Journal of European Public Policy

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjpp20

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To cite this article: Erik O. Eriksen (2022): Three modes of administrative behaviour: differentiated policy implementation and the problem of legal certainty, Journal of European Public Policy, DOI: 10.1080/13501763.2022.2125047

To link to this article: https://doi.org/10.1080/13501763.2022.2125047

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Published online: 18 Oct 2022.

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JOURNAL OF EUROPEAN PUBLIC POLICY
https://doi.org/10.1080/13501763.2022.2125047

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Three modes of administrative behaviour: differentiated policy implementation and the problem of legal certainty

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ABSTRACT
In the European Union, non-compliance with EU law and uneven protection of rights may be caused by differentiated policy implementation, potentially creating a problem of legal certainty. A Norwegian 'scandal' caused by the misapplication of EU law provides a case in point. To analyse the case, this article outlines an instrumental, an advocate and a conciliatory mode of incorporation, showing how these give rise to different assumptions about how agencies incorporate EU law and why they sometimes err. Under conditions of complexity, the instrumental mode of incorporation may be unable to ensure legal certainty. The Norwegian scandal is explained as the result of undue political influence and the fact that differentiated integration gives rise to the illusion of a national 'room for manoeuvre'. Hence the explanatory value of the advocacy mode. The conciliatory mode of incorporation recommends itself as a way of ensuring legal certainty in complex orders.

KEYWORDS Compliance; differentiated integration; European Union; legal certainty; national 'wiggle room'; implementation

Introduction

Compliance with European Union (EU) law has become a condition for the equal treatment of citizens. However, differentiated integration (DI) may challenge this condition as it implies 'the differential validity of formal EU rules across countries' (Schimmelfennig & Winzen, 2014, p. 356). Effects of EU law may vary with the type of EU association and form of cooperation. Variation may thus be due to the mode of *implementation* – that is, how legal acts are incorporated into national law by implementing agencies. This article asks how different modes of administrative behaviour affect policy implementation in a DI context. Implementing agencies, it is conjectured, understand and practise EU law differently owing to the existence of different types of administrative 'styles'.

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Administrative behaviour is intrinsically related to legal certainty, which cannot be achieved if there are discrepancies between how individuals' rights and obligations – in the areas of, say, consumer protection, public health or social benefits – are regulated within diverse legal regimes and at different regulatory levels. A prominent example of discrepancies is the scandal that recently engulfed the Norwegian Labour and Welfare Administration (NAV).[1] Owing to misgivings about open borders and 'welfare exports', NAV misapplied the relevant EU regulation when it imposed a requirement of 'mandatory physical presence in Norway' for the payment of certain benefits. As a result, more than 6000 persons were wrongly withheld benefits and/or accused of fraud, while dozens were sentenced to prison for periods of stay in other European Economic Area (EEA) countries.

Norway is not formally a member of the EU, but it is a member of the EU's Single Market through the EEA Agreement. Some of EU legal acts thus apply in Norway in the same manner and to the same degree as they do in EU member-states. The EEA Agreement is particularly challenging for national regulators, as it requires them to translate and apply EU law consistently across many policy sectors while being excluded from the law-making process. In legally integrated orders, problems occur when there is more than one single correct solution to a case. Like all public institutions, implementing agencies are bound by the formal demands of the rule of law – the principles of predictability, legality, and equal treatment. Decisions on translation can be checked, appealed, or overruled. In the case examined here, courts found NAV's practice invalid as it restricted the right to free movement.

Uneven practices have previously been observed in the EU (see, for example, Wiering & Havinga, 2021). The Norwegian scandal illustrates a general problem of legal certainty in multilevel administrative orders – that is, how to ensure that everyone has the same rights, and that the protection of those rights leads to similar results in all cases. The scandal surrounding the implementation of EU regulations in Norway provides an extreme case that highlights not just the problem of multilevel administrations but also that of differentiated policy implementation within the EU.

Why did it happen? Public officials are supposed to observe formal rules, treat cases justly and enact legal norms in a disinterested manner. In this case, they acted wrongly but still some seemingly saw themselves as acting appropriately. This paradox may occur in a multilevel context, where obligations collide. Since implementing agencies exercise considerable discretion, and their behaviour is affected by established practices, policies, and interpretative frames, we may look for explanations in the different modes of administrative behaviour observed in the incorporation of EU law.

The question examined in this article is under which mode of administrative behaviour the Norwegian scandal occurred and why DI matters. I

distinguish between an *instrumental,* an *advocate* and a *conciliatory mode of incorporation*. These modes give rise to different assumptions regarding how agencies incorporate EU law and why they sometimes err. The instrumental mode sees incorporation as a technical, adaptive process complying with the value of accuracy. In the advocate mode, incorporation is related to the realisation of policy goals and reflects the value of effective, professional performance. The conciliatory mode takes the inter-institutional context into consideration and seeks to accommodate different concerns in a fair manner.

The empirical strategy of this article is to establish why the NAV scandal occurred through analyses of official documents.[2] It is a single case study using the scandal as *a crucial example* most likely to generate a specific outcome to highlight a general phenomenon (see Gerring, 2017). Facilitating factors are to be identified, as is the determinate *causal mechanism* that can explain the conversion of a particular policy preference to a practical result. The article aims both to explain the NAV scandal and to clarify the relevance of the three modes of administrative behaviour in a DI context. The article questions the conclusion of the investigative report commissioned by the Norwegian government that EEA rules were not known, and officials were not acting against their better judgement.

I begin by clarifying the status of EU law in Norway before outlining (1) the theoretical approach adopted in the article, (2) the three modes of incorporation and (3) the expectations for the study. Thereafter, by identifying the causes of errors, I analyse both what happened and why. Then, I discuss whether the notion that there is a leeway for national concerns in the interpretation of EU law is a consequence of the fact that DI gives rise to the illusion of a certain 'room for manoeuvre'. Lastly, I discuss implications of the study for logics of administrative behaviour.

Equivalence of legislation

DI is a pragmatic response to political challenges of a fundamental character. It represents a way of keeping a controversial system together by sectioning off particular policy areas and countries from centralised rule. DI has become a functional means for handling (or bypassing) various forms of crisis and opposition to integration. The consequences of DI are not trivial, however. Types EU differentiation affect identities, political statuses, and self-rule, as well as threatening the integrity and viability of the political order (Eriksen, 2019; Kelemen, 2019).

The EEA Agreement, which provides access to the EU's Single Market for Norway, Iceland and Liechtenstein, entered into force in 1994 and is a case of DI. The core of the Agreement consists in the four freedoms – for goods, capital, services and people – and EU regulation of competition, public procurement and government subsidies. Integrated markets require the

existence of consistent legal frameworks at the EU level and that national regulators comply. To ensure a level playing field, regulations and directives must be uniform and produce the same results for all EU member-states, including the EEA countries. To this effect, the principles of mutual recognition of the 'equivalence of legislation' and *effet utile*, which commits members to effectual application of EU law, apply. In addition, there is *the principle of loyalty* – a duty to realise the commitments of the Agreement (Article 3).

Since EEA member-states have not transferred legislative competencies to the EEA institutions, they cannot accept direct decisions of the European Commission or the Court of Justice of the European Union (CJEU). The EEA Agreement therefore established the EEA EFTA bodies – the EFTA Court and the EFTA Surveillance Authority (ESA) – to match the corresponding bodies of the EU. The EEA Committee is responsible for amending the relevant national legal acts. This two-pillar system was established to ensure reciprocity, non-discrimination and legal *homogeneity*. The EEA countries are obliged to adopt EU regulations and to interpret, uphold and live by them in the same way as EU member-states. Homogeneity is dynamic, as one must be prepared to change and update the rulebook whenever necessary. In the event of conflict, national law gives way to EU law. This requirement can be found not only in the Preamble of the EEA Agreement – it is also an 'unwritten rule' governing the Schengen Agreement and other EU agreements with associated non-members.[3]

The welfare benefits scandal in Norway testifies to the fact that the effects of EU law are not uniform. Other studies support such a finding. For example, case studies indicate the existence of a gap between legal and actual compliance in Central and Eastern Europe (Zhelyazkova et al., 2016, 2017). To understand the problem of non-compliance and the uneven application of formal EU rules, we need to focus on the policy implementation process.

Policy implementation

As the requirements of the Single Market regarding the establishment of a 'level playing field' and the terms of the EEA Agreement and other EU agreements with associated non-members attest, the EU strives to achieve legal homogeneity and uniformity. However, the number of cases brought by the Commission against member-states for infringements has plummeted, especially since 2009 (Hofmann, 2018). This may be due to the fact that decentralised agencies have become an integral part of the EU's institutional structures and that national agencies are implementing the EU's legal acts (see Egeberg & Trondal, 2016). To understand the real effects of EU legislation on national law, we need to examine the processes through which the EU's secondary laws become national law.

This article focuses on how agencies interpret legal acts of the EU. Administrative bodies are expected to observe the rule-of-law principle – their decisions should be impartial, based on sound knowledge, and respect the virtues of professionalism, integrity and fairness (see Majone, 2005, p. 37). Implementing agencies are public institutions that can be seen to be bound by the values of *accuracy*, *impartiality,* and *effective performance*. However, these three values may be contested, mean different things to the respective institutions, and be weighted differently. Consequently, we must examine how institutions shape legal acts through informal routines and practices – or 'styles' – to understand the effects of EU law on national law.

Policy styles have implications for the making and implementation of public policies (Richardson et al., 1982). Policy style is a useful independent variable in the study of various politico-administrative phenomena and is particularly relevant in the study of complex institutional settings in the interface between the political and the administrative domains (see Bayerlein & Knill, 2019, pp. 1–2). However, 'it is striking that the specification of policy styles has always been based on the politics dimension: i.e., typical features characterising the process of policy-making. By contrast, issues of policy content and policy design have been neglected' (Adam et al., 2017, p. 329). Adjusting for policy content alerts us to differences in administrative implementation style and the problem of undue influence.

The concept of administrative style depicts the relationship between institutional context and the implementation practices (Terpestra & Havinga, 2001, p. 96). Administrative bodies are obliged to comply with formal regulations and statutory law but are also authorised to exercise discretion. The interpretation and operationalisation of statutes are the prerogative of administrators, who 'exercise considerable discretion in giving content to ambiguous laws' (Sunstein, 1997, p. 289). Discretion makes agencies vulnerable to political influence favouring a particular policy outcome, which may conflict with the principle of legality. In studying administrative behaviour, we thus need to adjust for the *requirement of legal certainty.* To meet this requirement, cognitive resources – the capacity to understand and interpret – are needed. Officials must be able to give an acceptable interpretation of the agency's mandate and reach decisions that are putatively well reasoned. Officials thus need *political literacy*, viz., political sensitivity to disagreement and the ability to track legislative intentions (Eriksen, 2020). Administrative bodies are required to make correct decisions, if not for other reasons than that their decisions can be appealed and overruled.

Modes of incorporation

In conceptualising administrative styles, scholars have identified a servant style, an advocacy style, a consolidator style and an entrepreneurial style

(Knill et al., 2019). By combining elements of these established styles, we may identify three modes of incorporation, along with their corresponding decision-making rationalities. Each involves a particular constellation of epistemic logics and values and gives more weight to some logics and values than to others.

The **instrumental mode** holds that decision-making follows a routine pattern of behaviour premised on standard operating procedures. It operates under conditions of stability and clarity, where the rules and goals are given and the *task environment is stable*. It sees the transposition of EU law as a technical operation of applying given rules in a correct manner – that is, through strict adherence to the wordings of the agency's mandate and legal arrangements that define its tasks and functions. The primary value is *accuracy* premised on a corroborated body of knowledge. This mode assumes that the relevant agency makes no attempt to fit the political substance in question to a particular policy but seeks rather to adapt it to the existing knowledge base. The agency's interpretation follows a value-neutral logic, which nevertheless reflects a particular knowledge, choice, and value prioritisation. The agency proceeds as though there were one simple criterion of application, thus neglecting the wider value complex. In this mode, the complexity of the legal basis is overlooked. In the context of the recent NAV scandal in Norway, the expectation of this mode would be that the errors were due to the agency's reliance on a narrow knowledge base, in which the principles of EU law and the EEA agreements were insufficiently known. Such practice may in fact amount to a method of avoidance as EU law is treated as a sideshow.

T**he advocate mode** works under *conditions of politicisation and conflict* when there are preferences regarding outcomes and when both the decision-making situation and the rules appear to be negotiable. In this mode, agencies will focus their activities on influencing those aspects that directly relate to the quality, internal consistency, and effectiveness of their policies. The mode is oriented towards the achievement of substantive policy ends, the paramount value being *effective performance*. There is an institution- and policy-specific interpretation of legal acts, which is buttressed by the idea that there exists some leeway for implementing agencies to diverge from legal obligations. Such divergence leads to a selective application of EU rules. EU law is treated as a strategic resource that may be ignored when it collides with policy goals. In the context of NAV's comprehensive errors, the expectation is that mistakes would be due to the agency's prioritisation of certain policy goals. In this mode, the interpretation of the agency's mandate is broader than is the case in the instrumental mode, as the value complex is recognised. However, conflicts of values and norm collisions are not solved. This is because there is seen to be an intrinsic conflict between values – between ethical commitments and moral norms,

between obligations and rights. When value conflicts are considered unsolvable, efforts to address them will consist solely of administrative fixes.

The **conciliatory mode** comes to the fore when the environment is complex, when the rules and goals are many, and when the relevant methodologies are not well established. It operates under *conditions of political literacy and participatory parity*. It holds that, owing to their politically autonomous status, administrative bodies are driven by an attunement logic of consistency between legal and practical concerns. Officials work together and seek to reach an inter-institutional understanding on the correct meaning and practice of EU law. With the help of reflective argument, they seek to reconcile different concerns in their efforts to interpret and apply the law in a consistent manner. Here, the paramount value is *impartiality*. The conciliatory mode recognises the value complex of the agency and a possible tension between values but assumes that conflicts between the latter can be solved through an interpretative praxis that is responsive both to the mandate and to other relevant legal sources. The meaning of values is not fixed but is up to debate owing to the standards of legal and professional integrity, which relate the proceedings to context-transcending knowledge claims. In this mode, we assume that there is an active and collaborative interpretation of legal acts that is aimed at securing harmonised practice, taking proper heed of both the national and the EU level. With reference to the 'NAV scandal', according to this mode the expectation would be that errors were due to structural obstacles to an unbiased interpretation of legal obligations.

Under the instrumental mode, agencies may err because DI creates a complex decision-making situation. Under the advocate model, officials may err because of politicisation and conflicts of loyalty in a DI context. Under the conciliatory mode officials may err because the requisite conditions of political literacy and participatory parity may not be in place in differentiated political orders.

Merely a blind zone?

Over the years, the Norwegian Labour and Welfare Administration (NAV) has applied the requirement of stay in Norway under the Norwegian National Insurance Act for recipients of allowances in a manner contrary to European social security regulations (EU Regulation No 883/2004) and other EEA law instruments.[4] According to the latter, people receiving cash benefits can leave Norway for other EEA/EU countries. There is thus no *residence requirement*. According to the Norwegian law on national insurance, however, such a requirement does exist: it is a condition for receiving welfare benefits that one remains in Norway.[5] In May 2021, the EFTA Court found that Norway had violated the right to free movement, which is fundamental

to the EEA Agreement. Later in the same year, the Supreme Court of Norway ruled NAV's interpretation of the law invalid.

When it comes to the causes of the misapplication of the requirement of stay in Norway, a government-commissioned investigative report points to a failure 'to align the provisions of the National Insurance Act correctly with the rules under EEA law' (NOU, 2020: 9, p. 26). The explanation given is that EEA rules were not known: they went under the radar of the decision-makers. An internal audit by NAV (2019) also found that the directorate lacked knowledge of EEA rules and about the collision between Norwegian law and EEA rules.

It is the responsibility of every local NAV office to integrate different concerns and determine whether a particular case is EEA-relevant and hence not to be treated in accordance with Norwegian internal law. The decision-makers are guided by circulars, the quality of which was poor in terms of information on the status of EEA law (NOU, 2020: 9, p. 248). The government-commissioned investigative report identified unskilfulness and capacity problems as explanations. Lack of adequate information, critical thinking and practical training was found to have caused the misapplication of the residence requirement. The report states that there was a *blind zone* and a weak management culture.

This is puzzling, as considerable insecurity existed regarding the legal basis for NAV's decision-making. The level of knowledge varied between departments, and not all officials were ill-informed or misled. Some were competent in EEA law. Still, this competence had no bearing on the handling of individual cases. Officials proceeded as though there were only one decision-making criterion. In a situation of legal complexity, the conditions for the instrumental mode are not in place.

According to the government report, the misapplication of EU law was due to a simplistic decision-making criterion. Yet this explanation of the errors is shallow and triggers new questions. Why is the competence low within NAV on EEA matters? And how could the misconduct continue when not all the actors suffered from a blind zone? To account for the scandal, it is necessary to adjust for facilitating factors related to political preferences and the predicaments caused by DI.

An unsustainable practice

The advocate model conjectures that the misapplication of the requirement of stay in Norway was due to political influence. The basis for this assumption is that some officials knew about the demands of the EEA Agreement and signalled uncertainty regarding the correctness of NAV's practice. Yet insecurity about the transposition of the EEA Agreement was not resolved by the ministry (NOU, 2020: 9, p. 269). NAV's (2019) own audit revealed that, as early as 2009, the directorate had expressed concerns about whether there was a

conflict between restrictions on welfare 'exports' and the EEA provisions on the right to free movement. Still, the Ministry of Labour restated that it was a condition for the right to receive cash benefits that a person resided in Norway (Ministry of Labour and Social Inclusion, 2008–2009). NAV's internal audit reports evidence of front-line officials in NAV questioning the compatibility between NAV's application of domestic law and Norway's EEA obligations in 2014 and 2015. Around the same time, after NAV denied an individual's request for permission to stay in Sweden while receiving Norwegian social benefits, the applicant lodged a complaint to the EFTA Surveillance Authority. The ESA requested more information but did not pursue the case after it was provided with incorrect information by NAV and the Ministry of Labour (ESA, 2015; NAV, 2019).

Even after rebuttals by Norway's National Insurance Court and a recognition by NAV that its practice was wrong, the directorate hesitated to change its practice (NOU, 2020: 9, p. 270). Growing awareness of non-compliance with EU regulations failed to persuade NAV officials to change course. That is, officials were not convinced that there was 'sufficient basis to argue in favour of change of practice towards the political leadership that wanted to limit welfare export' (NOU, 2020: 9, p. 270). The National Insurance Court found that NAV's practice was not compliant with Regulation 883/2004 in as early as 2017, but the practice was not changed until 2019. NAV's practice was untenable, yet the agency continued to implement it. It changed course only when there was a threat of referral to the EFTA Court (NOU, 2020: 9, p. 141).

Advocatory decision-making

The issue in question was highly politicised owing to misgivings within Norway about the costs of open borders. *Reducing welfare export* was explicitly defined as a goal in declarations by various governing coalitions (Regjeringen, 2013, 2018, 2019). Such a policy, often fuelled by suspicion of welfare fraud, figured strongly in the corresponding period (see NOU, 2020: 9, Chapters 6 and 12). Calls to prevent the exploitation of Norway's generous welfare state became frequent. At the same time as anti-immigration attitudes were increasing across Europe, the perils of welfare export were highlighted by several expert reports. One committee of experts on social policy warned that labour migration following EU enlargement posed grave challenges for the Norwegian welfare model (NOU, 2011: 7). The costs of immigration – and even of refugees – came to the fore, and contentious calculations were made. Researchers *conjectured* that unless a change was implemented, the free movement of workers, owing to their earned rights, could amount to *a bomb under the welfare state*. According to one researcher, '400 million Europeans can earn extensive rights in Norway' (NTB, 2011). Researchers warned that support for the universal provisions of the welfare state would decrease

because of immigration. The conjecture remains to be verified.[6] Still, in an ensuing white paper, the government linked the rise in labour immigration to Norway to the increasing importance of avoiding so-called exports of Norway's generous social welfare benefits (St.meld.nr 5 [2012–2013]).

Leading figures within the government coalition wanted to challenge EEA rules that impeded the ability to halt export of welfare benefits. There was concern that the EEA Agreement made it difficult to restrict 'export' of welfare benefits, and it was repeatedly asked if the proper balance had been reached or whether more could be done to reduce the export (see, for example, St.meld.nr 40 [2016–2017]). Internal and external investigation reports, green and white papers, and legislative proceedings both before and after 2012 have addressed the issue of non-domestic residence in the light of the agreed-upon policy of reducing export of welfare benefits.

Even though the ministry did not openly instruct NAV on how to apply the rules for welfare benefits within or outside the EEA, it signalled a restrictive attitude to all types of welfare exports. All parties agreed with the government on the goal of reducing the export of Norwegian welfare benefits. 'In light of these policy preferences, it is unsurprising that mounting evidence of noncompliant practices was repeatedly ignored, dismissed, and even suppressed within the Ministry of Labor' (Pavone & Stiansen, 2021, p. 9).

The combination of an anti-immigration zeitgeist spearheaded by the ascendant populist right-wing Progress Party (FRP) and the academic and professional defence of the Norwegian welfare state became a forceful power in touting the danger of welfare export. Such export was viewed as a threat to the Norwegian model (NOU, 2011: 7) – not merely its economic but also its normative basis – as it was seen as eroding the basis for the established 'social contract' of the welfare state.

Accordingly, the advocate mode of incorporation has the most explanatory purchase in relation to the NAV scandal. The pivotal goal was to protect the Norwegian welfare model, which many – including both academics and politicians – saw as threatened by the rise of welfare export. The 'national interest' had the upper hand. Errors were thus due not just to unskilfulness and ignorance, but also to the political goal of reducing 'welfare export' combined with widespread concern for the economic and normative viability of the Norwegian welfare model.

One thing is political preference and general mood. Another is the low level of competence regarding EEA Agreement obligations in the implementing administration in the first place. Why was this the case?

The rights revolution

An indication of the cause of knowledge gaps is hinted at in the commissioned investigative report in which the development of EU law and its

implications are said to have been too extensive for decision-makers to keep track of (NOU, 2020: 9, p. 67). For the traditional view of the EU in Norway, it is awkward that the European Economic Community (EEC) has evolved into *a quasi-federal union*. The entity has evolved from what is traditionally seen as an economic organisation in the hands of its constituent parties, the Masters of the Treaties, focused on the rights of mainly economic actors in a free trade area, into a union of citizens based on a range of rights, including social and political ones. Today, the weight of substantive rights is a characteristic of EU law. On the basis of the four 'market freedoms', the EU has transformed into a distinctly *rights-based union* (Eriksen, 2009). The foundational principle – the prohibition of discrimination based on nationality (now Article 18 of the Treaty on the Functioning of the European Union) – was first extended to equality between men and women, and later to all types of discrimination (Article 21 of the Charter of Fundamental Rights). This 'rights revolution' involved the incorporation of measures pertaining to social policy.[7]

The dynamic EEA Agreement reflects this development. New rules are to be adopted on a continual basis to ensure the frictionless movement of persons, goods, capital and services. EEA citizens have a bankable right to freedom of movement within the EU, a right to seek employment in other member-states and a right to non-discrimination based on origin. Associated non-members are obligated to sustain these rights. Legal acts in the area of social insurance are given as regulations, which according to Article 7 of the EEA Agreement are to be implemented by incorporation.

Despite obligations to the contrary, the Norwegian authorities upheld the residence requirement, curtailing welfare benefit rights to individuals travelling abroad. In 2006, for instance, legislation was amended to explicitly state that 'it is a condition of entitlement to sick pay that the beneficiary resides in Norway' (Ministry of Labour and Social Inclusion, 2008–2009, Section 4.4.2.4). This amendment represents an infringement of EU law that forbids discrimination on the basis of nationality. Both EU Regulation No. 1408/71 (pre-2012) and EU Regulation No. 883/2004 (post-2012) were directed at coordinating social security systems within the European Single Market. These regulations prohibit discrimination in the allocation of social benefits on the basis of country of residence or an individual's decision to travel or move to another EEA country. They link beneficiaries' welfare rights to their free-movement rights.

Justificatory deficit

In a differentiated political order in which affected parties are excluded from participating in the policy and law-making process, it is hard for them to keep track of an evolving entity. Knowledge of the EU is generally low in the

politico-administrative complex of Norway (NOU, 2012: 2). Politicians and officials know little about the legal state of affairs for the EU's associated non-members. Many legal scholars have observed that EEA law goes under the radar of administrative law in Norway (Ikdahl, 2020). Educational programmes in these matters for lawyers, judges and administrative officials are close to non-existent (NOU, 2020: 9, pp. 184ff.). Academic institutions and the media are also to blame for illiteracy in EU matters (see Fossum & Holst, 2014; Sverdrup et al., 2019).

What is more, there is no parity of participation. Norwegian representatives are not part of EU law-making processes, and Norwegian officials are excluded from preparatory processes of policy-shaping in the Commission.[8] For an associated non-member, EU relations are part of external affairs and thus the prerogative of the executive. Exclusion from law-making processes also means being excluded from the justificatory process in which both proponents and opponents come to learn why new policies are adopted. *Decisional exclusion* causes a deficit of justification and hinders the establishment of the cognitive resources required for understanding and applying the law correctly. Politicians and officials are excluded, but so is the public sphere in which laws are a debated part of the general opinion and will formation processes. To a large extent, the background context for rules is missing. Correct rule application requires justification, interpretation, and prior understanding of context and rationale. When those applying a law do not know the reasons behind it, they may err.

Political illiteracy and lack of parity in participation means that the requisite conditions for the conciliatory model are not in place. In the light of decisional exclusion and executive dominance, it may not be surprising that EU regulations are ignored. For legal scholars, as noted above, this is a familiar story. Still, some knew that NAV's practice was legally wrong but did not act. No whistle blowers or warnings were observed by the evaluators. The ESA was even supplied incorrect information. Can decision-makers have felt justified in acting against their better judgement?

As Norway is not a formal member of the EU, it may be hard for Norwegians to realise that they are bound by its laws and to accept that resident non-citizens have a right to welfare benefits. The EU's rights-based model collides not only with the conventional understanding of what the EU is but also with popular opinion regarding what people temporarily staying in Norway might legitimately claim. The underlying attitude conducive to the scandal seems to be that non-Norwegians did not 'deserve' the full exploitation of welfare benefits: people staying in Norway temporarily had not 'earned' their rights. An old slogan of the Norwegian Labour Movement reads 'do your duty, claim your right' emphasising the symmetry of obligations and rights. The rights, and in particular social rights, are deserved for those who have contributed to the common welfare. This 'communitarian'

understanding of rights collides with a right to have welfare rights beyond the state. For many, it was difficult to accept that non-nationals should have welfare rights regardless of their prior contributions. Owing to the EEA Agreement, EU as well as Norwegian citizens have obtained rights against the Norwegian state.[9] Political preference, knowledge gaps and a justificatory deficit were factors that facilitated a wrongful administrative practice, but what exactly was the mechanism that caused the scandal?

A national 'wiggle room'

The expectation of the advocate mode finds support in our analysis, particularly when we adjust for the possibility that DI gives rise to the idea that national agencies have some scope for divergence. In some cases, non-compliance may be caused by ignorance or oversight, but in the NAV scandal some were aware that there was a problem. Why were decision-makers 'allowed' to break the law? The ethos of the welfare state and professional norms of effective performance may explain why some felt justified in doing so. However, administrative bodies are supposed to observe objective criteria. The principle of legality allows for administrative restrictions on rights only on the basis of enacted law. The question is where the idea of a leeway or 'wiggle room' for agencies to diverge from legal obligations came from and why it came to have empirical bite. There must be someone or something that converted policy preferences contradicting the legal obligations to the decision-making site – that persuaded, swayed, or compelled those who knew better not to take action, or warn about wrongs. Hence the quest for a mechanism that can explain the conversion of political preference into practical result.

The notion of a 'room for manoeuvre' appeared in a commissioned report on Norway's EU relations numerous times (NOU, 2012: 2). Indeed, the doctrine was advocated most prominently by the leader of the expert group that produced the report – Fredrik Sejersted, who subsequently became the Attorney General and was thus responsible for providing legal advice to the government in these types of cases. The claim, according to the Attorney General himself, was that Norwegian jurists should assist Norwegian authorities, including the government and parliament, to understand the requirements of EEA laws in ways that would ensure that national interests could be protected (Sejersted, 2019). According to one white paper, the aim behind the 'room for manoeuvre' doctrine was to explore the possibilities for influencing the bulk of EU legislation as to establish whether and how Norwegian authorities should implement EU rules (St.meld.nr 5 [2012–2013]). The subtext was that a minimal implementation of rights was seen as a means of protecting the viability of the Norwegian model.

When it became abundantly clear that NAV's practice was not compliant with Regulation 883/2004, concerns were voiced about the room for manoeuvre – viz., whether a referral of the practice to the EFTA Court would entail a restriction of it. A note to the Minister of Labour and Social Affairs in February 2019 explained:

> A referral of the case to the EFTA Court … involves a certain risk of a judgment that defines our room for manoeuvre even more narrowly, in the sense that the Court not only provides a clarification of the term 'stay' but also rules that a system of prior authorization cannot be sustained. (NOU, 2020: 9, p. 271)

The Attorney General took an active role in efforts to reduce the effects of EU law. He was active when Norway intervened as a third party in a Court of Justice of the European Union (CJEU) case concerning the validity of UK legislation that was very similar to NAV's restrictive social-benefits policy. In this case, the attempt to defend the principle of residence failed and Case C-430/15 *Tolley* was rebutted (see Lundevall, 2017). However, this particular judgement in 2017, of considerable relevance for Norway's legal affairs, had no effect in Norway until the EFTA Court relied on it in 2021 (Baudenbacher, 2021). That there should be a possible room for manoeuvre that might enable a minimal implementation of social rights is highly questionable, as it would mean divergence from legal obligations as well as from the principle of loyalty to the EEA Agreement.[10]

Those in favour of the doctrine hoped to increase the space for manoeuvre by a restricted implementation of rights. The doctrine of a national 'wiggle room' thus paved the way for implementing agencies to disregard and downplay EU law. Political will and national sovereignty had the upper hand. This downplaying of EU law flies in the face not only of EU/EEA law but also of the very principle of the 'Rechtstaat' – namely, legal certainty. Moreover, cherry-picking rights and interpreting rules differently endangers the integrity of the Single Market: there is no level playing field when not everyone has to play by the same rules or has the same rights and duties.

A logic of justification

DI creates a complex decision-making situation that undermines the conditions for the instrumental mode. It opens the space for the operation of the advocate mode under conditions of politicisation and conflicts of loyalty. In a DI context, owing to illiteracy and decisional exclusion, the requisite conditions for an impartial resolution of conflicts are not in place.

It is well known that public administrations are characterised by informal practices, traditions and routines that shape decision-making. Such characteristics may lend support to incorrect decisions, violate citizens' rights, and endanger the coherence and integrity of social institutions. One source of

bias and faults is when officials judge a case according to policy preferences and parochial values, rather than according to the specific rules that apply. Flaws and errors may also occur even when officials believe that they are compliant.

Students of modern administrations have highlighted the role of contextual values in explaining administrative behaviour. There is not just a 'logic of consequentiality' associated with anticipatory choice but also a logic of 'appropriateness' associated with obligatory action (March & Olsen, 1989, p. 23). However, one type of obligatory action may collide with another. Officials may act appropriately according to national law but inappropriately according to EU law. Thus, as we have seen, one logic of appropriateness may lend support wrong actions. As the logic of appropriateness highlights, knowledge transmitted through *socialisation* is important, as rules do not apply themselves. Still, in a legal context made up of bankable rights, criteria of correctness cannot be derived from custom and usage. That would be a threat to legal certainty and would undermine EU obligations. It would wrong citizens' rights. An incorporative decision is correct when it upholds the law as established through an authorised procedure. Non-compliance is a fault. Hence the call for inter-institutional understanding, reflective argument, and context-transcending standards.

Autonomous administrative reasoning is needed to figure out the right thing to do when vagueness and indeterminacy of legal statutes prevail. Under conditions of indeterminacy and discretion, how can we know that administrators act correctly? Neither the instrumental nor the advocacy mode can be guaranteed to ensure legal certainty under conditions of uncertainty and complexity, of politicisation and conflict. The conciliatory mode relates decision-making to reason-giving in an inter-institutional justificatory context. It is the critical standards of this mode, after all, that explain how the NAV scandal could be exposed, and it is the mode the investigators found lacking in the way NAV had practised EU law and that is recommended for future reform (NOU, 2020: 9).

In a context of rights proliferation and democratisation, with more review, appeal and complaints procedures in place, administrative explanation and justification are inevitable. Accountability mechanisms, which increasingly operate between administrative levels, aim at ensuring that discretionary decision-making power is used in a reasoned and vindicated manner (see Eriksen, 2022). In multilevel administrative orders, agencies are multi-hatted and must be prepared to justify their decisions towards different stakeholders and audiences. The relevance of the conciliatory mode of incorporation is also due to the fact that reasons are legally requested whenever an administrative decision is subject to judicial review.

The right to reasons is both a human right and a legal right. The reason-giving requirement is legally enshrined in national administrative law and

both in the EU and in the USA. In the EU, it is entailed in the *right to good administration*.[11] Reason-giving involves explanation and justification, the subjection of reasons to a critical test; as to 'whether agency reasons are legally sound, factually accurate, and logically coherent' (Mashaw, 2018, p. 70). For the reason-giving requirement to be fulfilled, the logic of consequentiality and the logic of appropriateness must be complemented with a *logic of justification* (Eriksen, 1999).

Conclusion

Spelling out three modes of incorporation in a DI context alerts us to the following: (1) when the task environment is complex and decision-making rules are in flux, a simplistic criterion of application may cause agencies to err; (2) when political knowledge is biased towards the national context in multilevel orders, agencies may obstruct justice; and (3) when knowledge gaps exist and organisational and communication defects persist, an informed reconciliation of obligations is imperilled. Under conditions of uncertainty and complexity, of politicisation and conflict, the instrumental and advocate modes of incorporation may not be able to fulfil the legal certainty requirement. Administrative bodies increasingly operate in a context of rights proliferation and democratisation. Hence the call for the conciliatory mode. This mode can account for the fact that the NAV scandal was discovered, as it became clear that the reasons provided by the authorities did not hold on closer scrutiny. Once judicial review was underway, they changed position.

The advocate mode of incorporation is encouraged by DI. Not being a full member easily gives rise to the impression that obligations do not apply in the same way or to the same extent as they do for full members of the EU. DI gives rise to the illusion of autonomy and the existence of a 'room for manoeuvre' that can be utilised by political entrepreneurs. Such leeway does not exist in legally integrated orders. Compliance with EU law has become a condition for the equal treatment of citizens. Threats to legal certainty and the rule of law are threats to the very basis of modern political order. Still, it is the idea of a 'room for manoeuvre' that explains how Norway's policy preference for hindering 'welfare exports' was converted into a practical result, which led to the NAV scandal.

Notes

1. NAV is a directorate under the Ministry of Labour and Inclusion (previously 'Labour and Social Affairs').
2. Sources are primarily the 375-page investigative report commissioned by the Norwegian government (NOU, 2020: 9) and the internal audit conducted by NAV (2019). In addition, three white papers, three green papers and four policy documents were consulted.

3. The treaty register of the Norwegian Ministry of Foreign Affairs currently includes some 130 agreements with the EU.
4. The scandal is mostly related to work assessment allowance. I use the term ‘welfare benefits’ to cover those and sickness benefits.
5. Permission to travel abroad for a limited period is conditional upon prior application.
6. To the contrary, welfare export represents no threat to the Norwegian welfare state (Hatland, 2015)
7. ‘By virtue of its superiority and direct effect, EU law now vests Union citizens with a wide array of substantive rights that national authorities are obliged to uphold’ (Hofmann, 2018, p. 737).
8. With the exception of Norwegian presence in some expert committees under the Commission.
9. The irony of the case is that it was mostly Norwegians that were withheld benefits and accused of fraud.
10. The authors of a report commissioned by the Norwegian Directorate of Immigration (UDI) found no legal basis for any room for manoeuvre (as an EFTA state) in cases falling within the scope of the EU citizens directive as incorporated into EEA law (Simonsen Vogt Wiig, 2016; see also Bekkedal, 2021).
11. See Article 41(2c) of the EU Charter of Fundamental Rights.

Acknowledgements

The author is grateful for comments by Mads Andenæs, Lars Blichner, Ingunn Ikdal, Aksel Hatland, Lars Inge Terum, two anonymous referees and by Andreas Eriksen in particular.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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Funding

This work was supported by Norges Forskningsr?d: [Grant Number 315074].

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