

“Room for Manoeuvre” is the Real Reason for Norway’s EEA Scandal

Carl Baudenbacher

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University of Oslo Professor Hans Petter Graver [tries to explain](#) the reasons for the EEA scandal that is currently shaking Norway. His considerations are not convincing. The total failure of politics, administration, and courts cannot be explained by alleged “conflicts of law” problems, an “extraordinary situation” allegedly created by Norway’s EEA accession, or by a “legal overload” which occurred 25 years ago when EU single market law had to be taken over. Every European country that has joined the EEA on the EFTA side or the EU had to overcome these challenges.

Collective defensive attitude

It was not “[t]he extraordinary character of European law and its introduction into national law [that] destroyed the judgement of the actors of the legal institutions”. It was rather an almost irrational collective defensive attitude of scholars, politicians, bureaucrats, and judges against EEA law, which from the outset was perceived as foreign and threatening, that prevented the relevant actors from acquiring the necessary knowledge and skills.

From the first days of Norway’s EEA membership in the EFTA pillar, Norwegian jurists were eager to ask how the sovereignty of the country could be defended against EEA law and the institutions of the EFTA pillar, the EFTA Surveillance Authority, and the EFTA Court. There are countless publications on the unpopular principles of primacy and direct effect. When the EFTA Court in 1998 recognised EEA State liability (Case E-9/97 *Sveinbjörnsdóttir*, large parts of the Norwegian legal community almost lost their composure. The substantive EEA law, on the other hand, which guarantees rights to those who create wealth, citizens and economic operators, was hardly dealt with.

Not a legitimate strategy

Professor Graver writes, as if that had been an inevitable development: “With EEA law, a new principle came into Norwegian law and administration: the so-called room for manoeuvre. EU law gives the national authorities room for protecting public policy, public security or public health and other legitimate aims of overriding importance. In a political culture based on social solidarity and a recognition of the need for public regulation, it is important that political decisions can be based on legitimate national political processes and concerns. From one perspective, this is both natural and necessary. Where national solutions are desirable, the authorities should not renounce it on the basis of a misconception that they are not free. This concept of a ‘room for manoeuvre’ represents a challenge from a legal

security perspective, however. Utilizing the room for manoeuvre can mean that the rights EEA rules give citizens, are restricted and challenged because it is politically desirable.”

I cannot follow these assertions. I am not aware that any other EEA State, neither in the EFTA nor in the EU pillar, has developed such a national strategy. “Room for manoeuvre” is the cause of all the evil. The NAV social security law scandal is just the tip of the iceberg. “Room for manoeuvre” has led Norway – with an interruption of 17 months – to claim the presidency of ESA for itself since 1994. Norwegian courts were asked by the State Attorney from the beginning to refrain from referring cases to the EFTA Court. If a reference was nevertheless made and the Norwegian State lost, the State Attorney invited Norwegian courts to decide in favour of the State anyway, often (albeit not always) with success. Professor Mads Andenæs has recently [coined the expression](#) that Norwegian courts are all too easily prepared to follow political signals. Disproportionate restrictions of fundamental freedoms and unjustifiable restrictions of competition could therefore be maintained. With one exception, ESA did not have the strength to take action against this (Carl Baudenbacher, *Judicial Independence. Memoirs of a European Judge*, Springer 2019, Chapters 15 and 22).

Early warnings

The “room for manoeuvre” dogma existed since the downsizing of the EFTA pillar to three States in 1995. It became Norway’s official EEA strategy after 2008. Critics from Norwegian academia objected that “room for manoeuvre” was incompatible with the principle that obligations flowing from international treaties had to be fulfilled in good faith (Mads Andenæs/Andreas Motzfeldt Kravik/Eirik Bjørge, *Høyesterett og EMD: samspill, subsidiaritet og skjønnsmargin, Lov og rett*, 2015, 261-278); alas, without success.

A systemic problem which needs systemic remedies

“Room for manoeuvre” has unfortunately become part of the Norwegian EEA-DNA. This goes so far that lawyers defend “room for manoeuvre” even though their clients, private operators, lose cases precisely because of this political concept.

The “room for manoeuvre” dogma has a lot in common with U.S. President Donald Trump’s chauvinistic rallying cry “America First”. This is not acceptable for a Western European State. Fundamentally, “room for manoeuvre” is a systemic problem which requires systemic remedies. The first short-term measure should be for the Norwegian Government to revoke the “room for manoeuvre” strategy. Norway, like any other of the current 31 EEA States, should apply European law in a way that is both fair and faithful.

There is furthermore much to suggest that the Norwegian Government’s “room for manoeuvre” strategy is incompatible with fundamental principles of EEA law:

(i) It is first and foremost irreconcilable with the principle of loyalty as laid down in Article 3 EEA. A government which instructs its administration to pursue national interests to the extreme in the application of international law explicitly or implicitly accepts that it may breach its international obligations. If I, as a football coach, continuously tell my players to play as hard as possible, to the limit of what is allowed, I cannot wash my hands in innocence if one severely injures an opponent.

(ii) “Room for manoeuvre” is also incompatible with proportionality. It is amazing that Hans Petter Graver mentions proportionality without drawing this consequence. “Room for manoeuvre” replaces the proportionality test with a mere “margin of appreciation” test. Instead of strictly examining the suitability and necessity of a restricting national measure, Norwegian courts are told by the State Attorney to limit themselves to a plausibility test. It is to be noted in this context that Norwegian judges traditionally have difficulty implementing the European law principle of proportionality. As Norway’s Judge on the European Court of Human Rights, Arnfinn Bårdsen has [observed](#), there is “still some way to go [...] to give full effect [to] that principle in the Norwegian Supreme Court”, not to mention the lower courts.

(iii) Since there is no “room for manoeuvre” dogma in the European Union and its Member States, the principle of reciprocity is also violated. From the perspective of reciprocity, EU citizens and economic operators must be granted similar rights in the EFTA pillar as EEA/EFTA operators enjoy in the EU pillar. Norwegian citizens and businesses have broad access to the Union courts whereas their counterparts in the EU are denied such access to the EFTA Court. The EFTA Court expressly highlighted this in its landmark judgments in Cases E-18/11 *Irish Bank* (Paragraph 58) and E-3/12 *Jonsson* (Paragraph 60).

(iv) “Room for manoeuvre” cannot be reconciled with the principle of homogeneity. As experience has shown, this dogma necessarily leads to inhomogeneous results.

Professor Graver mentions that the Government has set up a task-force with the mission to establish the facts and come up with explanations on how the dynamics of the NVA scandal developed. The problem with this committee is twofold: First, if its task is limited to investigating the NAV scandal, it will not even recognise the true reasons for the Norwegian EEA malaise. Second, the committee includes members who have until recently stood up for “room for manoeuvre”. Their unbiasedness is at least questionable.

Norway must loosen its grip on ESA. The authority has failed in the NAV scandal. It received a complaint in 2015 without taking any action. ESA can no longer limit itself to making submissions in proceedings before the EFTA Court. The authority must also ascertain whether the rulings of the EFTA Court are correctly implemented by the national courts and if necessary start infringement proceedings against the country concerned.

The Norwegian Government must give up its resistance against the establishment of a supranational body in the EFTA pillar along the lines of the Article 255 TFEU panel, which would examine candidates for the bench proposed by governments for their qualification and independence.

Finally, EEA law education must be made mandatory for prospective lawyers and judges. It is incumbent on Norwegian universities and the Bar to require that new entrants to the profession are properly educated and equipped to identify, consider, and argue points of EEA law before all courts. This is a long-term solution.

Together, these measures are the only way in which Norway's systemic EEA problems of yesterday and today will no longer be the problems of tomorrow. And the only way to avoid that a situation like the NAV scandal, where the weakest of society have been systematically failed by every state body, repeats itself.

