases in the NAV complex, the motivation for the stays in other EEA States was quite simply to visit family or friends. The EFTA Court was probably aware of this as it established a presumption that a person who for whatever reason travels to another EEA State will in fact receive services there, and that this is sufficient to be covered by Article 36 EEA.[61] Thus, it is not required that the decision to go to another EEA State is motivated by an interest in a specific service provided there.[62] Arguably, this presumption establishes Article 36 EEA as a legal basis for a general right to free movement, possibly equalling that of Article 20(2)(a) TFEU. Potential critics of this interpretation of Article 36 EEA will nevertheless have to take into account the ease of justifying a stay in any given EEA State with an alleged interest in a particular service offered there. Thus, the practical significance of a less liberal approach to Article 36 EEA appears limited.

The Supreme Court noted that the interpretation prescribed by the EFTA Court entails a wide application of the rules on the freedom to provide services, but accepted this without further ado.[63]

B. The Existence of Restrictions on the Freedom to Receive Services

The question whether the conditions for the exportability of sickness benefits in cash established by section 11-3 of the National Insurance Act constituted restrictions on the freedom to receive services was rather straightforward.[64] As noted by the EFTA Court, a condition limiting the duration of stays abroad constitutes, by its very essence, a restriction on the freedom to receive services abroad because it is liable to render the provision of services between EEA States more difficult than within the home state.[65] Furthermore, the EFTA Court considered it clear that a system of prior authorisation represents an additional burden for individuals wishing to stay in another EEA State compared to those staying in Norway, and that the condition that the stay abroad had to be compatible with the planned activity and possibility of control by Norwegian authorities, by its very nature, severely limited the possibility to go to another EEA State to obtain services there.[66] The EFTA Court quite rightly also gave short shrift here to the Norwegian authorities' argument based on Commission v Spain,

[60] Through acquaintances, the defendant and his spouse were offered the use of a house in Italy and, during the material time, they had a total of 14 three and four-week stays there; see *N* (n 20) para 33.

[61] ibid para 77.
[62] For a sceptical view of such an approach and of the view that the right to free movement and residence ought to be limited to receipt of specific services, see, eg, F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 European Law Journal 1, 11.
[63] HR-2021-1453-S, paras 164–65.
[64] The conditions are set out in section III.C above.
[65] N (n 20) para 85.
[66] ibid para 86.

which seemed rather irrelevant in the case at hand.[67]

The Supreme Court took note of the EFTA Court's view and simply stated that it was 'clear' that section 11-3 of the National Insurance Act constituted restrictions on the freedom to receive services in another EEA State.[68]

C. Whether the Restrictions could be Justified

i. Legitimate Objectives: The Objective of Re-integrating Recipients of Sickness Benefits into the Labour Market in Particular

The Norwegian authorities claimed that there were four potential public interest objectives which could justify the restrictions on Article 36 EEA: avoiding the risk of seriously undermining the financial balance of the Norwegian social security system; avoiding the risk of abuse of sickness benefits; the need to monitor compliance with the conditions for said benefits; and re-integration of recipients of sickness benefits into the labour market.[69] The first three of these were accepted as legitimate aims without further ado, but apparently not the final one. Although 'encouragement of recruitment' was accepted as a legitimate aim of EEA States' social or employment policy in principle,[70] the EFTA Court emphasised that sickness benefits (as under- stood under the Social Security Regulations) are health-related benefits and 'cannot be considered to be primarily instruments of national employment policy designed to improve opportunities for entering the labour market'.[71] This led the EFTA Court to conclude that 'considerations devised to fit the specific purposes of the employment policy of re-integrating persons into the labour market cannot justify the restriction in question'.[72]

If interpreted to suggest that the objective of re-integration into the labour market can never justify restrictions on free movement rights for recipients of sickness bene- fits, the implications for national social security law would be rather dramatic.[73] Indeed, the whole point of the activity obligations placed on the recipients of sick- ness benefits is to re-integrate them into the labour market as soon as possible, and it is rather inevitable that activity obligations can and often will limit the recipients' free movement rights. There was therefore much to suggest that the EFTA Court's statements were made with the specific restrictions in section 11-3 of the National Insurance Act in mind, given the

[67] ibid paras 88–89, with reference to Case C-211/08 Commission v Spain ECLI:EU:C:2010:340.
[68] HR-2021-1453-S, paras 166–68.
[69] N (n 20) para 96.
[70] ibid para 98.
[71] ibid para 105.
[72] ibid para 106.
[73] See SB Tronsmoen, '- I ytterste konsekvens avliver EFTA-domstolen arbeidslinja', Advokatbladet.no (21 May 2021).

reference in the last part of paragraph 106 to 'the restriction in question' as well as the otherwise somewhat confusing references to the proportionality test (suitability) in the preceding paragraphs.

The Supreme Court was clearly aware of this matter, as this part of the EFTA Court's answers to the Supreme Court had raised some eyebrows in the Norwegian legal community.[74] It therefore chose to focus on the EFTA Court's more general acceptance of 'encouragement of recruitment' as a legitimate aim of EEA States' social or employment policy instead, and then used this to interpret the less fortunate wording later on in the Opinion in the narrower way in which the EFTA Court surely intended.[75] In apparent deviation from the Advisory Opinion, the Supreme Court held that integration into the labour market was a legitimate objective to also be considered with regard to the specific restrictions in section 11-3 of the National Insurance Act, but then simply concluded that it had not been satisfactorily demonstrated that it was with a view to obtaining employment that the recipient had to be physically present in Norway.[76]

ii. Proportionality

The EFTA Court proceeded to examine each of the three exceptions to the prohibition on export of sickness benefits under the National Insurance Act in turn and in light of the otherwise legitimate objectives, finding them all to fail to fulfil the requirements of the proportionality principle. The four-weeks-per-annum time limit for stays abroad was deemed both unsuitable and unnecessary in order to monitor compliance with the conditions for retaining the sickness benefits in question, since no comparable limitations applied for travel and stays within Norway and less restrictive means (a general control system or individual activity plans) could equally achieve this aim.[77] The same applied as far as the prior authorisation requirement was concerned, as it did not apply to travel within Norway (where unilateral reporting to NAV every 14 days sufficed) and less restrictive alternatives (prior notification schemes) seemed to be available.[78] Concerning the activity and control conditions, in something of a more obiter fashion, the EFTA Court concluded that these must also be deemed both unsuitable and unnecessary for countering the risk of beneficiaries falling ill when travelling to other EEA States and thereby preserving the financial balance of the Norwegian social security system.[79] There was simply no evidence put forward concerning the costs attached to this risk, and a different and less restrictive requirement of notification every second week applied for travel within Norway. In common with its assessment of each of the three exceptions, the EFTA Court seemed to emphasise a lack of persuasive evidence (or in parts a complete lack of argumentation whatsoever) on the part of Norwegian

[74] ibid; and see the discussion in NOU 2021:9, s 2.4.4.
[75] See HR-2021-1453-S, paras 172–73.
[76] ibid para 180.
[77] N (n 20) paras 107–13.
[78] ibid paras 114–20.
[79] ibid paras 121–28.

authorities backing up their arguments.

The EFTA Court's approach to the proportionality principle left very little for the Supreme Court to do. This may go some way towards explaining the Supreme Court's emphasis in its decision on the fact that statements in an Advisory Opinion from the EFTA Court on 'more specific assessments' carry less weight than statements regarding the interpretation of EEA law.[80] Notwithstanding this general, principled declaration, the Supreme Court chose not to follow up with an independent, in-depth review of the EFTA Court's proportionality assessment in this case, endorsing the EFTA Court's findings in whole.[81]

V. A closer look at the EFTA Court's Approach to the Consistency Requirement

Looking more closely at the EFTA Court's approach to the proportionality principle, the consistency requirement (ie, that the national measures must genuinely pursue their stated, legitimate aims in a consistent and systematic manner) takes centre stage. Consistency requirements are of course nothing new in the context of proportionality assessments, and frequently appear in the judgments of the CJEU and the EFTA Court,[82] most often in assessments as to the suitability of a given national measure, but also at times in connection with their alleged necessity. The EFTA Court's opinion in the NAV case nevertheless sheds light on how the consistency requirement has developed over the years, exposing not only where it seems to have originated from, but also how certain internal market rules continue to converge.

In order to understand these developments, it is important to recall the different ways in which consistency arguments are used. First, where inconsistencies or contra- dictions exist between the national measures and other national rules or practices, which serve to undermine the very legitimacy of the aim itself, such measures may be deemed both inconsistent and unsystematic (with emphasis particularly on the latter) and therefore as unsuitable.[83]
Second, and more relevant in the NAV context, inconsistencies may also be used to show that a given national measure will not in fact be able to achieve the alleged legitimate aim behind it.[84] In other words, the inconsistency exists between the means and the ends, with the result that the measure cannot be deemed as an effective way to achieve its goal.[85] In such cases, consistency

[80] HR-2021-1453-S, para 66.
[81] ibid paras 176–81.
[82] For case law examples, see, eg, GT Petursson, The Proportionality Principle as a Tool for Disintegration in EU Law – of Balancing and Coherence in the Light of the Fundamental Freedoms (Lund, Lund University, 2014) 161.
[83] See, eg, Case C-333/14 Scotch Whisky Association and Others ECLI:EU:C:2015:845, paras 37–38; and Case E-3/06 Ladbrokes [2007] EFTA Ct Rep 86, para 51.
[84] See, eg, Case C-153/08 Commission v Spain ECLI:EU:C:2009:618, para 42; and Case C-169/08 Presidente del Consiglio dei Ministri ECLI:EU:C:2009:709, paras 43–45.
[85] D Chalmers, G Davies and G Monti, European Union Law, 4th edn (Cambridge, Cambridge University Press, 2019) 834–35.

arguments arguably seem to offer little more than support to that which could already be drawn from a classic application of the suitability test (ie, determination as to the appropriateness of a given measure to achieve its goal). Consistency in this second context was indirectly touched upon in the NAV case. There, it was applied to evaluate the Norwegian authorities' claim that the activity and control conditions, operationalised through a system of prior authorisation for travel to other EEA States, was suitable and necessary in order to mitigate the risk of undermining the financial stability of the Norwegian social security system. This risk would otherwise follow from having to cover the costs of sickness benefit recipients needing medical treatment whilst abroad. As the EFTA Court held, the Norwegian authorities failed to present any persuasive argument or evidence that the financial viability of the wealthy Norwegian state's social security system was in fact at risk of being seriously undermined by the potential costs.[86]

Implicitly, the point seemed to be (at least in part) that the national measure would not be capable of effectively achieving such a goal.

Third, consistency arguments may be used to expose and prevent various forms of unequal treatment on grounds other than nationality.[87] Herein lies the real added value of the development of consistency as a central facet of the proportionality test, as also illustrated in the NAV case itself – where it is relied upon in this manner in several places: first, in finding the four-week time limit unsuitable to achieve the aim of monitoring compliance, since no similar limitation applied as far as travel within Norway was concerned;[88] second, in finding the prior authorisation requirement unsuitable to achieve the same end, given that – again – no such requirement was imposed for travel within Norway;[89] and, third, regarding the activity and control conditions, that these must be regarded as unsuitable and unnecessary given that travelling to another EEA State posed no exceptional or additional risk of becoming sick compared to travelling within Norway.[90] To put it another way, the situations of a beneficiary travelling to another EEA State and another travelling within Norway being deemed comparable, such unequal treatment is deemed an inconsistency in itself, rendering the measure(s) in question potentially unsuitable to attaining the legitimate aim allegedly behind it.

It is important to note that the unequal treatment referred to here is clearly not based on nationality, but rather on other grounds or parameters.[91] This is not surprising, since otherwise it would in certain cases be impossible for a Member State to justify a breach – the justification stage would be rendered entirely redundant. Member States found in breach of free movement rules due to direct

[86] N (n 20) para 125.
[87] See, eg, Case C-500/06 Corporación Dermoestética ECLI:EU:C:2008:421, para 39; and Case C-169/07 Hartlauer ECLI:EU:C:2009:141, paras 54–60.
[88] N (n 20) para 109.
[89] ibid para 117.
[90] ibid para 126.
[91] See, eg, Case C-137/09 Josemans ECLI:EU:C:2010:774, para 76: 'it is important to point out that the discriminatory nature of the rules at issue in the main proceedings does not, on its own, mean that the way in which they pursue the intended objective is inconsistent'.

or indirect discrimination at the prior stage of investigation would otherwise automatically fail in any attempt at justification. And as we know, the CJEU has (on rare occasions) also found even directly discriminatory breaches to be justified.[92]

Whilst the three different ways in which consistency arguments may be used present nothing new in themselves, the use of the third dimension exposes another significant EU and EEA legal development in itself connected to theories of convergence between the four freedoms more generally.[93] And identifying where this aspect of the consistency requirement stems from may in turn inform us further as to how it works today.

Whilst the first express mention of the 'consistent and systematic' requirement appears to have been in the CJEU's decision in Gambelli,[94] Mathisen has traced the presence of (implicit) consistency requirements in CJEU case law all the way back to the 1980s.[95] However, having seen above how the third dimension of consistency operates, the consistency requirement might even be claimed to have originated even further back in EU history – in what are today's Articles 36 and 54 TFEU, concerning the free movement of goods and capital. As we know, Article 36 TFEU was not 'new' as such when introduced by the Treaty of Rome, being largely a copy of Article XX of the General Agreement on Tariffs and Trade (GATT) 1947 (often referred to as the 'chapeau' provision),[96] which itself was modelled on the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927(!).[97]

As we recall, after listing the many express derogations to restrictions on the free movement of goods, the second sentence of Article 36 TFEU provides that such restrictions shall not in any event 'constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States' (emphasis added).[98] Article 65(3) TFEU identically provides that any derogating measures covered by the two preceding paragraphs shall not constitute a means of arbitrary

[92] See, eg, Case 4/75 Rewe-Zentralfinanz ECLI:EU:C:1975:98; and Case C-141/07 Commission v Germany ECLI:EU:C:2008:492.

[93] Generally concerning convergence theories, see, eg, H Toner, 'Non-discriminatory Obstacles to the Exercise of Treaty Rights: Articles 39, 43, 49 and 18' (2004) 23 Yearbook of European Law 275; and A Tryfonidou, 'Further Steps on the Road to Convergence Among the Market Freedoms' (2010) 35 European Law Review 36.

[94] Case C-243/01 Gambelli ECLI:EU:C:2003:597, para 67.

[95] G Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1029. Langer and Sauter for their part have contended that its use stretches back a few years further, to CJEU case law on taxation issues from the 1990s; see J Langer and W Sauter, 'The Consistency Requirement in EU Law' (2017) 27 Columbia Journal of European Law 39, 53.

[96] See, eg, S Enchelmaier, 'Art. 36 TFEU: General', in P Oliver (ed), Oliver on Free Movement of Goods in the European Union, 5th edn (Oxford, Hart Publishing, 2010) 215, 222.

[97] The chapeau itself provides for a two-tier, cumulative test – first providing for several general exceptions, and second subjecting reliance on these to a requirement that such measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.

[98] The second sentence of Art 36 TFEU is reproduced verbatim in Art 13 EEA.

discrimination or a disguised restriction on the free movement of capital and payments. The provisions on workers, services and establishment contain no similar requirements. However, looking at how Articles 36 and 65(3) TFEU have been interpreted and applied in practice, there seems little doubt that the CJEU and the EFTA Court have sought to close this gap by incorporating the arbitrary discrimination/disguised restriction requirement into the proportionality test, which naturally applies universally to all of the four freedoms.[99] Indeed, the CJEU has even indicated the link as much in its case law, stating how the proportionality principle constitutes the basis for the arbitrary discrimination/ disguised restriction test in Article 36 TFEU.[100] The link becomes even clearer bearing in mind the aim of the arbitrary discrimination/disguised restriction test, which according to the CJEU is designed to prevent the derogations mentioned in the first sentence of Article 36 'from being diverted from their proper purpose and used in such a way as to either create discrimination in respect of goods originating in other Member States or indirectly protecting certain national products'.[101] The consistency requirement, as part and parcel of the principle of proportionality, naturally has the same objective of filtering out unmeritorious claims in view. There is also an uncanny resemblance between the situations where arbitrary discrimination or a disguised restriction in trade has been considered to exist, and those deemed by the CJEU or the EFTA Court to constitute inconsistencies born out of unequal treatment.[102] Simply put, it seems as though the majority of (if not all) national measures deemed to fall foul of the second sentence of Articles 36 and 65(3) TFEU by the CJEU in the past could be dealt with as an issue of (in)consistency under the proportionality assessment today. This much seems apparent from the fact that in quite a few recent cases where Article 36 or 65

[99] As can be seen, eg, in cases such as Case C-55/94 Gebhard ECLI:EU:C:1995:411, para 37 (establish- ment), Case C-338/04 Placanica ECLI:EU:C:2007:133, para 49 (services) and Case C-42/07 Liga Portuguesa, ECLI:EU:C:2009:519, para 60 (services), where the CJEU appears to require that the national measures are 'non-discriminatory' as a separate heading under the justification assessment. All three cases concerned mandatory/public interest requirements, as opposed to express derogations.

[100] See, eg, Case 174/82 Sandoz ECLI:EU:C:1983:213, para 18. Emiliou therefore contends that since the arbitrary discrimination/disguised restriction test under Art 36 TFEU and the proportionality test overlap to a significant extent, they should not therefore be viewed in isolation; see N Emiliou, The Principle of Proportionality in European Law: A Comparative Study (Dordrecht, Kluwer, 1996) 259. Interestingly, the link between the prohibition against arbitrary discrimination/disguised restrictions set out in Art 36 TFEU and consistency requirements was raised a few years earlier in Case 34/79 Henn and Darby ECLI:EU:C:1979:295. The appellants in the case argued that since stricter rules existed for imports than those which applied internally, 'no consistent policy of public morality' could be said to exist, thus constituting arbitrary discrimination under today's Art 36 TFEU. The CJEU disagreed and deemed the UK authorities' reliance on the derogations to be genuine.

[101] See, eg, cases such as Case 34/79 Henn and Darby ECLI:EU:C:1979:295, para 21; Case C-170/04 Rosengren and Others ECLI:EU:C:2007:313, paras 41–42; Case C-434/04 Ahokainen and Leppik ECLI:EU:C:2006:609, paras 29–30; and Case C-198/14 Visnapuu ECLI:EU:C:2015:751, paras 123–29.

[102] cf the findings of the EFTA Court set out above with, eg, Case 53/76 Bouhelier ECLI:EU:C:1977:17, para 15, where the CJEU found a French measure requiring quality certificates for watches due for export to constitute arbitrary discrimination, since no similar requirement was imposed on watches destined for the domestic French market. Similarly, in Case 152/78 Commission v France ECLI:EU:C:1980:187, para 18, French advertising restrictions on alcoholic beverages were deemed to constitute arbitrary discrimination as they affected imported alcoholic goods more heavily than (at least certain) domestically produced alcoholic drinks.

derogations have been relied upon, the CJEU makes no mention of the express prohibition against arbitrary discrimination/disguised restrictions whatsoever, simply applying the consistency requirement in its place.[103]

However, the introduction and development of the consistency requirement not only broadens the scope of equal treatment assessments under the TFEU and Main Part of the EEA Agreement. It also both alters and strengthens the suitability strand of the proportionality test, which has changed rather dramatically from one based solely on the relationship between the means and ends in terms of adequateness or appropriateness, by taking on an additional requirement of equal treatment on grounds other than nationality. The consistency requirement also amplifies the more traditional, classic 'means and ends' suitability test, too. Traditionally, little seems to have been required before a state could maintain that a given measure was suitable for attaining an (at least in principle) accepted legitimate aim. Showing how a measure pursues its aim in a consistent and systematic fashion may arguably lend a robustness to proving the effectiveness of the measure in question.

Integrating the arbitrary discrimination/disguised restriction requirement into the proportionality test has in turn also had the effect of extending their remit beyond the express derogations set out in Articles 36 and 65(3) TFEU. As part of the general proportionality assessment, the consistency requirement will naturally also apply in situations where the court-made mandatory/public interest requirements are relied upon to justify restrictions on the free movement of goods and capital.

It has been said that the introduction of consistency generally makes it easier to justify a restriction.[104] Had the test merely centred on the objective element of whether an inconsistency is present or not, this would undoubtedly be true. Yet the test also contains a subjective element. Just as with Articles 36 and 65(3) TFEU, which require the unequal treatment or restriction to be arbitrary or disguised, the condition that the unequal treatment or restriction is genuine involves a rather clear value judgment to be made by the court assessing the justification alleged by the Member State in question.[105] This may obviously prove a delicate issue, as it requires the court to look behind the reasons provided and question the state's intentions and whether it believes these to be true or not. And the very finding of a breach of the proportionality principle owing to an inconsistency, with no less than three examples of this in the NAV case, implies that the state in question has acted disingenuously, even if this is not explicitly stated in the judgment or opinion itself.

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[103] See, eg, Case C-161/09 Kakavetsos-Fragkopoulos ECLI:EU:C:2011:110; Case C-648/18 ANRE ECLI:EU:C:2020:723; and Case C-663/18 Criminal Proceedings against B S and C A ECLI:EU:C:2020:938.

[104] Mathisen (n 95) 1047.

[105] As pointed out by Gormley ((n 101) 505), as far as the second sentence of Art 36 TFEU is concerned, the use of the word arbitrary 'is, however, not superfluous and is probably meant to indicate that different treatment may in some circumstances be justified. … Overall, that second sentence acts as something of an "emergency brake" means of ensuring that the [express derogations in] the first sentence of [Art 36 TFEU] is not misused'.

Tied in with the subjective element, there are also certain interesting points to note concerning the burden of proof in the NAV case. As we know, the burden naturally rests with the EEA States, and the amount of evidence required may varies quite considerably from one case to another – from almost nothing to a rather strict burden.[106] In cases where a state has been accused of pursuing an otherwise legitimate objective in an inconsistent or unsystematic manner, this has seldom been linked to a very strict burden of proof by the EFTA Court[107] – and quite rightly so in our view, since not every inconsistency can or should lead to a finding of disproportionality. To put it another way, the existence of an inconsistency is a necessary yet insufficient element in itself in finding a measure disproportionate. Whether it should be deemed so hinges on the genuine nature of the state's action. Furthermore, as stated by the CJEU in several cases, social policy – including social security – is still merely subject to coordinating EU competence and rules.[108] The fact that EEA States therefore still enjoy a wide discretion in exercising their powers in this field seems at times to be also reflected in a rather 'light' application of the proportionality principle.[109] The NAV case thus seems to represent something of an anomaly in this respect, in several places demanding a very high evidentiary burden on the part of the state in seeking to show that its measures were consistent and systematic, and hence both suitable and necessary. The reasons invoked had to be accompanied 'by specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, if necessary, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the attainment of the stated objectives'.[110] The level and clarity of guidance provided on this point is commendable, and no doubt of great value more generally for national courts and authorities when seeking to decide cases at final instance. The EFTA Court's opinion also leaves little doubt as to its implied judgment over the disingenuous nature of the Norwegian state's actions. Given that the Norwegian authorities themselves publicly had admitted a wrongdoing to begin with, the fact that much would be asked of them in terms of evidence to the contrary in justifying their measures seems only natural. The very high evidentiary burden imposed in this

[106] See, eg, T. Tridimas, 'The Principle of Proportionality' in R Schütze and T. Tridimas (eds), Oxford Principles of European Union Law – Volume I: The European Legal Order (Oxford, Oxford University Press, 2018).

[107] See, eg, Case E-3/06 Ladbrokes [2007] EFTA Ct Rep 86; Case E-8/16 Netfonds [2017] EFTA Ct Rep 163; Case E-8/17 Kristoffersen [2018] EFTA Ct Rep 383; and Case E-9/20 ESA v Norway (Corporate Officers), judgment of 15 July 2021.

[108] That coordinating rules in this field may also have certain de facto harmonising effects has been pointed out by several writers and seems beyond doubt (see, eg, F Marhold, 'Modernisation of European Coordination of Sickness Benefits' (2009) 9 European Journal of Social Security 119, 127–29), although exactly how and why would certainly be deserving of further research and analysis.

[109] See, eg, the Grand Chamber ruling in Case C-213/05 Geven ECLI:EU:C:2007:438, paras 27–29, where the CJEU required the national authorities merely to show that they were reasonably entitled(!) to consider that the measure in question was suitable and necessary. See further S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' (2008) 27 Yearbook of European Law 167, 188. Other cases from the field of social security where similarly light proportionality assessments were made include, eg, Case C-406/04 De Cuyper ECLI:EU:C:2006:491; see M Cousins, 'Citizenship, Residence and Social Security' (2007) 32 European Law Review 386, 393.

[110] *N* (n 20) para 119, repeated in similar terms in paras 95 and 125.

case nevertheless warrants a small note of caution moving forward. It is important to remember that the NAV case is a rather exceptional case of EEA malpractice in itself. The evidence threshold should therefore not automatically be set too high simply because an inconsistency seems present in a case, but only where the genuine manner in which the objective seems to have been pursued can be called into question. In other words, the evidentiary burden should – in our view – be clearly linked to the determination of the subjective element of the consistency test. This may provide even greater clarity to national courts and authorities in applying the proportionality principle in cases, whilst also avoiding tipping the important balance that should and must exist between restrictions and justifications too far for the future.

VI. Outlook

The NAV scandal resulted in much soul-searching in the Norwegian legal community, including in the Supreme Court. In an unprecedented move, the final acquittal of the defendant in the case discussed in this chapter was accompanied by an apology from the Supreme Court for the failure to discover the violation of his free movement rights when first hearing his case in 2017.[111] Furthermore, the Supreme Court's guidelines to lawyers appearing before it, as well as the guidelines to the Court's own clerks, have been updated to prevent similar mistakes in future cases.

However, for the EFTA Court, the NAV case offered an opportunity to further strengthen its relationship with Norwegian courts both generally and with the Supreme Court more particularly. This was an opportunity which the EFTA Court seized, delivering its detailed answers to (most of) the many questions put by the Supreme Court in roughly 10 months.[112] This again allowed the Supreme Court to render final judgment in the case only two months later, on the basis of grounds largely only echoing those provided by the EFTA Court. The Supreme Court's introductory note that statements in an Advisory Opinion from the EFTA Court on 'more specific assessments' carry less weight than statements regarding the interpretation of EEA law comes across as merely a friendly reminder. And on the points in the Advisory Opinion which were not perhaps as clear as they ought to have been – concerning the distinction between 'criteria for entitlement' for a sickness benefit and 'further conditions in the application of Article 21(1) of the 2004 Regulation (see section III.C above), and the acknowledgement of re-integration of recipients of sick- ness benefits into the labour market as a legitimate aim under Article 36 EEA (see section IV.C.i) – the Supreme Court opted for unassertive clarification in line with the presumed intentions of the EFTA Court. It thus seems justified to claim, as the EFTA Court's President indeed has, that the NAV case demonstrates the 'close partnership' that now exists between the EFTA Court and Norwegian courts.[113]

[111] HR-2021-1453-S, para 191.
[112] In comparison, the average time taken by the CJEU to deal with requests for preliminary rulings was 17.3 months in 2022 (CJEU, Annual Report 2022, p 27).
[113] P. Hreinsson, 'The EFTA Court – Past, Present, Future' (2023) 62 Lov og Rett 77–78, 78.

The same conclusion may also be drawn when looking at the assessment of the justifications provided in the case. The requirement to genuinely pursue the accepted aim(s) in a consistent and systematic manner clearly played a central role in the EFTA Court's Advisory Opinion. The impact and increased use of consistency requirements in proportionality assessments – which has had the effect of extending two black-letter requirements related to goods and capital under the TFEU to all of the four freedoms under EU and EEA law – is rather astonishing and shows how important continued guidance and judicial dialogue remains, even concerning fundamental aspects of EEA law. The development of the consistency requirement itself does not of course help judges avoid having to make discretionary, value-based decisions on policy choices made by national authorities in the EEA States in the future. But if used properly and explained clearly to the national courts – as the EFTA Court has endeavoured to do in the NAV case – it may well prove of some assistance in packaging such decisions into somewhat more palatable and diplomatic terms, and with a clearer signal to national authorities as to what levels of proof may be required in a given situation to dispel any concerns the CJEU and/or the EFTA Court might have.