



EUROPEAN COMMISSION

Brussels, 19 September 2023  
sj.g(2023)9744342

**TO THE PRESIDENT AND MEMBERS OF THE  
EFTA COURT**

**WRITTEN OBSERVATIONS**

submitted by the **EUROPEAN COMMISSION**, pursuant to Article 20 of the Statute of the EFTA Court, by the European Commission, represented by Elisabetta MONTAGUTI, Legal Adviser, and Jonathan TOMKIN Member of its Legal Service, acting as Agents, with an address for service at the Legal Service, *Greffe contentieux*, BERL 01/093, 1049 Brussels, and consenting to service by e-EFTACOURT

**in Case E-5/23,**

**LDL**

Appellant

- and -

**Påtalemyndigheten** (Prosecuting authority)

Respondent

concerning the interpretation of Articles 27, 29, 30 and 31 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

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## I. THE LEGAL FRAMEWORK

### A. EEA Law

#### 1. The EEA Agreement

1. Part III of the EEA Agreement provides for the free movement of persons, services and capital in the EEA.
2. Pursuant to Article 28 of the EEA Agreement, Freedom of movement for workers shall be secured among EC Member States and EFTA States.<sup>1</sup>
3. Pursuant to Article 36, there shall be no restrictions on freedom to provide services within the EEA. Freedom to provide services includes the right for the recipients of services, who are nationals of one EEA State, to go to another EEA State in order to receive a service there, without being obstructed by restrictions.<sup>2</sup>
4. There is no equivalent in the EEA Agreement to Articles 20 and 21 TFEU, which, within the Union legal order, establish the “Union citizenship” and confer a general right to free movement, by virtue of an individual’s Union citizenship. However, the detailed rules on the right of free movement of Union citizens and their family members, as set out in Directive 2004/38/EC<sup>3</sup> (hereinafter also “the Directive”) are applicable in the EEA legal order, in respect of EEA citizens exercising such right of free movement – whether as workers, self-employed, service providers or recipients or more generally non

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<sup>1</sup> Detailed rules specifically on the freedom of movement of workers as set out in Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1) are applicable in the EEA legal order following the incorporation of that regulation into the EEA Agreement by the EEA Joint Committee Decision 52/2012 of 30 March 2012 (OJ L 207, 2.8.2012, p. 32.).

<sup>2</sup> See, in relation to current Article 56 of the Treaty on the Functioning of the European Union (TFEU), judgment of 31 January 1984, *Luisi and Carbone v Ministero del Tesoro*, joined cases 286/82 and 26/83, EU:C:1984:35, paragraph 16.

<sup>3</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

economically active persons, following the incorporation of that Directive into the EEA Agreement by the EEA Joint Committee Decision 158/2007 of 7 December 2007.<sup>4</sup>

2. Directive 2004/38/EC

5. Directive 2004/38/EC was incorporated into the EEA Agreement by its insertion in point 3 of Annex VIII (“Right of Establishment”) to the Agreement. Pursuant to the second paragraph of point 3:
  - a. The Directive is to apply, as appropriate, to the fields covered by Annex VIII.
  - b. The Agreement applies to nationals of the Contracting Parties. However, members of their family possessing third country nationality shall derive certain rights according to the Directive.
  - c. The words “Union citizen(s)” shall be replaced by the words “national(s) of EC Member States and EFTA States.”
  - d. In Article 24(1) the word “Treaty” shall read “Agreement” and the words “secondary law” shall read “secondary law incorporated in the Agreement”.
6. Pursuant to Protocol 35 of the EEA Agreement, implemented EEA law must be given precedence over national law.<sup>5</sup>
7. Pursuant to Article 1 of Directive 2004/38/EC, the Directive lays down the conditions governing the exercise of the right of free movement, residence and permanent residence within the territory of the Member States by Union citizens and their family members.
8. Article 4(1) of Directive 2004/38/EC provides for a right of exit as follows:

*“Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid*

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<sup>4</sup> OJ L124, 8.5.2008, p. 20.

<sup>5</sup> Protocol 35 to the EEA Agreement states that 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.

*passport shall have the right to leave the territory of a Member State to travel to another Member State.”*

9. Article 5(1) of Directive 2004/38/EC provides for a right of entry in the following terms:

*“Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport”.*

10. Directive 2004/38/EC further regulates, in its Chapter VI, limitations which may be imposed on free movement on grounds of, in particular, public health. Article 27(1), part of the general principles, stipulates that:

*“Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.”*

11. Specifically as regards public health, Article 29(1) of Directive 2004/38/EC reads as follows:

*“The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.”*

### 3. Council Recommendation (EU) 2020/1475

12. Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic was adopted by the Council in its original form on 13 October 2020, and was intended to apply to travel between EEA States.<sup>6</sup> In view of the evolution of the pandemic, the Recommendation underwent a first modification in February 2021 through Council Recommendation (EU) 2021/119

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<sup>6</sup> Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (Text with EEA relevance), OJ L 337, 14.10.2020, p. 3.

of 1 February 2021.<sup>7</sup> It is the text of Council Recommendation (EU) 2020/1475 as thus amended (hereinafter also “the Recommendation”) that was applicable at the time of the facts of the present case. While by definition not a binding instrument, Member States were still to take due account of the principles and recommendations set out therein<sup>8</sup>. As such, the instrument provides relevant contextual elements, in particular as regards the review of the proportionality of the national measures at issue.

13. Paragraphs 1 and 2 of the Recommendation, forming part of its General Principles, are worded as follows:

***“General Principles***

*When adopting and applying measures to protect public health in response to COVID 19 pandemic, Member States should coordinate their actions based, to the extent possible, on the following principles:*

*1. Any restrictions to the free movement of persons within the Union put in place to limit the spread of COVID-19 should be based on specific and limited public interest grounds, namely the protection of public health. It is necessary for such limitations to be applied in compliance with the general principles of Union law, in particular proportionality and non-discrimination. Any measures taken should thus not extend beyond what is strictly necessary to safeguard public health.*

*2. Any such restrictions should be lifted as soon as the epidemiological situation allows it.” [underlining added]*

14. The Recommendation provided for the publication and regular update of a map of EU and EEA States, attributing different colours to States or areas thereof on the basis of the number of notified cases and the test positivity rate. More specifically, paragraph 10 indicated that an area should be marked in one of the following colours:

*“(a) green, if the 14-day cumulative COVID-19 case notification rate is less than 25 and the test positivity rate of tests for COVID-19 infection is less than 4%;*

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<sup>7</sup> Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (Text with EEA relevance), OJ L 36I , 2.2.2021, p. 1.

<sup>8</sup> Within the EU context, the basis for this being the principle of sincere cooperation in Article 4(3) TEU; cf. Article 3 EEA.

*(b) orange, if the 14-day cumulative COVID-19 case notification rate is less than 50 but the test positivity rate of tests for COVID-19 infection is 4% or more, or, if the 14-day cumulative COVID-19 case notification rate ranges from 25 to 150 but the test positivity rate of tests for COVID-19 infection is less than 4%;*

*(c) red, if the 14-day cumulative COVID-19 case notification rate ranges from 50 to 150 and the test positivity rate of tests for COVID-19 infection is 4 % or more, or if the 14-day cumulative COVID-19 case notification rate is more than 150 but less than 500;*

*(ca) dark red, if the 14-day cumulative COVID-19 case notification rate is 500 or more; [...]*. [underlining added]

15. The Recommendation further indicated common thresholds for Member States if considering restrictions on free movement. In particular, paragraph 13 provided that in that case:

*“(a) Member States should respect the differences in the epidemiological situation between areas classified as ‘orange’, ‘red’ or ‘dark red’ and act in a proportionate manner;”*

16. At the same time, the Recommendation specifically provided for possible measures for travellers coming from higher-risk areas.

*“16a. Member States should strongly discourage all non-essential travel to and from areas classified as ‘dark red’ and discourage all non-essential travel to and from areas classified as ‘red’ pursuant to point 10.*

*At the same time, Member States should seek to avoid disruptions to essential travel, to keep transport flows moving in line with the ‘Green Lanes’ system as well as avoid disruptions to supply chains and the movement of workers and self-employed persons travelling for professional or business reasons.* [underlining added]

*[...]*

*17a. Member States should require persons travelling from an area classified as ‘dark red’ pursuant to point 10(ca) to undergo both a test for COVID-19 infection prior to arrival and to undergo quarantine/self-isolation as recommended by the Health Security Committee. Similar measures could apply to areas with a high prevalence of variants of concern.* [underlining added]

*Member States should adopt, maintain or reinforce non-pharmaceutical interventions, in particular in areas classified as ‘dark red’, strengthen testing and contact tracing efforts and increase the level of surveillance and sequencing of a*

*representative sample of community COVID-19 cases, in order to control the spread and impact of the SARS-CoV-2 emerging variants with increased transmissibility.*

*17b. Member States should offer persons residing in their territory the option to substitute a test prior to arrival mentioned in points 17(b) and 17a by a test for COVID-19 infection carried out after arrival, in addition to any applicable quarantine/self-isolation requirements.*

*[...]*

*19. Travellers with an essential function or need should not be required to undergo quarantine while exercising this essential function, in particular:*

*(a) Workers or self-employed persons exercising critical occupations including health care workers, frontier and posted workers as well as seasonal workers as referred to in the Guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak ( 4 );*

*(b) transport workers or transport service providers, including drivers of freight vehicles carrying goods for use in the territory as well as those merely transiting;*

*(c) patients travelling for imperative medical reasons;*

*(d) pupils, students and trainees who travel abroad on a daily basis;*

*(e) persons travelling for imperative family or business reasons;*

*(f) diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and police officers, and humanitarian aid workers and civil protection personnel in the exercise of their functions;*

*(g) passengers in transit;*

*(h) seafarers;*

*(i) journalists, when performing their duties. [underlining added]*

*19a. Pursuant to point 17a, travellers with an essential function or need travelling from a 'dark red' area should fulfil testing requirements and undergo quarantine/self-isolation, provided that this does not have a disproportionate impact on the exercise of their function or need." [underlining added]*



## **B. National law**

17. The Commission refers to the provisions of national law as set out at pages 4-12 of the Request for an Advisory Opinion.
18. At the relevant time, Norway had adopted rules to the effect that persons returning from “unnecessary travel” had to undergo a 10-day quarantine at a quarantine hotel. Stays in quarantine hotels are subject to a daily charge of NOK 500 (approx. EUR 45) for adults.

## **II. THE FACTS AND THE PROCEDURE**

### **A. The General Context**

#### *1. Introduction*

19. On 30 January 2020, the Director-General of the World Health Organization (“WHO”) declared a public health emergency of international concern related to the global outbreak of a novel virus causing coronavirus 2019 disease (COVID-19). On 11 March 2020, the WHO qualified the COVID-19 outbreak as a pandemic.
20. The COVID-19 pandemic led to the introduction of unprecedented measures throughout the EEA, including restrictions on free movement and the reintroduction of internal border controls. Given the nature, scale and consequences of the pandemic, a wide range of measures were taken at a European level to facilitate a coherent and coordinated response.
21. For a proper understanding of this request for an Advisory Opinion, it is useful, in the Commission's view, to be aware of the relevant context. For that reason, the Commission briefly sets out below the main steps and measures taken at EU level with regard to free movement and mobility in the context of the COVID-19 pandemic. A distinction is made in this respect between the different phases.

#### *2. March 2020: the early phase*

22. On 16 March 2020, the Commission adopted Guidelines for border management measures to protect public health and ensure the availability of essential goods and

services<sup>9</sup>. These guidelines stress the importance of coordination and the need to ensure that restrictions comply with Directive 2004/38/EC and are both necessary and proportionate. The Commission also stressed the need for Member States to authorise the entry of EU citizens or third-country nationals residing on their territory and to facilitate the transit of other EU citizens and residents returning home.

23. Point 18 of these guidelines states that Member States may reintroduce temporary internal border controls if justified on grounds of public policy or internal security. In an extremely critical situation, a Member State may determine the need to reintroduce border controls in response to the risk posed by a contagious disease. Member States are required to notify the reintroduction of border controls in accordance with Regulation (EU) 2016/399 (the “Schengen Borders Code”)<sup>10</sup>.
24. On 30 March 2020, the Commission adopted guidance on the implementation of the temporary restriction of non-essential travel to the EU, the facilitation of the transit regime for the repatriation of EU citizens and the effects on visa policy<sup>11</sup>. On the same day, the Commission also adopted guidelines on the exercise of the right to free movement of workers during the COVID-19 pandemic<sup>12</sup>.

### 3. May-July 2020: the situation improves

25. In view of the improved epidemiological situation, on 15 May 2020 the Commission adopted a communication entitled “*Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls*”<sup>13</sup>. This communication invited Member States to start lifting restrictions between areas or Member States with a sufficiently similar epidemiological situation. This approach included the possibility of reintroducing certain measures if the epidemiological situation

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<sup>9</sup> OJ C 86, 16.3.2020, p. 1.

<sup>10</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) (OJ L 77, 23.3.2016, p. 1).

<sup>11</sup> OJ C 102 I, 30.3.2020, p. 3.

<sup>12</sup> OJ CI 102 I, 30.3.2020, p. 12.

<sup>13</sup> OJ C 169, 15.5.2020, p. 30.

so required. Member States were strongly encouraged to lift restrictions on free movement within the EU by 15 June 2020 at the latest.

26. On 11 June 2020, the Commission adopted the Communication on the third evaluation of the application of the temporary restriction on non-essential travel to the EU<sup>14</sup>.
27. On the basis of the Commission's proposal of 25 June 2020, the Council adopted on 30 June 2020, Recommendation (EU) 2020/912 on the temporary restriction of non-essential travel into the EU and the possible lifting of such restriction<sup>15</sup> (hereinafter "Recommendation 2020/912").
28. On 17 July 2020, the Commission adopted guidelines on seasonal workers in the European Union in the context of the COVID-19 outbreak<sup>16</sup>.

#### *4. August 2020: the second wave*

29. As a result of the deterioration in the epidemiological situation around August 2020, some Member States resumed the introduction of restrictions on free movement.

#### *5. September to December 2020: the Council's recommendations*

30. On the basis of the Commission's proposal of 4 September 2020, the Council adopted on 13 October 2020, Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic<sup>17</sup>. The Council emphasised that the Recommendation should not be interpreted as facilitating or encouraging the adoption of restrictions on free movement in response to the COVID-19 pandemic, but rather as aiming to provide a coordinated approach should any Member State decide to introduce such restrictions. As noted above, one of the coordination tools was the 'traffic light map', which would subsequently be adopted and published weekly by the European Centre for Disease Control (ECDC).

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<sup>14</sup> COM(2020) 399 final.

<sup>15</sup> OJ L 208, 1.7.2020, p. 1.

<sup>16</sup> OJ C 235, 17.7.2020, p. 1.

<sup>17</sup> OJ L 337, 14.10.2020, p. 3 (See, legal framework above).

31. In addition, on 22 December 2020, the Commission adopted Recommendation (EU) 2020/2243 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant discovered in the UK<sup>18</sup>, in response to a variant of COVID-19 then observed in the UK.

*6. 2021: the further development phase*

32. The COVID-19 pandemic continued to develop rapidly during 2021, in particular due to the appearance of several variants of concern. In the light of these developments, Recommendation 2020/912 (on travel to the EU) and Recommendation 2020/1475 (on free movement) were amended several times.
33. On the basis of the Commission's proposal of 17 March 2021, the Council and the European Parliament adopted on 14 June 2021 Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 certificates of vaccination, testing and recovery (the EU digital COVID certificates) to facilitate free circulation during the COVID-19 pandemic<sup>19</sup> (hereinafter "Regulation 2021/953").
34. By way of background, in week 11 of 2021, when the rules on mandatory hotel quarantine applicable to appellant in the main proceedings were adopted, Norway reported a 14-day notification rate of 226 (in the week 17 of 2021, when the appellant entered Norway, Norway reported a rate of 111)<sup>20</sup>.

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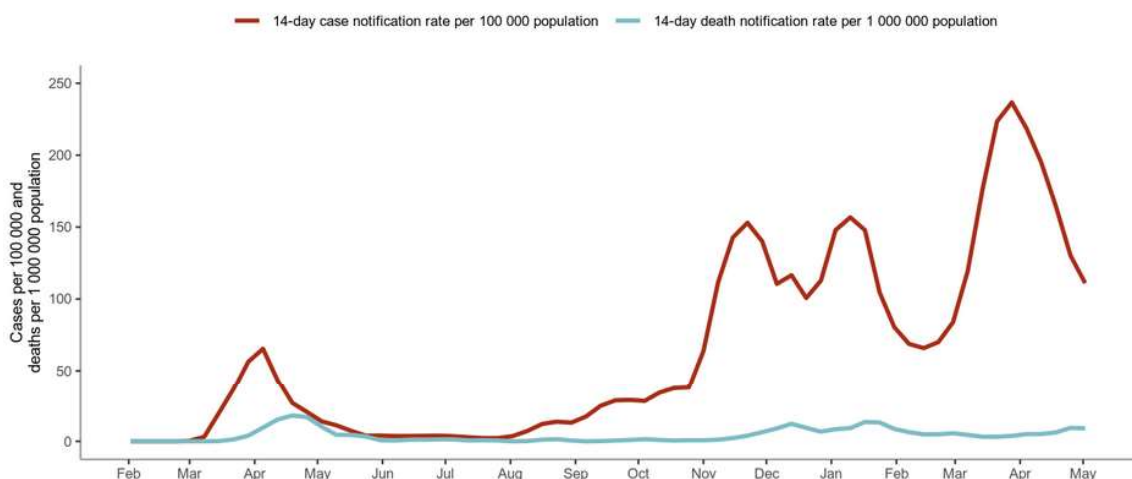
<sup>18</sup> OJ L 436, 28.12.2020, p. 72.

<sup>19</sup> OJ L 211, 15.6.2021, p. 1. At the same time, a parallel Regulation was adopted for the purposes of extending the application of the EU digital COVID certificate system to third country nationals legally residing or staying in the Schengen area without controls at internal border controls: Regulation (EU) 2021/954, OJ L 211, 15.6.2021, p. 24.

<sup>20</sup> <https://www.ecdc.europa.eu/en/publications-data/data-national-14-day-notification-rate-covid-19>

### Norway: 14-day COVID-19 case and death notification rates

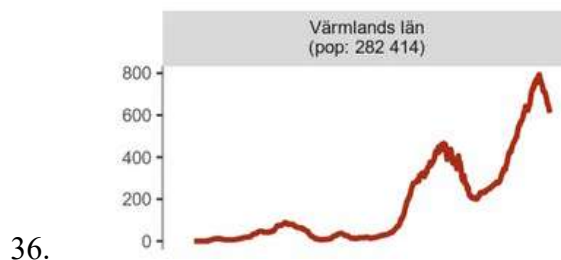
National totals as of 3 May 2021: 113 468 cases (earliest 2020-W09, latest 2021-W17), 757 deaths (2020-W11, 2021-W17)



ECDC. Figure produced 6 May 2021.  
 Source: Epidemic intelligence, national weekly data

Source: ECDC weekly COVID-19 country overview for week 17, 2021<sup>21</sup>

35. During week 17 of 2021, the 14-day notification rate for the Swedish region of Värmland, from which LDL returned to Norway and which featured in Appendix A containing a continuously up-to-date overview of the countries and, where applicable, areas in that country, regarding which upon entry into Norway applied a requirement to quarantine as a result of increased infection, was about 600:

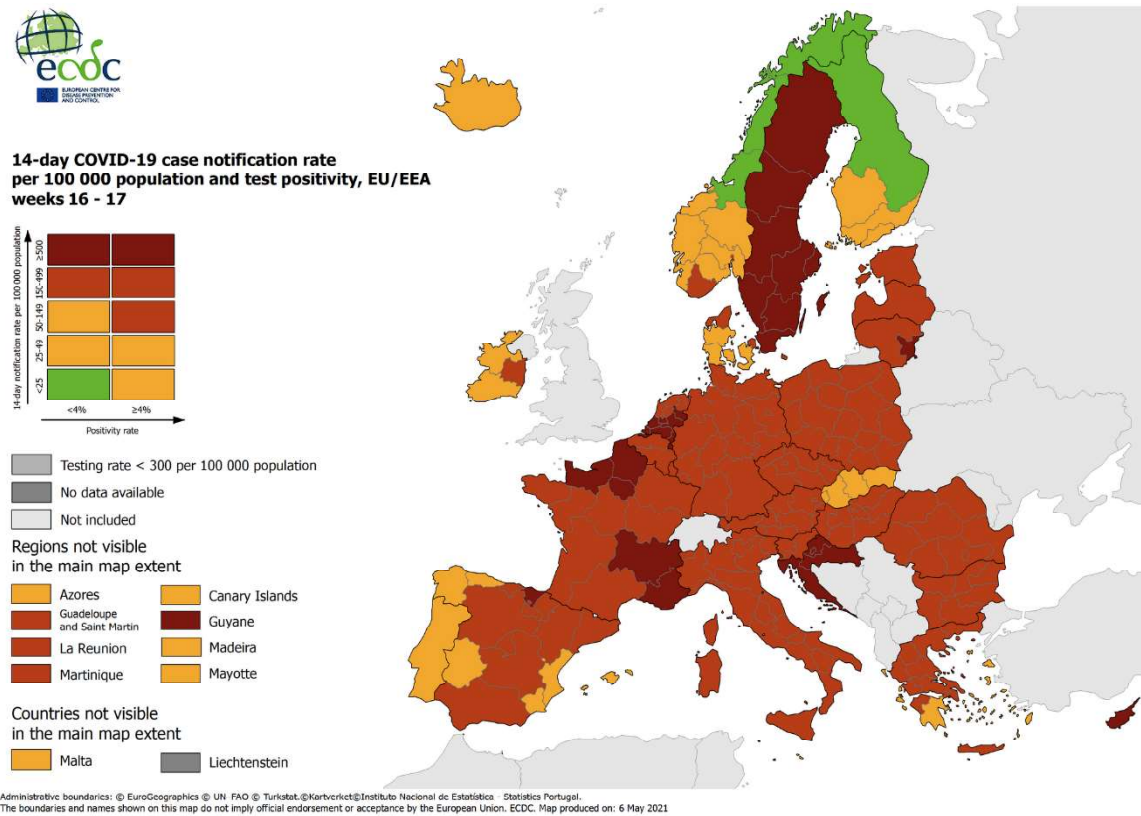


Source: ECDC weekly COVID-19 country overview for week 17, 2021<sup>22</sup>

<sup>21</sup> <https://covid19-surveillance-report.ecdc.europa.eu/archive-COVID19-reports/>

<sup>22</sup> <https://covid19-surveillance-report.ecdc.europa.eu/archive-COVID19-reports/>

37. As a consequence, the region of Värmland, like the rest of Sweden, was marked in ‘dark red’ in the map published by ECDC based on Council Recommendation (EU) 2020/1475<sup>23</sup> as amended by Council Recommendation (EU) 2021/119<sup>24</sup>:



Source: ECDC<sup>25</sup>

38. In addition, while in most EEA States, SARS-CoV-2 variant of concern B.1.1.7 (‘Alpha variant’) had become dominant by week 17 of 2021 (in 16 EEA States, more than 80% of all sequenced positive test results were for Alpha variant. In Sweden, the percentage stood at 57.9%), in Norway, that was not yet the case (26.6%)<sup>26</sup>.

<sup>23</sup> Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (available at: <http://data.europa.eu/eli/reco/2020/1475/oj>)

<sup>24</sup> Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (available at: <http://data.europa.eu/eli/reco/2021/119/oj>)

<sup>25</sup> <https://www.ecdc.europa.eu/en/publications-data/combined-indicator-week-17-2021>

<sup>26</sup> <https://covid19-surveillance-report.ecdc.europa.eu/archive-COVID19-reports/>

## **B. The facts giving rise to the Request for an Advisory Opinion**

39. LDL, the appellant in the main proceedings, is a Swedish national living and working in Norway since Autumn 2016. In the period between the end of April and the beginning of May 2021, during the COVID-19 pandemic, LDL travelled to Sweden to visit his father. It appears from the request for an Advisory Opinion, the visit took place in the context of a recent family bereavement.
40. On his return to Norway, LDL was stopped at the border between Sweden and Norway and ordered to a designated quarantine hotel. However, the individual opted to quarantine at home. On 2 and 3 May the municipal authorities sought to contact the appellant but were unable to reach him.
41. On 25 June 2021, the police authorities issued LDL with an optional penalty for violation of national rules that would have required him to have presented himself at the designated hotel. In circumstances where LDL contested the fine, the matter went to the District Court. That Court convicted LDL and ordered him to pay a fine of NOK 24 000 plus costs of the procedure amounting to NOK 4 000. The Conviction was subsequently upheld by the Court of Appeal.
42. On 25 December 2022, LDL was granted leave to appeal to the Supreme Court on a point of law in so far as it concerns the question whether the applicable rules in the Regulation are contrary to the rules of the control of communicable diseases act, the Constitution, the European Convention on Human Rights or EEA law. Leave to appeal was refused as to the remainder.
43. Considering that the questions required an interpretation of EEA law, the Supreme Court stayed the proceedings and referred 11 questions to the EFTA Court for an Advisory Opinion. By those questions, the Supreme Court seeks, in essence, guidance on the EEA legal framework that is applicable to the facts before the Court and on the compatibility of the contested national rules with the applicable legal framework.

### **III. ON THE QUESTIONS ASKED**

#### **A. Preliminary observations**

44. The Commission observes that it is possible to regroup the eleven questions referred by the referring court into thematic clusters.
45. In the first instance, the referring court seeks an Opinion on the specific provisions of the EEA legal framework that would be of relevance to examining the legal question at issue in the main proceedings. The Supreme Court next seeks guidance on the nature of restrictions that may be imposed under EEA law on public health grounds, and whether such measures can include measures of general application, as opposed to individual measures. Thirdly, the referring court raises a number of questions linked to assessing the proportionality of the rules imposed, particularly the requirement to undergo quarantine at a designated hotel. Finally, the Supreme Court raises questions linked to procedural requirements applicable to the imposition of restrictions. It is proposed to deal with each theme in turn.
46. The Commission further observes that the terminology and notions used in the Norwegian measures (more precisely, in the English translation provided in the Request for Advisory Opinion), appear broadly to correspond to the ones used in Council Recommendation (EU) 2020/1475, as amended by Council Recommendation (EU) 2021/119 including, in particular, as regards the concepts of “essential” and “non-essential” travel. Accordingly, the Commission assumes that the personal scopes of, respectively, the obligation to undergo hotel quarantine and the exemptions therefrom correspond to those of the recommendations in points 15, 17a and 19(a) of that Recommendation. The following observations, particularly as regards the answer to Questions 5-8 and 10-11, are premised on this assumption. Verification that this is the case rests with the referring court.

#### **B. On the applicable legal framework (Questions 1 to 3)**

47. At the outset, it is noted that the case concerns the conditions under which the national of one EEA State (Sweden), is able to exercise free movement rights in another EEA State, of which he is not a national (Norway). It is, moreover, apparent from the



reference that the appellant in the main proceedings has been a worker in Norway since 2016.

48. In these conditions, it follows that the situation of the appellant in the main proceedings is governed by the EEA Agreement, in particular Article 28 thereof, and more specifically by the provisions of Directive 2004/38, which lay down detailed rules on the exercise of free movement rights. More specifically still, it is submitted that Chapter VI of Directive 2004/38 is of particular relevance, since that Chapter lays down the conditions under which restrictions on free movement may be imposed.
49. As regards the scope of Directive 2004/38, it is recalled that, it follows from its third and fourth recitals, that the directive was adopted with a view to codifying and reviewing the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens. Indeed, a key objective of the Directive was to remedy the previous “sector-by-sector, piecemeal approach to the right of free movement and residence” by establishing a single overarching legislative framework that would facilitate the exercise of free movement.
50. Accordingly, Directive 2004/38 has been adopted on the basis of a number of different legal provisions of the Treaties, precisely, to allow its application to movement that is based on different grounds.
51. It follows, in response to the referring court’s third question, there is no basis to interpret the provisions of the Directive differently depending on the particular nature of the free movement at issue and whether the appellant in the main proceedings was travelling as a worker or to receive services.

**C. On the imposition of public health restrictions as a general measure (Question 4)**

52. The Commission notes that this question corresponds to the question raised by the referring Court in Case C-128/22, *Nordic Info*, which is currently pending before the Grand Chamber of the Court of Justice.

53. The Commission maintains the position also expressed in its observations submitted in Case C-128/22<sup>27</sup>, that Articles 27 and 29 of Directive 2004/38 do not preclude, in a situation such as that at issue in the main proceedings, the adoption of general measures on public health grounds.
54. Firstly, there is nothing in the wording of these two articles (i.e Article 27(1) and (4) and Article 29 as a whole) to indicate that such general measures would be excluded.
55. Furthermore, an analysis of the relevant context shows that such general measures are not excluded when they are taken for reasons of public health. In particular, Article 27(2) of Directive 2004/38 provides that measures taken on grounds of public policy or public security must “be based exclusively on the personal conduct of the person concerned”. An *a contrario* interpretation of this provision indicates that such a requirement does not therefore apply to measures taken on public health grounds.
56. Moreover, in the Commission’s view, this is also logical, given the nature of the justification in question and the objective pursued by it. Potential threats to public policy or public security are closely linked to the behaviour of certain individuals. On the other hand, threats to public health – and especially those linked to epidemics and other diseases referred to in Article 29(1) of the Directive – are of a much more general nature; they are not linked, or at least not necessarily or only to a limited extent, to the behaviour of certain individuals and may affect large sections of, or even the entire, population of a Member State, as demonstrated by the COVID-19 pandemic.
57. Precisely because of the general nature of the threat in situations such as those at issue in the main proceedings, purely individual measures will often not suffice (and will not be practicable) to protect public health effectively. A different interpretation would therefore entail a serious risk that the objective pursued could not be achieved.

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<sup>27</sup> See Opinion of Advocate General Emiliou delivered on 7 September 2023, Case C-128/22, *Nordic Info*, EU:C:2023:645, paragraph 64.

58. The Commission notes that these considerations have also been echoed by the Advocate-General in his Opinion in Case C-128/22, *Nordic Info*, delivered on 7 September 2023.<sup>28</sup>

**D. On the justification of the measures (Questions 5-8, 10-11)**

*1. Introduction*

59. It is uncontested that mandatory hotel quarantine imposed on persons who enter Norway from another EEA State for reasons deemed ‘unnecessary’ constitutes a restriction on the freedom of movement. Therefore the question arises as regards its justification. To this end, by questions 5-8 and 10-11, the referring Court essentially seeks guidance on the factors to be taken into account in order to determine whether the restrictive measures can be justified and therefore comply with the EEA Agreement.

*2. The existence of a legitimate objective*

60. At the outset, the Commission notes that Chapter VI of Directive 2004/38 and indeed the case-law of the Court of Justice on the free movement of persons provides some important key principles governing the conditions under which Member States may restrict free movement on public policy, security and health grounds.
61. Article 27 of Directive 2004/38/EC sets out the general principles applicable to restrictions on free movement and states in particular that such restriction may be justified only on grounds of public policy, public security or public health. According to the Court’s settled case-law, a restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law<sup>29</sup>.
62. As regards restrictions on public health in particular, limitations on freedom of movement can take different forms, depending on the disease concerned. They may

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<sup>28</sup> Opinion of Advocate General Emiliou delivered on 7 September 2023, Case C-128/22, *Nordic Info*, EU:C:2023:645, paragraphs 62 ff.

<sup>29</sup> Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 41 and the case-law cited).

entail an obligation to provide proof of medical examinations such as tests for infection, to undergo post-arrival quarantine, or to submit passenger locator forms or similar documentation prior to or following travelling<sup>30</sup>.

63. Any such restrictions must be limited to diseases falling within the scope of Article 29(1) of Directive 2004/38 – such as diseases for which the WHO has declared a public health emergency of international concern – and be applied in accordance with the general principles of EU law, in particular proportionality and non-discrimination.
64. The conditions laid down in Article 29(1) of the Directive are clearly fulfilled in the case at hand, since, on 30 January 2020, the WHO declared a public health emergency of international concern over the global outbreak of severe acute respiratory syndrome coronavirus 2 (*SARS-CoV-2*), which causes COVID-19<sup>31</sup>.

### 3. Proportionality

65. It follows from the Court of Justice’s case-law that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective<sup>32</sup>.

#### *a. As to the appropriateness of the measure*

66. It is important to underline that in the field of public health, Member States are responsible for defining their national health policy as well as the organisation and delivery of health services and medical care. National governments in principle decide on the specific measures based on each country’s national epidemiological and social situation<sup>33</sup>.

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<sup>30</sup> See Council Recommendation (EU) 2020/1475; see also Article 11 of Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ L 211, 15.6.2021, p. 1).

<sup>31</sup> [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))

<sup>32</sup> Judgment of 18 July 2006, *De Cuyper* (C-406/04, EU:C:2006:491, paragraph 42); judgment of 26 October 2006, *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraph 35); and judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 41).

<sup>33</sup> Article 168(7) TFEU.

67. As stated by the Court of Justice on multiple occasions, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved<sup>34</sup>. The principle of proportionality is therefore applied in a particular manner “in the sensitive area of public health”<sup>35</sup>. Member States have a wide margin of discretion in determining which restrictive measures they consider necessary in a given case.
68. At the same time, the appropriateness of public health measures limiting the exercise of the right to move freely within the Union may also be assessed by reference to the coherence of the overall regulatory framework and whether the Member State concerned introduces comparable public health measures at domestic level.
69. Regarding the appropriateness of the measure at issue in these proceedings, namely, mandatory hotel quarantine, the Norwegian authorities had noted at the time of the adoption of the measure that:
- (1) the measure is intended to delay the introduction and spread of more infectious mutated virus variants as much as possible;
  - (2) an increase in the number of journeys will likely lead to increased import infection and subsequent spread of infection in Norway;
  - (3) there is a need to strengthen monitoring of compliance with the rules applicable to persons in entry quarantine;
  - (4) the measures is intended to deter persons from unnecessary travel.
70. The Commission considers that fact that a measure may not be wholly reliable or sufficient, in itself, should not be seen as decisive to determine its appropriateness. It

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<sup>34</sup> See for example Case C-141/07, *Commission v Germany*, EU:C:2008:492, paragraph 51, and Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes and Others*, EU:C:2009:316, paragraph 19.

<sup>35</sup> See for example Case C-413/17, *Roche Lietuva*, EU:C:2018:865, paragraph 42.

should be considered as enough if it contributes to the achievement of the public objective pursued<sup>36</sup>.

71. In particular, there is nothing to suggest that mandatory hotel quarantine is incapable of achieving the objectives pursued, namely to delay the introduction and spread of more infectious mutated virus variants, decreasing import infection and subsequent spread, monitoring compliance with the applicable rules, and deterring persons from engaging in unnecessary travel. In view of the specific situation at the time<sup>37</sup>, the restriction may, in principle, be considered appropriate to secure the public health ground it was intended to pursue.
72. However, the question arises as to whether the restriction is applied in a coherent way, that does not undermine the appropriateness of the measure. In this regard, the Commission observes that LDL argues that there is no such coherence since national authorities allowed equivalent measures with a similar risk of infection. Under the rules in force in Norway, **persons travelling for essential purposes**, including work-related purposes, were exempt from hotel quarantine and were allowed to quarantine at home or in another suitable location instead, notwithstanding that they presented the same risks of infection.
73. Indeed, whether the measure is appropriate will also depend on whether (1) the specific criteria and methodology applied by the national authorities when designating the Värmland region of Sweden as an area with an obligation to quarantine are based on objective considerations (such as a comparison of the epidemiological situation in Norway and in the Värmland region of Sweden at the date of the facts (in particular the variants presence, if any, and the rates for each variant) and (2) whether the rules are applied in a manner that allows for the attainment of the objective pursued in a consistent manner.

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<sup>36</sup> See Case C-291/12, *Schwarz*, EU:C:2013:670, paragraph 43.

<sup>37</sup> See in particular the health statistics referred to at paragraphs 34 to 38 above.

74. As outlined above, the region of Sweden at issue in the main proceedings was marked as ‘dark red’ in the map produced by ECDC on the basis of Council Recommendation (EU) 2020/1475 as amended by Council Recommendation (EU) 2021/119.
75. In this context, it is worth noting that Point 16a of Council Recommendation (EU) 2020/1475, as amended by Council Recommendation (EU) 2021/119, recommended that “*Member States should strongly discourage all non-essential travel to and from areas classified as ‘dark red’*”.
76. When pursuing a public health objective, it is not unreasonable for the authorities to take measures seeking to discourage behaviour that may contribute to the public health threat. Moreover, for travel from such areas, point 17a of the Recommendation stated that “*Member States should require persons travelling from an area classified as ‘dark red’ pursuant to point 10(ca) to undergo both a test for COVID-19 infection prior to arrival and to undergo quarantine/self-isolation*”.
77. At the same time, it is necessary to note that Council Recommendation (EU) 2020/1475 as amended by Council Recommendation (EU) 2021/119, after laying down the general principle at paragraph 17a, provided for differentiated measures depending on whether a person was travelling for essential or non-essential reasons (see point 19 and 19a). Specifically, in the case of non-essential travel from dark red zones, the combination of tests and quarantine was recommended. It was also recommended that, for essential travel, quarantine would only be applied if not disproportionate, or would be waived.
78. The Commission thus considers that it is appropriate to apply slightly differentiated rules with a view to seeking to limit the significant disruption to the internal market and family life caused by the pandemic<sup>38</sup>.
79. While it is likely that not exempting essential travellers from hotel quarantine would have been more effective in achieving the public health objective pursued, such restrictions could have, as outlined in the authorities’ assessment accompanying the

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<sup>38</sup> See Recital 18 of Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337, 14.10.2020, p. 3).

rules on hotel quarantine, resulted in the measure being considered disproportionate *i.a.* in view of competing interests behind such essential travel.

80. For example, workers who are sent abroad by their employer will often not have a choice whether or not to engage in such travel. Similar considerations apply to persons travelling for imperative family reasons, such as to attend a funeral. It is thus not unreasonable to argue that the legitimate objectives pursued by such types of essential travel justify a slightly different treatment compared to travel for other reasons.
81. Similarly, the fact that infected persons who had not travelled outside Norway were able to undergo infection-related quarantine in their own home must not necessarily affect the appropriateness of the measure regarding non-essential travellers, given the difference between two groups. In particular, at the time of the facts of the main case, travellers were at an increased risk of being infected with variants not prevalent in Norway, as also noted by the Norwegian government in its explanations of the measure.
82. In addition, persons undergoing infection-related quarantine will typically have spent the days prior to the confirmation of the infection with the persons living in the same household (thus the concept of ‘waiting quarantine’), while persons travelling will by definition have been separated from these persons (unless they have accompanied them, in which case they are equally concerned by the quarantine provisions).
83. The Commission therefore does not consider that the application of the rules were incoherent and liable to undermine their appropriateness.
84. In view of the considerations set out above, it is considered that the contested measure was appropriate for ensuring the attainment of the objective pursued.

*b. As to whether the measures go beyond what was necessary to achieve the objective pursued*

85. In order for a restriction to be proportionate, it must not only be appropriate for securing the attainment of the objective pursued. It must also not go beyond what is necessary in order to attain that objective. In assessing whether such measures are necessary, Member States need to examine whether the public health objective pursued could not be achieved by alternative measures that interfere less with the right to free



movement<sup>39</sup>. The restrictions imposed must be clearly defined and limited in scope and time<sup>40</sup> such that they do not extend beyond what is strictly necessary to safeguard public health<sup>41</sup>. This may require, for example, specific exemptions for essential travellers, including workers or self-employed persons in critical occupations<sup>42</sup> or transit passengers, and cross-border regions. It should be added that Member States' respect for the principle of proportionality is also ensured through the provision of clear, comprehensive and timely information about any such general public health measures<sup>43</sup>.

86. The measures and possible alternatives that can be taken will necessarily depend on the nature of the specific public health threat. During the COVID-19 pandemic, for example, travel-related test or quarantine requirements were measures available that caused less interference than a blanket ban on entry or exit<sup>44</sup>.
87. In the case at hand, there was the obvious alternative of home quarantine (which, as outlined above, applied to essential travellers and persons infected in Norway). It can be argued that such quarantine measures would have interfered less with the right to free movement, given that due to their reduced cost and lower impact on family life, they would have had a less discouraging effect on the exercise of that right.
88. However, it is evident that the authorities sought to lessen the impact of mandatory hotel quarantine by limiting it to unnecessary travel, an activity that was actively discouraged at the time. In addition, persons concerned were able to shorten the

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<sup>39</sup> See, for example, C-406/04, *De Cuyper*, ECLI:EU:C:2006:491, paragraph 44.

<sup>40</sup> Regulation (EU) 2021/953, for example, was limited both in scope and in time to the COVID-19 pandemic.

<sup>41</sup> Recital 6 of Regulation (EU) 2021/953. See also judgment of 18 July 2006, *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 42.

<sup>42</sup> See, for example, Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (OJ C 102I, 30.3.2020, p. 12).

<sup>43</sup> See Council Recommendation (EU) 2020/1475, paragraph 25.

<sup>44</sup> See point 17 of Council Recommendation (EU) 2020/1475 and point 11 of Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 (OJ L 18, 27.1.2022, p. 110). Based on Regulation (EU) 2021/953, where Member States were requiring proof of a negative test, of vaccination or of recovery, they were obliged to accept, under the same conditions, certificates conforming with that Regulation.

quarantine period based on a negative test. Finally, it only applied to travel from certain areas, and not to all travel to Norway.

89. As regards the duration of the measures, it is worth considering to what extent the measures were limited in time and regularly being re-assessed. In the case at hand, it can for example be taken into account that travel measures were initially less strict, but that new restrictions were considered necessary in response to the emergence of new variants. The quarantine restrictions were later lifted again and at the time of writing no COVID-19 related travel measures are still in place in Norway.
90. In view of the above, the measure could be considered not to go beyond what is necessary to achieve the objective pursued.

*c. As regards the strict proportionality (stricto sensu) of the contested travel restrictions*

91. According to the settled case-law of the Court of Justice, a limitation on the exercise of a fundamental right guaranteed by the Charter is regarded as ‘proportionate’, in the strict sense of the term, if the disadvantages caused by the measure in question are not disproportionate to the aims pursued<sup>45</sup>.
92. An assessment of the proportionality *stricto sensu* is relevant in the present case in that a restriction on free movement has an impact on fundamental rights of the persons concerned (in the present case, in particular, protection of family life). Although the EU Charter of Fundamental Rights does not form part of the EEA legal order, fundamental rights form an integral part of the general principles of law, the observance of which must be ensured, including in the case of national measures restricting the fundamental Treaty freedoms of movement.<sup>46</sup> Accordingly, the referring court is called to review the balance between the restriction on the individual rights and the pursuit of the legitimate public policy objective through the contested national measure. In other

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<sup>45</sup> See, inter alia, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 64 and the case-law cited).

<sup>46</sup> See e.g. Judgment of 18 June 1991, *ERT*, case C-260/89, EU:C:1991:254, para 43. According to established case law, the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49 and case law cited).

words, to review whether the restriction pursuing the legitimate public policy objective is not excessively burdensome on other fundamental interests.<sup>47</sup>

93. In this connection, it is relevant that the challenged national measures, while requiring the quarantine take place *in hotels* (with ensuing costs and with possibly more stringent limitations on temporary exit from such structures<sup>48</sup>) also provided for exemptions for certain categories of persons (those undergoing “necessary travel”, in particular for work and for “compelling” family reasons, such as “visiting close relatives who are seriously ill”<sup>49</sup>). Given, on the one hand, the importance of the rights which were limited by such measures, and, on the other hand, the fact that certain categories of exemptions, including one potentially relevant to the case in point, were couched in rather general terms, their flexible application would contribute to ensuring the strict proportionality of the restrictions.
94. Other elements to consider, also in order to review the strict proportionality of the restrictions at issue, are the duration of the measure, to be kept to the strict necessary through close monitoring of the evolution of the epidemiological situation and a possibility of rapid adjustment. All the foregoing characteristics contribute to reducing the application of the most stringent regime to a more limited number of persons.
95. As outlined above, the Norwegian authorities made considerable efforts to limit the disadvantages caused by mandatory hotel quarantine. In particular, while the exercise of free movement for non-essential purposes was certainly discouraged by the measure, it nevertheless remained possible, as evidenced by the fact that LDL undertook the travel that gave rise to this case.
96. In view of the above, it is considered that the interference arising from the measure at hand could be viewed as justified by its public health objectives of seeking to delay the introduction and spread of more infectious mutated virus variants, decreasing import

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<sup>47</sup> See also Opinion of Advocate General Emiliou delivered on 7 September 2023, Case C-128/22, *Nordic Info*, EU:C:2023:645, paragraphs 123 ff.

<sup>48</sup> See Request for an Advisory Opinion, paragraphs 36-37.

<sup>49</sup> See Request for an Advisory Opinion, p. 8.

infection and subsequent spread, monitoring compliance with the applicable rules, and deterring persons from engaging in unnecessary travel.

**E. On the applicable procedural safeguards/Notification and procedural safeguards (Question 9)**

97. Article 30 of Directive 2004/38 provides that “*the persons concerned shall be notified in writing of any decision taken under Article 27(1)*”. As this Article refers to “*any decision taken under Article 27(1)*” this in principle includes measures of a general nature taken on grounds of public health as in the case at stake. Indeed, Article 30 should be considered in its context as a provision falling within Chapter VI and therefore concerns notification of all restrictive measures.
98. The goal of notifying decisions is to inform persons as regards measures taken, and to give them the chance to oppose them. When implementing this notification obligation in practice, the general nature of the measures should then of course be taken into account.
99. It is understood that Member States should provide clear, comprehensive and timely information about any general public health measures, including travel requirements. This could be done, for example, through televised press conferences, websites, etc. The same applies to Article 31 of the Directive: when implementing these safeguards in practice, the general nature of measures should be taken into account.
100. Given that Directive 2004/38/EC sets out the conditions applicable to the exercise of the freedom of movement of workers provided for in Article 28 of the EEA Agreement and the exercise of the freedom to move to receive services provided for in Article 36 of the EEA Agreement, LDL does not derive a more extensive right to engage in non-essential travel in situations such as this case.

#### IV. CONCLUSION

For the reasons set out above, the Commission considers that the questions referred to the EFTA Court for an Advisory Opinion by the Norges Høyesterett (Supreme Court) should be answered as follows:

**Articles 27, 29, 30 and 31 of the Directive 2004/38/EC and Articles 28 and 36 of the EEA Agreement must be interpreted as not precluding legislation of an EEA State under which nationals of other EEA States travelling, during the COVID-19 pandemic, from certain areas of other EEA States particularly affected by SARS-CoV-2 to that EEA State for non-essential reasons are required to undergo mandatory hotel quarantine provided that such measures are non-discriminatory, proportionate, properly publicly communicated, and that any persons found in breach of such measures have access to judicial and, where appropriate, administrative redress procedures.**

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