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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

EFTA SURVEILLANCE AUTHORITY

represented by
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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-5/23

LDL

v

Påtalemyndigheten

in which the Supreme Court of Norway (*Norges Høyesterett*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement concerning the interpretation and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and Articles 28 and 36 of the EEA Agreement.

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1 INTRODUCTION

1. By its reference of 7 June 2023, the Supreme Court of Norway (*Norges Høyesterett*) requests the EFTA Court to clarify the compatibility with EEA law of measures taken by the Norwegian Government in order to control and combat the spread of viruses during the COVID-19 Pandemic.
2. Specifically, the reference concerns the compatibility with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[1] (**"the Directive"**) as well as with Articles 28 and 36 of the EEA Agreement of a measure under Norwegian law in the form of an obligation to undergo a period of quarantine at a quarantine hotel for those crossing a border into Norway, including those crossing from other EEA States (**"the Quarantine Hotel Requirement"**).
3. On 30 January 2020, the Director General of the World Health Organization (**"WHO"**) declared a public health emergency of international concern, linked to the worldwide epidemic of a new virus causing the coronavirus disease 2019 (**"COVID-19"**).[2] On March 11, 2020, the WHO raised the status of COVID-19 to the pandemic level.[3]
4. Considering the very serious nature, the global scale and severe consequences of the COVID-19 pandemic for nearly all aspects of human life, the need to combat and prevent the spread of the virus led to the introduction of far-reaching measures in all EEA States, including "*various restrictions on cross-border mobility*", which "*resulted in an unprecedented level of border closures within the*" EEA,[4] hereunder

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[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 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).

[2] WHO, "Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)", 30 January 2020, available at 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).

[3] See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, available at https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[4] Opinion of Advocate General Emiliou in Case C-128/22 *BV NORDIC INFO v Belgische Staat*, EU:C:2023:645, ("the ***Nordic Info*** **AG Opinion**"), paragraph 2.

in the form of lockdowns, "*the most drastic of those measures*,"[5] and the reintroduction of internal border controls.

5. As noted by Advocate General Medina, the COVID-19 pandemic

> "*has been one of the most serious health emergencies in living memory, triggering a series of crises. To counter the spread of the pandemic, governments worldwide imposed restrictions the length and scope of which are unprecedented in times of peace. The challenges posed by the COVID 19 pandemic are multiple and multidimensional. In certain circumstances, the pandemic has put the existing legal framework and its efficacy in governing the implications of such crises to the test.*"[6]

6. This is precisely what the present case is about. Whatever one's view of the Quarantine Hotel Requirement (and regardless of whether it can, legally speaking, be justified), the Norwegian Government requiring individuals, whether healthy or infected, who exercised their right of free movement to quarantine in a hotel room for ten days, regardless of whether they had suitable lodging available on their own, constitutes an unprecedented restriction. It took the form of "*precautionary measures which shook, by their very nature and severity, one of the main foundations, and indeed achievements, of the*" EEA Agreement,[7] an Agreement through which the parties were "*determined to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area.*"[8]

7. While it is not the first COVID-19 case to come before the European Courts,[9] it is the first before the EFTA Court. Moreover, this case "*also brings to the fore the eternal issue of the balance that public authorities, in a democratic society, must strike between, on the one hand, the legitimate objective of effectively combating the threats facing society and, on the other hand, the fundamental rights of the persons affected by the measures adopted in that regard.*"[10] Like Advocate General Emiliou noted in a recent and similar case at the CJEU, the EFTA Court will have

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[5] The *Nordic Info* AG Opinion, paragraph 1.
[6] Opinion of the Advocate General Medina in Case C-396/21 *FTI Touristik*, EU:C:2022:688, paragraph 1.
[7] The *Nordic Info* AG Opinion, paragraph 4.
[8] EEA Agreement, recital 5.
[9] See e.g. Case C-396/21 *FTI Touristik*, EU:C:2023:10 and Case C-128/22 *BV NORDIC INFO v Belgische Staat*, not yet decided.
[10] The *Nordic Info* AG Opinion, paragraph 4.

to address this balance *"for the first time, in the context of the threat posed by a pandemic."*[11]

8. As such, this case is accordingly putting the legal framework of the EEA Agreement to the test.
9. Against this background, the EFTA Surveillance Authority ("**ESA**") notes that practically all EEA States at some point during the pandemic introduced quarantine requirements for persons returning from travels abroad, including within the EEA. It seems uncontested that such measures generally speaking were suitable or appropriate to achieve the objective of preventing or limiting the spread of the virus.[12] In order to achieve this objective, the quarantine should be undergone in a suitable place, which typically meant in the residence of the individual in question. The Norwegian Quarantine Hotel Requirement differed in this respect in that it did not allow those affected to utilize their residence or any other suitable lodging they might have had for the purposes of their quarantine.
10. Like all EEA States faced with the rapid spread of the COVID-19 virus, the Norwegian Government from around the period of March 2020 enacted a wide variety of a regulatory measures aimed at combating it and limiting its spread.[13] The Quarantine Hotel Requirement was thus just one of several measures.
11. Having received numerous complaints with respect to several such COVID-19 measures taken by the Norwegian Government, ESA on 24 November 2020 informed the Norwegian Government that it had opened a case to investigate the application of the some of those measures. In particular, ESA drew attention to Section 5 of the Regulation on infection control measures etc. during the corona outbreak, dealing with conditions for entry quarantine for those arriving in Norway

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[11] The *Nordic Info* AG Opinion, paragraph 4.

[12] See, for example, the *Nordic Info* AG Opinion, paragraph 102.

[13] In addition to the Quarantine Hotel Requirement, at issue in the present case, such measures for instance included general entry restrictions for non-resident foreign nationals, including EEA nationals, pursuant to the *Interim Act relating to entry restrictions for foreign nationals out of concern for public health* of 19 June 2020 no 83 (repealed on 1 May 2022). For an overview of Norwegian measures until the start of 2022, see e.g. the various measures described in the COVID-19 Regulation (most of which are now repealed) and Chapter 2 of the White Paper NOU 2022:5 *The Authorities' Handling of the Corona Pandemic - Part 2 of the Report from the Corona Commission* – hereinafter referred to as "**NOU 2022:5**"). (ESA's translation. In Norwegian: "*Myndighetenes håndtering av koronaepidemien – del 2. Rapport fra koronakommisjonen*") available at https://www.regjeringen.no/contentassets/d0b61f6e1d1b40d1bb92ff9d9b60793d/%20no/pdfs/nou202220220005000dddpdfs.pd. This white paper (the second of two volumes) was produced by an independent commission, established by the Norwegian Government.

("**the COVID-19 Regulation**").[14] This provision imposed an obligation to undertake the mandatory quarantine at the premises of hotels contracted by the government for such purposes. This scheme entered into force in its original form on 9 November 2020.[15]

12. On 17 March 2021[16] the Norwegian Government announced additional restrictions on entry to Norway in the form of amendments to Section 5 of the COVID-19 Regulation, which would enter into force on 19 March 2021. The revised rules provided *inter alia* that those who travelled on "unnecessary" trips abroad had to stay in quarantine hotels, i.e. the Quarantine Hotel Requirement.
13. Following additional correspondence, ESA on 26 May 2021 concluded that the Norwegian rules in question, including rules substantially identical to those at issue in the present request for an advisory opinion, were not in compliance with Norway's obligations under the EEA Agreement, including, *inter alia*, Articles 4, 28 and 36 EEA, Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC, and Articles 9 and 16 of Directive 2006/123/EC.[17]

2 THE FACTS OF THE CASE

14. As set out in the Request for an advisory opinion from the Supreme Court of Norway ("**the Request for an advisory opinion**") this case concerns criminal proceedings against LDL, a Swedish national, who since 2016 has worked and resided in Norway. He currently resides with his wife at Bruvoll in Nord-Odal in Norway, whereas his parents and siblings reside in Sweden. For about a week from the end of April until the beginning of May 2021, he went to Sweden to visit his father in Karlstad in Värmland, Sweden. The reason for the travel, as well as the further course of events, are described as follows in the District Court's judgment:

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[14] Regulation of 27 March 2020 no 470 on infection control measures etc. during the corona outbreak (in Norwegian: "Forskrift 27. mars 2020 nr 470 om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften)").

[15] See G-08/2021 Revidert Rundskriv om karantenehotell (Revised circular about quarantine hotel) p.1, available at https://www.regjeringen.no/contentassets/862c40a247734dd6bd4bb9b1d3ad15b7/rundskriv-om-karantenehotell.pdf.

[16] Ibid

[17] See Letter of formal notice to Norway concerning Norwegian restrictions upon entry on the basis of COVID-19, dated 26 May 2021 (Document No: 1199663). Available at: https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Letter%20of%20Formal%20Notice%20concerning%20Norwegian%20restrictions%20on%20entry%20imposed%20on%20the%20basis%20of%20COVID-19.pdf

"His father was very distraught after his brother (the indicted's uncle) had recently passed away. In Karlstad, the indicted was also together with his brothers and his father's cohabiting partner. The indicted was to return to Norway because he has permanent residence here, where he resides with his wife."[18]

15. On the way home on Sunday 2 May 2021 ("**the Material Time**"), LDL was stopped at the border at Magnormoen. He was ordered to go to the quarantine hotel, but instead he opted to return home to undergo the quarantine at home. His wife was in Oslo at that time, so LDL considered it acceptable to undergo quarantine at home. Trysil municipality attempted to contact him by telephone on 2 and 3 May but were unable to reach him.[19]
16. On 25 June 2021, the Chief of Police of Innlandet County (*Politimesteren i Innlandet*) issued LDL with an optional penalty writ (*forelegg*) for violation of Section 7-12 of the Control of Communicable Diseases Act,[20] read in conjunction with Section 24 of the COVID-19 Regulation and Section 4-3 of the Control of Communicable Diseases Act, read in conjunction with a combined reading of Sections 4 and 5 of the COVID-19 Regulation.
17. The grounds were described as follows:

    "Sunday 2 May 2021, at around 20:00, he entered Norway via Magnormoen. Under the applicable provisions on control of communicable diseases, he was to stay at a quarantine hotel, and a room was organised at Kjølen hotel, but despite of this he never presented himself at Kjølen hotel."
18. As LDL did not accept the optional penalty writ, the case was referred to Østre Innlandet District Court (Østre Innlandet tingrett) for trial. On 28 February 2022, Østre Innlandet District Court found LDL guilty and sentenced him to a fine of NOK 24 000. On 6 July 2022, Eidsivating Court of Appeal (Eidsivating lagmannsrett) dismissed his appeal. By its decision of 25 November 2022, the Appeals Selection Committee of the Supreme Court (Høyesteretts ankeutvalg), granted LDL leave to appeal *"on the point of application of the law in so far as it concerns the question whether the applicable rules*

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[18] Judgment of Østre Innlandet District Court of 28 February 2022 (TOIN-2022-3645). Referred to in the Request for an advisory opinion, paragraph 9.
[19] The Request for an advisory opinion, paragraph 9.
[20] Act of 5 August 1994 No 55 relating to control of communicable diseases (In Norwegian: Lov 5. august 1994 nr. 55 om vern mot smittsomme sykdommer (smittevernloven)).

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".[21]

19. The Supreme Court subsequently submitted the Request for an advisory opinion to the EFTA Court.[22]

3 EEA LAW

20. Article 28 EEA provides:

> "1. *Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
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> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
>
> *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
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> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*"

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[21] The Request for an advisory opinion, paragraphs 16-17.

[22] For the sake of completeness, ESA notes that a similar quarantine hotel scheme in Iceland was the subject of litigation in the spring of 2021. By a ruling of 5 April 2021 in Case No. R-1900/2021, which was the leading case on the issue in Iceland, the Reykjavik District Court found that a regulatory provision imposing an obligation on certain travellers to quarantine at a quarantine hotel had not had a sufficient basis in legislation. In this respect, the District Court noted that quarantining at a hotel was a more restrictive measure than allowing persons to quarantine in their own homes. It should be noted that an appeal against the District Court's judgment was rejected by the Court of Appeal on procedural grounds, since the concerned persons were in any event no longer subject to a quarantine obligation and that therefore the authorities no longer had a legitimate interest in pursuing the case, cf. rulings of 7 April 2021 in Cases 229/2021, 230/2021, and 231/2021.

21. Article 33 EEA provides:

> *"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."*

22. Article 36 EEA provides in relevant part:

> "1. *Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."*

23. Article 39 EEA provides:

> "*The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter* [i.e. in respect of the freedom to provide services]."

24. The Directive was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3 by Decision of the EEA Joint Committee No 158/2007,[23] which entered into force on 1 March 2009.

25. Article 5 of the Directive, entitled "Right of Entry", provides in relevant part:

> *"1. [...] Member States shall grant Nationals of EC Member States and EFTA States 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."*

26. Article 6 of the Directive, entitled "Right of residence for up to three months", provides in relevant part:

> *"1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport."*

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[23] OJ 2008 L 124 p. 20, EEA Supplement No 26 8.5.2008, p. 17.

27. Article 7 of the Directive, entitled "Right of residence for more than three months", provides:

> *"1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
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> *(a) are workers or self-employed persons in the host Member State; or*
>
> *(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
>
> *(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and — have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or*
>
> *(d) are family members accompanying or joining a National of an EC Member State or EFTA State who satisfies the conditions referred to in points (a), (b) or (c)."*

28. Article 27 of the Directive, entitled "General principles" provides in relevant part:

> *"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Nationals of EC Member States and EFTA States 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."*

29. Article 29 of the Directive, entitled "Public health", provides:

"1. 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.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory."

30. Article 30 of the Directive, entitled "Notification of decisions", provides:

"1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

31. Article 31 of the Directive, entitled "*Procedural safeguards*", provides in relevant part:

"1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health."

4 NATIONAL LAW

4.1 The Control of Communicable Diseases Act

32. Section 1-1 of the Control of Communicable Diseases Act of 5 August 1994 no. 55 ("**the Act**")[24] is entitled "*Purpose of the Act.*" It provides:

> "*The purpose of this Act is to protect the population against infectious diseases by preventing them and preventing them from being transmitted in the population, as well as preventing such diseases from being brought into Norway or taken out of Norway to other countries.*
>
> *The Act shall ensure that the health authorities and other authorities implement the necessary infection control measures and coordinate their activities in the infection control work.*
>
> *The Act shall safeguard the judicial rights of the individual who is targeted by infection control measures under the Act.*"[25]

33. Section 1-5 is entitled "*Fundamental requirements when implementing infection control measures*". It provides

> "*Measures for control of communicable diseases pursuant to this Act shall be based on a clear medical justification, be necessary for the purpose of controlling infection and appear appropriate after an overall assessment. Upon the implementation of measures for control of communicable diseases, emphasis shall be given to voluntary participation by the person or persons concerned by the measure.*
>
> *Coercive measures cannot be used when, according to the nature of the case and the circumstances, it would otherwise be a disproportionate intervention*"[26]

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[24] Lov 5. august 1994 nr. 55 om vern mot smittsomme sykdommer (smittevernloven).

[25] ESA's translation. In Norwegian: *"§ 1-1.Lovens formål*
Denne loven har til formål å verne befolkningen mot smittsomme sykdommer ved å forebygge dem og motvirke at de overføres i befolkningen, samt motvirke at slike sykdommer føres inn i Norge eller føres ut av Norge til andre land.
Loven skal sikre at helsemyndighetene og andre myndigheter setter i verk nødvendige smitteverntiltak og samordner sin virksomhet i smittevernarbeidet.
Loven skal ivareta rettssikkerheten til den enkelte som blir omfattet av smitteverntiltak etter loven."

[26] ESA's translation. In Norwegian: *"§ 1-5.Grunnleggende krav ved iverksetting av smitteverntiltak*
Smitteverntiltak etter loven skal være basert på en klar medisinskfaglig begrunnelse, være nødvendig av hensyn til smittevernet og fremstå tjenlig etter en helhetsvurdering. Ved iverksettelse av smitteverntiltak skal det legges vekt på frivillig medvirkning fra den eller de tiltaket gjelder.
Tvangstiltak kan ikke brukes når det etter sakens art og forholdene ellers vil være et uforholdsmessig inngrep."

34. At the material time,[27] Section 4-3 of the Act was entitled "*Regulations on quarantine provisions*". It provided:

> *"The King may issue regulations to prevent communicable diseases from being brought into the country or spread to other countries (quarantine measures), including provisions regarding measures in respect of persons, animals, means of transport, goods and objects which may conceivably transmit communicable diseases. In the regulations the King may also establish further requirements for examinations, removal of sources of contagion and documentation in connection with entry into and departure from Norway and in connection with the import and export of goods.*
>
> *In order to prevent or hinder the spread of Covid-19, the King may issue regulations governing where and how persons entering Norway shall undergo quarantine. The King may also issue regulations governing deductibles for persons in quarantine or their employers or clients to cover costs of the quarantine stay.*
>
> *The King may issue regulations governing procedural rules for decisions taken pursuant to regulations under the second paragraph. In that connection, exceptions may be made from Chapters IV, V and VI of the Public Administration Act (forvaltningsloven)."*[28]

35. At the material time, Section 4-3a was entitled "Regulations on isolation and restrictions on freedom of movement etc.". It provided:

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[27] Entry into force on 19 February 2021. It was subsequently amended with effect from 18 June 2021, i.e. a week prior to the penalty writ issued to LDL on 25 June 2021. ESA understands that it is the rules in effect at the time the acts or omissions in question were committed which would be the applicable rules. However, it does not appear that the amendments which entered into effect on 18 June 2021 are substantive or relevant for the issues at hand.

[28] ESA's translation. In Norwegian: *"§ 4-3.Forskrifter om karantenebestemmelser*
Kongen kan gi forskrifter for å motvirke at smittsomme sykdommer føres inn i landet eller spres til andre land (karantenetiltak), herunder bestemmelser om tiltak som gjelder personer, dyr, transportmidler, varer og gjenstander som kan tenkes å overføre smittsomme sykdommer. I forskriftene kan Kongen også fastsette nærmere krav til undersøkelser, smittesanering og dokumentasjon i forbindelse med innreise til og utreise fra Norge og i forbindelse med inn- og utførsel av varer.
Kongen kan for å forebygge eller motvirke overføring av covid-19 gi forskrift om hvor og hvordan personer som reiser inn til Norge, skal gjennomføre karantene. Kongen kan også gi forskrift om egenandel for personer i karantene eller deres arbeids- eller oppdragsgiver til dekning av kostnader ved karanteneopphold.
Kongen kan gi forskrift om saksbehandlingsregler for vedtak gitt i medhold av forskrift etter andre ledd. Det kan her gjøres unntak fra forvaltningsloven kapittel IV, V og VI."

"In order to prevent or counteract the transmission of covid-19, the King can issue regulations on isolation and other restrictions on freedom of movement for persons who have, or after a professional assessment are believed to have, covid-19. The same applies to people who have an increased risk of covid-19 after close contact with an infected or suspected infected person. In the regulations, the King can determine further requirements for assessments in connection with or instead of isolation or other restrictions on the freedom of movement."[29]

36. At the Material Time, Section 8-1, entitled "*Sanctions*" provided:

"With the exception of breach of duties according to Section 5-1 or duties covered by the health personnel legislation, intentional or negligent breach of the Act here or a decision made pursuant to the Act is punishable by a fine or imprisonment for up to 2 years. If the violation results in loss of human life or significant damage to body or health, the penalty is a fine or imprisonment for up to 4 years."[30]

4.2 The COVID-19 Regulation

37. The COVID-19 Regulation was enacted pursuant to Section 4-3 of the Act. It entered into force on 27 March 2020. At the Material Time, Section 1 was entitled "Purpose" and read:

"The purpose of the regulation is to determine infection control measures to prevent or limit the spread of SARS CoV-2 in the population and among health personnel, and to ensure the maintenance of sufficient capacity in the health

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[29] ESA's translation. In Norwegian: *"§ 4-3 a.Forskrifter om isolering og begrensninger i bevegelsesfrihet mv.*
Kongen kan for å forebygge eller motvirke overføring av covid-19 gi forskrifter om isolering og andre begrensninger i bevegelsesfrihet for personer som har, eller etter en faglig vurdering antas å ha, covid-19. Det samme gjelder for personer som har økt risiko for covid-19 etter nærkontakt med smittet eller antatt smittet person. I forskriftene kan Kongen fastsette nærmere krav til undersøkelser i forbindelse med eller til erstatning for isolering eller andre begrensninger i bevegelsesfriheten."

[30] ESA's translation. In Norwegian: *"§ 8-1.Straff*
Med unntak av overtredelse av plikter etter § 5-1 eller plikter som omfattes av helsepersonellovgivningen, straffes forsettlig eller uaktsom overtredelse av loven her eller vedtak gitt med hjemmel i loven med bot eller fengsel inntil 2 år. Dersom overtredelsen har tap av menneskeliv eller betydelig skade på kropp eller helse som følge, er straffen bot eller fengsel inntil 4 år."

and care service so that the service can handle the infection situation and at the same time take care of ordinary health and care services.

The regulation shall ensure that the infection control measures implemented by municipalities and state health authorities are co-ordinated, cf. Section 1-1 of the Control of Communicable Diseases Act."[31]

38. At the Material Time, Section 4 of the COVID-19 Regulation was entitled "Mandatory Quarantine." It read in relevant part:

"*The following persons are subject to mandatory quarantine*:

a. Entry quarantine: persons arriving in Norway from an area where the mandatory quarantine obligation applies as set out in Appendix A, must quarantine for 10 days. This also applies to stopovers in areas as set out in Appendix A. If the person arrives via an area without mandatory quarantine, the period is shortened by the time the person has stayed in the quarantine-free area. If the country or area is no longer subject to mandatory quarantine according to Appendix A, the mandatory quarantine is lifted." [32]

39. It is apparent from the Request for an Advisory Opinion that Appendix A to the COVID-19 Regulation, referred to in its Section 4a, at the Material Time "*contained a continuously up-to-date overview of which countries and, where applicable, which areas in that country, for which there upon entry into Norway applied a requirement to quarantine as a result of increased infection*" in the respective area.[33] Moreover,

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[31] ESA's translation. In Norwegian: *"§ 1.Formål*
Forskriftens formål er å fastsette smittevernfaglige tiltak for å hindre eller begrense spredning av SARS CoV-2 i befolkningen og blant helsepersonell, og for å sikre opprettholdelse av tilstrekkelig kapasitet i helse- og omsorgstjenesten slik at tjenesten kan håndtere smittesituasjonen og samtidig ivareta ordinære helse- og omsorgstjenester.
Forskriften skal sikre at smitteverntiltakene som iverksettes av kommuner og statlige helsemyndigheter er samordnet, jf. smittevernloven § 1-1."

[32] ESA's translation. In Norwegian: *"Følgende personer er underlagt karanteneplikt:*
a. Innreisekarantene: personer som ankommer Norge fra et område med karanteneplikt som fastsatt i vedlegg A, skal i karantene i 10 døgn. Dette gjelder også ved mellomlanding i områder som fastsatt i vedlegg A. Kommer personen via et område uten karanteneplikt forkortes karantenetiden med den tiden som personen har oppholdt seg i det karantenefrie området. Dersom landet eller området ikke lenger omfattes av karanteneplikt etter vedlegg A, oppheves karanteneplikten."

[33] Request for an Advisory Opinion, paragraph 29.

at the Material Time "*the Värmland region of Sweden, which LDL had visited and returned to Norway from, was listed in the overview in Appendix A.*"[34]

40. At the Material Time, Section 4d of the COVID-19 Regulation was entitled "*Requirements for testing for those who have stayed in an area with compulsory quarantine*". Its first and second paragraphs read:

> *"Persons who have stayed in an area with mandatory quarantine as set out in Appendix A during the last 10 days before arrival in Norway must be tested for SARS-CoV-2 at the border crossing point in Norway. The test must be an antigen rapid test. PCR tests can only be used in exceptional cases. People who have been tested with an antigen rapid test must wait at the test station until the test result is available as far as is practically possible based on the conditions on site. In the event of a positive rapid antigen test, those who have stayed outside the EEA and Schengen area during the last 10 days must take a PCR test at the border crossing point. Other people with a positive antigen rapid test must take a PCR test within 24 hours of arrival. At the border control, the authorities can give instructions at which test station the traveller is obliged to test at immediately after entry.*
>
> *Persons covered by the first paragraph who, without reasonable reason, do not want to be tested and do not voluntarily leave Norway, are punished with fines, cf. Section 24. Children under 12 years of age shall not be tested where it is disproportionately demanding to get the child tested."*

41. At the Material Time, Section 5 of the COVID-19 Regulation was entitled Requirements for those who are to be in entry quarantine or waiting quarantine". Section 5(1) read:

> "*Persons in entry quarantine must stay in a quarantine hotel at the first place of arrival in the country during the quarantine period.*"[35]

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[34] Ibid.

[35] ESA's translation. In Norwegian: *"§ 5.Krav til de som skal være i innreisekarantene eller ventekarantene*
Personer i innreisekarantene skal oppholde seg på karantenehotell på første ankomststed i riket i karantenetiden."

42. Section 5(2) subparagraphs a and c read:

"*The obligation to stay in a quarantine hotel shall not apply in respect of persons who fulfil the conditions in Section 4d and who:*

a. upon entry, are able to document that they are resident in Norway and that the travel was necessary, and who stays at the residence or other suitable location where it is possible to avoid close contact with others, with a separate bedroom, separate bathroom and separate kitchen or the possibility of having meals provided. [...]

c. upon entry, are able to document that they own or rent permanent residence in Norway where they can undergo quarantine in a separate living space with a bedroom, bathroom and kitchen, and that the travel was necessary. A lease as referred to in the first sentence must have a minimum duration of at six months.

[...]"[36]

43. Section 5(5) and 5(7) read:

"*Work-related travel will be deemed necessary under letters (a) and (c) of the second subparagraph when confirmation from an employer or contractor*[37] *is provided. For persons who are resident in Norway, see letter (a) of second paragraph, and temporarily work abroad, studies abroad or are accompanying members of the household of persons who work or study abroad, travel into and out of Norway during the period they are based abroad shall be considered necessary. Travel will also be necessary if it is justified by compelling welfare-related grounds such as spending time with minor children, visiting close relatives who are seriously ill or dying, or attendance at the burials or funeral of close relatives.*[38]

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[36] ESA's translation. In Norwegian: *"Plikten til å oppholde seg på karantenehotell gjelder ikke for personer som oppfyller vilkårene i § 4d og som:*

a. ved innreisen kan dokumentere at de er bosatt i Norge og at reisen var nødvendig, og som oppholder seg i boligen eller på annet egnet oppholdssteder der det er mulig å unngå nærkontakt med andre, med enerom, eget bad og eget kjøkken eller matservering(...)

c. ved innreisen kan dokumentere at de eier eller leier fast bopel i Norge hvor de kan gjennomføre karantenen i en egen boenhet med soverom, bad og kjøkken, og at reisen var nødvendig. En leiekontrakt som nevnt i første punktum må ha en varighet på minst seks måneder."

[37] In the Request for an advisory opinion, the Norwegian term "oppdragsgiver" is translated with "client". ESA however considers "contractor" to be a more precise translation.

[38] In Norwegian: *"Arbeidsreiser vil anses som nødvendige etter andre ledd bokstav a og c når det fremlegges bekreftelse fra arbeids- eller oppdragsgiver. For personer som er bosatt i Norge, jf. andre*

Persons in entry quarantine may only be outside their place of residence if they can avoid close contact with people other than those with whom they reside. Persons in quarantine may not be at a workplace where other persons are also present, or at school or kindergartens. The use of public transport is not permitted."[39]

44. At the Material time, Section 22(1), entitled "Deductible for stays in a quarantine hotel during the quarantine period" provided:

"(1) *Individuals staying at a quarantine hotel during the quarantine period under Section 5 shall pay a deductible of NOK 500 per day. If a person has an employer or contractor in Norway, this party shall pay the deductible of NOK 500 per day."*[40]

45. At the Material time, Section 24, entitled "Criminal liability", read:

"Intentional or grossly negligent violation of the provisions of these regulations is punishable by fines or imprisonment of up to 6 months, cf. Section 8-1 of the Infection Control Act. Violation of Section 4d and Section 5b is punishable by a fine and only when the violation has occurred without reasonable cause. Violation of Section 8 and Section 13d shall not be punished."[41]

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ledd bokstav a, og arbeider midlertidig i utlandet, studerer i utlandet eller er medfølgende husstandsmedlem til personer som arbeider eller studerer i utlandet, vil reiser til og fra Norge i perioden de er stasjonert i utlandet anses nødvendige. En reise vil også være nødvendig dersom den er begrunnet i sterke velferdshensyn som samvær med mindreårige barn, besøk til nærstående som er alvorlig syke eller døende, eller deltakelse i begravelse eller bisettelse til nærstående."

[39] ESA's translation. In Norwegian: *"Personer i innreisekarantene kan bare oppholde seg utenfor oppholdsstedet hvis de kan unngå nærkontakt med andre enn dem de bor sammen med. De som er i karantene, kan ikke være på en arbeidsplass der også andre oppholder seg, på skole eller i barnehage. Det er ikke tillatt å bruke offentlig transport."*

[40] ESA's translation. In Norwegian: *"§ 22. Egenandel ved opphold på karantenehotell i karantenetiden*
Privatpersoner som oppholder seg i karantenehotell i karantenetiden etter § 5, skal betale en egenandel på 500 kroner per døgn. Har en person en arbeids- eller oppdragsgiver i Norge, skal denne betale egenandelen på 500 kroner per døgn. (...)"

[41] In Norwegian: *"§ 24.Straff*
Forsettlig eller grovt uaktsom overtredelse av bestemmelser i denne forskriften, straffes med bøter eller fengsel inntil 6 måneder, jf. smittevernloven § 8-1. Overtredelse av § 4d og § 5b straffes med bot og bare når overtredelsen er skjedd uten rimelig grunn. Overtredelse av § 8 og § 13d skal ikke straffes."

5 THE QUESTIONS REFERRED

46. The following questions were referred to the EFTA Court by the Supreme Court for an Advisory Opinion:

1. Based on the information provided about the factual background to the case [as set out in the Request], in the light of which provision(s) of Directive 2004/38/EC should the restriction-related questions in the present case be examined?

2. Provided that LDL, upon returning to Norway, could rely on his rights under Articles 4, 5, 6 and/or 7 of Directive 2004/38/EC, does a more extensive right to cross the border and reside in Norway without restrictions derive from his right of free movement as a worker under Article 28 of the Main Part of the EEA Agreement or from his right to travel to Sweden to receive services under Article 36 of the Main Part of the EEA Agreement?

3. If a more extensive right of entry derives from the provisions on freedom of movement under the Main Part of the EEA Agreement, ref. question 2, and if LDL's travel to Sweden on its own also came within the scope of his right to travel there to receive services, is the question of whether the restriction on the freedom to provide services absorbed by the question of whether the restriction on his free movement as a worker can be justified?

4. Does Chapter VI of Directive 2004/38/EC allow for the introduction of restrictions on rights under that directive, with the objective of safeguarding public health, in the form of general regulations, or is that option limited to individual measures based on considerations of risk of infection relating to the individual traveller?

5. In light of the fact that the authorities are free to determine the degree of protection, and assuming that EEA law would not have precluded the adoption of even more invasive measures such as total or partial closure of borders, or a decision to require all travellers to undergo the period of quarantine at a quarantine hotel, what implications does it have for the EEA law assessment of the suitability of the scheme chosen that only certain groups had to go to a quarantine hotel?

6. What significance does it have for the assessment of whether the measure is consistently implemented and therefore suitable, that the quarantine hotel

scheme (was part of an overall strategy for control of communicable diseases that also) was based on prioritisations as to which groups who, out of consideration for society as a whole, should be given priority within the parameters of the overall infection burden which the authorities considered acceptable at that time?

7. In the drafting of the rules in a pandemic situation such as that at issue in the present case, how much weight can be attached to the need to introduce general and simple rules which can be easily understood and applied by concerned parties and easily managed and supervised for compliance by the authorities, see C-110/05 Commission v Italy, paragraph 67?

8. Is it within the consideration of enforceability and control – and therefore within the legitimate aims in the assessment of whether the measure is justified – that the quarantine hotel scheme could potentially have a deterrent effect for persons contemplating travel abroad, with the consequence that the total infection pressure was reduced?

9. What implications does it have for the assessment of the lawfulness of the restrictions if individual legal certainty safeguards under Articles 30 and 31 of Directive 2004/38/EC apply to the present case, but were potentially not fulfilled?

10. In the assessment of whether the measure is proportionate under Articles 27 and 29 of Directive 2004/38/EC, and potentially also under the Main Part of the EEA Agreement, is there a requirement of proportionality in the narrow sense of the term (stricto sensu) in the present case?

11. If question 10 is answered in the affirmative, what is potentially the legal content of and the legal subject-matter to be examined in the assessment of whether such a requirement is fulfilled in the present case?

6 LEGAL ANALYSIS

6.1 The relevant free movement provisions of Directive 2004/38 and the EEA Agreement (Questions 1, 2 and 3)

47. By its first, second and third question, which can be examined together, the Supreme Court of Norway requests the EFTA Court to clarify in light of which provision(s) of the Directive the facts of the case should be examined, and to clarify whether, in light of the facts of the case, if a more extensive right than under the

Directive can be derived from Article 28 or Article 36 EEA and if so, whether Article 36 is absorbed by Article 28.

48. ESA considers that the question, in essence, entails an analysis of which provision(s) conferring a fundamental freedom upon EEA nationals the facts of the case should be assessed against.

49. It follows from Article 5(1) of the Directive that EEA States "*shall grant*" EEA nationals "*leave to enter their territory with a valid identity card or passport.*" This right of entry, found in Chapter II of the Directive, can be seen as a "gateway" to the right of residence, found in Chapter III of the Directive. It follows from Article 7(1)(a) that all EEA nationals have the right of residence on the territory of another EEA State for a period of longer than three months if they are workers in the host EEA State. It is evident from the Request for an advisory opinion that LDL was a Swedish national, residing and working in Norway for a period of more than three months.

50. In ESA's view, Article 7 of the Directive is consequently the principal provision under the Directive in light of which the facts of the case should be examined. Already at this stage it is useful to recall that the rights found in that provision may be restricted pursuant to the provisions of Chapter VI, cf. Part 6.2. below.

51. In this sense, ESA considers that Article 7 of the Directive protects not only a right to *formally reside* within the territory of a State, but also to *maintain and utilize a residence there*. In this respect it suffices to observe that it is settled case law of the European Courts that "[i]*t follows from the context and objectives of the Directive that its provisions cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness*".[42] The free movement of persons necessarily entails that those persons be allowed to establish themselves in a place of residence, where they can conduct their private affairs and to which they come home at the end of the working day. If an EEA State completely unhindered by Article 7 of the Directive could impose on an EEA national of another EEA State that he or she would not be allowed, for a shorter or longer period, to live in his own home, this would deprive Article 7 of its effectiveness.

52. In this context, ESA considers in particular that all the provisions of the Directive, including Article 7, must be interpreted in light of fundamental freedoms.[43]

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[42] Case E-4/19 *Campbell*, paragraphs 57 and 65.

[43] See e.g. Case C-46/12 *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, EU:C:2013:97, paragraph 33 (by analogy).

53. ESA considers that it is for the national court to ascertain, in line with the Advisory Opinion of the EFTA Court, on the basis of the precise facts exactly which fundamental freedom, whether in combination with the Directive or not, was triggered by the measure at issue in the present case. However, ESA recalls that as LDL is an EEA national with the right to free movement, it would not even be "*necessary to start construing (sometimes quite tenuous) connections to one of the specific freedoms*".[44] As Advocate General Bobek has noted with respect to the EU: "*Being a citizen freely moving on the territory of the Union should be enough in itself: after all, what else should be included under the notion of European citizenship if not the right to travel freely around the territory of the Union? 'Autoraedarius europeus sum.'*"[45]
54. To ESA, despite the fact that no direct "*parallel to Article 21 TFEU exists in EEA law*",[46] the right to freely travel around the territory of the EEA is equally encompassed by the rules and principles following from the EEA Agreement,[47] in light of the objective of homogeneity.
55. It is not entirely clear from the Request for an advisory opinion to which extent or in what way specific freedoms either come into play or were restricted, but on the basis of the available facts potentially relevant freedoms appear to include, for instance, first, the right of LDL to travel to Sweden and receive services there pursuant to Article 36 EEA.[48] Even if that was not the principal purpose of his travel, it seems to be an inevitable consequence of it. Second, as an EEA national of another EEA State residing and working in Norway, LDL's ability to return to work could in principle be affected by the Quarantine Hotel Requirement. It appears plausible that the fundamental freedom to take up work in another EEA State,[49] as LDL has done under Article 28 EEA, can only be effective when it is accompanied

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[44] Opinion of Advocate General Bobek in Case C-195/16 *Staatsanwaltschaft Offenburg v I*, EU:C:2017:374, paragraph 73.
[45] Ibid
[46] See Case E-4/19 *Campbell*, paragraph 57.
[47] ESA observes that this is expressed in different ways in the Court's case law. For instance, with respect to Directive 2004/38, the Court has interpreted this Directive broadly and/or analogously in favour of free movement, see e.g. Case E-26/13 *Gunnarsson,* Case E-28/15 *Jabbi,* and Case E-4/19 *Campbell.* In Case E-8/20 *N*, the Court refrained from applying the Directive and instead relied (paragraphs 75, 77) on the "passive" freedom to provide services under Article 36 EEA, "*namely the freedom for recipients of services to go to another EEA State in order to receive a service there*", finding that when an EEA national stays in another EEA State for a longer period, *"it can be assumed that such an individual will receive services in the EEA State in which he stays."*
[48] Case E-8/20 *Criminal Proceedings against N,* paragraph 77 and 78.
[49] Case E-4/19 *Campbell,* paragraph 50.

by the right to travel in one's free time to the home state in order to visit friends and family.[50] This freedom would seem liable to be restricted when the return is made possible only under the conditions at issue in the present case, thereby placing workers from other EEA States at a disadvantage.[51] Lastly, it appears that LDL owned property in Norway as a national of another EEA State. It is settled case law that "*the right to acquire, use or dispose of immovable property on the territory of another [EEA] State*" would in principle fall under the right to freedom movement of capital,[52] a right which in turn must be examined in light of the right to property, as expressed in Article 1 of Protocol No. 1 to the European Convention on Human Rights ("**ECHR**").[53] Thus, it cannot be excluded that a restriction on the right to use his house in the manner prescribed by the national authorities would be encompassed by this freedom.

56. The above should be examined against the background of fundamental rights, which form part of the general principles of EEA law.[54] In this respect, the imposition of an obligation to pass a ten-day quarantine in a hotel where a person's movements were severely restricted, on penalty of a fine or imprisonment in case of non-compliance, should be considered with regard to the right to liberty and security as protected by Article 5 ECHR. Article 5(1)(e) permits, under certain circumstances, the lawful detention of persons for the prevention of the spreading of infectious diseases.[55] Even if such an obligation were to be found not to constitute deprivation of liberty, due to the apparent absence of physical enforcement of the

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[50] As noted in the *Nordic Info* AG Opinion, paragraph 129: "*For instance, preventing a person from returning home and/or from being reunited with his or her loved ones in a different country encroaches on that person's fundamental right to privacy and family life more so than simply preventing him or her from going on a tourist trip to Sweden*".

[51] For instance, in Case C-187/15, *Joachim Pöpperl v Land Nordrhein-Westfalen*, EU:C:2016:550, paragraph 23, the CJEU stated: "*The Court has consistently held that all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of a Member State other than their Member State of origin.*"

[52] See e.g. Case C-235/17 *Commission v Hungary, EU:C:2019:432, paragraph 51.*

[53] See e.g. *ibid*, paragraphs 67-89, examining free movement of capital restrictions in light of the right of property as expressed in Article 17 of the Charter of Fundamental Rights and at paragraph 72, examining the case law of the European Court of Human Rights ("**ECtHR**") with respect to Article 1 of Protocol No. 1 to the European Convention on Human Rights. See also, for example, ECtHR *Tre Traktörer Aktiebolag v. Sweden*, app. no. 10873/84, paragraphs 54-55, 7 July 1989, and ECtHR *Karahasanoğlu v. Turkey*, app. no. 21392/08, paragraphs 144-145, and ECtHR *O'Sullivan McCarthy Mussels Development Ltd. v. Ireland*, app. no. 4460/16, paragraphs 88-90, 7 June 2018.

[54] See, for example, Case E-1/20 *Kerim v. the Norwegian Government*, 9 February 2021, paragraph 43.

[55] See, for example, ECtHR *Enhorn v. Sweden*, app. no. 56529/00, 25 January 2005.

hotel quarantine, the imposition of a fine and/or imprisonment for staying in one's home should in any event be considered against the background of the right to respect for private life, family life, and the home, as protected by Article 8 of the European Convention on Human Rights. Both Article 5 and Article 8 ECHR would require that such an obligation meet the requirements of being lawful, necessary, and proportionate, encompassing *inter alia* a requirement that less restrictive measures would have been insufficient to achieve the legitimate aim sought.[56]

57. In conclusion, therefore, ESA submits that the facts of the case should be assessed under Article 7 of Directive 2004/38. It is for the national court to examine on the basis of all facts of the case whether and to what extent any fundamental freedoms under the EEA Agreement will be applicable in addition. With respect to whether a particular fundamental freedom being applicable (in addition to Article 7 of the Directive) has any bearing on whether the whole Quarantine Hotel Requirement can be justified, ESA considers that this cannot be excluded. For instance, an assessment of the requirement of proportionality stricto sensu (see below, Part 6.7) can in principle lead to different outcomes, depending on which fundamental freedom is being restricted. Thus, a restriction in the form of the Quarantine Hotel Requirement upon the right to receive services as a tourist in Sweden under Article 36 EEA can perhaps be more easily justified than a restriction the Quarantine Hotel Requirement may impose upon the free movement rights of workers or the right to use one's property (see paragraph 55 above), which in turn might encroach directly upon fundamental rights.

6.2 Does Chapter VI of Directive 2004/38 allow general regulations safeguarding public health and restricting individual rights? (Question 4)

58. By its fourth question, the Supreme Court of Norway requests the EFTA Court to clarify whether Articles 27 and 29 of the Directive allow an EEA State to adopt certain general measures restricting the freedom of movement of EEA nationals, i.e. measures which have not been adopted on an individual basis, but which apply to all persons under the (broad) personal scope of the measures in question.

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[56] Concerning Article 5(1)(e) see, for example, ECtHR *Enhorn v. Sweden*, cited above, paragraphs 49-55. Concerning Article 8 see, for example, ECtHR *Gillow v. the United Kingdom*, app. no. 9063/80, paragraphs 47-58, 24 November 1986, and ECtHR *Nada v. Switzerland* [GC], app. no. 10593/08, paragraph 183, 12 September 2012.

59. At the outset and as a general matter, ESA notes that it is settled case law that where uncertainty remains as to the existence or extent of the alleged risk to 'public health', but the likelihood of real harm to that interest persists should the risk materialise, an EEA State may, "*under the precautionary principle, take measures without having to wait until the reality and seriousness of that risk become fully apparent.*"[57]
60. In ESA's view, Articles 27 and 29 of the Directive should be interpreted as meaning that, in a situation such as that at issue in the main proceedings, they do not oppose, in principle, the adoption of such general measures for public health reasons, also for the additional reasons set out below.[58]
61. First, Article 29 of the Directive specifically concerns restrictions on the free movement for public health reasons. It appears from Article 29(1) that the only diseases justifying measures restricting freedom of movement "*shall be the diseases with epidemic potential as defined by*" the WHO. Given that, as noted in paragraph 3 above, the WHO designated the COVID-19 outbreak as pandemic, it seems clear that COVID-19 qualifies as a disease in principle capable of justifying measures restricting freedom of movement pursuant to Article 29 of the Directive and that measures taken by EEA States to fight the spread of the COVID-19 pandemic are therefore not precluded by that provision.
62. Second, nothing in the wording of the restriction concerning provisions for public health reasons listed in these two articles (i.e. Article 27, paragraphs 1 and 4, and Article 29 as a whole) indicates that such general measures would be excluded.
63. Moreover, it is apparent from an analysis of the relevant context that such measures are not excluded when taken for public health reasons. In particular, Article 27(2) provides that the measures taken for reasons of public order or public security must "*be based exclusively on the personal conduct of the individual concerned*". A contrario, such a requirement therefore does not apply to measures taken for reasons of public health.
64. Further, in ESA's view, this is also logical, given the nature of the justification in question and the objective pursued by it. While threats to public policy or in particular public security would normally arise out of individual (rather than

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[57] The *Nordic Info* AG Opinion, paragraph 79.
[58] Ibid, paragraphs 62-73.

collective) conduct, this is clearly different with infectious diseases, the spread of which is not solely dependent on the individual conduct of those infected.[59]

65. In conclusion, Articles 27 and 29 of the Directive should be interpreted as meaning that, in a situation such as that at issue in the main proceedings, they do not oppose, in principle, the adoption of such general measures for public health reasons.

6.3 Suitability and consistency – only certain groups and societal considerations (Questions 5 and 6)

66. By its fifth and sixth question, which can be examined together, the Supreme Court of Norway, in essence, requests the EFTA Court to clarify the significance of the consistency of the measures for the proportionality assessment.

67. As pointed out above, practically all EEA States at some point during the pandemic introduced quarantine requirements for persons returning from travels abroad, including within the EEA. It seems uncontested that this, generally speaking, was a suitable measure to achieve the objective of preventing or limiting the spread of the virus.[60] In order to achieve this objective, the quarantine should be undergone in a suitable place.

68. The Norwegian quarantine hotel scheme, which would later be amended into the Quarantine Hotel Requirement, was first introduced in November 2020 precisely for persons without at suitable place to quarantine, such as persons not residing in Norway. Residents could, as a main rule, quarantine in their own homes.[61]

69. In connection with the preparation of the relevant legislation, the Norwegian Government requested an assessment of the medical justification for the quarantine hotel scheme. Both the Norwegian Institute for Public Health and the Directorate of Health found in their assessments that quarantine hotels could be a useful and proportionate measure when there was no other suitable place to quarantine.[62]

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[59] See also 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, which sought, i.a. as set out in Recital 12, to "*ensure increased coordination among Member States considering the adoption of measures restricting free movement on grounds of public health. To limit restrictions to what is strictly necessary, Member States should, in a non-discriminatory manner and as much as possible, apply those restrictions to persons coming from specific areas or regions particularly affected rather than to the entire territory of a Member State.*"

[60] See, for example, Section 1 of the COVID Regulation.

[61] NOU 2022: 5, page 196-200. Se Request for an advisory opinion, paragraph 31.

[62] Ibid, page 205-206.

70. The scope of the quarantine hotel scheme, however, was gradually expanded during the first half of 2021. Here, it is of special importance that as of 19 March 2021 the Quarantine Hotel Requirement became dependent on whether the travel abroad was "necessary" or "unnecessary", rather than whether the person had a suitable place to quarantine. This distinction between "necessary" and "unnecessary" was applicable when LDL entered Norway on 2 May 2021.

71. It is this restriction whereby persons who had undertaken "unnecessary" travel abroad were obliged to quarantine at a hotel — the Quarantine Hotel Requirement — that is the object of the proportionality assessment in the present case.

72. At the outset, it is important for ESA emphasise that at no point during the pandemic, was the fundamental right of free movement suspended.[63] Consequently, the Quarantine Hotel Requirement, like any restriction on the free movement, must be justified in the standard manner, using the ordinary methodology as for any other restriction before the outbreak of the pandemic.

73. As set out above, the right of entry into an EEA State may be restricted, inter alia, on the grounds of public health, as set out in Articles 27 and 29 of the Directive. However, any derogations to the free movement of persons must be interpreted restrictively.[64]

74. It is apparent from the Request for an advisory opinion (as well as from the reply to the letter of formal notice[65]) that the Norwegian Government seeks to justify the Quarantine Hotel Requirement on public health grounds. ESA observes that, while a State may opt for a high level of public health protection, when a measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the party imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[66]

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[63] For example, as far as ESA is aware, no safeguard measure was taken or purported to be taken by the Norwegian Government pursuant to Chapter 4 of Part VII of the EEA Agreement, which include notification of any such measure to the EEA Joint Committee, see Article 113 EEA.

[64] Case E-15/12, *Jan Anfinn Wahl*, paragraph 117.

[65] See the letter from the Norwegian Government of 7 July 2021, entitled "Response to Letter of formal notice concerning Norwegian restrictions upon entry on the basis of Covid-19" (available at https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Reply%20to%20formal%20notice%20-%2085895.pdf), page 4.

[66] Case E-8/16 *Netfonds*, paragraph 117.

75. ESA submits that both for the suitability and for the necessity of a measure such as the Quarantine Hotel Requirement, it must be assessed whether the measure has been consistently implemented.

76. As regards the *suitability*, if follows from the case law that when a national measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the relevant EEA State to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[67]

77. At the Material Time, Section 4 of the COVID-19 Regulation set out that persons arriving from certain regions or states as defined in its Annex A[68] were required to quarantine for 10 days (see paragraph 38 above). Such quarantine, i.e. the Quarantine Hotel Requirement, is referred to in the COVID-19 Regulation as "entry quarantine" ("innreisekarantene"). Pursuant to the first paragraph of Section 5 of the COVID-19 Regulation (see paragraph 41 above), persons in "entry quarantine" were as a main rule obliged to stay at a quarantine hotel during the quarantine – the Quarantine Hotel Requirement.

78. However, the second paragraph of Section 5 sets out a number of exceptions from the main rule, allowing certain categories of persons to quarantine in their own homes, or in other suitable places. Most notably, persons residing in Norway were exempt to the extent that they could demonstrate that the travel was "necessary". Furthermore, as set out in paragraph 42 above, there were also exceptions for workers coming to Norway who could demonstrate that the employer or contractor ensured a suitable place to quarantine, as well as for persons who could demonstrate strong welfare considerations, asylum seekers, truck drivers, workers on marine vessels coming to a Norwegian harbour to embark, as well as for foreign military personnel.

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[67] Case C-169/07 *Hartlauer*, EU:C:2009:141, paragraph 55, Case C-173/13 *Leone*, EU:C:2014:2090, paragraph 54, Case E-8/16 *Netfonds,* paragraph 117 and Case C-377/17, *Commission v Germany,* EU:C:2019:562, paragraph 89 and the case law referred to therein.

[68] As referred to in the Judgment of the District Court in this case (TOIN-2022-3645), Annex A was at this point in time based on a weekly assessment by the Norwegian Institute of Public Health of the situation in regions or states in the EEA/Schengen, based on the number of cases, as well as an overall assessment of the situation, based on trends in the number of cases and other relevant information. On 2 May 2021, all EEA States were listed in the Annex, with the exception of three regions in Finland. As of 21 June 2021, Norway harmonised the assessment with that of the EU, see NOU 2022: 5 page 232.

79. "Necessary" travels were further defined in the fifth paragraph of Section 5 (see paragraph 43 above), firstly setting out that travelling for work was considered necessary if confirmed by the employer or contractor. Furthermore, the provision set out that travels to Norway for residents working or studying abroad were considered necessary, including for members of the household. Finally, travelling could also be considered necessary in case of "compelling welfare-related grounds", such as spending time with minor children, visiting seriously ill or dying close relatives or attending funerals of close relatives.

80. ESA is not arguing that any exception to a restriction, such as the Quarantine Hotel Requirement, would render it inconsistent and hence unsuitable. As pointed out by the Advocate General in *Nordic Info*, the fact that the contested restrictions in that case did not apply to travel for "essential" purposes did not call their consistency into question. Indeed, a limited number of reasons for travel were recognised as "essential". The scope of that exclusion was, accordingly, not such that it could have prevented the achievement of the public health objective pursued.[69]

81. However, ESA submits that the scope of the exclusions in the present case was much wider, essentially considering all travelling for work as "necessary" if confirmed by the employer or contractor. "Essential" travel, on the other hand, as set out in e.g. Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, was defined much more narrowly as regards workers.[70] Hence, when a measure has as many wide-reaching exceptions as in this case, it is difficult to see how it can be suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner, as required by the case law.

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[69] The *Nordic Info* AG Opinion, paragraph 105. See also, in comparison, Case C-411/22 *Thermalhotel Fontana Hotelbetriebsgesellschaft,* EU:C:2023:490, where the Court found that COVID measures in the form of compensation only of persons required to isolate under national legislation, to the exclusion, inter alia, of migrant workers required to isolate under the health measures in force in their Member State of residence, did not appear to be appropriate to achieve the objective. The compensation of such migrant workers would be just as likely to encourage them to comply with an isolation measure imposed on them, to the benefit of public health.

[70] See recital 18 and point 19 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. See also Communication from the Commission of 30 March 2020: COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy ((2020/C 102 I/02), point 1(b)(2).

82. Indeed, this was also pointed out by the Norwegian Ministry of Justice, as referred to by the COVID Commission:

> "[The Ministry of Justice] *further pointed out the paradox related to the requirement for a quarantine hotel for people returning to Norway after leisure trips, which means that people who test negative on entry are required to stay in a quarantine hotel, while others who test positive can travel to their own home and go into isolation there*. [The Ministry of Justice] *thought the latter was "challenging to justify in terms of infection control". In conclusion, they wrote: If a requirement is introduced to stay at a quarantine hotel exclusively after leisure trips, it could be difficult to justify why it is necessary and proportionate in these cases as long as business travellers are not subject to the same requirements. It must also be possible to provide an infection control justification for why it is better for these people to spend their quarantine in a quarantine hotel rather than in their own home. […] In our view, it is uncertain whether the introduction of a requirement for a mandatory quarantine hotel exclusively for leisure travel will be in line with the EEA rules and human rights. In that case, this requires an infection control justification for why the two groups are treated differently*."[71]

83. The many exceptions meant in practice that persons who posed the same risk of infection were subject to different measures, depending on whether the travel could be considered necessary. As pointed out by the Norwegian Government itself, the purpose of the travel in itself has no implications for the risk of infection the person represents.[72] Applied to the facts of the present case, it appears irrelevant from the perspective of the risk of infection whether LDL had travelled to Sweden for business, for leisure, whether he travelled to make a visit to a relative which

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[71] NOU 2022: 5, page 217. In Norwegian: "[Justisdepartementet] *påpekte videre paradokset knyttet til at krav om karantenehotell for personer som returnerer til Norge etter fritidsreiser, medfører at personer som tester negativt ved innreise, blir pålagt karantenehotell, mens andre som tester positivt kan reise til sin egen bolig og gå i isolasjon der.* [Justisdepartementet] *mente det siste var "utfordrende å begrunne smittevernfaglig". Avslutningsvis skrev de: Dersom det innføres et krav om opphold på karantenehotell utelukkende etter fritidsreiser, vil det kunne være krevende å begrunne hvorfor det i disse tilfellene er nødvendig og forholdsmessig så lenge arbeidsreisende ikke er underlagt de samme kravene. Det må også kunne gis en smittevernfaglig begrunnelse for hvorfor det er bedre at disse personene gjennomfører karantene på et karantenehotell enn i egen bolig. Dette vil særlig kunne være utfordrende i de tilfellene der personer bor alene i egen bolig (ev. der hele husstanden har vært på reise sammen).* […] *Etter vårt syn er det usikkert om innføringen av et krav om obligatorisk karantenehotell utelukkende for fritidsreiser, vil stå seg i forhold til EØS-regelverket og menneskerettighetene. Dette krever i så fall en smittevernfaglig begrunnelse for hvorfor de to gruppene behandles ulikt*." (ESA's emphasis.)

[72] Request for an advisory opinion, para 49.

qualified as a strong welfare consideration pursuant to Section 5 (5) of the Covid Regulation (see paragraph 37 above) or for the reason he did travel (which apparently did not qualify as a compelling welfare-related ground pursuant to Section 5 (5)).

84. ESA also notes that the Advocate General in *Nordic Info* suggests that, where a Member State restricts travel from and to other EEA States on the grounds of their comparatively worse epidemiological situation, consistency requires that it impose similar restrictions on movement to and from the areas within the national territory, with an equally serious epidemiological situation.[73] There is no information about such domestic restrictions in the Request for an advisory opinion, but to ESA's knowledge, no such restrictions existed in Norway at the Material Time.

85. Against this background, ESA submits that the under the circumstances, where only certain groups without regard to their particular risk profile, and only with respect to travels abroad, had to go to a quarantine hotel, but where broad exceptions existed, imposing a requirement to undergo hotel quarantine only for certain travellers, cannot be considered sufficiently consistent and systematic and is not suitable for attaining the objective, and does therefore not appear capable of being justified.

86. In any event, whether or not the measure in question is suitable for attaining the objective, it must also be assessed if it goes beyond that is necessary in order to attain that objective. An obligation to quarantine at home is in ESA's view less restrictive than the Quarantine Hotel Requirement. If quarantine at home was considered sufficient for a person who had been on a "necessary" travel, it is not consistent to require that a person after an "unnecessary" travel, possible even coming from the same destination, and has undergone the same test requirements, is subjected to the Quarantine Hotel Requirement. In the words of the Court, the necessity test consists in an assessment of whether the measure is functionally needed in order to achieve the legitimate objectives of the legislation at the level of protection chosen by the State concerned, or whether this could equally well be

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[73] The *Nordic Info* AG Opinion, paragraph 103. As regards the equally serious epidemiological situation, ESA notes that NOU 2022: 5 page 222 refers to a letter of 23 March 2021 from the Norwegian Institute of Public Health to the Ministry of Health, stating that the number of cases linked to travelling abroad did not appear to be the biggest challenge compared to the domestic spread of the virus. It was estimated that around 5000 persons were infected per week in Oslo, and in that context, a couple of hundred cases linked to travelling abroad was unfortunate, but not critical.

obtained through other, less restrictive means.[74] ESA considers that the inconsistency that persons travelling from the same place, and were subject to the same tests, in certain situations were allowed to quarantine at home, and in other situations subjected to the Quarantine Hotel Requirement, based on whether the travel was "necessary", indicates that the objective could be obtained through a less restrictive means, notably by allowing all persons to quarantine at home, or another suitable place, as defined by the COVID-19 Regulation.

87. Additionally and in the alternative, ESA submits that one specific element of the Quarantine Hotel Requitement went beyond what was necessary to achieve the objective: The fact that a person subjected to the Quarantine Hotel Requirement had to pay a deductible for the stay, as set out in Section 22 of the COVID-19 Regulation (see paragraph 44 above).[75] For adults this amounted to NOK 500 per day, or NOK 5000 per individual adult for the full ten days. In practice, this deductible functioned as an extra cost imposed upon individuals not because of their individual risk profile but solely for the reason that they crossed a border between two EEA States. ESA submits that the deductible made the Quarantine Hotel Requirement more restrictive, most notably in a situation where a person had another suitable place to quarantine. Therefore, this element goes beyond what was necessary. ESA notes that there is no indication that the objective could not have been obtained without the deductible. In fact, it appears that the deductible amounts to an administrative sanction, and ESA notes that the legal basis was indeed placed in the same chapter of the COVID-19 Regulation as sanctions. Furthermore, as a matter of principle, when an EEA State introduces measures that limit the free movement of persons, it should be for the State to finance those restrictions, not the persons whose fundamental EEA rights are restricted. Consequently, ESA submits that requiring persons obliged to stay at a quarantine hotel in the described manner went beyond what was necessary.

6.4 General and simple rules (Question 7)

88. By its seventh question, the Norwegian Supreme Court asks how much weight can be attached to the need to introduce general and simple rules which can be easily understood and applied by concerned parties and easily managed and supervised

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[74] Case E-3/06 *Ladbrokes*, paragraph 58.

[75] See also the Request for an advisory opinion, paragraphs 39 and 40.

for compliance by the authorities, in the drafting of the rules in a pandemic situation such as that at issue in the present case.

89. According to the case law of the Court of Justice, EEA States cannot be denied the possibility of attaining objectives in the public interest such as the protection of public health by the introduction of general and simple rules which will be easily understood and applied and easily managed and supervised by the competent authorities. ESA however notes that this case law seems to mainly concern rules of a technical or specific nature, with a relatively limited impact, such as use of personal watercraft on waters other than general navigable waterways,[76] a prohibition on mopeds, motorcycles, motor tricycles and quadricycles towing a trailer,[77] legislation concerning the establishment of shopping centres,[78] measures adopted by a local public authority restricting access to coffee-shops[79] and a temporal limit on the marketing and sale of cigarettes.[80] ESA considers that the Court should question the relevance of this case law in circumstances such as in the present case, where the rules in question are of a general nature, restricting practically any exercise of free movement between Norway and other EEA States.

90. In ESA's view, the case law concerning general and simple rules is in any case of little relevance, if any, to the present case. On the contrary, the rules in question were far from general, simple and easily understood and applied. The relevant rules were based on a main rule with several exceptions, as well as the distinction between "necessary" and "unnecessary" travels, which appears confusing, subject to frequent changes and fundamentally open to interpretation. The official White Paper registered criticism along similar lines.[81]

91. Consequently, while the case law allows for making general and simple rules which can be easily understood and applied by concerned parties and easily managed

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[76] Case C-142/05 *Mickelsson and Roos,* EU:C:2009:336, paragraph 36.
[77] Case C-110/05 *Commission v Italy*, EU:C:2009:66 paragraph 67.
[78] Case C-400/08 *Commission v Spain*, EU:C:2011:172, paragraph 124.
[79] Case C-137/09 *Josemans*, EU:C:2010:774, paragraph 82.
[80] Case C-126/15 *Commission v Portugal*, EU:C:2017:504, paragraph 84.
[81] See NOU 2022:5 page 11. One of the main findings is described in this way: "*In order to limit infection due to travels from abroad, the authorities introduced drastic measures for individuals. The measures were characterized by haste and constant adjustments. This was demanding both for those who had to design and implement the measures, and those who had to comply with them.*" (ESA's translation. In Norwegian: "*For å begrense smitte ved innreise fra utlandet innførte myndighetene inngripende tiltak overfor enkeltpersoner. Tiltakene var preget av hastverk og stadige justeringer. Dette var krevende både for de som skulle utforme og iverksette tiltakene, og de som skulle etterleve dem.*")

and supervised for compliance by the authorities, and while ESA acknowledges that this consideration may be of prime importance during a pandemic situation, the need for general and simple rules cannot come at the cost of foreseeability and transparency, i.e. compliance with principle of legal certainty.[82] This principle must be adhered to in all situations governed by EEA law.

92. In conclusion, therefore, ESA considers that the need to introduce general and simple rules which can be easily understood and applied by concerned parties and easily managed and supervised for compliance by the authorities cannot come at the cost of the need to comply with the fundamental freedoms and general principles of EEA law, such as the principle of legal certainty.[83]

6.5 The relevance of the deterrent effect (Question 8)

93. By its eighth question, the Supreme Court of Norway requests the EFTA Court to clarify if it is within the legitimate aim, as part of the assessment of whether a measure such as the Quarantine Hotel Requirement is justified, that the restriction could have a deterrent effect for persons contemplating travel abroad.

94. ESA understands the question as covering persons in Norway contemplating travel abroad, as well as persons in other EEA States contemplating travelling to Norway. There is, however, little or no relevant information from the national court as to how this issue comes into play in light of the facts of the case. ESA recalls in that context that "*the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.*"[84]

95. As a starting point and generally speaking, ESA notes that a measure deterring persons from exercising their rights of free movement, constitutes a restriction to fundamental freedoms following from the EEA Agreement that in itself would have to be proportionate in order to be justified.[85] In the present case however, the

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[82] See similarly the *Nordic Info* AG Opinion, paragraphs 87-88.
[83] See e.g. Case E-11/22, *RS* v *Steuerverwaltung des Fürstentums Liechtenstein*, paragraph 45, where the Court referred to "*the general principle of legal certainty inherent in the EEA legal order*".
[84] Case E-9/22 *Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga and Lyfjafræðingafélag Íslands v íslenska ríkið*, paragraph 23.
[85] See, by analogy, Case C-340/97 *Nazli*, EU:C:2000:77 paragraph 59.

measure having the deterrent effect is the Quarantine Hotel Requirement, which clearly, as already set out above, constitutes a restriction on fundamental freedoms.

96. Furthermore, as set out above, it falls to the party imposing the restriction to demonstrate that the measure is suitable to achieve the legitimate objective and does not go beyond what is necessary to attain that objective.

97. The Quarantine Hotel Requirement had the objective of preventing or limiting the spread of the virus. If this measure had a deterrent effect for persons contemplating travelling, that could be of relevance to the assessment of the suitability of the measure. However, firstly, it would be for the public authorities to demonstrate that the measure could have a deterrent effect. Secondly, as addressed above, the measure having the deterrent effect (the Quarantine Hotel Requirement) would in any way not pass the test of being suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.

98. In any case, it seems that a deterrent effect such as that described by the national court would not be liable to be considered necessary. Indeed, ESA notes that a key objective of the EEA Agreement is, according to its fifth recital, to "*provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area*". In principle it can be questioned whether a measure which purpose is to deter this very objective can, as such, be compatible with the EEA Agreement. At the very least, the threshold for justifying such a measure must be very high. Deterrent measures are inherently wide-reaching and are therefore liable in a similar manner to induce those who pose a particular risk and those who do not to refrain from exercising their right to free movement.[86]

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[86] In the same vein, it appears from the official White Paper that the Ministry of Justice had considered that the Quarantine Hotel Requirement was not based on direct public health advice but instead to a large extent had a penal justification and that this was challenging to justify legally. See NOU 2022: 5, at page 219. "[The legislative department of the Ministry of Justice] *believes that questions can be raised as to whether the proposal is sufficiently substantiated in terms of infection control. Professional advice has not been obtained from* [the Directorate of Health] *and* [the Public Health Institute]. [The Ministry of Health] *has given an infection control justification for the proposal, which they have initially based largely on a penal justification.* (...) *The rationale for discriminating based on the purpose of the trip is that the quarantine rules are largely based on trust, and people who deliberately break the advice to avoid trips abroad that are not strictly necessary cannot be shown the same trust. This is the basis for why people who break the travel advice should be ordered to complete the quarantine at a quarantine hotel on their return to Norway, even if the person has*

99. In sum, ESA considers that it is within the legitimate aim as part of the assessment of whether the measure can be justified that a restriction could have a deterrent effect for persons contemplating travel abroad, provided that the measure with such a deterrent effect is suitable to achieve the legitimate objective and does not go beyond what is necessary to attain that objective. In that regard, the national court must consider that deterrent measures are inherently imprecise and therefore particularly liable to go beyond that which is necessary.

6.6 The consequences of a failure to comply with Article 30 and 31 (Question 9)

100. By its ninth question, the Supreme Court of Norway requests the EFTA Court to clarify the implications for the assessment of the lawfulness of the restrictions if individual legal certainty safeguards under Articles 30 and 31 of Directive 2004/38/EC apply to the present case, but were potentially not fulfilled.

101. ESA observes at the outset that there is little or no relevant information from the national court on how or to what extent information was given to LDL pursuant to Article 30 of the Directive.

102. ESA recalls in that context that "*the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.*"[87]

103. Article 30(1) of the Directive entails, in short and for our purposes, that any decision taken under Article 27 of the Directive requires a notification, which must be in writing, that the addressees must comprehend its content and implications,

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access to a suitable place to stay. In our view, this would not be a legally valid justification." (ESA's translation. In Norwegian: *"Som det fremgår av utkastet til r-notat, mener LOV [lovavdelingen] at det kan stilles spørsmål ved om forslaget er tilstrekkelig smittevernfaglig begrunnet. Det er ikke innhentet faglige råd fra Hdir og FHI. HOD har gitt en smittevernfaglig begrunnelse for forslaget, som de i utgangspunktet har basert langt på vei på en pønal begrunnelse. (...) Begrunnelsen for å forskjellsbehandle ut fra formålet med reisen er at karantenereglene langt på vei er tillitsbasert, og personer som bevisst bryter rådet om å unngå reiser til utlandet som ikke er strengt nødvendige ikke kan vises samme tillit. Det er grunnlaget for at personer som bryter reiserådet bør pålegges å gjennomføre karantenen på karantenehotell ved hjemkomst til Norge, selv om personen har tilgang til et egnet oppholdssted. Etter vårt syn vil dette ikke være en rettslig holdbar begrunnelse.*)

[87] Case E-9/22 *Verkfræðingafélag Íslands, Stéttarfélag tölvunarfræðinga and Lyfjafræðingafélag Íslands v Íslenska ríkið*, paragraph 23.

that information must be precise and in full, and that the persons concerned must be informed about appeals.[88]

104. Article 31 of the Directive obliges the EEA States to lay down, in domestic law, the measures necessary to enable EEA nationals and their family members to have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their right to move and reside freely in the Member States on the grounds of public policy, public security or public health.[89] Article 30(2) provides in turn, in order for "*the person concerned to make effective use of the redress procedures*" established under Article 31,[90] "*the competent national authority is required, to inform him in the administrative procedure precisely and in full of the public policy, public security or public health grounds on which the decision in question is based.*"[91]

105. It seems clear that divulging any grounds in this case would not be "*contrary to the interests of State security.*"

106. Case C-136/03 *Dörr and Ünal* of the CJEU concerned similar procedural rules in Articles 8 and 9 of Directive 64/221.[92] There, the Advocate General noted:

> "*The procedural safeguards laid down in Article 9 of Directive 64/221 must not be regarded merely as technical rules unconnected with the substantial rights conferred on individuals. On the contrary, they safeguard and protect those rights. They are therefore fundamental guarantees required to ensure the effectiveness of those rights and of the principle of the free movement of workers. In that sense, they are inseparable from that principle and those rights.*"[93]

107. The CJEU endorsed this view, finding that such procedural "*guarantees are inseparable from the rights to which they relate.*"[94] In the same vein, ESA submits that the procedural guarantees found in Articles 30 and 31 of the Directive are

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[88] Case C-300/11 ZZ, EU:C:2013:363, paragraph 46.
[89] Ibid, paragraph 47.
[90] Ibid, paragraph 48.
[91] Case C-300/11 ZZ, EU:C:2013:363, paragraph 48.
[92] One of the predecessors to the Directive, which it repealed. See e.g. the description in Case E-28/15 *Yankuba Jabbi*, paragraph 56.
[93] Opinion of Advocate General Maduro in Case C-136/03 (1) *Georg Dörr*, (2) *Ibrahim Ünal*, v (1) *Sicherheitsdirektion für das Bundesland Kärnten*, (2) *Sicherheitsdirektion für das Bundesland Vorarlberg*, EU:C:2005:340, paragraph 59.
[94] Case C-136/03 (1) *Georg Dörr*, (2) *Ibrahim Ünal*, v (1) *Sicherheitsdirektion für das Bundesland Kärnten*, (2) *Sicherheitsdirektion für das Bundesland Vorarlberg*, EU:C:2005:340 Paragraph 67.

inseparable from the right to entry and the right to residence, which can be restricted only subject to the conditions set out in Articles 27 to 29 of the Directive.

108. Consequently, ESA submits that Articles 30 and 31 of the Directive preclude restrictions on the right to entry and the right to residence in the form of decisions which do not adhere to the procedural rights conferred by in those provisions.

6.7 Proportionality stricto sensu (Questions 10 and 11)

109. By its tenth and eleventh question, which can be examined together, the Supreme Court of Norway requests the EFTA Court to clarify whether, in the present case, the proportionality assessment under Articles 27 and 29 of the Directive and potentially under Articles 28 and 36 EEA includes an assessment of proportionality in the narrow sense of the term ("stricto sensu") and, if so, what is the legal content and the legal subject-matter to be examined in order to assess whether that requirement is fulfilled.

110. In the previous questions, the principle of proportionality has been examined from the perspective of first, suitability and second, necessity. Those requirements are "*solely concerned with the efficiency of the measures in question in relation to the objective pursued*", which in a case like this also must be seen in light of the level of protection which the public authorities sought to achieve. That said, "*some measures, as 'necessary' as they may be for the purposes of safeguarding certain interests, are simply too taxing on other interests to be acceptable in a democratic society.*"[95]

111. This is where the requirement of 'proportionality sensu stricto' is particularly relevant. Thus, it "*opens a debate about the values that must prevail in a democratic society and, ultimately, about what kind of society we wish to live in.*"[96]As recently observed by Advocate General Emilou, such debate is particularly necessary "*in relation to measures taken during the COVID-19 pandemic, given their unprecedented impact on "the entire population of the Member States.*"[97] In the CJEU's practice, this part of the requirement is typically described in the following

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[95] The *Nordic Info* AG Opinion, paragraph 108.

[96] Opinion of Advocate General Saugmandsgaard Øe in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB* v *Post- och telestyrelsen* and *Secretary of State for the Home Department* v *Tom Watson et al*, EU:C:2016:572, paragraph 248.

[97] See e.g. the opinion of AG Maduro in case C-434/04 *Ahokainen and Leppik*, EU:C:2006:462, paragraph 26.

manner: "*the disadvantages caused [by a restriction] must not be disproportionate to the aims pursued*".[98] The case law of the EFTA Court also supports this. For example, in case E-1/09, *ESA v Liechtenstein*, a case concerning residence requirements, the Court held that such measures must "*be suitable, necessary and proportionate as means to attain those objective*" in order to be justified.[99]

112. In the recent case C-128/22 *BV NORDIC INFO*, concerning certain Belgian COVID-19 restrictions which were somewhat similar to those at issue here, Advocate General Emiliou concluded that proportionality stricto sensu should be assessed. Similarly, ESA considers that proportionality stricto sensu should be assessed in the present case, which entails weighing the interest of public health protection and the right to health of the population against other fundamental rights and freedoms.[100]

113. In sum, while the EEA States enjoy a wide margin of appreciation in the assessment of measures aimed at protecting public health, like the Quarantine Hotel Requirement, under the proportionality stricto sensu test, an EEA State may nonetheless be required to adopt a measure that is less restrictive with respect to the right of free movement in the EEA "*even if this would lead to a lower level of protection of its legitimate interests*".[101]

114. It is ultimately for the Supreme Court of Norway, which is best placed with respect to its overview of all the relevant facts and national rules, to determine whether the Hotel Quarantine Requirement imposed upon LDL complies the proportionality stricto sensu requirement. To ESA, the central elements of that assessment would largely be the same as those identified with respect to whether

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[98] See e.g. Case C-336/19 *Centraal Israëlitisch Consistorie van België e.a. and Others*, EU:C:2020:1031, paragraph 64; Sometimes the CJEU simply states that the measures must be proportionate to the objective pursued. See e.g. Case C-434/04 *Ahokainen and Leppik*, EU:C:2006:609, paragraphs 34-35.

[99] Case E-1/09 *ESA v. Liechtenstein*, paragraph 38

[100] Case C-128/22 *BV NORDIC INFO v Belgische Staat*. That said, Advocate General Emiliou states that the requirement of proportionality strictu sensu "*is generally absent from the 'traditional' case-law of the Court on free movement*". See the *Nordic Info* AG Opinion, paragraph 120. Insofar as the Advocate General is to be taken to mean that the CJEU does not conduct assessments of proportionality *stricto sensu* in its traditional case law on free movement, ESA fails to see that this can be squared with the case law of the CJEU. See, for example, e.g. Case C-434/04 *Jan-Erik Anders Ahokainen, Mati Leppik*, EU:C:2006:609, paragraphs 34-35. That said, it is of course not always necessary to examine the proportionality stricto sensu requirement. For example, this is the case for measures which are either not suitable, not necessary, where the necessity requirement overlaps with the stricto sensu requirement or measures which are clearly proportionate.

[101] Opinion of Advocate General Maduro in case C-434/04 *Ahokainen and Leppik*, EU:C:2006:462, paragraph 26

the Hotel Quarantine Requirement was necessary. However, when assessing the proportionality stricto sensu, the national court must examine also the impact those measures had upon LDL in view of his individual circumstances,[102] including his right to privacy, his right to family life, the direct and indirect economic cost involved and the criminal sanction which is associated with his actions.

115. Lastly, ESA considers, like in *Nordic Info*,[103] that the proportionality stricto sensu requirement must also take into account whether the Hotel Quarantine Requirement was sufficiently flexibly enforced or whether specific individual circumstances should have been taken into account, such as those of LDL, having his own home nearby, where he could quarantine alone, presumably with lower risk of transmitting, or being exposed to, the COVID-19 virus than in hotel facilities which for a period of ten days would house what the Norwegian Government ostensibly considered high-risk individuals.

116. In conclusion, ESA considers that there is a requirement of proportionality stricto sensu in the present case. This requirement entails in particular weighing the need for a high protection of public health during a pandemic against the impact those measures had upon the individual concerned in light of his circumstances, including the impact upon his fundamental rights, the economic cost and the criminal sanction potentially imposed upon him as well as the potential for taking into account factors such as the fact that he had a suitable residence which could serve the same purpose as the Quarantine Hotel.

7 CONCLUSION

Accordingly, ESA respectfully proposes that the Court respond to the Request for an Advisory Opinion as follows:

1. The facts of the case should be assessed under Article 7 of Directive 2004/38. It is for the national court to examine on the basis of all facts of

[102] The *Nordic Info* AG Opinion, paragraph 129.
[103] Similarly, Advocate General Emilou questioned the Belgian measures in the *Nordic Info* AG Opinion, see paragraph 132.

the case whether and to what extent any fundamental freedoms under the EEA Agreement will be additionally applicable.

2. Articles 27 and 29 of the Directive must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, characterised by a pandemic, they do not oppose, in principle, the adoption of general measures restricting the free movement of persons for public health reasons.
3. Under the circumstances of the present case, where only certain groups without regard to their particular risk profile, and only with respect to travels abroad, had to go to a quarantine hotel, but where broad exceptions existed, imposing a requirement to undergo hotel quarantine only for certain travellers cannot be considered sufficiently consistent and systematic and is not suitable for attaining the objective, and does therefore not appear capable of being justified.
4. The need to introduce general and simple rules which can be easily understood and applied by concerned parties and easily managed and supervised for compliance by the authorities cannot come at the cost of the need to comply with the fundamental freedoms and general principles of EEA law, such as the principle of legal certainty, which must be adhered to at all times.
5. The potential deterrent effect for persons contemplating travel abroad could be a legitimate aim when assessing whether a restriction can be justified, provided that the measure with such a deterrent effect is suitable to achieve the legitimate objective and does not go beyond what is necessary to attain that objective. In that regard, the national court must take into account that deterrent measures are inherently wide-reaching and therefore particularly liable to go beyond that which is necessary.
6. Articles 30 and 31 of the Directive must be interpreted as precluding restrictions on the right to entry and the right to residence pursuant to Articles 5 and 7, respectively, which do not adhere to the procedural rights conferred by Articles 30 and 31.
7. The rules on free movement applicable in this case must be interpreted to include, in order to consider any restriction to be justified, a

requirement of proportionality *stricto sensu*. This requirement entails in particular weighing the need for a high protection of public health during a pandemic against the impact those measures had upon the individual concerned in light of his circumstances, including the impact upon his fundamental rights, the economic cost and the criminal sanction potentially imposed upon him as well as the potential for taking into account factors such as the fact that he had a suitable residence available.

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