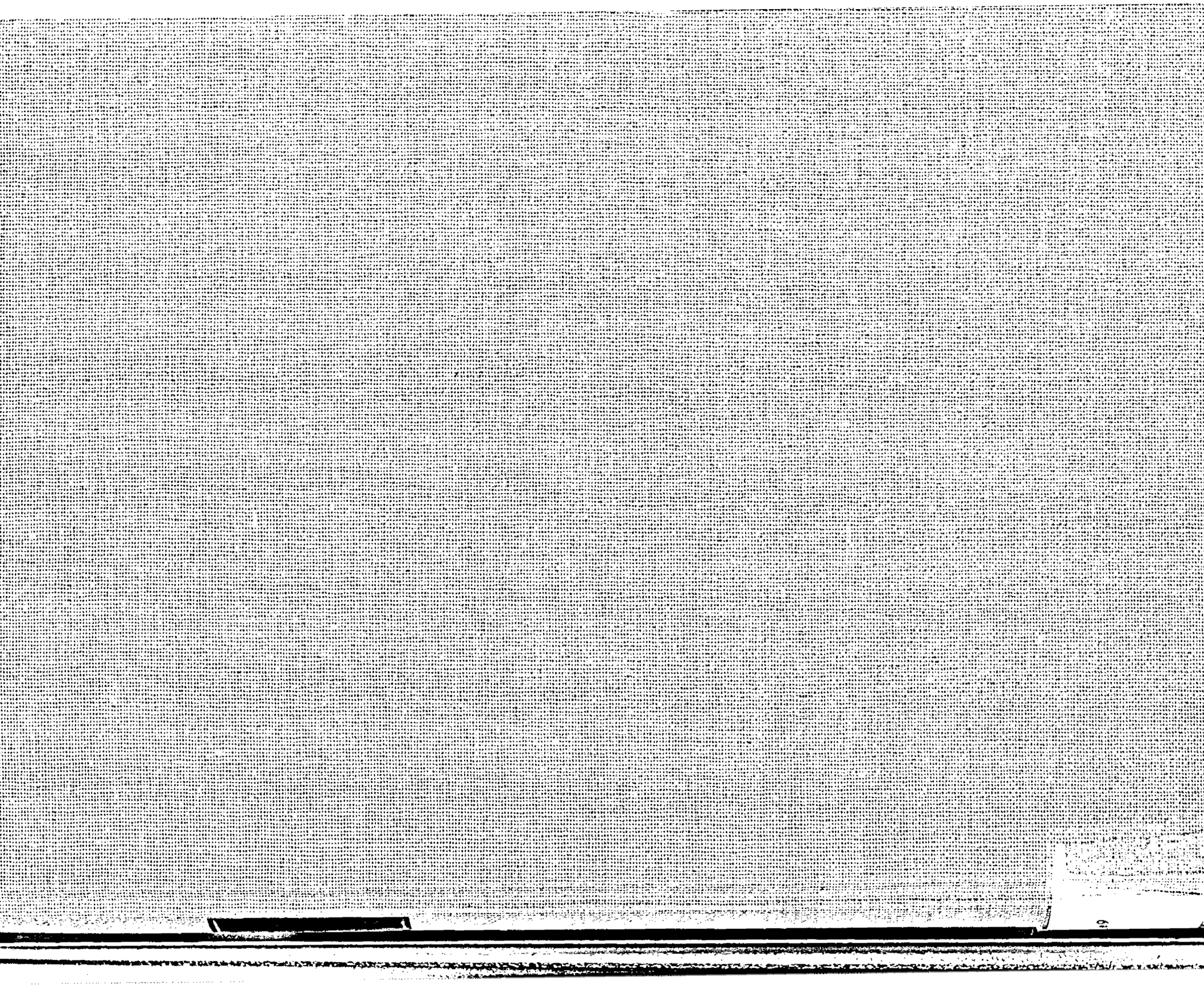

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THE PRINCIPLE OF PROPORTIONALITY IN EC LAW AND ITS APPLICATION IN NORWEGIAN LAW

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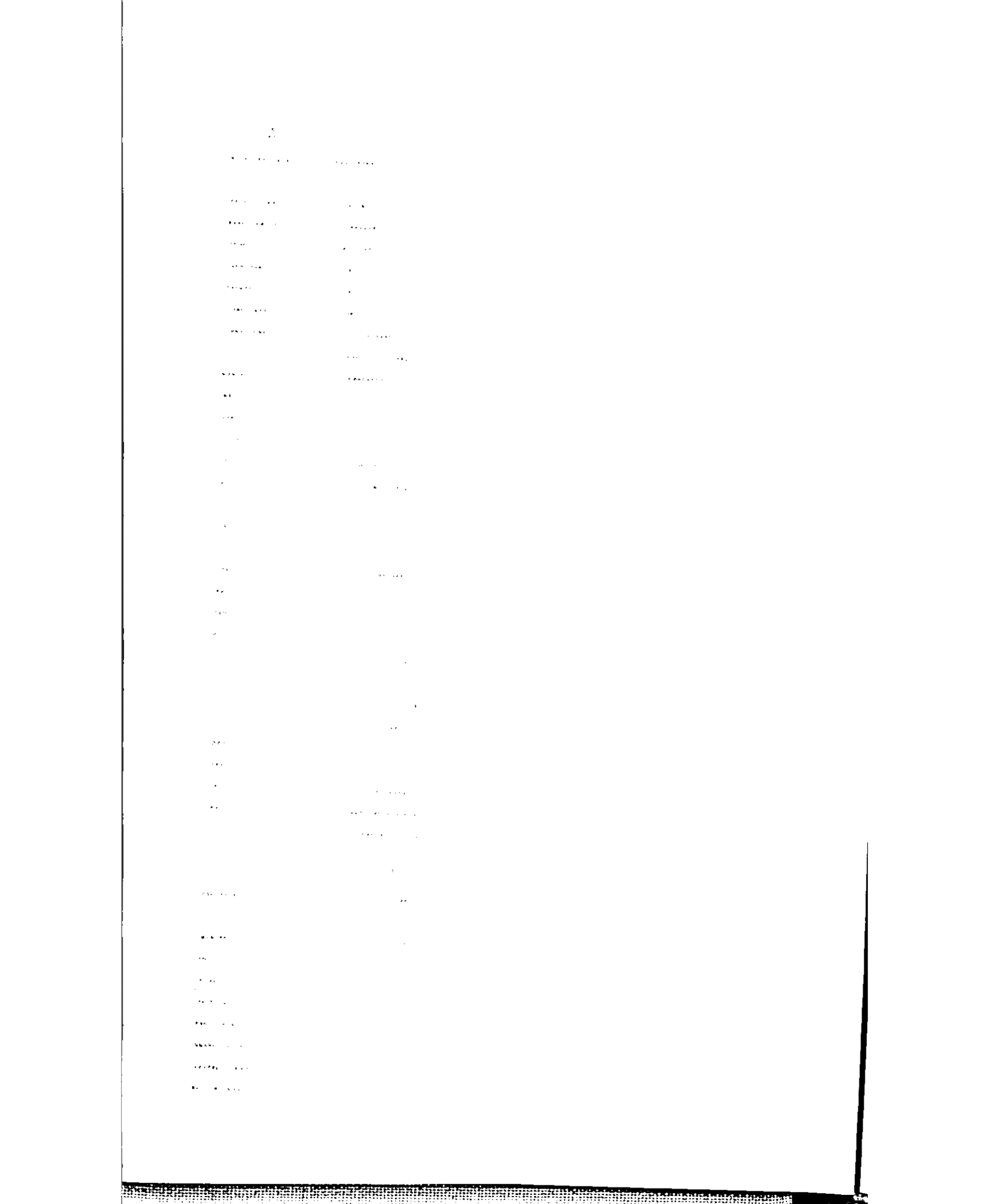

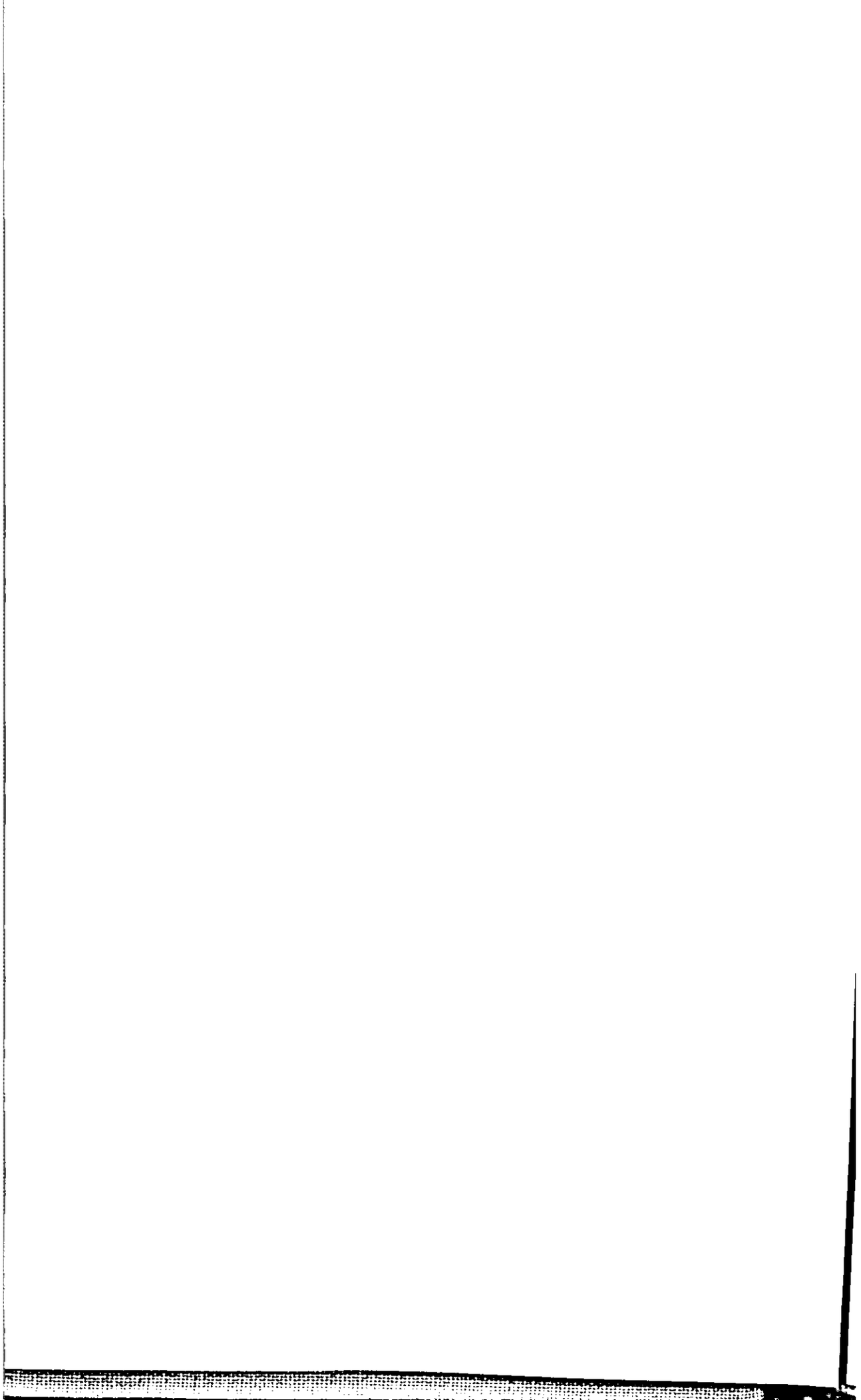

I INTRODUCTION

1. The subject

The principle of proportionality has been described as "the most important general legal principle in Common Market law".[1] In short, the principle requires that there must be some sort of proportionality between the end an administration or a legislator wants to reach and the means used to reach this end. If there is no such proportionality, the measures adopted can be quashed by the courts.

In broad terms, such a principle has traditionally not been accepted in Norwegian law. The aim of this study is to assess whether this principle has become part of Norwegian law as a consequence of the EEA-Agreement[2], and if so, to assess what will be the consequences of the incorporation of the principle.

The paper proceeds as follows. Section 2 of this introduction places the study in its legal context - the transformation of the doctrine of Scandinavian Legal Realism due to the impact

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[1]Gündisch, p 108, cited in English translation from Schwarze, p 677. As an example of the importance of the principle, it can be mentioned that according to Emiliou, p 134, the principle had, until the end of 1994, either been invoked by litigants or applied on the ECJ's motion in more than five hundred ECJ cases.

[2]The EEA Agreement is the Agreement on the European Economic Area between the European Communities and the Member States of the European Communities on the one side and the then EFTA States on the other side, signed 2 May 1992. When the Agreement was signed, Norway, Sweden, Finland, Austria, Licthenstein, Iceland and Switzerland were all members of the EFTA. Switzer-land has later rejected the EEA Agreement in a referendum. Sweden, Finland and Austria have become members of the EU, but are still, like all the other EU members, parties to the Agreement. The Agreement is hereinafter partly referred to as the "EEA Agreement" and partly as "the Agreement". When references are made to "the EEA", this is the European Economic Area, i.e the area consisting of the 15 EU States and the 3 EFTA States.

of EC law. An outline of the EEA Agreement is given in section 3. Chapter II contains an overview of the principle of proportionality as it appears in EC law. The question of whether this principle has become part of Norwegian law within the sphere of the EEA Agreement will be assessed in chapter III, where this is answered in the affirmative. Chapter IV contains an assessment of the principle's status within the Norwegian hierarchy of legal norms. Chapter V contains a description of the Norwegian doctrine on review of legislation and administrative measures outside the sphere of the EEA Agreement, in order to establish a basis for the assessment, in chapter VI, of the consequences of the incorporation. Chapter VII considers whether it is likely that the principle will have a "contagious" effect in Norwegian law, i.e. that it will also influence the law *outside* the sphere of the EEA Agreement. My overall conclusions are found in chapter VIII.

2. The legal context - Scandinavian Legal Realism

Norwegian legal theory and practise are - like in the other Scandinavian countries - heavily influenced by the tradition of Scandinavian Legal Realism. The philosophical background of this tradition rests on the so called Uppsala school of philosophy.[3] The main feature of Scandinavian Legal Realism is its extreme positivism, in the sense that it tries to eliminate all metaphysical, ideological and normative elements in the study of the legal order. According

[3]For an introduction to this school, see Olivecrona.

to Scandinavian Legal Realism, legal science consists of statements concerning the future behaviour of courts, i.e predictions.[4]

Another prominent feature of Scandinavian legal realism is the pluralistic approach to the question of what are valid sources of law, and its adherence to what is called a *subjective method of interpretation*. This means that when courts are assessing the content of legislation, they try to find out what the legislator had in mind when adopting the law in question. One of the consequences of this interpretative style is that courts normally attach great weight to preliminary works preceding legislative acts, the *travaux préparatoires*.[5] This approach stands in contrast to the interpretative style adopted by the European Court of Justice (ECJ), which has been highly influenced by the Courts desire to promote the effectiveness of EC law and to further European integration, aims which are not always shared by the EC legislator. Such an interpretative style creates more scope for judicial creativity and judicial activism than an interpretation which is stricter confined by the intention of the legislator.

It seems fair to say that the Norwegian approach to legal questions is *pragmatic*. Legal questions tend often to be solved on the basis of very concrete and pragmatic considerations of the conflicting interests in the particular case, and there has been a widespread scepticism about the value of conceptualization and systematics.[6] Legislation of recent years in the field

[4]See for a detailed account Ross, in particular at p 40 f.

[5]The preliminary works of parliamentary acts are in particular regarded as important sources of law in Finland, Norway and Sweden, and to a somewhat lesser degree in Denmark, see Nielsen, p 30.

[6]Nielsen, p 30.

of contract law has, for instance, introduced general clauses concerning reasonableness.[7] This pragmatism seems to stand in some contrast to the ECJ approach, which in its case law has evolved a number of different general principles, the principle of proportionality beeing a prominent example.

This pragmatic approach is apparant also in the field of administrative law.[8] Norwegian judgments concerning the validity of administrative measures tend to be orientated towards the concrete case at issue, rather than trying to establish broad general concepts, such as the concept of proportionality. This might lead one to believe that Norwegian courts show a high degree of judicial activism when reviewing administrative acts. However, the case is quite the opposite. Broadly speaking, Norwegian courts have shown a degree of deference when reviewing administrative measures. This is, among other factors, connected with the subjective method of interpretation. If a court is convinced that a measure is in accordance with the will of the legislator, it has generally been unwilling to interfere with the adopted measure, even if it appears to be unreasonable or disproportionate.[9]

There is no doubt that the Nordic concept of law and legal science which has been outlined above, will be challenged by the Europeanisation of the Nordic legal systems. Even though Norway, unlike Denmark, Sweden and Finland, has chosen not to become a member of the

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[7]See, for instance, section 36 of the Act on Agreements, which allows revision of an agreement which is, or turns out to be, "unreasonable".

[8]It should be pointed out that within the field of administrative law there is a greater diversity between the Nordic legal systems similar than is the case in many other fields of law, see Sejersted (ed), p 5.

[9]See chapter V sections 2.3-2.4 for an assessment of the approach of Norwegian courts towards administrative measures.

Community, this will undoubtedly prove to be the case as regards Norwegian law. As will be shown in section 3 below, Norwegian law is closely interwoven with EC law as a result of the EEA Agreement. Within the sphere of the EEA Agreement the importance of the national legislator will decrease, both because much of the legislation will, in reality, be adopted by the EC legislator and because the weight of the national preliminary works of legislative acts as sources of law will be diminished. Furthermore, it seems likely that the importance of general legal principles, like the principle of proportionality, will increase, at the expense of the traditional pragmatic approach adopted by Norwegian courts.[10]

The most interesting question, and the most difficult to predict, is whether this trend will have a spill-over effect into Norwegian law falling *outside* the scope of the EEA Agreement. In this sense, the principle of proportionality is only one among a number of different principles and concepts which, at least in the long term, may contribute to a major change in the Norwegian concept of law.

[10]For a more detailed assessment of the differences between Norwegian courts and the ECJ as regards legal method and reasoning, see Krüger 96, who argues that the differences are substantial.

3. The EEA-Agreement

3.1 Introduction

The EEA Agreement was signed on 2 May 1992. At the same date the EFTA States signed an Agreement on the establishment of a surveillance authority and a court,[11] and an Agreement creating the EFTA States Standing Committee[12]. The EEA Agreement is the successor to the free trade agreements, which the EFTA States had concluded on a bilateral basis with the European Communities. Its aim is, with some exceptions, to include the EFTA States in the internal European Common Market.[13]

3.2 The substantive scope of the Agreement

In general terms, the EEA Agreement covers nearly all the primary and secondary EC legislation concerning the four freedoms, competition rules, state aids, and public procurement.[14]

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[11] Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, signed 2 May 1992, hereinafter referred to as the ESA/EFTA Court Agreement.

[12] Agreement on a Standing Commitee of the EFTA States, signed 2 Mai 1992, hereinafter referred to as the Standing Committee Agreement.

[13] However, it should be remarked that the EEA is not really an internal market in the sense which the term is used in Article 8A EC, see Gormley, pp 3-4.

[14] In this paper it is neither necessary nor possible to give a thorough description of the scope of the Agreement. For such a work I refer to Norberg: EEA Law.

In addition, the EFTA States have adopted a wide range of so called "horizontal policies"[15], i.e. rules which do not directly concern the four freedoms, but which are necessary to make the four freedoms work. These concern fields such as social policy, consumer protection, environment, statistics and company law.

The EFTA States have also adopted parts of the EC legislation concerning the so called "flanking policies", i.e. policies which are not closely connected to the four freedoms, but where the Contracting Parties for other reasons wanted to have common rules. For this reason The Contracting Parties have, for instance, adopted rules concerning research and development, education and tourism.

There are four main differences between the substantive scope of the EEA Agreement and that of membership in the EU. First, the EEA is a free trade area but not a customs union. Secondly, there are no common policies with regard to fisheries and agriculture. Thirdly, there is no common policy on taxation. Finally, the Agreement does not cover any political collaboration in the Communities outside the market, unlike the Treaty of Rome which provides for the creation of an economic and monetary union, or the Maastricht Agreement which provides for the establishment of a common foreign and security policy and for co-operation in the fields of justice and home affairs.

[15]Cf. the expression used in part V of the Agreement.

The scope of the EEA Agreement is much wider than the previous free trade agreements. The most important difference is that the previous free trade agreements were only concerned with goods, while the EEA Agreement also contains provisons concerning free movement of persons, services and capital.[16]

3.3 Legal homogenity and the dilemma of the Agreement

In order to understand why the question arises whether or not the principle of proportionality is part of the EEA Agreement it is necessary to understand that there is, inherent in the Agreement, a sort of dualism. One the one hand, the Contracting Parties wanted homogenity between the Agreement and the corresponding Community legislation. On the other hand, the EEA is a different concept, pursuing different aims, than those pursued by the Community.

As described in section 3.2 above, the EFTA States, by signing the EEA Agreeement, have adopted a large part of the Community's primary and secondary legislation. The intention of the Contracting Parties was that this should lead to a high degree of legal homogenity between the legal system of the Community and the legal system created by the EEA Agreement, within the sphere of the Agreement. This intention is clearly stated in the fifteenth recital of the preamble to the Agreement, which reads

The objective of the Contracting Parties is to arrive at and maintain a uniform interpretation and application of this Agreement and those provisions of the Community legislation which are substantially reproduced in this Agreement...

[16]For an up to date and thorough analysis of Free Trade Agreements vs Europe Agreements and the EEA Agreement, see Evans. See also Usher 97, assessing, inter alia, some aspects of the Community's external relations, including the EEA Agreement.

The aim of creating legal homogenity is also apparent in the third recital of the Agreement's preamble, which reads

CONSIDERING the objective to establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition ...

Also Article 105 EEA states the aim of homogenity, and reads

1. In order to achieve the objective of the Contracting Parties to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement, the EEA Joint Committee shall ...

Furthermore, Article 6 EEA states that provisions in the EEA Agreement which in substance are identical to EC rules shall be interpreted in conformity with the relevant rulings of the European Court of Justice.[17]

In order to ensure uniform interpretation, Article 106 EEA institutes a system whereby the EFTA Court and the European Court of Justice shall exchange information concerning their respective judgments.

In other words, it is quite obvious from the wording of the Agreement that the intention of the parties was not only to reproduce the wording of the Community legislation, but also to create legal homogenity between the Agreement and the corresponding Community

[17] I deal with this Article more in detail in chapter III. section 4 of this paper.

legislation by "as uniform an interpretation as possible" of this legislation. Apart from the explicitly stated aim of homogenity in the Agreement, one may also ask the obvious question "why adopt over 13.000 pages of Community legislation if one does not have the ambition to ensure a uniform interpretation and application of the EEA Agreement and the corresponding parts of Community Law?"[18]

On the other hand, the aims of the EEA Agreement are not the same as the aim of the Treaties establishing the Community. The aim of the Agreement is to extend the four freedoms to the European Economic Area and promote competition within this area. In the Community order, however, the four freedoms are a means to integrate the Member States and to create European unity.[19] It is generally accepted, and also laid down in Article 31 of the Vienna Convention,[20] that treaties should be interpreted in the light of their object and purpose. Accordingly, provisions in different treaties, though equally worded, may be interpreted differently if the treaties pursue different objectives.[21] This is the genuine dilemma of the EEA Agreement - how is it possible to create legal homogenity between two treaties which are (to a certain degree) pursuing different objectives, and which do not fully overlap with regard to the spheres which they cover. The solution is a compromise, expressed in Article

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[18]Sevon, p 339.

[19]These differences are highly emphasised in European Court of Justice, *Opinion 1/91*, [1991] ECR I-6079 (hereinafter *Opinion 1/91*), especially paragraphs 15-18. See also T-115/94 *Opel Austria* [1997] CMLR 733, paragraphs 104-111, and Cremona, p 519 f, about this aspect of *Opinion 1/91*. An assessment of whether the EFTA Court's interpretation of Article 34 EEA in E-1/94 *Restamark* EFTA Court Report [1994-95] 17 differs from the corresponding provisions in the EC Treaty, is carried out by Kronenberger 96.

[20]Vienna Conevention on the Law of Treaties of 23 May 1969.

[21]This is also confirmed by the ECJ with regard to the free trade agreements between the European Communities an the EFTA states in Case 270/80, *Polydor* [1982] ECR 329, paragraph 15; and Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 30.

105 EEA nr 1, where the aim of the Contracting Parties is described as to achieve "as uniform an interpretation as possible". In other words, not necessarily an identical interpretation. The other underlying problem, as regards the aim of homogenity, is that the EEA Agreement, to a certain extent, is an attempt to do the impossible; to combine formal sovereignty for the EFTA States with real resignation under EC law. Normally, homogenity within a legal system is obtained by a hierarchical court system where one court is at the top of the hierarchy. Because of constitutional problems, such a system was impossible to establish within the framework of the EEA Agreement. This is the reason why the Agreement may seem a strange hybrid - an attempt to create legal homogenity without a court at the top to ensure such homogenity. These two dilemmas lie at the bottom of most of the legal questions which arise when discussing whether a specific principle or legal rule in EC law forms part of the EEA Agreement.[22] They are also the underlying problems which must be considered when discussing whether the principle of proportionality has become part of Norwegian law.

[22]For instance for a discussion of the question of whether the principles of direct effect and supremacy are part of the EEA Agreement, see van Gerven; and Sevon: Direct Effect, and likewise the discussion whether the principles laid down in the Francovich judgment are part of the EEA Agreement, see Norberg: EEA Law, p 107 ff.

II THE PRINCIPLE OF PROPORTIONALITY IN EC LAW - AN OVERVIEW

1. Introduction

Within the framework of this paper it is impossible to give a thorough description of the principle of proportionality as it appears in EC law.[23] The aim of this section is only to describe the principle's main features. The focus of the assessment will be on the question of how intensively the ECJ scrutinizes different types of judicial measures when it assesses whether they are disproportionate. Some aspects of the principle will be further elaborated in chapter VI when I am assessing the principle's impact in Norwegian law.

The European Court of Justice interprets certain provisions of the Treaty as expressly reqiring the principle of proportionality to be respected, notably where the words «justified« or «necessary» are used. However, the principle of proportionality is also recognised as an unwritten general principle of Community law, and it is this unwritten principle which will be focused on in this paper.[24] After an amendment in the EC Treaty made by the Maastricht Agreement, the principle is now also embodied in the EC Treaty, as a part of the subsidiarity principle which is laid down in Article 3b EC. Article 3b (3) EC now reads "Any action by

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[23]For such a thorough work, see Emiliou, p 115 f; Schwarze, p 708 f; and, for a somewhat shorter treatment of the issue, De Búrca. A good assessment of the principle, focused on the the differing intensity with which it is applied within different areas of Community law, is given by de la Mare, p 89 f (unpublished). For an assessment of the principle in Community anti-dumping law, see Egger; and for a discussion of its role in social security law, Arnull, p 203 f.

[24]Reference to the principle is made as early as in Case 8/55 *Fédéchar* [1954-56] ECR 292, at p 299. However, the first really clear precedent is Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 16.

the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".[25]

Community measures which are contrary to the principle can be declared void. Likewise, Member States must observe the principle when they implement Community law, or when they take measures affecting rights given or protected by Community law, or when they adopt measures in areas specifically regulated by Community law.[26] Furthermore, it has been argued that, even this has not yet been by the ECJ, Member States are bound by the principle when they take measures on behalf of the Community.[27] In all likelihood, this is correct. If the Community had adopted the measure itself, it would certainly have been bound by the principle. There are no arguments in favour of giving the individuals a weaker protection just because the Community has permitted a Member State to adopt the contested measure, instead of adopting it itself.[28]

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[25] It should, however, be pointed out that it is doubtful whether Aritcle 3b (3) EC is completely corresponding with the principle of proportionality as it is elaborated as an unwritten principle by the ECJ. According to its wording, Article 3b (3) EC is, for instance, only covering actions by the Community. The unwritten principle of proportionality, on the contrary, also covers different actions by the Member States.

[26] See, Lang, p 30, with extensive references to the case law of the ECJ.

[27] Lang, p 30. See also Lenarts, p 29, who seems to take the view that such a doctrine is confirmed by the ECJ, referring to Case 59/75 *Manghera* [1976] ECR 91; and Case 41/84 *Pinna* [1986] ECR 1. However, the question is not directly discussed in these cases. Hence it seems difficult to agree that the question is resolved by the cases.

[28] The question of whether the Norwegian administration, when acting on behalf of the Community, is bound by the principle, will in all likelihood never arise. In EC law, this question arises when the Community, within the fields where it has exclusive competence, delegates parts of its power to a Member State, see Hartley p 125. The EEA Agreement does not give the Community such exclusive competence within a specific field. As an international agreement, it only binds Norway to accept the specific provisons which are part of the Agreement. Hence, it is doubtful whether the need of delegation will arise. Accordingly, the question of whether the proportionality principle applies when the administration exercises such power will, most likely, not arise in Norwegian law.

It should be pointed out that the principle of proportionality only applies towards individual interests, a proportionality test is not utilized towards acts by the Community, infringing the "rights" of the Member States.[29]

The principle is not only a test to determine the lawfulness of a measure, but is also a principle of interpretation of all rules of Community law. In short, if a Community act is open to more than one interpretation, preference will be given to an interpretation which is most consistent with the principle.[30]

2. The three-part structure of the proportionality test

The core of the principle is that there has to be some sort of proportionate relationship between the end the authorities want to reach and the means used to reach this end. When assessing whether the means used are proportionate, the European Court of Justice often uses a three-part test.[31] Broadly, the three parts of the test are as follows.

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[29]See, Gydal, p 30.

[30]See, for instance, Case 39/75 *Coenen* [1975] ECR 1547, paragraph 12. In this case the ECJ stated that Articles 59, 60 and 65 EC should be interpreted as meaning that national legislation may not make it impossible for persons residing in one Member State to provide insurance services in another Member State, when the professional rules to which this service is subject in the latter State, can be complied with by less restrictive means. For a discussion of the use of the principle as an interpretative guide, see also Emiliou, p 121.

[31]See, for instance, Case C-331/88 *Fedesa* [1990] ECR I-4023 paragraph 13, where the three-part structure is stated. See also Emiliou, p 134.

The first part of the test consists of an assessment of whether the measure is a *useful, suitable or effective* means of achieving the objective which the authorities want to reach. This implies that a measure, in order to pass the test, has to be a means which is *capable* of reaching the desired aim. It is rare that a contested measure fails this part of the test. Few measures imposed by the Community or a Member States are incapable of reaching the desired aim. Normally, the crucial points are the two other parts of the proportionality test.

The second part of the test consists of an evaluation of whether the means is *necessary*, in the sense that there is no other, equally effective means of achieving the desired aim which would be less restrictive or burdensome on the affected individual. This part of the test has also been described as "the principle of mildest means".[32]For this concept to be of importance, it is a presumption that there exists several suitable means to achieve the desired aim.

Thirdly, even if there is no less restrictive means of achieving the aim, the Court assesses whether the measure has an *excessive or disproportionate effect* on the applicant's interests, i.e., whether the means is *proportional in the strict sense of the word.* This part of the test involves a balancing of the utility of a measure for the collective on the one hand, and the restriction of the rights protected by the community on the other hand. This part of the test is normally regarded as the most controversial part, since it often involves a high degree of discretion on the part of the judges.

[32] See, for instance, Gydal p 33.

If the contested measure does not pass the three tests, it is, generally spoken, quashed by the Court. However, the Court does not always apply all of the three steps when assessing whether the contested means are contrary to the principle.[33] Especially the assessment of the last step, proportionality *stricto sensu*, is often deleted.[34]

3. The intensity of the review

3.1 Introduction

It is apparent from the case law of the ECJ that the rigour with which the Court applies the proportionality test varies from case to case. In other words, the degree of scrutiny to which the Court subjects the justification offered for a measure is not the same in all types of cases. This is not a surprising observation, given the heterogenous nature of the issues which arise for the Court, ranging from broad policy influenced decisions with implications for the whole functioning of the Common Market, to cases concerning classical fundamental rights. Basically, the Court uses three different, although overlapping, techniques to vary the intensity of the proportionality test.

[33]See Emiliou, p 191.

[34]See Emiliou, pp 192-193, with references to the case law of the ECJ.

First, the Court in some cases places the onus on the affected party to produce evidence that there were less restrictive means whereby the desired end could be reached.[35] In anti-dumping cases, for instance, the Court's approach towards proportionality has generally been described as "in dubio pro Commissione".[36]

Secondly, the Court often *qualifies* the three tests described in section 2 above, in the sense that it, for instance, refuses to quash a measure unless it is a *manifestly inappropriate* way of reaching the desired aim,[37] or unless the administration has made a *manifest error* when evaluating the necessity of the measure.[38]

Thirdly, as already mentioned, the court often does not apply the third step, the proportionality *strictu sensu* test.[39]

When the Court wants to reduce the intensity of the review, these three different techniques are often used together, i.e., the Court, for example, qualifies the two first tests, and does not carry out the third test.[40]

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[35]Cf for instance Case 255/84 Nachi Fujikoshi [1987] ECR 1861, paragraph 42; and De Búrca, p 143.

[36]Egger, p. 386, quoting Van Bael's comment on anti-dumping measures in general, cf Van Bael, p 407.

[37]Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 14.

[38]Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 16.

[39]Case C-280/93 *Germany v. Council* [1994] ECR-4973, is an example of this approach. The Court carries out the suitability test and the necessity test in paragraphs 90-95, stating that it will not interfere with the Council's decision unless it is manifestly inappropriate. However, it does not move on to the third step of the test.

[40]Cf what is said about the Court's approach in Case C-280/93 *Germany v. Council* [1994] ECR I-4973 in footnote 39.

When attempting to describe the proportionality test accurately it is crucial to emphasise how the intensity of the application of the criteria which make up the test may vary. It is also crucial for the assessment in chapter VI section 2 of whether the principle differs from the Norwegian principle of reasonableness. In sections 3.2-3.3 below I assess some of the most important criteria which tend to influence the intensity with which the test is carried out. When making such an assessment, one should distinguish between the Court's practice when it assesses Community measures, cf section 3.2, and its approach when the question turns on the validity of Member State measures, cf section 3.3.

3.2 Review of Community measures

The variation in the intensity of review when the Court deals with Community measures depends mainly on four different factors. First, it depends on which area of the Community's widespread activity is in question, eg whether the contested measure is adopted within an area where the authorities enjoy wide discretionary powers. Secondly, it varies with the nature of the different interests which are at stake. Thirdly, it will be affected by the type of act in question, eg whether it is a normative act or an individual act. Finally it will depend on how much expertize and knowledge the Court possesses in relation to the particular field which the case involves.[41]

[41] For a treatment of the varying intensity of the review in general, see, for instance, De Búrca, pp 110-113; De Búrca 95, pp 504-505; and de La Mare, pp 94-128.

If the contested measure is adopted within a field in which the decision-maker is given broad discretionary powers, like, for instance, that of the common agricultural sphere, the Court does not tend to scrutinize the measure very intensivly.[42] One example of this deferential approach is *Fedesa*, where a Council Directive prohibiting the use in livestock farming of certain hormonal substances was challenged. The Court stated that

"in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of the measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate* (my emphasisis) having regard to the objective which the competent institution is seeking to pursue".[43]

The level of scrutiny to which a contested measure is subject also depends on the interests at stake in the particular case. Generally, a measure restricting fundamental rights is subject to close scrutiny by the Court.[44] One example of this approach is the well known *Hauer* case.[45] The case concerned a Council Regulation which, for a limited period, prohibited the planting of new vines. The validity of the Regulation was challenged, and the claim contained an alleged infringment of the right to property. The Court concluded that the prohibition did not impinge upon the substance of this right, but in reaching this conclusion it carried out quite an intrusive examination of whether the measure was proportional or not. According to the Court it was necessary to examine whether the disputed restrictions introduced by the regulation

[42]See De Búrca, p 147.

[43]Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 14.

[44]Emiliou, pp 172-173.

[45]Case 44/79 *Hauer* [1979] ECR 3727.

"constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property."[46]

This evaluation of whether the measure is "disproportionate" stands in sharp contrast to the assessment in the cases where the Court qualifies the proportionality test and rejects to interfere unless the measure is "manifestly inappropriate".

However, the Court does not carry out such an intensive review in all cases where fundamental rights are at stake. The importance of the objective pursued by the contested measure is also taken into account.[47] This implies that the Court, also in cases involving fundamental rights, often applies a rather "weak" variant of the proportionality test.

One example of the last mentioned approach is *Germany v. Council.*[48] The case concerned the validity of a Council Regulation aimed at restructuring the Community market in bananas and involved an alleged infringment of the right to property and the right to the free pursuit of trade. The Court upheld the regulation and stated that

"While other means for achieving the desired result were indeed conceivable, the Court cannot substitute its assessment for that of the Council as to the appropriateness or otherwise of the measures adopted by the Community legislature if those measures have not been proved to be manifestly inappropriate for achieving the objective pursued."[49]

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[46]Case 44/79 *Hauer* [1979] ECR 3727, paragraph 23.

[47]Schwarze, pp 863-864, states that "the interests of the general public which are worthy of protection have to be weighed up against the individual right affected, on the understanding that the more a regulating measure restricts the economic freedom of the individual, the more important the public protection requirement has to be".

[48]Case C-280/93 *Germany v. Council* [1994] ECR-4973.

[49]Case C-280/93 *Germany v. Council* [1994] ECR-4973, paragraph 94.

The Court's approach can most likely be explained as a result of the fact that very important Community interests were at stake, namely the aim to open up the trade in bananas between the Member States and create a single market in bananas. This market has always been segregated within the Community, and the Court obviously regarded the Council Regulation, that was aimed at reducing this segregation, as pursuing an important aim.[50]

In some cases concerning fundamental rights, the Court's reasoning is so brief that it is difficult to decide whether an intensive or a more deferential test is applied. One example is *Zuckerfabrik Süderdithmarschen.*[51] The case involved an alleged infringment of the right to property and the freedom to pursue a profession or trade, but the Court merely stated that restrictions on these rights were permissable

"provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."[52]

The last point concerning fundamental rights which should be mentioned is that the ECJ decides for itself whether a right is fundamental or not. If a national court refers a question to the ECJ and expresses the matter in terms of fundamental rights, this does not necessarily mean that the ECJ will categorise the matter in a similar fashion.[53] This is a logical

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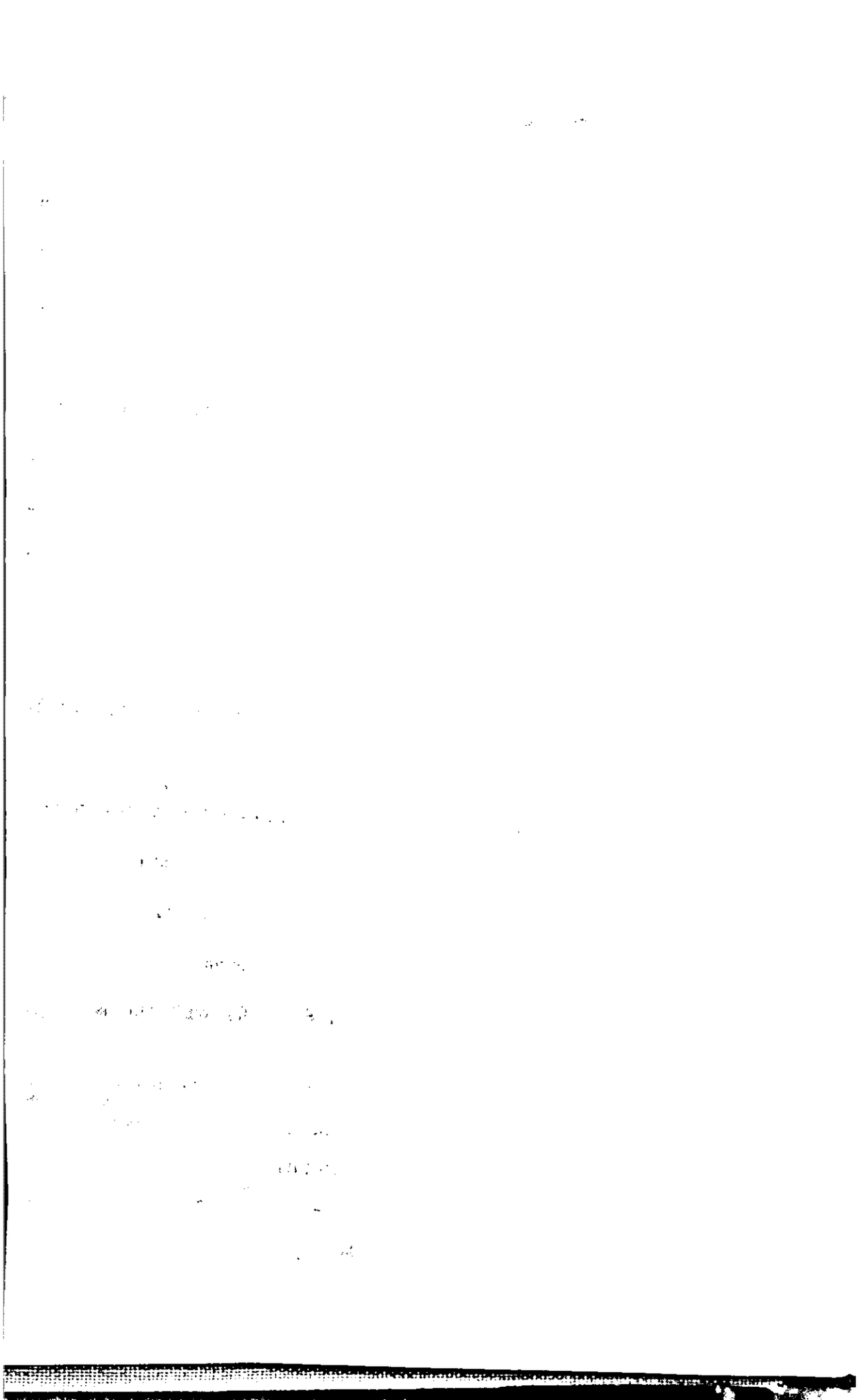
[50]The Court's approach in the case has been highly criti-cised, see among others, Everling, pp 410-419. However, I would argue that the judgment is in line with previous case law from the ECJ, and that Everling's critique seems influenced by the German approach towards proportionality, which, generally speaking, involves very intensive scrutiny by the courts.

[51]Cases C-143/88 & C-92/89 *Zukerfabrik Süderdithmarschen* [1991] ECR I-415.

[52]Cases C-143/88 & C-92/89 *Zukerfabrik Süderdithmarschen* [1991] ECR I-415, paragraph 73.

[53]See Cases 133-136/85 *BALM* [1987] ECR I-2289 paragraphs 33-38.



consequence of the autonomy of Community law, but it offers the ECJ a further means of differentiating the intensity of review of measures affecting rights which are regarded as fundamental within the national legal systems.

Thirdly, the intensity of the review depends on the type of measure in question. The standard of review is normally less intensive when the Court is assessing Community acts of a normative nature, compared to the intensity of review when assessing individual measures.[54] When normative acts are challenged, the proportionality test is often also applied in a somewhat different way compared with the test when the case turns on an individual measure. Normative acts are normally not measured in relation to the individual situation of the claimant, but in relation to the total number of persons or entities affected by the act.[55]

However, it should be mentioned that if a contested Community measure is a decision, but appears as the mere result of the administration's application of the law to an individual case, and not as a result of the administration's discretion, the intensity of the review is normally the same as when normative acts are challenged. In these cases, it is in fact the general norm which is contested, not the individual decision, even though the claim is formally made against a decision. Accordingly, the same degree of scrutiny as when the claim formally concerns the validity of a general norm should be adopted.[56]

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[54]Emiliou, p 181; De Búrca 95, p 302.

[55]See, for instance, Case 5/73, *Balkan-Import-Export* [1973] ECR 1091, paragraph 22, and Emiliou, pp 187-188.

[56]Schwarze, p 861 with further references, touches on this point when he states that "the importance of the proportionality principle is normally greater the more scope there is for discretion, and smaller the more precise the manner in which the decision concerned has been laid down in legal provisions".

Finally, the intensity of the review also seems to depend on the relative expertise, position, and overall competence of the Court as against the decision-making authority as regards the subject matter.[57] Typically, complicated technical assessments concerning matters on which the Court does not possess much expertize, tend not to be scrutinized very intensively.

3.3 Review of national measures

The question of review of national measures for lack of proportionality may arise in two different situations. First, where the challenged measure is the result of the implementation of Community legislation into national law.[58] Secondly, when a national measure affects rights given or protected by Community law. The majority of the conflicts which have arisen before the Court of Justice have concerned the second situation.

In the *first* situation, when the question turns on implemented Community legislation, one should differentiate between Community legislation which in reality does not offer the Member State any choice as to how it is to be implemented, and legislation which gives the Member State some margin of discretion as regards the method of implementation.

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[57]De Búrca, p 111.

[58]One of the relatively rare examples of such a case is case 5/88 *Wachauf* [1989] 2609, which turned on the validity of German legislation, based on a Council Regulation, concerning the right to compensation for discontinuing milk production.

When the Member State does not have any discretion as to how to implement the Community legislation, the situation will be similar to that described in section 3.2 above. In reality, the measure which is challenged is a Community measure, and the intensity of the review varies according to the criteria which are already descibed.

When the Member State *has* discretion as to how to implement, it is debateable whether the Court is more willing to scrutinize this discretion than it is to interfere with the Community's discretionary powers.[59] However, it seems difficult to answer this question in general terms. It would, for instance, require an asessment of the different areas within which the Member States are granted such powers.

In the *second* situation, when the contested measure is a national measure affecting rights given or protected by Community law, the general impression is that the Court engages in a fairly intensive review.[60] One example is *Bilka Kaufhaus*.[61]

The case turned on the question of whether a pension scheme established by Bilka was contrary to Article 119 EC. The scheme required that the employees, in order to receive the pension, had to work full time for a minimum period of 15 years. One of the employess argued that this was contrary to Article 119 EC because it placed female workers, who were less likely to work full time for such a period, at a disadvantage.

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[59]De Búrca, p 125, touches on the question when contrasting the Court's willingness to interfere with the discretion given to the German authorities by a Council regulation in Case 5/88 *Wachauf* [1989] ECR 2609, cf footnote 58, with the deference the Court normally shows when asked to interfere with the discretionary powers of the Community institutions.

[60]De Búrca, p 126, with reference to Case 13/78 *Eggers* [1978] ECR 1935, paragraph 30, states that "the approach of the Court has been to say that the rules on freedom of movement etc. are fundamental Community requirements, and that any purported derogation from them will be strictly scrutinized in order to ensure that they do in fact pursue a legitimate aim within the Treaty, and that they are necessary to achieve this aim."

[61]Case 170/84 *Bilka Kaufhaus GmbH* [1986] ECR 1607.

The ECJ, in an article 177 procedure, stated that the mere fact that the limitations of the pension scheme affected more women than men was not sufficient to show that it was contrary to Article 119 EC, if the measures chosen by Bilka were "*appropriate* with a view to achieving the objective pursued and are *necesary* to that end" (my emphasisis).[62]

However, also as regards measures restricting Community rights the intensity varies. To give an accurate description of this variance requires an assessment of the different rights, and the possibility of derogation from these rights. This is outside the scope of this paper. However, some general features of the variance can be found.

First, the intensity of the Court's review will be a function of how seriously it regards the Member State's argument that the measure really was necessary to protect vital national interests, such as, for example, public health. If the Court feels that the measure in reality is designed to protect national producers from foreign competition, the scrutiny will be intensified.[63]

Secondly, the subject-matter of the national measure influences the intensity of the review. It has been argued that the Court has allowed the Member States a wide margin of discretion as regards the adoption of measures aimed at securing the protection of public health.[64] However, as pointed out by De Búrca,[65]one should be cautious about characterizing such

[62]Case 170/84 *Bilka Kaufhaus GmbH* [1986] ECR 1607, paragraph 36.

[63]De Búrca 95, p 348.

[64]See Schwarze, p 790, who states that the Member States are given a wide margin of discretion to determine, "in the absence of any harmonizing measures and subject to their observing the requirements of the free movement of goods, the extent to which they wish to ensure the protection of public health".

[65]De Búrca 95, pp 348-349.

cases as involving less intensive review. They may equally well be regarded as instances where the Court, having surveyed the evidence, believes that Member State action of the type under scrutiny is warranted for the present.

Finally, it has been argued that, other things being equal, the Court has tended to be more intensive in its review as time has gone on.[66] This is based on the observation that some cases which have come before the Court involving similar facts, or raising similar principles, have tended to be subject to a more rigorous scrutiny, with the result that Member State action which was regarded as lawful in the earlier case has been held not to be so in the later instance. The argument seems mainly to be based on the different approach adopted by the Court in *Van Duyn*[67] compared to the more intensive review in *Adoui and Cornaille*[68] and likewise *Henn and Darby,*[69] compared to the more intrusive assessment in *Conegate.*[70] It must indeed be admitted that in these cases the Court has moved towards a stricter application of the proportionality test. However, these four cases seems to be a very limited material upon which to build a general conclusion about the trend in the Court's case law.

It may be asked if the Court's approach differs depending on whether the national measure is a normative act or an individual decision. Unlike the case when the Court deals with

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[66]See De Búrca 95, p 348.

[67]Case 41/74 *Van Duin* [1974] ECR 1337.

[68]Cases 115 & 116/81 *Adoui and Cornaille* [1982] ECR 1665.

[69]Case 34/79 *Henn and Darby* [1979] ECR 3975.

[70]Case 121/85 *Conegate* [1986] ECR 1007.

Community measures, this does not seem to influence the rigour with which national measures are scrutinized.

4. Conclusions

It can be concluded that the principle of proportionality is not a uniform concept. It appears in different formulations, and implies different degrees of scrutiny by the ECJ. In some cases it is formulated as a "non manifestly inappropriate test", while in other cases the three-part structure described in section 2 is applied in a more stringent fashion. The principle appears in such heterogenous formulations that the question may indeed be raised if it is misleading to describe them all as variants of the same principle, or if it is more appropriate to describe them as separate tests. However, the core of the different tests is the same - there has to be some sort of relationship between means and end. This is, in all likelihood, sufficient to justify the term "proportionality" as an overall description of the different tests.

III HAS THE PRINCIPLE BECOME PART OF NORWEGIAN LAW WITHIN THE SPHERE OF THE AGREEMENT?

1. Introduction - the implementation of the Agreement

The Norwegian legal system is a dualist system.[71] Consequently, an act of incorporation by the legislator is necessary if an international agreement, like the EEA Agreement, is to be recognised as part of Norwegian law. This is taken into account in the EEA Agreement Article 3 EEA first paragraph, which states that

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising of this Agreement.

This obligation is fulfilled by Norway, partly by incorporation and partly by transformation. The main part of the Agreement, and the regulations which formed part of it, are incorporated into Norwegian law by section 1 of Act no. 109 1992 of 27th November 1992 (hereinafter the EEA Act). The directives which formed part of the Agreement are transformed into Norwegian law. It should be noted that not all the directives which formed part of the Agreement needed to be transformed into Norwegian law, because Norwegian law already before the signing of the Agreement contained provisions satisfying the requirements in these

[71] The question of whether the Norwegian system is, or should be, monistic or dualistic, has been keenly debated, see, for instance, Elgesem, pp 198-199, with further references. On the *de lege lata* level the question is, however, defintely settled in a resent Supreme Court judgment, Rt. 1997 p 580 at p 593, where it is stated that "If there is a clear conflict between international law and Norwegian law, the starting point is, however, that the internal law prevails". However, as pointed out by Elgesem, stating that the Norwegian system is a monistic system, gives little guidance when the impact of international law in Norwgian law is to be assessed. There is, for instance, little doubt that international law is a relevant source of law when *interpreting* Norwegian laws. The discussion in Norwegian legal theory tends to turn on the *weight* of this source, rather than on its relevance.

directives. When the expression "EEA derived law" or "EEA law" is used in this paper, it covers all Norwegian provisons which serve to fulfil Norway's obligation under the Agreement, including those provisions which were kept unchanged because they were in accordance with the directives.

It follows from what is said in this section that *if* the principle of proportionality is part of the Agreement, which will be assessed in the following sections, it has also become part of Norwegian law within the sphere of the Agreement.

2. The principle as part of Norwegian law - initial remarks

The EEA Agreement does not contain any provisions as regards either the principle of proportionality or the other so called "unwritten general principles of EC law".[72] Normally this would have been a clear indication that the principle of proportionality is not part of the Agreement. Generally, when parties to an agreement want an important principle to be part of their agreement, they mention it in the agreement. Accordingly, when the Contracting Parties to the EEA Agreement did not mention "the most important general legal principle in Common Market law" in the Agreement, it seemed likely that the principle was not meant to be part of the Agreement.

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[72] Indirectly, the principles of direct effect and supremacy are touched upon in the only Article of Protocol 35 of the Agreement, which states that the Agreement does not require "any Contracting Party to transfer legislative powers to any institution of the European Economic Area, and Whereas this consequently will have to be achieved through national procedures". Most legal scholars read this as an indication that the principles of direct effect and supremacy are not part of the Agreement. However, for a differing opinion, see van Gerven.

However, in the case of the EEA Agreement, this is too simple a conclusion. There are provisions in the Agreement, as well as other sources of law, which may imply that the principle of proportionality is part of the Agreement. In sections 3-6, these different factors will be assessed.

3. The aim of homogeneity

There is no doubt that one of the major aims of the drafters of the EEA Agreement was to create a high degree of legal homogeneity between Community law and the legal system created by the Agreement, in the sense that EC legislation should apply in the EEA States and that this legislation should be interpreted similarily in the EC and in the EEA States.[73]Such homogeneity seems difficult to obtain if the principle of proportionality is not regarded as part of the Agreement.

It has been argued that "Stripping Community law of its general principles amounts to taking its heart. An EEA legal system that would not encompass such general principles, would therefore be a legal system that is not at all homogenous with Community law".[74] Even if one does not agree with such a statement in general, it is difficult to deny that if the principle of

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[73]Cf. what is said about the aim of homogenity in chapter I, section 3.3.

[74]Van Gerven, p 973.

proportionality is not part of the Agreement, this creates quite a big discrepancy between EC law and EEA law.

The principle of proportionality influences all parts of the Community legal system, both as a general principle of law in itself and as an interpretative guideline when interpreting Community legislation. Hence, it seems difficult to reconcile a view that the principle should not be part of the Agreement, given the clearly stated aim of homogeneity between Community law and EEA law.

It may be argued that the Norwegian doctrine of unreasonableness, which will be assessed in chapter V section 2.3, serves as a substitute for the proportionality principle, and, accordingly, that homogeneity may be secured without the principle of proportionality beeing regarded as part of the Agreement. However, as will be shown in chapter VI, section 3.3, there are substantial differences between the two principles. Accordingly, the unreasonableness principle can only to a limited extent act as a substitute for the principle of proportionality.

It follows that the aim of homogeneity is a strong argument in favour of regarding the principle of proportionality as part of the Agreement.

4. Article 6 EEA

Article 6 EEA is the single most important provision in the EEA agreement to achieve the aim of homogenity between Community law and EEA law, and it is crucial when assessing whether the principle of proportionality is part of the Agreeement. The Article reads

Without prejudice to future development of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

The Article is far from clear, and gives rise to different questions concerning its interpretation.[75] The crucial question with regard to the principle of proportionality is whether the judgments establishing the principle are "relevant" according to Article 6, or, more precisely, whether *those parts of the judgments* dealing with the principle are relevant.

[75]Norberg, p 1178, describes the subject matter regulated in the Article as "One of the most difficult and delicate issues to negotiate ...". The somewhat unclear wording of the Article is probably a result of this difficulty. However, a general assessment of the different interpretation problems which the provision gives rise to lies outside the scope of this paper.

There are three different ways of understanding the relevance- criteria. The first alternative is to read the word "relevant" as referring to all judgments by the ECJ. According to Rosén[76] this seems to be the interpretation in the *travaux prèparatoires* to the Swedish EEA Act. Such an interpretation implies that also the judgments establishing the principle of proportionality are relevant.

However, such an interpretation makes the word "relevant" superfluous. If the Contracting Parties ment that all the rulings should be relevant, it would have been unnecessary to add the word "relevant" to the Article. This is quite a strong argument against such an interpretation of Article 6.

The second possible interpretation is to read the word "relevant" as referring to judgments concerning provisions in EC law which reproduced verbatim in the EEA Agreement. This would imply that when a provision in EC law is verbatimly reproduced in the Agreement, the provison in the Agreement should be interpreted in conformity with the ECJ judgments concerning the corresponding provision in EC law.

However, such an interpretation seems difficult to reconcile with the *Opinion 1/91* of the ECJ. In *Opinion 1/91*, the ECJ strongly indicated that provisions in the EEA Agreement, although similarily worded to provisions in EC law, may be interpreted differently to the EC

[76]Rosén, p 194 ff.

provisions. The Court stated, with regard to the idea of establishing an EEA Court, that the judges of such a court would have to interpret provisions identically worded

"but using different approaches, methods and concepts in order to take account of the nature of each treaty and of its particular objectives".[77]

If Article 6 is to be understood as stating that all judgments concerning provisions which are verbatimly reproduced are relevant, it would be difficult to take into account the "nature of each treaty" when interpreting the provisons of the Agreement. If the provisions in the Agreement should be interpreted "in conformity" with *all* the relevant rulings concerning equally worded provisions in EC law, there would not be much room left to take into account "the nature of each Treaty".

The third possible interpretation of Article 6 EEA is that one has to assess whether the judgment at issue is relevant in accordance with the duty of conformity of interpretation in Article 6 EEA. In other words, the word "relevant" becomes an additional criteria. It is not enough that a judgment of the ECJ concerns EC legislation which is copied in the EEA Agreement, the judgment must in addition be relevant.

The problem with such an interpretation is to decide by which criteria it should be established whether or not a judgment is relevant. The view expressed in an almost unequivocally legal literature is that this depends on whether or not that particular judgment is influenced by an

[77] *Opinion 1/91*, paragraph 51.

aim which is not an aim of the EEA Agreement.[78] If the interpretation of a provision in EC law is influenced by an aim which is not an aim of the Agreement, the ECJ judgment is not necessarily relevant. The judgments establishing supremacy and direct effect, which are highly influenced by the integration aim of the Community, are often mentioned as such non-relevant judgments.[79]

The interpretation presented in the third alternative seems to be the only alternative which can be reconciled with *Opinion 1/91*. Only by adopting such an interpretation does it seem possible to "take account of the nature of each treaty and of its particular objectives" when deciding if a judgment is relevant. This fact, in addition to the fact that such an interpretation is argued for by most legal scholars, implies that one, in all likelihood, can conclude that this is the correct interpretation of the relevance criteria in Article 6.

It has been argued above that the question of whether the judgments establishing the principle of proportionality are relevant, depends on whether the principle pursues aims which are not aims of the EEA Agreement. It is difficult to describe the underlying idea of the principle of proportionality in few words, but the principle is influenced by the idea of the liberal state, based on the premise that the state should restrict itself to the achivement of objectives which are limited and that the law must serve a useful purpose.[80] These are ideas which are not

[78]Sejersted, p 163 ff.; Rosén, p 196 ff.; Bull, pp 594-595. Also Norberg: EEA Law, page 191 seems to adopt this view, although he underlines the aim of homogenity very strongly and mentions only the judgments concerning primacy and direct effect as "not relevant". For a different opinion, see van Gerven, cf footnote 91.

[79]Cf. the references in footnote 78 above.

[80]See Schwarze, pp 678-679; and Emiliou, p 40, with regard to the principle of proportionality in German law.

anything particular to the legal order of the Community or which represents objectives which are not part of the EEA Agreement.

From the preceding paragraphs it should be concluded that since the application of the principle of proportionality does not involve the pursuit of aims which differ from the aims of the EEA Agreement, the relevance criteria contained in Article 6 EEA indicates that the principle is part of the Agreement.

However, two more arguments, connected to Article 6, have been raised against the view that the principle forms part of the Agreement.

First, the following view has been presented: unwritten general principles of law are relied upon when no written provision is found to be applicable to the case in question. Consequently, as Article 6 EEA limits itself, referring only to case law that is relevant for the interpretation of the provisions of the EEA Agreement, the general principles do not form part of the Agreement.[81]

However, such an approach is to simplistic. The general principles of EC law are closely linked to written provisions and they often emerge in the form of interpretation of such provisions, or they are used in interpreting such provisions.[82] Accordingly, the term

[81]See Bull: The EEA Agreement, p 57, who, however, rejects this argument.

[82]Cf. Bull: The EEA Agreement, p 57.

"provisions of this Agreement" in Article 6 EEA could not be interpreted as to exclude the principle of proportionality from being part of the Agreement.

Secondly, doubts have been raised as to whether the fact that the principle of proportionality is partly elaborated in areas not covered by the EEA Agreement, such as the sphere of the common agricultural policy, implies that the rulings establishing the principle are not relevant.[83]

This argument must, however, also be rejected. The principle of proportionality, even though partly elaborated and appearing within areas not covered by the Agreement, is a general principle of EC law. It is a part of EC law within all spheres, also the spheres which are part of the EEA Agreement. The fact that it is *also* applied outside the sphere of the Agreement, cannot hinder it from being part of the EEA Agreement.[84]

Fianlly, it should be mentioned that Article 6 distinguishes between judgments given before and after "the date of signature of this Agreement". The duty of conformity of interpretation applies only to the former.[85] The principle of proportionality, however, was well established as a general principle of EC law before the signing of the Agreement. Hence, the distinction between rulings before and after the date of signature should be irrelevant. However, without going into details, I mention that if the ECJ in the future changes its interpretation of the

[83]See Sevon, p 338.

[84]See also Norberg: EEA law, p 191.

[85]For a general discussion of this distinction in the Article, see Sejersted, p 162 f.

principle, the question of whether such a new interpretation is part of the Agreement may arise.

5. Judgments by the EFTA Court

The only case so far in which the EFTA Court has dealt with the principle of proportionality is its advisory opinion E-1/95 *Ulf Samuelsson.*[86] The case concerned the interpretation of a Swedish law, based on Council Directive 80/987/EEC, regulating the rights of the employees to payment of outstanding wages in the case of bankruptcy of their employer. The issue at question was under which circumstances an EFTA State can derogate from the rights granted to an employee by the Council directive. The Court stated that

> "As with all provisions under which a State may adopt measures which derogate from the main principles of a directive, Article 10(a) must be given a restrictive interpretation, and any measures undertaken on the basis thereof must be effective and proportionate."[87]

An advisory opinion from the EFTA Court is, unlike the corresponding opinions from the ECJ, not binding for the court that asks for the opinion, cf. the ESA/EFTA Court Agreement Article 34.

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[86]Case E-1/95, *Ulf Samuelsson* [1994-95] EFTA Court Report 145.

[87]Case E-1/95, *Ulf Samuelsson*, paragraph 31.

However, even though an advisory opinion from the EFTA Court is not formally binding, it is likely that Norwegian courts will attach great weight to such an opinion. The same questions which are decided by the EFTA Court in advisory opinions may also arise in proceedings according to Articles 31 and 32 in the ESA/EFTA Court Agreement. It is likely that the EFTA Court will adopt the same approach as regards proportionality in such proceedings as it has expressed in its advisory opinion. Judgments in cases according to Articles 31 and 32 are binding on the EFTA States, cf. the ESA/EFTA Court Agreement Article 33. Accordingly, if the EFTA Court applies the principle of proportionality in such a case, Norwegian authorities are bound by the judgment. It would create a very confused legal regime if the principle of proportionality should be regarded as part of the Agreeement when the question arises in the context of proceedings according to Articles 31 or 32, but not be regarded as part of the Agreement if the question arises in the context of proceedings before a Norwegian court. It is presumeable that Norwegian courts will be careful to avoid such a situation.

It follows from what is said above that the EFTA Court's advisory opinion is a strong indicator that the principle of proportionality will be regarded as part of Norwegian law, also by Norwegian courts.

6. Academic Legal writing

The question of whether the principle of proportionality has become part of Norwegian law within the sphere of the EEA Agreement has been discussed in legal literature, although no legal scholar has done a thorough assessment of this question. Most of the assessments tend to be mere statements that the principle has been incorporated in Norwegian law, without any real discussion of the question. However, it seems to be a general agreement that the principle is part of the Agreement and thereby part of Norwegian law within the sphere of the Agreement.[88]

Although the assessments are not very thorough, Norwegian courts would normally tend to attach weight to such an unequivocal standpoint adopted in the academic legal writing. Accordingly, also this factor supports the conclusion that the principle has become part of Norwegian law.

7. Conclusion

The principle of proportionality is not mentioned expressly in the EEA Agreement and this may seem to indicate that it is not part of the Agreement. However, this argument has limited weight, compared with the aim of homogenity expressed in the EEA Agreement, Article 6 of

[88] See Sejersted, p 76; Graver, p 305; Rasmussen, p 315, Eckhoff, p 162; Norberg: EEA Law, p 191; Sevon, pp 338-339; and van Gerven. Bull: The EEA Agreement, p 57, is the only one who discusses the question to some extent. He also concludes that the principle has become part of Norwegian law, but his conclusion is not as clear as the other authors'.

the Agreement, the advisory opinion 1/95 of the EFTA Court, and the opinions expressed in legal writing. Accordingly, it should be concluded that the principle is part of the EEA Agreement, and by incorporation of the Agreement has become part of Norwegiean law within the sphere of the Agreement.

IV THE STATUS OF THE PRINCIPLE IN NORWEGIAN LAW

1. Introduction

The conclusion that the principle of proportionality has become part of Norwegian law within the sphere of the EEA Agreement, gives rise to the question of its status within the Norwegian hierarchy of legal norms.

In Community law it is accepted that the principle enjoys a higher status than derived Community law.[89] It may be asked how the conflict should be solved if an express term of the Treaty is contrary to the principle. The traditional view seems to be that the Treaty provision prevails in such a conflict.[90] However, it does not seem likely that such a conflict will ever arise. It would require that a Treaty provision clearly implied that a unproportional measure had to be adopted, and it is difficult to imagine how such a situation should arise.

Because of the supremacy-doctrine, also national legislation and administrative measures adopted by Community Member States may be declared void if they are contrary to the principle.

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[89] Schwarze, pp 717-718 with further references.

[90] Emiliou, p 169, with reference to Case 40/64 *Sgarlata* [1965] ECR 215, at p 217, states such a view, without any real discussion of the question. However, it seems doubtful whether this conclusion is really as clear as Emiliou suggests. Since the delivery of this judgment there has been an important evolution in the Court's case law with regard to fundamental rights. The Court has in several later cases stated that fundamental rights form part of EC law. Even though no express Treaty provison is set aside as contrary to fundamental rights, the outcome of such a conflict seems more uncertain today than in 1965, when the *Sgarlata* judgment was delivered. This evolution is relvant also with regard to the hierarchical status of the proportionality principle. Furthermore, the principle is now embodied in the Treaty by Article 3b (3) EC. If a conflict between Article 3b (3) and another Treaty provision arises, it seems far from clear that the latter prevails.

As will be shown below, the situation in the EFTA States is somewhat different from the EU States with regard to the hierachical status of implemented EEA rules, and thereby also with regard to the status of the principle of proportionality.

The question of the principle's status in Norwegian law is closely linked to the question of the status of EEA derived law in general. Accordingly, before assessing the status of the principle in Norwegian law, it is necessary to give a brief overview of the Agreement's provisions concerning the status of EEA law in general, cf section 2, and a description of how these provisions are fulfilled in general in Norwegian law, cf section 3. Section 4 contains a specific assessment of the principle's status in Norwegian law.

2. The status of EEA law according to the Agreement

As an international agreement, the EEA Agreement is binding between the Contracting Parties, who, at a state to state level are obliged to follow it, even if it should be contrary to national law. However, this does not solve the question of which effect the Agreement has in the internal national law.

Since the Community legal system is monistic, the Agreement immediately forms part of EC law without a particular act of incorporation. Furthermore, since EC law in general is superior to national law in the Member States, also the Agreement is superior to national laws in these States.

With regard to the EFTA States, however, the Contracting Parties could not rely on the doctrine of supremacy. Accordingly, it was necessary to regulate in the Agreement the hierarchical status of the implemented EEA rules. This is carried out in Protocol 35 of the Agreement, which reads

"For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases."

Three remarks should be made about this paragraph.

First, it obliges the EFTA States to secure supremacy through a statutory provision, i.e., it is not like in EC law, where the ECJ has laid down that supremacy is a result of the EC legal system itself.

Secondly, the paragraph is only concerned with implemented EEA rules. In other words, while the doctrine of supremacy in EC law regulates a conflict between national law and EC law, protocol 35 regulates a conflict between different national provisions. It should also be mentioned that the provision does not regulate the problems arising if a provision of the Agreement is not implemented, or is implemented wrongly.

Thirdly, Protocol 35 is concerned with the conflict between EEA rules and statutory provisions. The EFTA States are not obliged to secure supremacy for implemented EEA rules over the national constitutions.

As is shown above, the "supremacy" established by Protocol 35 is quite different from the supremacy in EC law.[91]

3. The fulfillment of Protocol 35 in Norwegian law

The obligation in Protocol 35 is fulfilled in different ways in the different EFTA States. Norway has fulfilled it by section 2 of the EEA Act, which reads

"Provisions of Acts of Parliament which serve to fulfil Norway's obligation under the Agreement shall in case of conflict prevail over other provisions which regulate the same matter. The same shall apply if a provision of an administrative regulation which serves to fulfil Norway's obligation under the Agreement, conflicts with another such provision, or with a later act of parliament."

According to its wording, first sentence of section 2 states that laws fulfilling Norway's obligations under the Agreement prevail over ordinary Norwegian statutory law. In other words, EEA derived laws do not prevail over the Constitution. The second sentence establishes, according to its wording, that administrative regulations which fulfil the obligations under the Agreement prevail over "ordinary" regulations and subsequent laws.

[91] For a different opinion, see van Gerven, who argues that Protocol 35 only regulates the transistory period until the EFTA States has inserted a provision in their national laws, establishing supremacy. After this, he argues, supremacy follows directly from the nature of the Agreement and its Article 6. Within the framework of this paper it is not possible to go deeply in to this discussion. I restrict myself to mention that there is nothing in Protocol 35 itself that indicates that it only regulates a transistory period. Furthermore, van Gerven's opinion does not seem to be shared by any other legal scholars, see Sejersted, p 141; Sevon: Direct Effect, p 351; Bull: The EEA, p 295; and Barentz, p 64.

Most conflicts between EEA derived law and ordinary Norwegian law will, in practise, undoubtedly be solved according to the wording of section 2 of the EEA Act. One way of viewing section 2 of the EEA Act is as a provision establishing a new level in the hierarchy of legal norms, between the Constitution and ordinary statutory laws. This seems like an appropriate way of categorizing its function *in practice*. However, as will be shown in the following, the fact that section 2 itself is an ordinary statutory provison, and not a higher norm, renders such a view difficult to upheld as a theoretical construction. Furthermore, in practice, it creates some problems when one have to decide which norm that is to prevail in conflicts between EEA derived laws and "ordinary" national legislation.

First, the fact that section 2 is a statutory provision implies that it does not hinder the Parliament from passing new statutory provisions which annul, or amend, an older EEA derived law or an EEA derived administrative regulation. If such a provision is adopted, Norwegian courts are obliged to apply the new provison. However, this will be a breach of the Agreement.

It does not seem very likely that the Norwegian Parliament deliberately will annul or amend EEA derived laws, and thereby breach an important international agreement. However, the Parliament may annul or amend a law without recognising that it is an EEA derived law. Given the very high number of EEA derived legislation in the Norwegian legal system, it is not unthinkable that such a situation might arise.[92]

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[92]Especially where an EC directive is implemented by an administrative regulation, it is conceivable that such a situation may arise. The procedure for amendment or anullment of administrative regulations is normally shorter and less thorough than the corresponding process when dealing with acts of Parliament.

Secondly, the fact that section 2 of the EEA Act is a statutory provision also creates complications in two of the situations which are regulated in the paragraph - where a new law is in conflict with an older EEA derived law, or with an older EEA derived administrative regulation. According to the wording of section 2, the solution to such a conflict is clearly that the EEA derived law or regulation prevails.

However, since section 2 is a statutory provision, the legislator can derogate from the section in a new law, and thereby also from the hierarchy which is established by the section. Accordingly, if it is evident, for instance by the wording of the new law and by statements in the *travaux préparatoires*, that the legislator wants to derogate from an older EEA derived law, the new law will, most likely, prevail. However, if the new law is to prevail, the legislator must express its intention clearly.

It seems most precise to describe section 2 of the EEA Act as an *interpretative guideline*, establishing the presumption that the Parliament will not make laws contrary to EEA derived law.[93] Accordingly, acts by Parliament should, if possible, be interpreted so that no conflict with EEA derived law arises. This implies that if the Parliament does not state expressly that a new law derogates from section 2 of the EEA Act, or from other EEA derived laws, the courts will, in all likelihood, interpret the scope of the new law so that no conflict with section 2 arises.[94]

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[93]Sejersted, p 142.

[94]This view is also adopted in Innst.O nr 14 [1992-1993] p 4, where the majority of the Parliamentary committee in charge of the EEA Act states that "If the parliament in a single case *expressly* (my emphasisis) states that a new law shall be enforced

It is debateable whether section 2, if interpreted as described above, adds much to what would anyway have followed from the Norwegian principle of *presumption*. This principle may, in short, be described as an interpretative principle which requires that a Norwegian act, if possible, should be interpreted so that no conflict arises between the act and a treaty into which Norway has entered.[95] The view that section 2 does not differ much from the principle of presumption is adopted in the *travaux préparatoires* to the EEA Act.[96]

However, it should be remarked that the principle of presumption is normally discussed in connection with the international human rights conventions entered into by Norway, such as for example the ECHR. The *content* of the provisions in these conventions is of such a nature that it is natural to rely heavily on them when interpreting Norwegian laws, and to apply a strict principle of presumption. This will normally not be the case with regard to implemented EEA law, which often concerns prosaic technical matters, far removed from fundamental rights. Accordingly, it seems likely that section 2 may play a role in addition to the principle of presumption, in the sense that Norwegian courts will go further with regard to interpreting

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even if it is in conflict with existing laws or administrative regulations which fulfil EEA-obligations, Norwegian courts will have to respect this, even if it implies a breach of our international obligations".

[95]In Rt. 1984 p 1175 at p 1180 the Supreme Court phrases the principle in the following way: "Norwegian law must to the extent possible be presumed to be in harmony with treaties which Norway has entered into." This case concerned a possible breach of the ECHR. It has been argued that the principle of presumption only applies to general international law and not to ordinary treaties, see, for instance, Andenæs, p 8. For a different view, see Smith, pp 367-368. However, with regard to the EEA Agreement it is presumed in the *travaux préparatoires* that the principle of presumption applies, see Ot.prp. 79 [1991-92] p 3-4. In Norwegian law, courts normally attach great weight to the *travaux préparatoires*. Hence, if the question arises, it is likely that a Norwegian court will apply the principle of presumption to the Agreement.

[96]Ot.prp. nr. 79 [1991-92], p 5.

Norwegian laws so as not to be in conflict with EEA derived laws than if they had have to rely exclusively on the principle of presumption.[97]

4. The hierarchical status of the proportionality principle

4.1 Introduction

After this assessment of the hierarchical status of EEA derived law in general, it is time to assess the status of the proportionality principle.

A conflict between this principle and other Norwegian laws might arise in two different ways, first, as a conflict between the principle and non-EEA derived laws, cf. section 4.2, secondly, as a conflict between the principle and EEA derived laws, cf. section 4.3.

4.2 Conflicts between the principle and non-EEA derived laws

Conflicts between EEA derived laws and ordinary Norwegian legislation are generally resolved by the EEA Act section 2, as described in section 3 above. However, section 2 of the EEA Act is concerned with "acts by parliament", and "administrative regulations". It does not cover possible conflicts between unwritten principles of law, like the principle of

[97] See in the same direction, Bull, pp 600- 601.

proportionality, and other Norwegian legislation. Neither is this question discussed in the *travaux préparatoires* to the EEA Act. However, this should not create problems. The EEA Act section 1 makes EEA Article 6 part of Norwegian law. Since the ECJ judgments concerning the proportionality principle are among the relevant rulings mentioned in Article 6, cf. my conclusion in chapter III, section 7, the principle has become Norwegian law with hierarchical status according to the EEA Act, section 2. Accordingly, if a conflict with non-EEA derived laws arise, the principle will normally prevail, cf section 3 above. However, some further explanations is required.

First, as explained in section 3, the Parliament can annul or amend EEA derived laws. If the Parliament makes a new law, stating that the principle of proportionality, in general, shall no longer apply, Norwegian courts will have to apply the new law, even though it will be a breach of the Agreement. However, it is nearly unthinkable that this will happen, both because it would be a breach of an international agreement and because no Parliament will admit that it intends to make legislation which contrvenes the principle of proportionality. Somewhat more conceivable is it that the legislator states that the principle shall not apply with regard to a *concrete* new law. Such a decision will have to be respected by the courts, provided that the legislator has expressed itself clearly to this effect.

Secondly, the Parliament can make a new law, and, for instance, in the *travaux préparatoire* state that the law is not disproportionate. If the court, after assessing the outcome of the law, concludes that the measure is disproportionate, there is a conflict, the likely outcome of which is unclear. However, in such a case it seems most likely that the court will apply section 2 as

an interpretative guideline, and interpret the law so that it accords with the principle of proportionality.

Normally the Parliament does not make any express statement regarding the proportionality of a law. If this is the case, and the court concludes that the law potentially may have consequenses which are disproportionate, section 2 will apply as an interpretative guideline. In this situation the court will, in all likelihood, limit the scope of the law so that no conflict with the principle of proportionality arises.[98]

4.3 Conflicts between the principle and EEA derived laws

The EEA Act section 2 is only concerned with the conflict between EEA derived legislation and "ordinary" legislation, i.e., non-EEA derived legislation. It does not solve conflicts between different EEA derived legislation. Hence, one may ask how a conflict between the principle of proportionality and other Norwegian EEA derived legislation should be solved.

In Norwegian law, the principle has the special status of EEA derived law, cf. section 4.2, in other words, the same status as other EEA derived law. Hence, contrary to EC law where the principle undoubtedly prevails in a conflict with derived legislation, in Norwegian law it is not obvious that the principle prevails over other EEA derived laws. However, the Agreement's aim of homogenity is an argument in favour of adopting the same solution as in

[98]This situation is mentioned in Graver: EF-rettens, p 92, who limits himself to stating that paragraph 2 of the EEA Act will be "an important factor for the interpretation".

EC law. Also Article 6 EEA is quite a strong argument in favour of such a solution. Accordingly, one can, in all likelihood, conclude that such a conflict should be solved in the same way as it is solved in EC law. This implies that the principle of proportionality prevails in cases of conflict with provisions in other EEA derived legislation, except where the latter reproduce provisions in the EC Treaty.[99]

5. Conclusions

It should be concluded that section 2 of the EEA Act, even though it is formally, only an interpretative guideline, for most practical purposes implies that a new level in the Norwegian hierarchy of legal norms is established. Unless the legislator clearly expresses that a new law shall prevail over EEA derived laws, the EEA law will prevail in such a conflict.

With regard to the proportionality principle, this implies that unless the legislator makes a new law which states expressly that the principle, in general, shall no longer apply, or that it shall not apply to a specific new law, the principle will prevail in a conflict with ordinary Norwegian legislation. Likewise it will prevail in conflict with other EEA derived laws, unless these are reproducing Treaty provisions.

[99] The question of possible conflicts between different EEA derived laws in general is discussed in Sejersted, p 196. Sejersted seems to adopt the same wiev as presented above with regard to conflicts between EEA derived laws reprodusing provisions in the EC Treaty, and other EEA derived laws. His concusion is, however, somewhat unclear.

V THE DOCTRINE ON REVIEW OF LEGISLATION AND ADMINISTRATIVE MEASURES IN NORWEGIAN LAW

1. Introduction

This chapter contains a description of the Norwegian doctrine on judicial review of legislation and administrative measures, *outside* the sphere of the EEA Agreement. The chapter is intended to establish the basis for my assessment in chapter VI of whether the incorporation of the principle of proportionality within the sphere of the Agreement adds anything to the traditional Norwegian doctrine on judicial review.

The chapter proceeds as follows. Section 2 contains a brief overview of the traditional Norwegian doctrine with regard to review of legislation and administrative measures. As will be shown, with the exception of some specific areas of administrative law, lack of proportionality has traditionally not been regarded as a sufficient reason for reviewing either legislation or administrative measures.[100]

However, in parts of the more recent Norwegian legal theory it has been argued that there exists a kind of a proportionality principle within Norwegian law which is generally applicable on administrative measures. Section 3 contains a description of this doctrine as it is presented in Norwegian legal theory, and an assessment of this new doctrine.

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[100] However, it is uncontroversial that within some *specific areas* of administrative law there exists a principle of proportionality, cf footnote 123.

2. The traditional doctrine

2.1 Introduction

In Norwegian law it is generally accepted that legislation, administrative regulations and administrative decisions can all, under certain circumstances, be reviewed by courts.

2.2 Review of legislation

Legislation can be reviewed if it is contrary to the Constitution.[101] Constitutional review is limited to cases where an actual conflict is brought before the court. The court can only interfere in relation to an act that has already come into force, and formally the court's decision has effect only with respect to the parties to the case.

2.3 Review of administrative decisions

Administrative decisions can generally be reviewed by courts if they are contrary to the Constitution, a statutory law, or an administrative regulation.[102] For a closer assessment of the

[101]Norway seems to be the first European country to accept judicial review of legislation. Already in a Supreme Court case from 1866 the Chief Justice, who was part of the majority in the case, stated that a conflict between a legislative act and a constitutional provision, must be resolved in favour of the Constitution. However, the case is not a clear precedent, because the rest of the majority arrived to the same solution as the Chief Justice, but without expressing an opinion on the constitutional question. In 1868 came the first work by a Norwegian legal scholar arguing that judicial review was part of Norwegian law, and in the 1880's this view was argued in the major treatise on Norwegian constitutional law. The indisputable Supreme Court precedent for judicial review occurred in 1890. For a short overview in English of the topic, see Smith 1996, pp 51-59.

[102]Before the Constitution of 1814, courts could only review administrative acts if the King, in the case at issue, had permitted the court to assess whether or not the act was in accordance with the law. The Constitution does not express itself with regard

possibility of review of such decisions, it is useful to split the assessment in two parts. Section 2.3.1 below, will deal with non discretionary decisions, and section 2.3.2, will deal with decisions where the administration has discretionary powers.

2.3.1 Non-discretionary decisons

In these cases the court may conduct a complete review of the contested decision, i.e. there is no margin of discretion left for the administration. If the decision is contrary to the Constitution, statutory law or an administrative regulation, it may be quashed. Likewise, it can be quashed if it is based on wrongful facts. On the other hand, as long as the outcome of the decision is in accordance with the law, such non-discretionary decisions would not be quashed for the misuse of powers. The court can, for instance, not quash the decision because it finds it to be grossly inequitable. In other words, the discretion of the legislator to adopt laws which have an unreasonable outcome cannot be reviewed, unless the law is contrary to the Constitution. It is also very ulikely that such a decision would be quashed because of breach of procedural rules.[103]

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to review of administrative acts. However, already in the 1830's the courts began to review such acts without a previous permission from the King, see Eckhoff, p 633, and, more thoroughly, Pedersen.

[103]See, for instance, Eckhoff, p 575. The reason why is obvious; as long as the decision is in accordance with the law, it is unlikely that a breach of procedural rules has influenced the outcome of the decision.

2.3.2 Discretionary decisions

Some laws grant the administration more or less of a margin of discretion.[104] This expression, as it is used in this paper, implies that the administrative decision *is not open to complete judicial review.*

In these cases, the question of review is more complicated. These decisions can also, of course, be quashed if they are contrary to the Constitution, statutory law or an administrative regulation. The crucial question is, however, what it implies that a decision is not open to *complete* judicial review, or in other words, what are the limitations on court's powers of review in these cases?

First, the court can always review the *general interpretation* of a provision in a law, even when the administration has discretionary powers. However, it cannot review the administration's application of the law in a concrete case. When the law contains vague expressions or phrases suggesting that the administration has a discretion to exercise, like, for instance, "unreasonable", "a certain amount", or "necessary" it may, however, be difficult to decide where the general interpretation ends and the application of the law to a concrete case begins.[105]

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[104] Whether a provision in a law gives the administration a margin of discretion depends on an interpretation of the provision at issue, but some general guidelines may be established. However, a description of these guidelines is beyond the scope of this paper. For a good asssessment of the question, see Eckhoff, p 267 f; and Innjord.

[105] See Eckhoff: Rettskilder, pp 26-27 about this question in general.

Secondly, the court can test the accuracy of the facts supporting the decision adopted. A decision may be quashed if the administration has based its decision on wrongful facts, and it is not unlikely that this has influenced the outcome of the decision.[106]

Thirdly, where the administration has discretionary powers, its conduct is regulated by procedural rules.[107] If the administration has not followed these rules when adopting the decision, its decision may be quashed by the courts, unless it is likely that the breach of the procedural rules has not influenced the outcome of the decision, cf the Administration Act section 41. One of the procedural requirements is the obligation to give reasons for the decision, cf the Administration Act section 24. The extent of the reasoning depends, to some extent, on the importance of the decision. An important decision normally requires a more thorough reasoning. Likewise, if the decision appears as unreasonable, the courts tend to require a more thorough reasoning.[108]

There is no example of a case where an administrative decision has been quashed because the administration has used its discretion to reach a result which is contrary to international law. However, the view that this is a potential ground of annullment is stated in Rt. 1982 p. 241,[109] and it seems to be generally accepted as a fourth ground of review.[110]

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[106] The precedent is Rt. 1960 p 1374. A taxi owner was deprived of his Taxi-licence because the authorities belived that he did not maintain his Taxis in a proper way. In court it was veryfied that the Taxis were properly maintained, and the authorities' decision was quashed.

[107] The procedural rules for the administration's behaviour in general follows from the Administration Act of 10th of february 1967, hereinafter referred to as the Administration Act. In addition, there exist different special procedural rules, governing administrative behaviour in special areas.

[108] The precedent is Rt. 1981 p 745. For a closer analysis of the judgment, see pp 71-72.

[109] Rt. 1982 p 241, [the Supreme Court in a plenary session] at pp 257-258.

Finally, a decision may be quashed if it is a result of *misuse of powers*. In Norwegian legal theory the concept of misuse of powers is normally split up in to four sub-concepts.[111] However, neither the borderline between the sub-concepts, nor the borderline between a wrongful interpretation of the law and misuse of powers, is very clear. The sub-concepts are as follows.

First, where the administration's decision is based on facts which, according to the law, are not relevant.[112]

Secondly, where the administration's decision implies an unjustified difference in treatment.[113]

Thirdly, where the decision is adopted completely arbitrarily, for instance, by drawing lots (apart from where the law requires lot-drawing).[114]

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[110]See Ot.prp. nr. 79 [1991-92] p. 4, where such a view is expressed in the *travaux préparatoire* to the EEA Act; Graver 1996 p 140; and Sejersted p 200-201.

[111]The Norwegian doctrine on misuse of powers is inspired by the French doctrine, but seems to have evolved somewhat differently than in France, see Smith 1986.

[112]Rt. 1933 p. 548 is generally regarded as the first precedent stating the doctrine. The council of a municipality denied a hotel a license to serve alcohol. Some of the council-members rejected the licence because the hotel did not allow its employees to sign a wage agreement. The court stated that the objective of the license system was to minimise the inconveniences which are normally connected to the serving of alcohol. Accordingly, it was irrelevant for the licensing question whether the hotel employees were allowed to sign a wage agreement. The Court declared that a decision based on such an irrelevant fact was void. For a different view, see Bernt, pp 284-289, arguing that the Rt. 1933 p. 548 is not a clear precedent and that the first clear precedent is Rt. 1955 p. 1162.

[113]The precedent is Rt. 1911 p 503. All the 160 bars in a city, apart from three, were given an exemption from the law, allowing them to expand the time period within which there could legally serve beer. The Supreme Court stated that there was no justification for treating the three bars differently from all the other bars in the city, and that this therefore was unlawful.

Finally, a decision may be quashed where it is inequitable or unreasonable.[115] The different Supreme Court cases where the principle has been applied use different expressions to describe the degree of unreasonableness which is required before a decision will be quashed.[116] However, the general impression is that it requires a very high degree of unreasonableness,[117] and the test is probably most precisely described as a "grossly inequitable test". Still, for the sake of simplicity, it is hereinafter referred to as the «ureasonableness test».

The Supreme Court's assessments of whether a measure is unreasonable tend to be brief, and it is difficult to deduce from the cases which criteria the Court applies in the assessments. However, it is uncontroversial that lack of proportionality between end and means is *one* of the criteria in the overall assessment of the reasonableness of a measure, see, for instance, Rt. 1995 p 109.

The case turned on the validity of a decision whereby the local municipality withdrew a pub's permission to serve beer because it had served drunk people and people who were below the age when they could legally drink beer. In this case the Supreme Court phrased the

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[114]So far the Supreme Court has not had to decide in such a case. Accordingly, no clear precedent exists. However, it is generally accepted in Norwegian legal theory that such a sub-concept of the doctrine of misuse of powers exists, see, for instance, Eckhoff, p 299.

[115]The concept was accepted in principle by the Supreme Court as early as in Rt. 1907 p 413. The first Supreme Court case where the principle is applied is Rt. 1951 p 19. Four taxi-owners were denied the right to engage in taxi-business because they had been passive members of the Norwegian nazi-party during the second world war. The Supreme Court quashed the decision because it was "so unreasonable and so contrary to the common opinion in society" that it should be declared void.

[116]Rt. 1991 p 973, at p 983 uses the expression "grossly inequitable"; in Rt. 1993 p 587, at p 598, the majority uses the expression "obviously unreasonable". In Rt. 1995 p 109, at p 118, the assessment criteria is phrased as "clearly unreasonable".

[117]See, for instance, Eckhoff, p 301, in this direction.

unreasonable test as whether the decision was "unproportionally burdensome and therefore could be declared void as clearly unreasonable".[118]

However, it should be underlined that according to the traditional view, it is not *sufficient* to quash a decision that it is disproportionate, unless this lack of proportionality, eventually together with other factors, renders the decision "clearly unreasonable", "grossly inequitable" or "obviously unreasonable".

2.4 Review of administrative regulations

Administrative regulations can be reviewed if they are contrary to the Constitution or statutory law.

An administrative regulation can also be declared void if the procedural rules governing the adoption of such regulations are not followed, unless it is likely that the breach of the procedural rules has not influenced the outcome of the regulation.[119] However, in legal theory it has been argued that the courts should be more cautious about declaring regulations void due to breach of procedural rules than when the question turns on administrative decisions.[120]

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[118]Rt. 1995 p 109 at p 118.

[119]See, for instance, Rt. 1964 p 98, where a regulation prohibiting the use of wedge-shaped seines was declared void because the fishery authorities and the municipality council had not been given the opportunity to give their opinion before the regulation was adopted.

[120]See, for instance, Eckhoff, p 579.

As regards the question of whether regulations can be quashed because of misuse of powers, the legal situation is somewhat unsettled. There is no Supreme Court judgment declaring a regulation void because of misuse of powers.[121]

In legal theory it has been argued that the sub-concepts apply also to regulations.[122] From a *de lege ferenda* point of view it is difficult to find good arguments in favour of the view that the rules regarding regulations should be different from those regarding decisions. Why should, for instance, the administration be allowed to adopt a regulation based on irrelevant facts, when it is not allowed to adopt such a decision?

Due to the strong de lege ferenda arguments and the opininions expressed in legal theory, it seems most likely that, if the question arises, the court will aply the concepts also to regulations. However, in the absence of a clear precedent, the question should not be regarded as entirely settled.

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[121]The question whether the concepts of unreasonableness and arbitrariness apply on regulations arised in Rt. 1951 p 1081 but the case was decided without this question beeing answered. The question whether the concepts of irreleveant facts and arbitrariness apply was rised in Rt. 1961 p 554. However, the Court states, at p 559, that as the case stood, it was unnecessary to assess this question.

[122]See, Eckhoff, p 584, who states, without any real assessment, that the concept of irrelevant facts apply also to regulations. Graver: EF-rettens, p 92, seems to adopt the view that all the sub-concepts of misuse of powers apply on regulations as well as decisions, referring to Rt. 1993 p 420. However, Gravers opinion is not quite clear, and Rt. 1993 p 420 does only concern the procedural rules.

2.5 Conclusion

It can be concluded that the traditional Norwegian doctrine on judicial review does not recognise a principle of proportionality as a sole legal basis for review of either Parliamentary acts or administrative measures.

However, with regard to administrative decisions, the question of proportionality is *one of the assessment criteria* within the sub concept of reasonableness.

With regard to administrative regulations it is not entirely settled if the misuse of powers doctrine applies, although it seems likely that the courts will apply it if the question arises. Accordingly, the proportionality question might well appear as one of the criteria, when assessing whether a regulation is unreasonable.

3. The new doctrine - a sort of proportionality principle

3.1 Introduction

In parts of the more recent legal literature the discussion has assumed that there is a *general* principle of proportionality in Norwegian law.[123] The doctrine described in chapter IV,

[123] It should be pointed out that within some *specific areas* of administrative law there exists a principle of proportio-nality. First, some laws contain provisions which expressly require a proportionality between end and means, see, for instance, the law on aliens (*utlendingsloven*), section 30. Secondly, the Norwegian Criminal Procedure Act (*straffe-prosessloven*), section 4, lay down that the Act shall be applied within the limits of international law. Accordingly, within this sphere, the principle

section 2.3.2, has been challenged, mainly by Graver,[124] arguing that there exists a sort of a proportionality principle within Norwegian law, also outside the sphere of the EEA Agreement. In section 3.2 I give a brief presentation of this discussion, with a focus on Graver's theory, while the validity of the different theories will be assessed in section 3.3.

3.2 The principle as presented in Norwegian academic legal writing

Different Norwegian legal scholars have used the term "proportionality" when discussing to what extent administrative measures can be quashed by the courts. However, the discussion is confusing because there seems to be a lack of common understanding as to the content of the term. Some authors use the term as another way of labelling the unreasonable test. Such a re-labelling does not add much to the traditional doctrine of unreasonableness. Other authors argue that the term has a content that differs from the unreasonableness doctrine, but nevertheless they obviously have different opinions as to what this different content is.

The term proportionality was introduced by Bernt.[125] However, Bernt's use of the term makes it appropriate to describe him as one of the theorists who see the concept of proportionality

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of proportionality, as it is applied by the European Court of Human Rights, is part of Norwegian law. Thirdly, within some areas of administrative law, like the area of police law, the principle exists as an unwritten principle of law. For an overview over the different areas where the principle applies, see Rasmussen pp 311-316. However, the proportionality principle, as it appears within these areas, is not completely equivivalent to the principle, as it exists within EC law.

[124] Graver, p 279 f; and Graver 1996, p 198 f.

[125] Bernt, p 261 f.

as a relabelling of the doctrine of unreasonableness, and as such his concept does not add much to the traditional Norwegian doctrine of unreasonablenss.[126]

Eckhoff[127] also points out the connection between unreasonablenss and proportionality. As regards the question of whether there exists a general principle of proportionality in Norwegian law, he states that such a principle

"may evolve in the light of the experiences the courts will gain with review of proportionality of administrative measures according to the EEA law and international human rights law. Apart from this there are reasons to believe that the courts will be reluctant to establish this sort of substantial review of the discretionary powers of the administration".[128]

In other words, Eckhoff seems to reject the view that the principle, for the present, is part of Norwegian law.

Backer discuss the question briefly, and conludes that it is "doubtful" whether the principle exists as a general principle within Norwegian law.[129] Bull is clearer, and states that the principle "does not exist as such in Norwegian law".[130]

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[126]The major contribution of Bernt's article is his demonstration of the relativity of the intensity with which the courts scrutinze different types of decisions, cf, for instance, p 262 f.

[127]Eckhoff, p 260.

[128]Eckhoff, p 303.

[129]Backer, pp 630-631.

[130]Bull: The EEA Agreement, p 58.

Rasmussen concludes that there exists a principle of proportionality within different areas of administrative law - which is an uncontroversial observation - and states that he "thinks" that this should be regarded as a reflection of a general principle. However, he admits that there is no Supreme Court authority for such a view.[131] Furthermore, even though he implicitly seems to take the view that this general principle differs in some way from the unreasonableness principle, it is highly unclear where this difference lies.

The most recent and thorough works on the subject have been carried out by Graver.[132] Relying on a number of Supreme Court cases which will be assessed in section 3.3 below, he argues that the principle of proportionality exists within Norwegian law, in the sense that when the administration enjoys discretionary powers, *either the legislator or the executive* must *have carried out an assessment* of whether or not the contested measure is *suitable, necessary* and whether or not *the gains exeed the costs*, i.e., proportionality in the strict sense. If such an assessment *is not carried out*, and the court finds the measure to be disproportionate, the measure may be quashed.[133] This is specified by Graver as follows.

First, if the proportionality of a type of measure is assessed by the legislator, this assessment cannot normally be reviewed by courts.[134] The question of whether the legislator has carried out such an assessment should be decided by an interpretation of the law at issue.[135]

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[131]Rasmussen, p 320.

[132]Graver, p 279 f; and Graver 1996, p 198 f.

[133]Graver, pp 297-298.

[134]Graver 1996, p 201 f, where he mentions two exeptions from this rule.

Secondly, if the proportionality of the type of measure which is contested is not assessed by the legislator, it must be *shown by the decision* that the administration has *assessed* the proportionality of the adopted measure. Furthermore, this assessment must be *justifiable*. Graver argues that the addition of this last criteria implies that it must be evident that the administration has assessed the counter-arguments in the case.[136] If such an assessment has been carried out by the administration, the court normally cannot review the measure, even if it finds the outcome of the decision to be disproportionate. However, Graver adds that it is *possible* that a measure will be quashed even if it is evident that the counter-arguments have been so assessed, if the court concludes that the administration has carried out an *obviously* erroroneous assessment. However, Graver states that it is doubtful whether this "obviously erroroneous-test" adds anything to what would have followed anyway from the principle of unreasonableness.[137]

The principle of proportionality existing in Norwegian law, as it is characterised by Graver, differs substantially from the principle in Community law. In Community law, the Court assesses whether a measure is proportional or not. According to Graver, Norwegian courts, with some exceptions, only test whether the proportionality of the measure *has been assessed*, either in general by the legislator, or specifically by the administration.

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[135]Graver, p 299.

[136]Graver, p 299.

[137]Graver, p 300.

3.3 The validity of the new doctrines

As it is pointed out in chapter V section 2.3.2, it is uncontroversial that the question of whether a means is proportional may appear as one of the assessment criteria within the "unreasonableness" test. However, the view that the principle exists as a separate test, as argued by Graver and Rasmussen, is more controversial.

The Supreme Court has never explicitly stated that an administrative decision can be declared void if it is disproportionate.[138] Nor, as far as I know, has any such principle been applied in any judgments from the lower courts.

Hence, it is not possible to argue that such a doctrine follows from the Court's declared ratio decidendi. It is therefore necessary to establish whether it is logical to see the principle of proportionality as the constructed ratio decidendi of one or another Supreme Court judgment.[139]

Rasmussen does not really try to show that the principle should be regarded as the constructed ratio decidendi of any judgments. His conclusion tends to be a mere statement that he thinks that the principle should be regarded as a general principle because it appears

[138]This is also observed both by Graver, p 282; and by Rasmussen, p 320.

[139]This term may have different meanings, see Eng. Here, it is understood as a general rule which one thinks the previous judgments "must" be seen as an instance of, although it is not expressly stated by the court, see Eng, p 19. Or in other words, the general rule is regarded as *necessary* to reach the courts conclusion. It is this general rule that is binding on the judge in a later case. Other statements are dicta. However, it should be stressed that also dicta are important sources of law in Norwegian law.

within some specific areas of administrative law. Furthermore, it is very hard to see what the difference is between the principle he argues that exists, and the principle of unreasonableness. Accordingly, his view appears as weakly founded. Furthermore, it is nearly impossible to verify or falsify, simply because it so unclear what the *content* of his theory is.

Graver's theory, on the contrary, is better developed and supported. Accordingly, it deserves a more thorough asessment. Graver rely mainly on six Supreme Court Judgments in support of his theory, Rt. 1981 p. 745, Rt. 1990 p. 861, Rt. 1991 p. 973, Rt. 1993 p. 587, Rt. 1994 p. 60, and Rt. 1994 p. 400. These judgments will be assessed in the following.

Rt. 1981 p 745 turned on the validity of a decision adopted by the agricultural authorities whereby they used their right to first refusal to a piece of a landed property. The plaintiff, who owned a farm nearby the piece of land at issue, had leased this piece for 10 years. Without this piece it would be impossible for him to earn a sufficient income from his farming. Therefore, he wanted to buy the land himself, and he challenged the decision whereby the authorities had used their right to first refusal.

The Court stated that the act regulating the right to first refusal should be interpreted so that the authorities could only use their right if this gave a better result, assessed according to the aims of the act in question, than by allowing the plaintiff to buy the piece of land. Furthermore, the court stated that when a decision has such important and radical implications as in this case, there are stricter requirements than normal as regards the grounding of the decision. This is especially the case when the decision adopted appears as so unreasonable as in this case. The court then concluded that the grounding for the decision was insufficient and that it was not ulikely that this had influenced the outcome. Accordingly, the decision was declared void.

Traditionally the judgment has been read as a precedent stating that the requirements regarding the grounding of a decision that will have important implications are stricter than the requirements in relation to other, less important decisions. Furthermore, it has been

argued that when the decision appears to be as unreasonable, the same rules apply, and that this is a sort of "hidden" unreasonable test. The decision is formally quashed because of an insufficient grounding, while in reality, it is the unreasonableness which renders it void.[140]

Graver, however, argues that the judgment introduces a sort of proportionality principle.[141] He argues that when the Court lays down that the law should be interpreted so that the first refusal could only be made if the aims of the law were better served by this than by letting the lessee buy the land, this is a proportionality test. And since the decision, according to the court, did not clearly show that this question had been *considered* by the authorities, the decision was declared void.

It is possible to read the judgment as Graver does. However, it should be observed that Graver bases his interpretation on a statement which is closely connected to the *interpretation* of the *act at issue*. The Court states that the act should be *interpreted* so that the first refusal can only be used if it serves the aims of the law better. This may of course be read as the introduction of the proportionality principle as an *interpretative guideline*. However, it is difficult to read it as introducing the principle as a review test in itself. Furthermore, while the statement concerning the requirements of proper grounding of decisions is general, the statement concerning "proportionality" is closely connected to the law at issue. Hence, this statement would normally be read as restricted to the interpretation of this law.

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[140]See, for instance, Eckhoff, p 260, who adopts such an interpretation of the judgment.

[141]Graver, p 288.

Rt. 1990 p 861 turned on the validity of a decision by the ministry of agriculture whereby it, by using section 55 of the law on landed property (*jordloven*), denied a farmer to split his farm in two separate parts. The ministry stated that, from an economical point of view, it would be possible to run the farm also after an eventual division. However, a split could create some inconveniencies for the farm and could have some drawbacks from an environmental point of view.

This decison was quashed by the Supreme Court. The Court stated that the main purpose of section 55 was to ensure that splits, from an economical point of view, did not make it impossible to continue to run the farm. On the other hand, it was also relevant to take into account environmental drawbacks and other inconveniencies for the farm, as the ministry had done. However, if the decision was founded on such grounds, which were not the main purposes of the law, it required a concrete and broad evaluation by the ministry. The Court then continued, stating that the grounding of the decision was not satisfactory, and that the reasonableness of it was questionable. However, it is unclear if it is the lack of a proper grounding or the unreasonableness, or both, which are the reasons why the Court quashed the decision.

Graver argues that the Supreme Court quashed the decision because the agricultural authorities had not carried out a concrete assessment of whether or not it was necessary to prohibit the division of the farm. In other words, the administration had not carried out a proportionality test.[142] Furthermore, when a decision, as in the case at issue, is based on the consideration of certain purposes which are relevant, but which are not the main purposes which the law is supposed to pursue, the requirements in relation to the grounds given for the adopted decision become stricter.[143]

Graver's last presumption, that the requirements in relation to the grounds which are given for the decision, depend on whether or not the decision is founded on purposes which are the main purpose of the law, is evident from the judgment.[144]

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[142]Graver, p 295.

[143]Graver, p 296.

[144]Judgment, p 865.

On the other hand, the claim that the court applied a proportionality test requires a somewhat inventive interpretation of the judgment. What Graver does is mainly to state that it is *possible* to read the judgment as applying a sort of proportionality principle. However, nowhere in the judgment is anything similar to the principle of proportionality actually stated. Accordingly, such an interpretation of this judgment is far from the wording, and such a claim could equally good have been justified in nearly every other case where the concept of reasonableness is mentioned.

However, even with little support in the wording of the judgment, one could have accepted Graver's conclusion if this had been the only interpretation which made sense of the somewhat unclear judgment. But this is not the case with regard to this judgment. An interpretation closer to the wording would be to interpret the judgment in accordance with the traditional interpretation of Rt. 1981 p 745.[145] This would imply that the essence of the judgment is that the reasonableness of the decision is questionable, and, accordingly, the requirements relating to the grounding of the decision are strict. These strict requirements are not fulfilled in this case and therefore the decision is quashed.

Rt. 1991 p 973 turned on the legality of a decision adopted by the Ministry of Justice whereby it decided that a person should be preventively detained in jail. An insane man had killed two persons. After being permitted by the court to do so, the Ministry of Justice decided that he should be preventively detained in jail. The man claimed that the decision was void, and that he should have been preventively detained in another type of institution than a jail. However, the Supreme Court upheld the Ministry's decision.

[145]See pp 71-72.

The Court stated that its competence was limited to the assessment of whether or not the decision was arbitrary or grossly inequitable. This assessment should be done in "the light of the danger that the man could commit a new serious crime". The Court continued by stating that, due to the very serious crime committed and the danger that the man could commit a new crime, the Minestry's decision was neither arbitrary nor grossly inequitable.

Graver interprets this judgment as stating that the intensity of the scrutiny to which a decision is subject depends on the importance of the adopted decision.[146] Furthermore, he argues that, even though the judgment formally is founded in the grossly inequitable doctrine, the reality is that the Court assesses whether or not the Ministry's assessment of the necessity of the preventive detention is justifiable. According to Graver, the decision is upheld because the Ministry's assessment as regards this issue, is justifiable.

It is easy to agree with the former part of Graver's interpretation, that the intensity of the scrutiny depends on the subject matter at issue. However, this was already stated in Rt. 1981 p 745 and is not very controversial,[147] even though the court's statement is somewhat clearer in Rt. 1991 p 973 than in the previous case.

Graver's second argument, that the Court in reality tests whether or not the Ministry's assessment is justifiable, is more controversial. Much the same counter-arguments can be presented against this interpretation as against Graver's interpretation of Rt. 1990 p 861. It is possible to argue as Graver does with regard to nearly all Supreme Court judgments

[146] Graver, p 290.

[147] Cf above at pp 71-72.

concerning the grossly inequitable doctrine, but there is little in the judgment itself that supports his interpretation.

Rt. 1993 p 587 concerned the validity of a decision whereby the Ministry of Agriculture denied to grant a person who wanted to buy a holiday house a concession to do so. A person wanted to sell his house. The house was located in an area where the buyer needed a concession to buy it. The local council refused to give such a concession because the buyer wanted to use the house as a holiday house, and the council wanted the buyerpeople to be resident in the area. This refusal was upheld by the Ministry of Agriculture. The seller, whose alternative would be to sell to a resident to a price far below what he himself had paid, claimed compensation for the loss incurred by him as a result of therefusal.

The majority in the Supreme Court, three judges, upheld the decision. The majority stated that the decision was hard on the seller, but added that this was normal when a concession was denied in these types of cases. Furthermore, it stated that the concession law was necessary precisely because it was possible to obtain a much higher price for a house if it was sold as a holiday house than as a permanent residence.[148]

A minority of two judges found the decision to be void because of insufficient grounding. These judges declared, referring to Rt. 1981 p 745, that since the decision has radical and important implications for the seller, it required a thorough grounding. According to the minority, this requirement was not fulfilled. Furthermore, the minority added that the main purpose of the law was not to turn holiday houses into permanent residences.[149]

Graver explains the difference of opinion within the Court as having its basis in the different opinions regarding the main purpose of the law.[150] Graver claims that since the majority seems to regard the aim of permanent residency as the main purpose of the law, it would not review the decision even though it was hard on the seller. To do otherwise would have been to interfere with the legislator's assessment that permanent residency in the area was more important than the economical interests of the house owners. Or, in other words, the

[148]Judgment p 598.

[149]Judgment, p 599.

[150]Graver, p 294.

proportionality of such decisions in general has been assessed by the legislator, and it is not for the Court to review this assessment. The minority, on the other hand, did not regard pemanent residency as the main purpose, and, accordingly, were more wiling to review the decision by a proportionality test because this did not interfere with the will of the legislator. The weak point of Graver's analysis of this judgment is similar to the weakness in his analysis of the other judgments presented - his interpretation is not closely related to the wording of the judgment. The majority's reasoning is expressly connected to the doctrine of unreasonableness and the minority's reasoning is expressly connected to lack of reasons - two well known concepts in Norwegian law. Hence, also this judgment has only a limited weight as a precedent in favour of Graver's doctrine.

In *Rt. 1994 p 60*, the discotheque "New York" was denied permission to open a night club. Three different establishments had applied for permissions to open night clubs in the town of Stavanger. Two of the applications were presented to the town council and were accepted by the council. The application regarding "New York" nightclub was, however, not presented to the council, but was rejected at a lower level in the political hierarchy of the town.

The Supreme Court quashed the decision, and passed a judgment whereby the town of Stavanger had to pay damages for the loss incurred by the rejection. The Supreme Court's decision was founded on a breach of procedural rules by the administration of the town, because "New York's" application, unlike the other applications, was not presented to the council.[151]

Graver argues that the fact that the Court granted "New York" compensation, and did not simply quash the decision, can only be explained if the Court perceived that the town authorities had failed to assess whether the denial was proportional.

[151]Rt. 1994 p. 60, at p. 67.

I have two remarks to Graver's argument. First, "New York" did not claim that the Court should quash the decision. They only claimed compensation for damages. This explains why the council's decision was not quashed.

Furthermore, the Court states that "New York" was an establishment very similar to the two establishments which were granted a permission, and that the town authorities had not produced any evidence indicating that "New York" would not have been granted permission if the procedural rules had been followed. Any possible doubt as to what the outcome would have been if the procedural rules had been followed, should be resolved in favour of "New York".[152] Consequently, according to the wording of the judgment, the outcome of the case is simply a result of the fact that the Court placed the onus to produce evidence about the outcome of the application on the party that had breached the procedural rules, namely the town authorities. This is far from an introduction of the proportionality principle.

Rt. 1994 p 400 concerned a decision whereby a town council changed the fees in a kindergarten, so that the price for children who attended the kindergarten part time were made the same as the price for children who stayed at the kindergarten for the whole day.The Supreme Court upheld the council's decision. The Court stated that the change in the fees was connected with the fact that children who stayed part time in the kindergarten, according to an evaluation done by the council, in effect occupied a space that would otherwise be used for a child who would attend full time. The Court stated that the parents who had children in the kindergarten "have to accept such an assessment".[153]

Graver states about this judgment that the Court founded its decision "nearly by stating that the council's decision was proportional directly".[154]

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[152]Rt. 1994 p 60, at p 67.

[153]Rt. 1994 p 400, at p 404.

[154]Graver, p 300, footnote 28.

However, the Court's statement can just as well be explained by reference to the traditional unreasonableness doctrine - when children occupy a full time space, it is not ureasonable that they also pay a full time fee.

From what I have said above it should be evident that Graver's case analysis does not give a clear support to his claim that there exists a sort of proportionality principle within Norwegian law.

In addition to the case analysis, Graver presents some de lege ferenda arguments, in favour of the view that (his variant) of the proportionality doctrine should be regarded as Norwegian law. I will not go into detail about all these arguments, I will only perform an assessment of the argument which seems to be the key to Graver's analysis, that the new doctrine is "a considerably more concrete and more precise form of the doctrine of invalidity (of administrative acts) than that offered in the classical doctrine".[155] In other words, it seems that Graver is of the opinion that his variant of the proportionality doctrine should be substituted for the unreasonablenss doctrine, at least inso far as the two overlap. I doubt whether such a development would really make the doctrine of ivalidity more concrete and precise. The unreasonableness doctrine is indeed a rather vague doctrine. However, as will be shown in the following paragraphs, it is doubtful whether Graver's doctrine really is much clearer.

[155]Graver, p 302.

At first glance, it may seem that the criteria established by Graver, is somewhat more clear-cut and concrete than the question whether the decision is unreasonable. However, Graver's doctrine also implies that quite discretionary assessments should be carried out by the courts, assessments the outcome of which is difficult to foresee.

First, the court has to decide whether the legislator, by making the law, implicitly has assessed the proportionality of the adopted decision. According to Graver this should be decided by an interpretation of the law at issue. One of the important questions with regard to this assessment should be, «what is the law's main purpose». However, it is not unusal for a law to pursue more than one aim or for a law to have multiple aims of equal importance. Furthermore, even if the court concludes that the contested measure is in accordance with the law's main purpose, this will not always be sufficient to conlude that the legislator has assessed the proportionality of the measure. Normally, it is the most extreme cases which are brought before the courts, and often the point at issue will be whether the contested measure seeks to achieve the aim of the law in a way which is too burdensome for the private party. In these cases, it is normally difficult to say for sure if such a situation has been assessed by the legislator.

Secondly, if the court concludes that the *legislator*, when making the law, has not assessed the question of the proportionality of the contested measure, it has to decide whether the question has been assessed by the *administration.* However, as already mentioned, it is normally the extreme cases which are brought before the courts, cases where the adopted decison appears to be unreasonable. In these cases the court should, according to Graver,

press on further and assess whether the administration's assessment is obviously erroroneous. As pointed out by Graver, it is doubtful whether this test differs much from the unreasonableness-test. Accordingly, it may seem that, also according to Graver's doctrine, the courts will, in a majority of the cases, end up with an assessment not very unlike the unreasonableness-test. The obvious question is why one then should adopt a new doctrine?

4. Conclusions

With regard to the question of whether legislative and administrative measures can be quashed due to lack of proportionality between the end and the means, the following conclusions can be drawn.

First, legislation cannot be reviewed due to lack of proportionality.

Secondly, administrative decisons cannot be reviewed due to unreasonableness or lack of proportionality if the administration was not granted any discretion when the measure was adopted. In these cases, the content of the adopted decision follows directly from the law, and a review of the decision would imply a review of the legislation.

Thirdly, when the administration does have discretionary powers, different views are expressed as regards the possibility of reviewing its decisions for lack of proportionality. The traditional doctrine is that grossly inequitable decisions can be quashed. Lack of

proportionality between end and means may appear as one among anumber of different criteria when establishing whether a decison is unreasonable. Proportionality is not a review-test by itself, and lack of proportion between end and means will not render a decision void unless it is so extreme that the decision appears grossly inequitable.

However, as described in section 3.2, it has been argued that lack of proportionality, or a failure to evaluate whether a measure is proportional by the administration, may render a decision void. However, this doctrine is weakly founded, and cannot be regarded as part of Norwegian law.

Thirdly, an administrative regulation can, most likely, be quashed if it is grossly inequitable. As is the case with decisions, proportionality may appear as one of the criteria when the unreasonable test is carried out.

VI THE CONSEQUENCES OF THE INCORPORATION

1. Introduction

This chapter is concerned with the consequences, within the sphere of the EEA Agreement, of the incorporation of the principle of proportionality. The main aim is to assess whether, and eventually how, this incorporation will change the traditional Norwegian approach to judicial review of legislation and administrative measures within this sphere. Or, in other words, what are the main differences between the traditional Norwegian approach to these questions, and the approach which is likely to be adopted after the incorporation?

2. Review and interpretation of legislation

2.1 Introduction

In EC law the principle of proportionality is, as has already been mentioned, both a principle by which the *validity* of general, normative acts is assessed and an *interpretative guideline* to be used when interpreting such acts. In practice, there is a sliding scale between interpretation and review, and it is, at least in practise, not always possible to draw a clear line between the two concepts.

Also in the Norwegian legal system the line between review and interpretation is, in practice, not entirely clear. However, with regard to EEA derived law, the difference between the two concepts is even more blurred than normal. This is due to section 2 of the EEA Act, which, as is shown in chapter IV section 3, even though it *formally* should be regarded as an interpretative guideline, in *practice* it will more or less serve as a means for reviewing the substance of parliamentary acts. This raises the question of whether the impact of the principle of proportionality as regards Norwegian legislation is most adequately decribed in terms of *interpretation* or *review* of laws. I have chosen to describe how it seems likely that Norwegian courts will approach a possible conflict between the principle and Norwegian legislation, without trying to draw a clear line between the two concepts.

2.2 The principle's impact as regards Parliamentary acts

In chapter IV section 5 I have concluded that Norwegian courts will apply all possible means to interpret a provision in a law so that no conflict with the principle of proportionality arises. Unless the legislator expressly has stated that the principle shall not apply on a specific provision, which is highly unlikely to happen, the principle will prevail in a conflict with other legislation.

This implies that a new, forceful interpretative guideline is implemented into Norwegian law. In Norwegian law it has always been accepted that when a provision is open to more than one interpretation, reasonableness will be one of the factors to be used by the courts to decide which interpretation is to prevail. In some cases the use of the concept of ureasonableness as

an interpretative guideline will give the same outcome as if the court had used proportionality as a guideline. However, the aim of reaching a reasonable result, is only one amongst many potential interpretative factors. If there exists other factors of weight, which would lead to a different conclusison than would be produced by reference to the concept of unreasonableness, these other factors may prevail. It seems quite obvious that the principle of proportionality will be a more powerful interpretative guideline than reasonableness has ever been, allowing the courts to carry out a much more intrusive review of the substance of legislation.

In practise, the principle of proportionality amounts to a means for the courts to carry out a substantial review of legislation, even if it is not contrary to the Constitution. It implies a major shift in the power balance between the legislator and the judiciary. Constitutional review in Norway has been carried out according to a very limited number of Constitutional provisions with a relatively clear and concise content, mainly section 105, protecting the right to property, and section 97, which prohibits retroactive laws. The principle of proportionality, on the other hand, offers the judiciary the possibility of striking down a much wider range of legislation. In addition, it seems fair to say that the principle has a considerably less clear-cut content than sections 97 and 105 of the Norwegian Constitution. Accordingly, it furnishes the judiciary with a more powerful tool if it wishes to substitute its own opinion for the will of the legislator.

However, needless to say, in practise, the impact of this new tool depends on how intensively it is applied by the courts. If the Courts choose a deferential approach, and limit themselves

only to strike down legislation which is manifestly inappropriate to achieve the aim of the legislator, then the incorporation, *in practice*, will have limited impact, even though it is important *in principle*. As regards the intensity of the review, Norwegian courts are obliged to apply the same approach as the ECJ, cf Article 6 EEA and section 1 of the EEA Act. This implies that the intensity varies from an intrusive and intensive assessment to a quite deferential approach - the "not manifestly inappropriate test", dependent on a number of different factors, cf. chapter II section 3.

3. Review of administrative decisions

3.1 Introduction

When the impact of the principle as regards administrative decisions is assessed, one should distinguish between decisions where the administration enjoys discretionary powers, cf section 3.2, and decisions where the administration does not have such powers, cf section 3.3. Accordingly, it seems appropriate to start with some introductory remarks concerning how the EEA Agreement influences the question of *when* the administration has discretionary powers.

Whether or not discretionary powers exist depends, according to Norwegian law, on the interpretation of the provision at issue, cf chapter V, section 2.3.2. However, when the administration applies EEA derived law, the question of whether the administration has such

powers depends on the EEA law, i.e., the most important source of law is the "relevant rulings" from the ECJ.[156] EEA law may give a Norwegian court the possibility of reviewing an administrative measure, even if the court, according to a traditional Norwegian interpretation of the provision at issue, would not have had such a possibility.[157] On the other hand, if the EEA law gives the administration discretionary powers, it is not entirely clear whether this discretion can be restricted by Norwegian administrative law.[158]

When the administration applies ordinary Norwegian law, i.e., non-EEA derived law, whether it has discretionary powers is in principle dependent on Norwegian national law.[159] However, if the application of such laws affects rights given or protected by EEA law, the EEA law requires that persons having their rights restricted by such laws must be able to apply for a

[156]See, for instance Case 183/84 *Rheingold* [1985] ECR 3351. The national administration was, according to a Commission regulation, given the competence to waive a special levy "on a discretionary basis". The plaintiff applied for such a waiver, but the competent German authorities rejected the application. In the proceedings, the Commission argued that the question of whether a waiver should be given depended on the discretion of the German authorities. However, the Court rejected this view, and stated that the provision at issue gave the authorities "a certain margin of discretion" but "once it is accepted that the conditions are in fact fulfilled, the competent authority has no power to refuse the waiver or refund", cf paragraph 24.

[157]*Rheingold*, cf footnote 156 above, serves as an example of a case where it seems likely that an interpretation according to traditional Norwegian law would have given the administration discretionary powers, but where the ECJ concluded that these powers were limited. When a provision in Norwegian law authorises the authorities "on a discretionary basis" to do something, this strongly indicates that the decision cannot be reviewed by courts.

[158]Case 4/68 *Scwartzwaldmilch* [1968] ECR 377, at p 387 has been interpreted as laying down that this question should be resolved by national law, i.e., that discretionary powers can be restricted by national law, cf Schwarze, p 467. However, the later judgment Case 183/84 *Rheingold* [1985] ECR 3351, cf footnotes 156 and 157, may be interpreted as implying a change, so that discretionary powers may not be restricted by national law, see Schwarze pp 472-474, who adopts such an interpretation of the judgment. However, such an interpretation is not necessarily correct. The fact that national authorities have some freedom according to EC law (or EEA law) does not necessarily imply that this freedom cannot be restricted by national laws. If the national authorities are given an EC-law competence, it is correct that this cannot be restricted by national law. On the contrary, if a freedom exists simply because the question is not regulated by EC law, the freedom may be restricted by national laws. See, in a similar way, Graver: EF-rettens, pp 83-84.

[159]See, for instance, Gulmann, p 222, with regard to Danish law.

court review of the restriction.[160] Accordingly, even outside the sphere of implemented EEA law, this law may have an impact on whether or not powers are discretionary.

3.2 Non-discretionary decisons

As will be remembered from chapter V section 2.3.1, according to Norwegian law, a non-discretionary decision may only be quashed if it is contrary to the Constitution, a law, or an administrative regulation. In other words, such a decision cannot be quashed, for instance, because it is unreasonable.

However, the incorporation of the principle of proportionality implies a major change in Norwegian law with regard to non-discretionary decisions. As concluded in chapter IV section 5, parliamentary acts which are contrary to the principle of proportionality may be quashed, unless the legislator has, very clearly expressed the view that the act shall prevail in a potential conflict with the principle. As has previously been pointed out, it is very unlikely that the legislator will make such a statement, and, accordingly, the proportionality principle amounts to means whereby laws can be quashed, even though *formally* it should be regarded as a guideline for the interpretation of laws. This implies that if a law, which leaves no discretion to the administration, has an disproportionate outcome, the decision adopted by that administration may be quashed.

[160] Cf., for instance, Graver: EF-rettens, p 89.

What the courts really do in these cases is to review the *law* upon which the decision is founded. Even though the judgment formally concerns the validity of a decision, the decision is merely the result of the application of the law to the facts. The question of whether a Norwegian law is proportionate or not will, in fact, always arise in connection with a concrete decision. As pointed out in chapter V section 2.2, the review of laws in the Norwegian legal system is always limited to cases where an actual conflict is brought before the courts. Accordingly, with regard to the consequences of the incorporation of the principle of proportionality a regards non-discretionary decisions, I refer to the assessment in section 2 above, concerning review and interpretation of laws.

3.3 Discretionary decisions

3.3.1 Introduction

As far as discretionary decisions are concerned, it will be remembered that, under Norwegian law, these can be quashed if they are contrary to the Constitution, a statutory law or an administrative regulation. Likewise, they can be quashed if they are the result of misuse of powers, error of facts, or if the administration has used its discretion so as to reach a result which is contrary to international law, cf chapter V section 2.3.2. The interesting issue for the Norwegian lawyer is whether application of the principle of proportionality would bring about a different result to the result which would have followed anyway from the misuse of powers-doctrine. Or, in other words, is it conceivable that the principle makes it possible for

Norwegian courts to quash decisions which could not have been quashed according to the misuse of powers-doctrine?[161]

Amongst the different sub concepts of misuse of powers, the unreasonableness doctrine is the one which is the most similar to the proportionality principle. If a measure appears as to be disproportionate, a Norwegian judge would normally test the measure against this concept. Hence, the assessment in the following paragraphs will focus on a comparison between the concept of unreasonableness and the proportionality principle.

A comparison between the two concepts will necessarily have to be based on the case law of the ECJ concerning proportionality and the Norwegian Supreme Court's case law on unreasonableness. However, some factors render it difficult to carry out a concrete comparison between the two concepts.

First, the case law is closely connected to the concrete issues at stake in the cases, and the issues in the Norwegian case law are quite different from the issues raised in the ECJ-cases. Accordingly, a comparison based on the facts in the cases is difficult, if not impossible, to carry out.

[161]The question may also be asked the other way around. Is it conceivable that a decision, which is the result of the application of an EEA derived law, may be found grossly inequitable by a Norwegian court without being disproportionate? And what would the consequences of such a conclusion eventually be? The consequences of such a conclusion beeing reached by national administrations is discussed in Case 118/76 *Balkan Import-Export* [1977] ECR 1177, paragraphs 5-6. The Court concluded that a national administration is not entitled to apply national law if this would alter the effect of Community rules. In other words, if the unreasonableness doctrine would render the EEA law inefficient, the doctrine cannot be applied. However, this is part of a complicated discussion about the implications of supremacy of EC law in general and the corresponding question in EEA law, and is outside the scope of this paper.

Secondly, with regard to the cases where the national authorities are restricting freedoms given by EC law, it might have been possible to compare the restrictions accepted in Norwegian law with restrictions accepted by the Court in EC States. However, a Norwegian measure restricting a freedom given by EEA law is not necessarily disproportionate even though a less restrictive regime exists in an EC Member State.[162] This renders such an approach somewhat difficult.

Due to the abovementioned difficulties, the assessment in the following will mainly be focused on the *general* differences between the two Courts' approaches, and less concerned with the question whether it is likely that a *concrete* measure which is accepted by the traditional Norwegian doctrine would be declared void by a proportionality standard.

3.3.2 Proportionality vs. unreasonablness - the basic differences

There is a close connection between the principle of unreasonableness and the proportionality principle, in the sense that lack of proportionality is one of the assessment criteria in the Norwegian unreasonableness test.[163]

However, there are also some basic differences. The application of the principle of proportionality requires two variables, a means and an objective pursued through this means.

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[162]Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51.

[163]See, for instance, Rt. 1995 p 109, referred at pp 62-63.

These variables are evaluated according to the different sub-concepts of proportionality. The proportionality test can therefore be applied only where such a comparison between means and ends is possible. The notion of reasonableness, on the other hand, does not assume any relationship between any two variables. It rather represents an evaluation standard by itself.

The proportionality test has also been described, by some legal scholars, as a more "objective" standard of review than the reasonableness doctrine.[164] However, if such a statement is intended to imply that the proportionality principle makes judicial activism possible to a lesser degree, it seems difficult to agree. All three steps of the test, and especially the assessment of proportionality ***strictu sensu*** imply a subjective evaluation on the part of the judges, just like the principle of unreasonableness.

However, it may be argued that the principle of proportionality is a somewhat more *structured* review test than the unreasonableness test. The Norwegian courts' asssessments of whether a measure is unreasonable are often fairly short, and it is not always evident exactly *why* the court finds the measure to be unreasonable or not unreasonable. The proportionality test, on the other hand, follows, at least in theory, the structure described in chapter II section 2. In principle, this should make it clear why the measure passes or fails the test. On the other hand, all of the three parts of the test are not always applied by the Court, and the test is often reduced to a "not manifestly inappropriate test". When this is the case, it is doubtful whether

[164]See Emiliou, p 39, with regard to German law.

the test in practise offers more information than the unreasonableness test as regards the reason why the measure is either quashed or accepted.

3.3.3 The intensity of the review

A crucial question is whether there is a difference in the intensity with which the two tests are applied by the courts. However, it seems difficult to answer this at a general level. As is explained in chapter II section 3, the intensity of the review with which the proportionality test is carried out varies, according to a number of different factors. Hence, it is doubtful whether one can in general state that the test implies a stricter or laxer review than the unreasonableness test.

However, this varying intensity of the proportionality test, *in itself* implies a difference from the unreasonablenes test. While the intensity of the proportionality test varies, the unreasonable test, is, at least in principle, applied with more or less the same degree of rigour in all types of cases, and a decision is only quashed if it is grossly inequitable. Principally, this is an important difference between the two concepts. One could imagine that it would lead to quite different outcomes, depending on which of the concepts one applies. For instance, it would seem that measures restricting individual rights generally are scrutinized more intensively according to the proportionality principle than according to the unreasonableness test. However, in practise there are different factors which makes the difference less important than one might believe.

First, even though the unreasonableness test applies with *more or less* the same degree of rigour in all types of cases the intensity of the test differs *somewhat*, according to the interests that are at stake. Typically, where a decision affects fundamental rights, it is subject to a somewhat closer review, even though the relativizing has not gone as far as in EC law.

The clearest precedent supporting such a view is Rt. 1991 p 973, concerning the validity of a decision whereby a man was preventive detained in jail. The leading speach states that "the determination of whether the decision is grossly inequitable or arbitrary, carried out by courts according to normal rules, must be made in the light of the considerable need for legal protection which is present in the case", p 985.

However, it should be pointed out that even where fundamental rights are at stake the courts are upholding the view that the decision will not be quashed unless it is *grossly* inequitable.

Secondly, the Norwegian courts tend to increase the requirements in respect of justifications given for decisions which have important effects for the individual. The same tendency is apparent in the case of decisons which appear to be unreasonable.[165] In practise this may serve as a sort of "hidden" unreasonableness test, allowing the court to quash a decision even though it does not want to stamp it as grossly inequitable.

[165] Cf Rt 1981 p 745, and the discussion in chapter V, section 3.3.

Even though there has been a trend towards a relativizing of the unreasonableness doctrine, the relativity of the proportionality test still implies some basic differences, as compared to the unreasonableness test.

First, even though the unreasonableness test is applied more intensively where, for instance, basic individual rights are at stake, the Supreme Court in these cases also takes as its starting point that the measure only can be quashed if it is "grossly inequitable", cf Rt. 1991 p. 973, at p. 985, concerning preventive detentioning in jail. This approach is in some contrast to the approach of the ECJ, which in some cases concerning fundamental rights qualifies the proportionality test by stating that a measure will only be quashed if it is "manifestly inappropriate" but in other such cases does not seem to qualify the test at all, cf generally chapter II, section 3.2. Accordingly, even where a case concerns classical fundamental rights, it seems fair to say that the incorporation of the principle of proportionality, at least in some types of cases, will allow Norwegian courts to scrutinize a measure more intensively than it could have done according to the unreasonableness doctrine.

When it comes to restrictions on rights which are fundamental in Community terms alone, such as the right to free movement of goods, of services and so on, the principle of proportionality implies an important change in Norwegian law. When a Member State restricts these freedoms, the proportionality test is, generally, applied rigorously by the ECJ.[166] In traditional Norwegian law, on the contrary, the courts have shown a high degree of deference when assessing restrictions concerning the performance of economic activity. One

[166] Cf chapter II, section 3.3.

example, concerning free movement of goods, where the approach of the ECJ would seem somewhat alien to the Norwegian courts is *Adrian De Pejiper.*[167]

The case turned on the importation of a pharmaceutical product into the Netherlands. The product was prepared in the same way as other products legally in circulation in several Member States. However, the Dutch authorities made the importation conditional upon the importers production of specific documents, which the authorities in fact already posessed. The ECJ stated, in an Article 177 procedure, that this was a measure equivalent to a quantative restriction, and, accordingly, contrary to Article 30 EC.

The Court then assessed whether the measure could be justified according to Article 36 EC. The Court answered this in the negative, and stated "In particular Article 36 cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required."[168]

I agree with Bull,[169]who states that it would seem a novel thought to Norwegian authorities, and courts, that rules or practises that "lighten the administration's burden or reduce public expenditure", can only be introduced if the burden or spending thus avoided "clearly would exeed the limits of what can reasonably be expected" - provided of course that the exercise of the four freedoms are affected. Like Bull I would think that traditionally, Norwegian authorities would reason the other way around: Efforts to reduce administrative burden or public expenditure are all right, as long as the trouble this would cause for *the citizen* does not exceed the limits of what can reasonably be expected.

[167]Case 104/75 *De Peijper* [1976] ECR 613.

[168]Case 104/75 *De Peijper* [1976] ECR 613, paragraph 18.

[169]Bull: The EEA Agreement, p 59.

4. Review of administrative regulations

As will be remembered from chapter V, section 2.4, administrative regulations can be reviewed if they are contrary to the Constitution or statutory law, or, most likely, if there has been some misuse of powers.

The incorporation of the principle of proportionality has two main implications in the context of administrative regulations. First, while it is not entirely settled that the misuse of powers doctrine applies to regulations, it is *undisputed* that the proportionality principle applies. In most cases where the question of misuse of powers concerning regulations arises, the courts can apply the proportionality principle, without having to decide whether or not it could also have applied the classical Norwegian misuse of powers doctrine.

The incorporation of the principle of proportionality will also be one more argument in favour of the view that the misuse of powers doctrine should be applied to regulations. If the principle of proportionality, which is so similar to unreasonableness, applies to administrative regulations, why should the unreasonableness doctrine not also apply?

5. Conclusion

It can be concluded that the incorporation of the principle of proportionality in Norwegian law implies an important change in the Norwegian approach towards the review of legislation and administrative measures, within the sphere of the EEA Agreement.

First, it furnishes the judiciary with a tool which, at least in practice, allows it to carry out a substantial review of legislation, even if that legislation is in accordance with the Constitution. As a consequence of this, even administrative measures which do not contain any element of discretion can be struck down if they are unproportional.

Secondly, the principle extends the power of review to decisions which are adopted according to the discretionary powers of the administration. The power of review will be expanded in particular when the courts deals with limitations on, and derogations from, the four freedoms. However, even when dealing with classical fundamental rights, the principle enables the courts to intensify their scrutiny of administrative measures. On the other hand, when the principle is applied in its "non-manifestly inappropriate" fashion, it seems more doubtful whether it adds anything to the Norwegian unreasonableness doctrine.

Furthermore, it also allows the courts to strike down administrative regulations due to lack of proportionality, when they are in accordance with the legislation whereby they are adopted.

VII THE PROPORTIONALITY PRINCIPLE OUTSIDE THE SPHERE OF THE EEA-AGREEMENT

1. *Introduction*

The aim of this chapter is twofold; first to assess whether it *is likely* that the principle of proportionality will have a spill over effect into Norwegian law outside the sphere of the EEA Agreement, cf section 2, and secondly, to asseess whether such a transplant would be *desirable*, cf section 3. Both as regards the likelihood, and as regards the desirability of a transplant a division will be made between the principle, on the one hand, as a principle of *administrative law*, in the sense that it may be applied to strike down measures adopted within the sphere of the administration's discretionary powers, and, on the other hand, the principle as a *constitutional principle*, in the sense that it may be applied to strike down legislation.

The discussion of the principle's possible spill over effect is not a specifically Norwegian debate. The same question has been discussed in relation to several other European legal systems, most notably in English law.[170]

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[170]See Jowell and Lester 87; and the same authors in Jowell and Lester 88, arguing that the principle has been the underlying rationale of several English judgments, and that the time has come to regard the principle as a general prin-ciple of law in English law. Bingham 92, p 524, states, with regard to a possible transplant of the principle into English law that "it would be worth a modest investment in proportionality as a growth stock". Boyron 92, in an article with the telling title: Proportionality in English Law: A Faulty Translation?, is more sceptic concerning the incorporation of the principle. Boyron's view is refuted by Jowell in a recent article, see Jowell 96. See also de la Mare's instructive study of the principle's spill over effect, especially at pp 160-163.

Furthermore, the possibility of a transplant of the principle should not be regarded as an isolated matter, but as part of a broader, ongoing discussion about the convergence of the different European administrative-law systems, and the possibility of the making of a distinct European administrative law.[171]

2. The possibility of a spill over effect

2.1 Introduction

A prediction of whether a legal principle will be transplanted from one legal system to another such system, or from one part of a legal system to another part of the same system, beers a considerable resemblance to a weather forecast. The main difference is that a weather forecast undeniable is more reliable. Presumably, the most one can achieve by such an assessment is to point out some of the factors which render it more or less likely that such a transplant will take place. This is the modest aim of this section.

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[171] It seems fair to say that this debate was initiated by Rivero 78. It was intensified by the path-breaking work of Jürgen Schwarze: Europäishes Verwaltungsrecht in 1988 (refe-rences to the work in this study is made to the English translation of the book; European Adminstrative Law.) The debate has been further elaborated by, among others: Schwarze 91; Lester 91; Koopmans 91; Chiti 92; Schwarze 93; Graham 93; and Chiti 95. In Norwegian law, the first contribution to the debate is Sejersted (ed), approaching the topic from a Nordic point of view. The debate is also connected to a more specific debate of whether the general principles of EC law should be *codified*, see Chiti 96, pp 21-23; and likewise whether the administrative procedures within EC law should be codified, see Harlow.

2.2 A transplant of the principle into administrative law

2.2.1 The coherence argument

The main argument in support of the view that a transplant will take place is that all legal systems normally strive to achieve some sort of *system coherence*. Indeed it may seem illogical that individuals and entities shall be protected by a principle of administrative law when they are subject to EEA derived laws and not when they are operating outside this sphere. This argument will become more and more forceful as time goes on, when gradually more and more of Norwegian legislation will have its origin in EC law.[172]

Furthermore, EEA law is heavily interwoven with "pure" Norwegian legislation. At least for a non-lawyer, it is often difficult to assess when he is operating within the sphere of EEA law, and when he is outside this sphere. Acordingly, if the principles governing the two spheres are different, it may be difficult for the individuals to forsee their legal position. Consequently, the principles of *legal certainty* and *forseeability* also seem to be strong arguments in favour of a transplant.

Moreover, the principle of proportionality is not only part of Norwegian law within the sphere of EEA law. As is shown in chapter V, section 3.1,[173] the principle is also applied in

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[172]The coherence argument is of course not anything particualar for Norwegian law. It is, for instance, one of Jowell's main arguments for the application of the principle in English law, see Jowell 96, p 410.

[173]Cf. footnote 123.

some specific areas of Norwegian law, although it is not applied in a fashion which is completely consistent with the principle as it exists in EC law.

The Norwegian Government has also made a decision of principle that international human rights should be made part of Norwegian law. The Royal Commission set up to consider how this should be done delivered its report in 1993, and has proposed to incorporate the ECHR and two UN Convenants by statute.[174] An Act incorporating the human rights treaties will in all likelihood be passed by the Parliament during 1998. After this incorporation, the Norwegian courts will have to apply the principle of proportionality, as it is applied by the European Court of Human Rights. Consequently, within a years time, the sphere within which the principle applies will be expanded even more. When the principle applies within such a large part of Norwegian law - EEA law, human rights law and some specific areas of administrative law - the coherence-argument becomes even stronger.

On the other hand, there are some factors that reduce the weight of the coherence-argument. First, it should be pointed out that the principle of proportionality, as it appears within EC law, is not a very coherent principle, in the sense that it implies a varying degree of scrutiny by the courts, cf chapter II, section 3. The variance depends on a number of different factors, and it is not always easy to forsee which approach the Court will choose in a concrete case. This implies that even if a transplant would make "pure" Norwegian administrative law more

[174] NOU 1993:18

coherent with EEA law, it seems doubtful whether the law would really become more forseeable, and whether legal certainty would really be increased thereby.

This argument is also supported if one assesses the way in which the principle is applied in different European legal systems *outside* the sphere of EC law. Such an assessment reveals that in those countries where the principle is also applied outside the sphere of EC law, the *content* of the principle is not always the same as it is in EC law. For instance, it seems that the principle generally implies a more intensive review in "pure" German law than in EC law.[175] Accordingly, an application of the proportionality principle outside the EC law sphere does not necessarily imply any coherence in the *content of the law*, but only a seeming-like coherence of *terminology*.[176]

Furthermore, a comparison between the content of the principle in those countries which apply the principle outside the EC law sphere reveals that the common term "proportionality" hides substantial differences in content, not only between EC law and national law, but also between the national law systems.[177]

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[175]See Schwarze, pp 854-855, who touches this point briefly. Most likely, the German critique against the ECJ's approach to the proportionally principle in Case C-280/93 *Germany v. Council* [1994] ECR I-4973, could be explained as a reflection of this difference, cf footnote 50.

[176]The debate between Jowell and Lester (Jowell and Lester 87 and 88) and Boyron (Boyron 92), cf footnote 170, serves as an example of the confusion which may arise as a result of this. Jowell and Lester argue that the principle of proportionality, *as it appears in EC law*, should be transplanted into English law, while Boyron, when refuting this view, argues against the principle of proportionality as it appears in *French* law.

[177]For an overview of the principle's status in the law of the Member States, see Schwarze, pp 680-702.

Moreover, it should be pointed out that a transplant of the principle of proportionality into Norwegian administrative law outside the EEA sphere *may* imply nothing more than a transplant of a term, without any real change in the content of the law. It seems fair to say that, whatever they call it, what both Norwegian courts and the ECJ really do, is to quash measures which they find *too* unreasonable. In this sense I agree with Emiliou, who states that "To the extent - which is always difficult to establish - that judges overlook modest differences of opinion on the proportionality question, they follow something of a reasonableness approach whatever else they might claim to do".[178] The main difference between the two courts' approach is the *willingness* to substitute the court's own view for the administration's view on the subject matter. As has been shown in chapter VI, in some types of cases the ECJ applies the proportionality test with a rigour that would seem alien to the Norwegian courts when they are applying the unreasonableness test. However, this is a difference of degree, not of principle. The principle of proportionality is so flexible that Norwegian courts, when applying it outside the sphere of EEA law, if they so wish, could continue their rather deferential approach towards review of administrative measures. If the courts choose such an approach, the main consequence of a transplant would be a change of terminology, not a change in substance. If courts more or less continue their approach to review, only re-labelling their test as a "proportionality" test rather than an «unreasonableness» test, the only gain would be that the *terminology* becomes coherent.

[178]Emiliou, p 273.

Finally, it should also be pointed out that even though it seems generally accepted that a legal system will, and should, strive for system-coherence, the coherence argument in *practice* often seems to be of limited weight. The principle of proportionality itself offers a good example of this. It has for a long time been recognised as a general principle of law in EC law, and much effort has been done by legal scholars in arguing that it should also be recognized as a general principle in the legal systems in the Member States.[179] Nevertheless, it is still not accepted as a general principle of law in English[180] and French law for example.[181]

It should be concluded that an assessment of the coherence argument reveals that it has a limited weight as an argument in favour of a transplant of the principle of proportionality.

2.2.2 The courts' "self interest"

When assessing the likelihood of a transplant, I think one should not underestimate the influence of what can roughly be described as the judicial "self-interest" in favour of such a transplant. It should not be very controversial to say that when courts engage in substantive review, they tend to mask that what they are in fact doing is to substitute their own view for that of the administration or the legislator. Different techniques are used to achieve this. To

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[179]See for example Lester and Jowell 87; Jowell; and de la Mare as regards the English legal system.

[180]The principle is discussed, but not applied, by the House of Lords in R v. Secretary of State for the Home Department, ex parte Brind and others [1990] 1 All E.R. 469, [1991] 1 A.C. 696. As is pointed out by de la Mare, p 134, the judgment does not necessarily barr a future development of the principle.

[181]The principle applies within some specific areas of French administrative law, but it is not recognized as a general principle of law in French law, see Emiliou, p 96.

apply very rigorous procedural rules when the court finds a decision to be unreasonable is one of them.[182]

Accordingly, when assessing whether it is likely that a transplant will take place, one should take into account whether this would enhance the judiciary's ability to carry out a substantial review of decision making without exposing its policy-making function too clearly.

It is difficult to deny that the principle of proportionality involves the judiciary in a review of the very substance of the administration's decisions. Accordingly, it is not the perfect principle for a judge who does not want to expose himself to criticism from those claiming that he is involving himself in policy making. On the other hand, in Norwegian law, the judge's alternative would normally be to apply the unreasonableness principle to the contested measure. When applying the unreasonableness principle, it is uncontroversial that the judiciary is reviewing the merits of the decision. Proportionality, at least *sounds* like a somewhat more objective criteria than unreasonableness. Furthermore, splitting the proportionality test into the three different steps may also help to create the fiction that the judge is doing something more "scientific" than simply assessing whether the measure is too unreasonable. Accordingly, a transplant of the proportionality principle may increase the judiciary's ability to carry out substantial review, without exposing its policy making function too clearly.

[182]See, for instance, Shapiro 1992, for an instructive study of how the requirement of giving reasons has been transformed from a procedural rule to a means for substantial review by American courts, and, to a somewhat lesser degree, by the ECJ.

It is of course impossible to measure whether, and eventually to what extent, the judiciary takes into account the considerations which I have described. It is likely that, even the judges themselves are not always conscious about their temptation to hide their own opinion behind a cover of "science". However, I think that this is one factor that may contribute to a transplant, and that the weight of this factor should not be underestimated.

2.2.3 Conclusion

In assessing the likelihood of a transplant of the principle of proportionality into "pure" Norwegian administrative law it is important to note the following factors of importance may be pointed out. First, a transplant would not necessarily imply a very big change in Norwegian law. Generally speaking, I would think that this increases the possibility of a transplant. It is to be presumed that the courts are likely to be more willing to adopt a new principle if it does not have dramatical consequences for the content of the national law. The coherence argument, even though it is often invoked as an argument in favour of a transplant, is of limited weight, while the courts' "self interest" is a factor which may contribute to a spill over.

2.3 Transplant of the principle as a constitutional principle

While a transplant of the principle of proportionality, as a principle of administrative law, would not necessarily alter Norwegian law very much, a transplant of the principle into Norwegian constitutional law would imply a fundamental change. As has been described in

chapter VI, section 2, constitutional review in Norwegian law has been based on a limited number of constitutional provisions with a relatively clear content. Unlike, for instance, American law, we have no tradition of review based on so called "non textual rights" or "unenumerated rights".

The fact that such a transplant would break a long tradition and imply a fundamental change in Norwegian law renders it unlikely that the principle will be transplanted. Such a transplant would highlight the policy making function of the courts, and it seems unlikely that the courts would be willing to expose themselves in such a way. Furthermore, while judicial review based on written provisions in the Constitution is more or less generally accepted among Norwegian legal scholars, there is a widespread scepticism when it comes to review based on nontextual rights.[183] Moreover, while some legal scholars have argued that the principle of proportionality is, or should be made part of, Norwegian administrative law, no one has argued that it is appropriate to give it a constitutional status.

It follows from the abovementioned that, within the forseeable future, it seems ulikely that the principle of proportionality will appear as a constitutional principle within Norwegian law.

[183] See, for instance, the president of the Norwegian Supreme Court, in Smith 1996, pp 129-130, who describes this type of review as an "alien thought in Norwegian law", and states that it implies "obvious dangers".

3. Is a transplant desirable?

The argument which is most often invoked in favour of a transplant of the principle of proportionality into different European legal systems is that this would make the national legal system more coherent with EC law. As is shown in section 2.2.1, this argument is, however, of a limited weight.

Another argument which is often invoked is that the principle enhances the intelligibility of the national legal system, in the sense that, in contrast to the unreasonableness principle, it forces the courts to be explicit about why they quash, or do not quash, a measure.[184] However, I doubt whether it is really more informative to state that a measure is "disproportionate", rather than stating that it is "unreasonable". Of course it may be argued that the courts, when applying the principle of proportionality, and especially when they apply it in the three-part fashion in which it is often applied by the ECJ, have to explain why the measure fails the tests. However, as it is pointed out in chapter II, section 2, all of the three steps are not always applied, and even when they are all applied, the Court's assessment is often brief and not very informative.

Furthermore, as I have argued in section 2.2.1 above, I am of the opinion that, whatever the courts *claim* to do, what they *really* do when they carry out substantial review, is to assess the reasonableness of the contested decision. Given that this is correct, sticking to the traditional

[184] See, for instance, Jowell 96, p 410, advocating this argument.

unreasonableness doctrine is a better way of enhancing transparancy of court decisions, and thereby the intelligibility of the legal system, than to adopt the proportionality test.

It follows from the abovementioned, that from my point of view, neither the coherence argument nor the intelligibility argument are weighty arguments in favour of a transplant. On the contrary, there are some weighty arguments *against* such a transplant. When assessing these, I find it appropriate to distinquish between a possible transplant of the principle as a principle of administrative law, and the principle as a constitutional principle.

As a principle of *administrative law*, I would think that a transplant, viewed in the short term, would have a limited impact. The principle, as it is applied by the ECJ, differs from the Norwegian unreasonableness concept, in the sense that, within some areas of administrative law, the former principle implies a more intensive scrutiny than the latter. However, the principle is flexible, and when applied outside the sphere of EEA law, the courts could apply it in a more or less similar fashion to the way in which they apply the unreasonableness principle.

However, viewed in the longer term, it seems likely that a transplant could have a more significant impact. It seems reasonable to presume that a transplant could create a pressure towards more or less complete coherence between the courts' approach within the sphere of EEA law and the approach outside this sphere, i.e., in "pure" Norwegian law. This would imply that when Norwegian courts assess measures which are *similar* to measures where the

ECJ apply a strict proportionality test, Norwegian courts should also apply a strict test, i.e., scrutinise the measures more closely than they do according to the unreasonableness doctrine.

I am sceptical regarding such a potential expansion of the courts' review of administrative measures. It raises questions concerning whether the judiciary is better qualified and equipped than the administration to assess the proportionality of discretionary measures adopted by the administration. Generally spoken, it may also reduce the efficiency of the administration, which is likely to spend more time giving reasons for its decisions in order to advocate the proportionality of the measure. Given that the resources of the administration are limited, this will inevitably have the result that less resources are spent on public service and similar tasks.

More specifically, as shown in chapter II, section 3.3, roughly speaking, the ECJ tends to increase the intensity of the review when derogations from the four freedoms are at stake. These are typical economic rights, free trade, free movement of capital and so on. If Norwegian courts, in order to create coherence, reason along the same lines in "pure" Norwegian law, it raises questions about who should decide on delicate and controversial issues concerning the power of the state to regulate the economy. These are highly political questions, where it seems doubtful to me whether it is more legitimate for the courts to make the final decision, than for the administration to do so.

As a principle of *constitutional law* I am even more sceptical as regards a transplant of the principle of proportionality. The basic objection against such a transplant is the same

objection that may be raised against all forms of constitutional review - to what extent is it legitimate for the court to substitute its own view for the will of an elected body of legislators. It is not possible to discuss this argument thoroughly within the confines of this thesis, but, as a *general* statement, I find the argument rather unconvincing.

However, when it comes to constitutional review based on the principle of proportionality I find the argument more convincing. The principle is so flexible that if the courts' want to adopt an activist-approach, it allows the judiciary to strike down a very wide range of legislation. As Shapiro has pointed out, what the courts in effect are saying is "We invalidate the law you have made because we can think of a better law - one that achieves your goals at less cost to competing interests".[185]Such a broad power for the courts to strike down legislation would be in clear contrast to traditional Norwegian constitutional review, based on a limited number of relatively clear, written provisons in the Constitution. It seems to me, that such a change would tilt the power balance between the legislator and the judiciary too much in favour of the non-elected body.

Furthermore, a transplant of the principle of proportionality as a constitutional principle *could* open the door for a more general acceptance of review based on non-textual rights. If one accepts review based on one non-textual right, namely the principle of proportionality, a barrier is broken. When the barrier is broken, it may more easily be argued that the courts have the right to invent other types of non-textual grounds of review. When the review is

[185]Shapiro 92, p 217.

based on non-textual rights, there are in reality very few, if any, limitations on the review-competence of the courts. Basically, only the judges' imagination represents a limitation on which rights they may invent. Such an evolution would raise serious problems in relation to the power balance between the legislator and the judiciary, in that it would transfer the locus of important political decisions from a democratically elected body to the non-elected courts. Furthermore, it would highlight the courts' lack of a democratic basis, and would thereby contribute to legitimacy problems for the courts. Such an evolution seems to me undesirable, seen from the viewpoint of both the legislator and the courts.

VIII OVERALL CONCLUSIONS

This study is concerned with the principle of proportionality in EC law and its impact in Norwegian law. In a broader context, it is an attempt to contribute to the ongoing dicussion about a possible convergence of the national European administrative law systems, and the making of a distinct European administrative law, seen from a Norwegian and, to a limited extent, a Nordic perspective.

It is concluded that, even though the EEA Agreement does not contain any reference to the principle of proportionality, it forms part of this Agreement. Through incorporation of the Agreement into Norwegian law, the principle has been made part of the internal law, within the sphere covered by the Agreement.

The principle's status in the hierarchy of Norwegian legal norms is assessed, and it is concluded that section 2 of the EEA Act gives the principle a somewhat different status in Norwegian law, compared to its status in EC law. Even though the wording of section 2 seems to indicate that the principle will always prevail in a conflict with statutory provisions, this is not the case. However, sestion 2 serves as an interpretative guideline, establishing the presumption that the legislator will not adopt legislation which is contrary to the principle of proportionality. This implies that unless the legislator *clearly* expresses that a provision shall apply even though it is contrary to the principle, the scope of the provision will be limited, so that it does not conflict with the principle. It is concluded that *in practice* the principle

amounts to be a principle by which the validity of parliamentary acts is assessed, i.e., a constitutional principle.

Chapter V of the study is concerned with the *consequences* of the incorporation, within the sphere of the EEA Agreement. An assessment of the traditional Norwegian doctrine concerning the review of legislation and administrative acts is carried out, and, contrary to the arguments advanced in parts of recent Norwegian legal literature, it is submitted that no principle of proportionality exists outside the sphere of EEA law. It is pointed out that the incorporation of the principle within the sphere of the Agreement, implies that courts, in practice, can carry out substantial review of legislation and non-discretionary administrative measures, even when these measures are in accordance with the Constitution. This is a novel situation, and it implies a shift in the power balance between the legislator and the judiciary. With regard to discretionary administrative measures, the principle of proportionality is compared with the traditional Norwegian principle of unreasonableness. It is submitted that the principle of proportionality, at least within some areas of administrative law, allows the courts to carry out a more intrusive and intensive review of administrative measures, than the principle of unreasonableness.

Chapter VI contains an assessment of whether a transplant of the principle into Norwegian law *outside* the sphere of the Agreement is likely to take place, and whether such a transplant is desirable. Some factors which render it likely that the principle, as a principle of administrative law, will be transplanted, are pointed out. On the contrary, it is submitted that it is unlikely that the principle will enjoy constitutional status in Norwegian law. However, it

is argued that a transplant of the principle, both as a principle of administrative law, and as a constitutional principle, is undesirable. The argument that a transplant will enhance the coherence between the law within the sphere of the EEA Agreement and the law outside this sphere, which is oftenly invoked in favour of a transplant, is refuted. Likewise, doubts are expressed about whether such a transplant would enhance the intelligibility of Norwegian law.

ABBREVIATIONS

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Arnull:	Anthony Arnull: The General Principles of EEC Law and the Individual, Leicester University Press, Leicester [1990].
Backer:	Inge Lorange Backer: Er det fri adgang til å omgjøre utslippstillatelser etter ti år? LoR [1991], p 625.
Barentz:	Rene Barentz: The Court of Justice and the EEA Agreement: Between Constitutional Values and Political Realities, in Stuyck, p 57.
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Boyron:	Sophie Boyron: Proportionality in English Administrative Law: A Faulty Translation?, OJLS, Vol 12 [1992], p 237.
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Bull: The EEA	Henrik Bull: The EEA Agreement and Norwegian Law, EBLR [1994], p 291.
Bull: The EEA Agreement	Henrik Bull: The EEA Agreement and Norwegian Administrative Authorities, in Sejersted (ed), p 53.
Chiti 92:	Mario P. Chiti: Administrative Comparative Law, REDP [1992], p 11.
Chiti 95:	Mario P. Chiti: Are there Universal Principles of Good Governance?, EPL [1995], p 241.
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Emiliou:	Nicholas Emiliou: The Principle of Proportionality in European Law, Kluwer Law International, London [1996].
Eng:	Svein Eng: The Doctrine of Precedent in English and Norwegian Law, Tidsskrift for Rettsvitenskap Foundation, Oslo [1993].
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Graham 93:	C. Graham: Towards a European Administrative Law, RTDP [1993], p 3.
Graver:	Hans Petter Graver: Forholdsmessighet som krav til forvaltningens skjønnsmessige avgjørelser, LoR [1995], p 279.
Graver: EF-rettens	Hans Petter Graver: EF-rettens føringer på forvaltningsskjønnet i medlemsstatene, in Sejersted (ed), p 75 f.
Graver 1996:	Hans Petter Graver: Materiell forvaltningsrett, Universitetsforlaget, Oslo [1996].
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Norberg: EEA Law	Sven Norberg (ed): EEA Law: A Commentary on the EEA Agreement, Fritzes, Stockholm [1993].
Olivecrona:	Karl Olivecrona: The Legal Theories of Axel Hägerström and Vilhelm Lundstedt, SSL [1959], p 125.
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PERIODICALS ABBREVIATIONS

CMLRev:	Common Market Law Review, Kluwer Academic Publishers, Netherlands.
EBLR:	European Business Law Review, Graham & Trotman Limited, London.
EJIL:	European Journal of International Law, European University Institute, Florenze.
ELJ	European Law Journal, Blackwell Publishers Ltd, Oxford
ELR:	European Law Review, Sweet & Maxwell, London.
EPL:	European Public Law, Graham & Trotman, London.
Fordham:	Fordham International Law Journal, Kluwer Law International, Belgium.
ICLQ:	The International and Comparative Law Quarterly, British Institute of International and Comparative Law, London.
JV:	Jussens Venner, Universitetsforlaget. Oslo.
LIEI:	Legal Issues of European Integration, Kluwer Law and Taxation Publishers, Deventer-Boston.
LoR:	Lov og Rett, Universitetsforlaget, Oslo.
NJIL:	Nordic Journal of International Law, Kluwer Law International, Netherlands.
OJLS:	Oxford Journal of Legal Studies, Oxford University Press.
PL:	Public Law, Sweet & Maxwell Ltd, London.
REDP:	Revue Européene de Droit Public, Esperia Publications Ltd, London.
RIDPC:	Rivista Italiana di Diritto Pubblico Comunitario, Giuffrè editore, Milano.
RTDP:	Rivista Trimestale di Diritto Pubblico, Giuffrè editore, Milano.
SSL:	Scandinavian Studies in Law, Almquist & Wiksell International, Stockholm.
TfR:	Tidsskrift for Rettsvitenskap, Scandinavian University Press, Oslo.
UCLF:	The University of Chicago Legal Forum.

COURT REPORTS ABBREVIATIONS

ECR:	European Court Reports.
Rt:	Norsk Retstidende - [Reports of Norwegian Supreme Court judgments].

TRAVAUX PRÉPARATOIRES ABBREVIATIONS

Ot.prp.	*Odelstingsproposisjon* - [Minesterial report to one chamber of the Norwegian Parliament]
Innst.O	*Odelstingsinnstilling* - [Parliamentary committee report]
NOU	*Norges offentlige utredninger* - [Royal Commission report]

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11/70	Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125
5/73	Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof [1973] ECR 1091
41/74	Van Duin v. Home Office [1974] ECR 1337
39/75	Coenen and Others v. Sociaal-Economische Raad [1975] ECR 1547
59/75	Pubblico Ministero v. Flavia Manghera and Others [1976] ECR 91
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C-331/88	R v. Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa [1990] ECR I-4023C
C-280/93	Federal Republic of Germany v. Council of the European Communities [1994] ECR I-4973
C-384/93	Alpine Investments BV v. Minister van Financiën [1995] ECR 1141
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Rt. 1993 p 587	Jan Chr. von Koss v. Staten v/Landbruksdepartementet
Rt. 1994 p 60	Stavanger Kommune v. Restaurant-Invest A/S
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