EFTA Court
1 rue du Fort Thüngen
L-1499 Luxembourg

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

IN CASE E-5/23

LDL

v

Påtalemyndigheten

WRITTEN OBSERVATIONS OF LDL

LDL, pursuant to the second paragraph of Article 97 of the Rules of Procedure of the EFTA Court, represented by Mr. John Christian Elden, advokat (H), Mr. Olaf Halvorsen Rønning, advokat, both of the Norwegian Bar, has the honour of submitting the following Written Observations to the EFTA Court on the questions referred for an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Norges Høyesterett (Supreme Court of Norway) by decision of that Court of 7. June 2023.

Oslo, 19 September 2023

1 INTRODUCTION AND OVERVIEW

1.1 Introductory remarks

1. The request for an advisory opinion in the present case arise from appellate proccedings before the Supreme Court of Norway (the referring court), in which LDL is accused of failing to abide by restrictive measures implemented by Norwegian authorities under the Covid-19 health crises.

2. Specifically, it relates to the omission of LDL, a Swedish citizen living in Norway, having travelled to Sweden to see his family, to undertake a quarantine period in a particularly designated hotel at his return to Norway. Instead, he travelled to his house in Norway, in which he at the time was alone for the duration of the quarantine period and undertook his quarantine there.

a. Facts of the case

3. Regarding facts, reference is made to the referring court's statements of the facts of the case.

4. As to the facts regarding the alleged transgression of LDL, the facts as set out by the referring court is sufficient to allow the EFTA court to assess the matter.

5. Furthermore, the referring court's account of the facts regarding the justification of the restrictive measures is sufficient for the EFTA court to asses the matter.

6. However, some supplements regarding facts of the national regulations concerning the implementation of the restrictive measures by way of general measures, and not by individual measure, is needed.

7. As set out in the referring court's para 50, the obligation to conduct the quarantine period in a quarantine hotel was regulated in the Covid-19 regulation section 5, with corresponding regulation in Circular g-2021-12.

8. In Section 5 paragraph 2 litra a and c allowance is made for travel outside Norway for necessary reasons, as set out in paragraph 33 of the Request. Furthermore Section 5 paragraph 5 states that a travel can be deemed necessary on account of compelling welfare-related grounds. In addition, under Section 5 paragraph 2 litra e, compelling welfare-related grounds could exempt travelers from having to stay in a quarantine hotel.

9. Since this provision is not quoted in the Request, the wording in the Norwegian as well as an unofficial translation to English is provided below:

> *"Plikten til å oppholde seg på karantenehotell gjelder ikke for personer som oppfyller vilkårene i § 4d og som:*
> *[...]*
> *e. kan dokumentere sterke velferdshensyn, og har et egnet oppholdssted der det er mulig å unngå nærkontakt med andre, med enerom, eget bad, og eget kjøkken eller matservering, og ved innreisen kan fremlegge bekreftelse på at oppholdsstedet oppfyller vilkårene fra den som stiller oppholdsstedet til disposisjon"*
>
> *"The obligation to stay at a quarantine hotel shall not apply in respect of persons who fulfil the conditions in Section 4d and who:*
> *[...]*
> *e. are able to document compelling welfare-related grounds, and have a 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, and, upon entry, are able to present a confirmation from the person who makes the location available that the location fulfills the aforementioned requirements"*

10. The supplicative regulation in the Circular referred to by the referring court sec 50 supplies further regulations as to what under the above mentioned sections of the Covid-19 regulation could be considered to be “sterke velferdsmessige hensyn”, both in relation to sec 5 paragraph 2 litra c and in relation to sec 5 litra e.

11. In the Circular g-2021-12, attached as an appendix to this written submission, the situation regarding the particular situation of LDL, him wanting to travel to see his family which he had been separated from for years, are specifically regulated. In sec 2 a of the Circular, one reads the following

> *Besøk til ektefelle, kjæreste eller andre nære relasjoner som ikke er alvorlig syk anses ikke som sterke velferdshensyn i denne sammenheng.*
>
> *[Unofficial english translation]*
> *Visit to spouse, girlfriend, or other close relations whom are not seriously ill is not to be considered as compelling welfare-related grounds in this context .*

12. Furthermore, in addition to the applicable material rules not allowing for considerations relevant to the assessment of proportionality under EEA law, the issue of procedural safeguards regarding the implementation of the civil law obligation to undertake quarantine in the designated quarantine hotel, this issue was in particular discussed under the legislative process leading up to the law allowing for such measures.

13. In *Prop.62 L (2020–2021) Midlertidige endringer i smittevernloven (oppholdssted under innreisekarantene mv* sec 5.3, the travaux preparatoire explicitly holds that such an obligation is implemented on the individual traveler without any decision, and that no possibility of decisions on exemption in individual cases are implemented,

> *Etter dagens regler følger plikten til å oppholde seg på karantenehotell, og unntakene fra denne plikten, direkte av covid-19-forskriften § 5. Det treffes derfor ikke vedtak overfor den enkelte tilreisende. Hvis det åpnes for å gjøre unntak i enkeltsaker, enten i tilknytning til hvor karantenen skal gjennomføres eller egenandel og kostnadsdekning, antar departementet at det kan bli behov for å kunne fravike forvaltningslovens saksbehandlingsregler for enkeltvedtak*
>
> *[Unofficial english translation]*
> *Under the current rules, the obligation to stay in a quarantine hotel, and the exceptions to this obligation, follow directly from section 5 of the covid-19 regulations. No decision is therefore made regarding the individual traveler. If it is to be opened for making exceptions in individual cases, either in connection with where the quarantine is to be carried out or deductibles and cost recovery, the ministry assumes that there may be a need to be able to deviate from the administrative law's case management rules for individual decisions*

14. Accordingly, in the view of the defense, neither the material conditions nor the procedural safeguards gave any possibility to consider the individual circumstances in the individual cases, making the restrictive measure of a general measure, otherwise unknown in Norwegian administrative law.

2 RELEVANT PROVISIONS OF EEA LAW

2.1 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

15. Recitals 1,2,3,7,22,25 read

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a

tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

16. Articles 1, 4,5,7,27,29,30,31 read

Article 1

Subject

This Directive lays down:

(a)the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b)the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c)the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 4

Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5

Right of entry

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

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(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 Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d)he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

CHAPTER VI

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27

General principles

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

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous

police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 29

Public health

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.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30

Notification of decisions

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.

Article 31

Procedural safeguards

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.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

— where the expulsion decision is based on a previous judicial decision; or

— where the persons concerned have had previous access to judicial review; or

—where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

3 REPLY TO QUESTIONS

3.1 Question 1

17. The referring court asks under which provision of the CD the restriction of rights in question should be assessed.

18. In the view of the defence, the assessment of restriction of rights should be assessed in light of articles 4, 5 and 7 of the CD.

19. As apparent from the referring court's account of the facts, LDL is a Swedish citizen, residing and working in Norway. The restrictive measures in question would serve to deter him from exiting Norway to visit his family in Sweden, and likewise deter him from re-entering Norway upon return to his home, cf articles 4 and 5 Furthermore, restrictions on his possibility to visit his family serves to make use of the right to residence in another member state less attractive, cf article 7. Taken together, the restrictions thus pose an interference with the fundamental rights of freedom of movement of workers and Union citizen under the CD.

20. The issue for lawfulness of the restrictions should be assessed in the light of articles 27, 29, 30 and 31 of the CD.

21. The defence thus suggest that the EFTA court reply that the assessment of restrictions should be made in reference to the CD articles 4,5 and 7, and the assessment of lawfulness of the restrictions in reference to the CD articles 27,29,30 and 31.

3.2 Question 2

22. The referring court asks about the relationship between LDLs rights under the CD and under EEA agreement art 28 on free movement for workers and EEA agreement art 36.

23. In the view of the defence, the EEA agreement art 28 and 36 does not confer more extensive rights to LDL of relevance for the underlying matter, and as such raises no separate issue.

24. The defence suggests that the reply of the EFTA Court should be that the EEA agreement art 28 and 36 does not in this matter confer upon LDL more extensive rights that under the CD.

3.3 Question 3

25. The referring court asks about the relationship between LDLs rights under the CD and EEA agreement art 36.

26. In the view of the defence, with reference to the observations regarding question 2, the EEA agreement art 36 does not confer more extensive rights to LDL of relevance for the underlying matter. In any way, it would appear that the restriction on the right to travel to receive services is an inevitable consequence of the restriction on free movement, cf C-197/11 and C-203/11 para 64, and as the right to receive services in this matter in any case appears to be entirely secondary to the restriction on freedom of movement, jf C-339/15 para 58, no separate examination of the restriction on freedom to travel to receive services is necessary.

27. The defense suggests that the EFTA court's reply should be the assessment of restriction of rights should be made in reference to the CD.

3.4 Question 4

3.4.1 Introductory remarks

28. The referring court asks if the CD prohibits the introduction on restriction on rights with the objective of safeguarding public health in the form of general regulations, or whether these possibilities in the directive is limited to individual measures.

29. Firstly, it must be clarified that the restriction in question is the civil law obligation under the Norwegian act on the control of communicable diseases with respective regulations to undergo the period of quarantine at the particularly designated quarantine hotel. As such, that the obligation to undergo such quarantine was enforced i.a. under the threat of criminal sanctions have bearing on the proportionality of the national regulation. However, such criminal sanctions are not in itself the restriction in

question, and cannot be of paramount importance when assessing the issue of whether the imposition of the civil law obligation to undergo quarantine at the designated quarantine hotel serves to make the exercise of fundamental freedoms less attractive and thus being a restriction under the EEA law.

30. Furthermore, for the avoidance of doubt, restrictions such as the one in question fall within the scope of "restrictions" as regulated under the chap VI of the CD, not merely encompassing "removal or refusal to leave", but any kind of restriction on free movement, cf the travaux preparatoire of the CD, COM/2003/0199 final, amendment 72.

3.4.2 Substantive remarks – general measures

31. In the view of the defence, the CD precludes restrictions in the form of general measures. This follows form the wording of the CD, the purpose and context of the CD, and the case law of the EU court.

32. The wording of the CD supports strongly supports the argument that the CD precludes restrictions in form of general measures. As the conditions for restrictions on rights are regulated in chp VI of the CD, the wording of these clauses must be decisive in the interpretation of the permittable restrictions. In this context, we would furthermore like to stress that restrictions on fundamental core rights in the EEA/EU area must be interpreted restrictively, cf for instance C-368/20 para 64.

33. The wording of art 27 gives the general condition for restrictions on rights. As can be seen, the article regulates different conditions of restrictions on the basis of different grounds. In art 27 (2) second paragraph, the CD sets out the requirement that the personal conduct of the person concerned by the restrictions as permitted under art 27 (1) must pose a sufficiently severe threat to society, and in the last sentence, it is expressly stated that justifications for restrictions isolated from the particulars of the case cannot be permitted.

34. In the view of the defence, it is clear that these regulations on restrictions refer not only to the measures explicitly regulated in the first paragraph of art 27 (2), but as it contains no delimitations on which grounds it refers to, it can only be read as applying to all restrictions as regulated under art 27.

35. Furthermore, the wording of the articles 30 and 31 strongly supports the argument that only individual measures might be allowed restricting freedom of movement. In both of these articles, the wording of the CD refers to the obligation to notify the individual concerned of the reason relied upon by the authorities, and the obligation to allow for redress procedures at a national level assessing the legality of the decision. Both articles refers to "the decision", and furthermore use language such as "decision taken against them", and "decision in their case". The wording can only be reasonably read as referring to an individual decision required under the CD.

36. Case law of the EU court further establishes such a requirement only to rely on individual measures restricting freedom of movement rights under the CD. In the case of Case C-202/13 Mccarty and others [GC] the EU court held that:

> *By virtue of Article 27 of Directive 2004/38, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal must be based on an individual examination of the particular case (judgment in Metock and Others, EU:C:2008:449, paragraph 74). Thus, justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention are not to be accepted*

37. In the light of EEA agreement art 6 and the corresponding case law, cf for instance C-897/19 PPU para 50 which holds the obligation to ensure as uniform interpretation as possible of corresponding provisions in the EEA agreement and corresponding EU law.

38. Furthermore, this interpretation is supported by the purpose and context of the CD.

39. The purpose of the CD, as set out in the preamble sect 25, is to ensure a "high level of protection of rights of Union citizens", and furthermore states that the CD is based on the "principle that any action taken by the authorities must be properly justified". Accordingly, a reading of the CD allowing for general measures taken without any form of individual considerations, cannot be reconciled with the purpose of the CD. As such, the CD appears to be based on a notion of exhaustive rights of the individual citizen. If allowing member states or other signatories to unilaterally not only make individual restrictions in individual cases, but general regulation departing from the regulation of the CD, this would undermine the entire purpose of the CD.

40. The existence of the Covid-19 health crisis cannot in itself justify such a depart from the wording and stated purpose of the CD. Doubtlessly it appeared as a very severe crisis. However, in a EU and EEA area based on the fundamental right of free movement, such a crisis cannot be met with general measures restricting free movement, dependent only on the crossing of borders. It will not only challenge the individual right of free movement, but serves as a threat to the functioning of the EU and EEA area in itself. Also in the future, individuals, businesses and member states must know they can rely on their right to free movement, also in times of crises.

41. Although it must doubtlessly be recognised that a health crisis such as Covid-19 made severe measures necessary, the design and application of such measures must comply to fundamental principles of EU and EEA law. Faced with challenges such as Covid-19, the authorities must balance the burden of restrictive measures on the individual against the potential effect containment of spread of disease among the greater population. However, also under such circumstances as the Covid-19 health crisis, this must be a genuine balancing act. The same way individual rights must to an extent yield to the interest of the greater population, so must the interest of the greater population also take into account certain individual rights. Failing to do this, restrictive measures might lose its legitimacy and trust. Accordingly, measures taken by governments must, to an extent, take into account individual circumstances. This cannot be done by way of general measures. The option of applying for an exemption

from such strict measures must be a minimum to ensure both the reasonableness of such severe measures in individual cases, but furthermore also the trust and legitimacy of such measures among the broader population.

42. The context of the CD furthermore supports the interpretation that only individual regulations are allowable under the CD chp VI.

43. Firstly, as set out above, the individual procedural safe guards the CD contains, would be rendered meaningless if the national authorities could circumpass them establishing a general measure regulating individual rights. In particular read in the context that EU law requires the assessment of individual circumstances in an *in concreto* assessment of the proportionality of measures restricting fundamental rights in the EU and EEA law, and the requirement in CD art 30 (2) that the individual concerned are entitled to be informed "precisely and in full" of the reason for the measure taken against them, this would not make sense if the national authorities would not be obligated to make individual decisions in matters such as these.

44. Secondly, the system of redress clearly presupposes the existence of an individual measure. As set out in the art 31 (3), the CD requires the availability of redress proceedings, in which the legality of the measure, the facts and circumstances on which it is based, and the proportionality of the measure must be tried. The concept of redress proceedings indicates that the decision on the matter must be taken beforehand, thus containing an assessment of i.a. the individual proportionality of the measure. If not, the "redress" procedure would in fact be a first instance decision, and not a review of the legality of the administrative decision made beforehand. The understanding that CD chp VI allows for general measures, would thus transfer the burdens and obligations on making first instance decision on i.a. proportionality from the national administration to the national courts. Not only would this account for a shift of power from the authorities to the court, relinquishing the traditional administrative task of administrative decision making to the courts. Furthermore, such a new process, national courts being first instance decision makers, would be incompatible with traditional review proceedings of the legality of administrative

decision in member states. Such an approach might serve to overturn the established legal order of national states being parties to the CD.

45. From the view of the defence, the contention that the criminal proceedings in which breaches of civil law obligations incompatible with EEA law are enforced by the imposition of criminal sanctions in itself constitutes the restriction in question cannot be accepted by the EFTA court. In the view of the defence, it is the civil law obligation mandating the individual to conduct his or her quarantine at the designated quarantine hotel which constitutes the restriction on freedom of movement rights. The enforcement of civil law obligations incompatible with EEA law by way of criminal sanctions is in itself in contravention with EEA law, cf for instance C-368/20 para 97. One cannot, however, from this infer that only the imposition of criminal responsibility is the sole issue in which EEA law issues arise.

46. Lastly, in the view of the defence, chp VI precludes general measures as restriction on free movement rights. However, in any case, presupposing there is a limited option for nation states to allow for general restrictions of a traditional mass regulation, such severe and restrictive measures as the one in question cannot be imposed by national authorities without the possibility of individual decision making process. Thus, if supposing not all but only the most severe restrictive measures require individual measures, restrictive measures such as the one in this case will in any case require such individual measures.

3.4.3 Concluding remarks

47. Accordingly, in the view of the defence, the wording of the CD; relevant case law, the purpose and the context of the CD all support that only individual measures, by way of individual decisions taking into account the individual circumstances of the individual concerned and the risk he or she pose, can be allowable to restrict rights in such a manner as the measures in questions.

3.4.4 Suggested reply

48. The defence suggests that the EFTA Court replies that the chapter VI of the CD does not allow for restriction of freedom of movement rights in the form of general regulations.

3.5 Question 5

3.5.1 Introductory remarks

49. The question concerns the issue of suitability, and raises in essence the issue of the importance of possible other either more restrictive or less restrictive measures in the assessment of the suitability of the restrictive measures in questions.

50. In the view of the defence, the question should be answered with reference to the consistent case law of the EFTA Court and the EU court, holding in essence that in order for a restriction on fundamental rights under the CD or EEA agreement to be deemed lawful, it must meet the criteria of (1) necessity, (2) suitable hereunder being consistent and (3) proportional.

3.5.2 Preliminary remarks

51. In must firstly be noted that the question is framed in an hypothetical manner. However, either this hypothetical being true or not, it has in our view no relevant impact on the assessment the EFTA court must make as to the reply.

52. Under well established EFTA Court case law, in order for a measure to he proportionate, no less restrictive measures equally capable of attaining the same level of protection must be established, cf for instance E-16/10 para 81 and 84.

53. In this case, the Norwegian authorities have assessed these measures, and found them to adequately meet the level of protection which the Norwegian authorities aim for. Thus, no stricter measures, presupposing the same wanted level of protection, would be allowable. Accordingly, the hypothetical question whether more restrictive measures could have been allowable, is moot.

54. It does then not have any importance for the reply to the question as to whether national authorities could have aimed for a higher level of protection, and if so which hypothetical restrictive measures under such an hypothetical higher level of protection would be proportionate. Neither the EFTA Court nor the national courts should make such hypothetical assessments.

55. In the view of the defence, the decisive factor for the assessment of the underlying matter standing before the national courts is the general requirements under the established case law from the EFTA court on the assessment of suitability, and in particular whether the measures were consistently implemented.

3.5.3 Substantive remarks

56. In the view of the defence, restrictive measures such as this one must comply with the requirement of consistency, even presupposing more stringent measures could be implemented.

57. As such, EEA member states are under an obligation to draft restrictive measures in a manner consistent with EEA law. Accordingly, if drafting restrictive measures of a less stringent nature, the national authorities are obligated to also make such measures conform to the principles of necessity, suitability and proportionality. Restrictive measures failing to meet such requirements cannot be justified by reference to the measures being less restrictive that other measures considered by the authorities.

58. In the view of the defence, what is decisive for the assessment of the underlying dispute is again the general requirements from the established jurisprudence of the EFTA Court and the requirements for suitability, including the requirement of concistency. This means that an assessment must be made of whether the authorities, by designing these measures in this way, at the same time allowed similar behaviour with the same risk to public health, in a way that meant that the measures cannot be considered consistent and thus suitable,

59. When assessing whether the measures according to this test can be regarded as consistent, in the defender's view, decisive emphasis must be placed on the extent to

which other behaviour posed a threat to public health, paramount weight must be placed on the risk of spread of disease this behaviour entailed. If the risk to public health of allowable behaviour is comparable to risk of public health to not allowed under restrictive measures, the onus will be on the authorities to justify such differential treatment. Although not all such differential treatment in itself can be considered sufficient to make a measure inconsistent, such differential treatment of comparable situations would be inconsistent if found to be of a major scale.

3.5.4 Suggested reply

60. The defence suggests that the EFTA court replies that the EEA law assessment of the suitability of the restrictive measures taken must be assessed in the light of the general obligation for measures restricting rights to conform to the requirement of consistency. Considerations made by national authorities as to the suitability of more restrictive measures does not have any bearing of the assessment of whether the chosen measures meets the requirement of consistency.

3.6 Question 6

3.6.1 Introductory and substantive remarks

61. The referring court ask about the significance of the overall strategy, which is in essence about the understanding and application of the requirements of consistency, which is exhaustively commented on in under question 5.

62. In the view of the defence, the Court should reply that the assessment of whether the restrictive measures comply with the requirement of consistency should take into account that the contested restrictive measures formed part of an overall strategy for control of communicable diseases. In this assessment, note must be taken as to the national authorities priorities of which groups should be given priority.

63. However, the priorities of the national authorities, and their drafting of the legislative instruments invoked in setting such priorities into practise, must comply with EEA law. As such, the EEA obligates the national authorities to ensure that all measures, including those implemented within an overall strategy, comply with the requirements of necessity, suitability (including consistency) and proportionality. This does not fully preclude that restrictive measures treat similar actions of the same potential infection risks in different manner, where limited or particular personal or public interests might give grounds for such limited differential treatment. Limited allowances for particular groups, for instance persons residing in border areas, cannot it itself make such priorities inconsistent or otherwise incompatible with EEA law. More extensive exemptions for larger groups in the society, to an extent which have the potential to undermine the effect of restrictive measures in question, will however necessitate a stringent assessment as to whether such priorities will be in keeping with in particular the requirement of consistency.

3.6.2 Conclusion – suggested reply

64. The defence suggests that the EFTA court replies that the EEA law assessment of the suitability of the restrictive measures taken must be assessed in the light of the general obligation for measures restricting rights to conform to the requirement of consistency. Under this assessment, note must be taken as to whether the measures in question was part of an overall strategy. Less restrictive regulation for limited and specific groups is not in principle in contravention of the requirement of consistency, but grander scale exemptions from restrictive measures will render such measures inconsistent under EEA law.

3.7 Question 7

3.7.1 Introductory remarks

65. The referring court asks in essence about the use of general and simple rules in legislation in the context of a health crisis.

66. It is the view of the defence that in any legislative process, either in the context of a pandemic or not, must allow for drafting of rules that are practicable. However, there are limits to how much weight can be placed upon the interest of drafting practicable rules. National authorities cannot legitimise substantial legislative choices, restricting fundamental rights, under the pretext of making rules practicable both for the population and the authorities.

3.7.2 Substantive remarks

67. Under the established case law of the EU Court, EU law allows for national legislation to be drafted in a manner in order to be practicable, being easily managed and supervised by authorities, cf for instance C-400/18 Infohos para 65.

68. However, the substantive contents of the legislation cannot be set first and foremost according to such principles, for example by way of general measures, cf for instance the same judgment para 50. The option of the legislature to draft laws in such a manner that they are easily understood and managed does not amount to an exemption from the obligation national authorities are bound by to legislate in keeping with EEA law principles, such as maintaining the proportionality, suitability and necessity of restrictive measures.

69. In a case such as the one in question, one must of course keep in mind the impact of the covid19 health crisis, which at the time was exerting a great pressure on the national authorities and their decision making capabilities. Furthermore, the need in the population for rules easily understood, where doubtlessly considerable.

70. However, in the light of the restrictive nature of the measures, interfering with key fundamental rights over a prolonged period of time, the onus on the national authorities to supply legislative solutions based on balanced and fair proportionality assessments should weight heavily. Substantial legislative choices limiting the fundamental rights of individuals under the EEA agreement cannot be justified solely with a reference to a perceived need for drafting of rules which are easily understood

and enforced. Allowing for a too extensive emphasis put on such consideration would serve to undermine the EEA law obligation for legislation in keeping with the requirements of EEA and EU law, and risk eroding the individual protection such EEA and EU law gives to individuals.

3.7.3 Suggested reply

71. The defence suggests that the EFTA court replies that drafting of rules with a view of making them easily managed and supervised by authorities will not in itself render such rules incompatible with EEA law. However, substantial legislative priorities, in particular regarding interference in fundamental individual rights, cannot be made solely with reference to the advantage of easily manageable rules. Fundamental rights such as the ones in question can in principle not be restricted solely or to a great extent with reference to the need for practicable rules.

3.8 Question 8

3.8.1 Introductory remarks

72. The referring court asks in essence whether the *deterrent effect* on legitimate exercise of freedom of movement which the restrictive measures had, could be legitimized and justified under the allowance EU law makes for national states to draft legislation which is easily enforced.

73. The question from the referring court refers to the published justification the Norwegian government had for the relevant measures, as set out in the referral sec 43, where the Norwegian authorities assumed that the measures would have a deterrent effect against people exercising their rights under the freedom of movement in the EEA area, which would reduce journeys and potentially thus also the overall risk of infection.

74. The Norwegian authorities therefore tried to justify that intrusive travel restrictions such as quarantine hotels would mean that more people would refrain from traveling on otherwise legitimate journeys to the EU_EEA area, because the people would

perceive the strict infection control measures afterwards as dissuasive. In the view of the Norwegian authorities, this could have an infection prevention effect, as such a possible effect would reduce the number of trips, and thereby reduce the possibility of infection from abroad.

75. In the defence's view, the question from the present court must be answered negatively, as imprecise broad, general and very intrusive restrictions on the population's right to free movement such as the present cannot be allowed.

3.8.2 Substantial remarks

76. In the defence's view, the question from the present court must be answered negatively, as imprecise broad, general and very intrusive restrictions on the population's right to free movement such as the present cannot be allowed.

77. Firstly, it follows from the general principles for free movement in the EU and EEA area.

78. As indicated at the outset, the right to free movement in the EU and the EEA area is the fundamental right under the agreements. Any exception to this must be interpreted strictly, as limited as possible, and with strict requirements for proportionality. A broad and unspecified deterrent measure inducing citizens in the EU and the EEA area not to make use of their fundamental right to free movement, under the threat that this will entail strict infection control measures which are otherwise not strictly necessary, is not in line with these overarching principles.

79. Furthermore, the wording of the CD in itself precludes such a reliance on the deterrent effect of restrictive measures. In article 27 (2) second section, the CD specifically bans member states from relying on the general preventive effect of measures under the article restricting the rights conferred to individuals under the CD.

80. This applies in particular to all the time measures based on such justifications of a deterrent effect from exercising fundamental rights under the EU and EEA regulations, in particular must be assessed in the light of general legal certainty

standards, see for instance Joined Cases C-72/10 and C-77 /10 section 74, such regulations cannot permitted

81. The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavorable consequences for individuals and undertakings (see, to that effect, Case C-17/03 VEMW and Others [2005] ECR I-4983, paragraph 80 and the case-law cited

82. In the view of the defense, such a manner of drafting restrictive measures, when these measures interfere with the fundamental rights under the EU and EEA law, is in clear contradiction to the interest of predictability and rule of law the common European legislative instruments otherwise are built upon. That is firstly because Norwegian authorities here solely build upon an *assumption* that the measures have such an intended effect, and secondly have no assessment of the broader impact such deterrent effect might have, including no assessment of the scope and character of such impacts.

83. Such restrictive measures with only a deterrent effect can have the effect that people with a great and legitimate need to travel, and such travel with home quarantine could be carried out properly in terms of infection control, but where the measure will be perceived as disproportionately burdensome, will refrain from travelling. This can also happen where, as in our case, the person has a perfectly adequate place to complete the quarantine at home. Conversely, we can similarly imagine that people who experience quarantine hotels as less burdensome will not be affected by the measure in the same way.

84. This means that the effect of the travel restrictions in question are linked not to the risk of infection or the need to travel, but to the individual's assessment of how burdensome a stay in a quarantine hotel will be for him or her.

85. CD recital 25 furthermore sets out that the principle that "*any action taken by the authorities must be properly justified*", in relation to restrictions at set out in chp VI. Applying general restrictions out of deterrence, and not on the measures' risk reducing

capabilities, is in itself in contravention with such principles. That is especially true, in the light of the uncertain effect such general dissuasive measures might have, as set out above.

86. We would like to in particular point out that a restrictive measure having deterrent effect on the individual right to free movement, must clearly be distinguished from general recommendations to refrain from unnecessary travel. Although such general recommendations perhaps might also constitute «restrictions» even lacking any effective consequences if not abided by, such general recommendations serve to enable the individual considering travel to make his or her own decision, which will be made without the possible negative effect of deterrent restrictive measures.

87. Furthermore, implementing restrictions on the basis of its "deterrent effect" on otherwise lawful use of the right to freedom of movement cannot be justified under the EFTA and EU court case law allowing drafting of rules "*which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities*", cf for instance C- -110/05 para 67.

88. As such, restrictive measures designed to have a deterrent effect on otherwise lawful conduct, cannot be said to be "easily understood and applied" by the individuals concerned. On the contrary, the design of rules such as this makes it more challenging for the individuals concerned to apply such rules and to make informed decision on how to act and behave.

89. Neither can such rules be justified as "easily managed and supervised by authorities". Restrictive measures having a "deterrent effect" on the population's actions, disincentivizing them from doing what are their right under the EEA agreement, might appear as a convenient for the authorities of the member states. However, such administrative benefits cannot outweigh the detrimental effects such methods of public governance will have on rule of law principles.

90. Summing up, it is the view of the defense that severe restrictive measures, based on having deterrence as its effect, hindering citizens of Europe of taking advantage of their fundamental right to free movement, cannot be acceptable in a rule of law society. If public recommendations are found to be insufficient, national government

retain the possibility of setting out restrictions and prohibition on travel to safeguard public health by way of legislation. Such legislation must be in keeping with fundamental EU law principles, herby proportionality requirements and rule of law principles. Restrictive measures with primarily, but uncertain, *deterrent effect* on the lawful exercise of fundamental EEA rights does not have a place in EEA law.

3.8.3 Suggestion for reply

91. The defence suggests that the EFTA court replies that the potential deterrent effect of restrictive measures in response to lawful exercise of free movement rights, which the authorities consider to be undesirable travel, does not lie within the permitted remit of national authorities when implementing measures restricting enjoyment of free movement rights, either under the assessment of enforceability and control or any other assessment under EU and EEA law.

3.9 Question 9

3.9.1 Introductory remarks

92. The referring court asks in essence about the requirement under the art 30 and 31 of the CD to about the effect if such safeguards are found not to be met.

3.9.2 Substantive remarks

93. In the view of the defence, the compliance with procedural safeguards requirement is a prerequisite for the legality of restrictive measures under chp VI of the CD. Without the procedural safeguards in art 31 and 32 being complied with, the restrictive measure in question must be found to be incompatible with the EEA and EU law obligations.

94. This follows firstly for the wording of the CD. In article 27 (1), it is held that restrictions from freedom of movement is contingent on being "subject to the provision of this Chapter". Accordingly, all obligations the provisions of the chapter set, must be complied with in order for the restrictions to be lawful under the chapter.

95. The purpose of the CD furthermore supports this assertion. As set out in the preamble sec 25, the purpose of the CD, including the regulations in chap VI, is to specify in detail the safeguards in order to ensure a high level of protection of the rights to individuals under the CD. An understanding that failure to comply with such key provisions on basic procedural rights should be without any effect would render the protection to the individual which the chapter provides, meaningless.

96. The context furthermore supports this understanding. As apparent from the overlapping nature of the material and procedural regulation of restrictions, the regulation of restriction constitutes a whole. As such, one cannot isolate either the material aspects or the procedural aspects of the regulations, and treat each one separate. In the view of the defence, the art 27 and 29 gives the material regulation on restriction, and must be viewed together with the procedural safeguards of art 30 and 31. The procedural safeguards ensure that the national application of the material rules is in keeping with the EEA and EU law requirements, and thus serve as a fundamental material right for the individuals concerned.

97. Accordingly, any restriction without procedural safe guards as set out in the chp VI would be rendered unlawful under EEA and EU law.

3.9.3 Conclusion – suggested reply

98. The defence suggests that the EFTA court replies that if individual legal procedural safeguards under the Directive article 30 and 31 are not fulfilled for a restrictive measure, it would render that restrictive measure unlawful under EEA law.

3.10 Question 10

3.10.1 Introductory remarks

99. The referring court asks about the requirement of an assessment of the proportionality of the measures *stictu sensu*.

100. In the view of the defence, it is well established EU and EEA case law that in order for restrictions of EU/EEA rights to be lawful, such restrictions must also be proportionate *strictu sensu*. There is no reason to depart from this approach in matters such as the one at hand

101. As such, the defence suggests that the EFTA court should reply that there is a requirement of proportionality in the narrow sense of the term in the present case

3.10.2 Substantial remarks

102. The requirement that national states under the EEA agreement must, when implementing restrictions on rights as established under the agreements, asses the proportionality *strictu sensu* follows from the wording of the CD, the context and purpose, and the case law of both the EU and EFTA court.

103. The wording of the CD, in article 30 (3) on redress proceedings, explisidly refers to the member states obligation to conduct a full assessment of the legality of the restrictive measures, including the proportionality of the measure.

104. In the view of the defence, the obligations to asses the proportionality *strictu sensu* in cases such as the one in question, in particular as it concerns restrictions into fundamental rights under the Charter and the ECHR and restrictions in the heart of the four freedoms, have been established in a range of judgments from the EU court.

105. Of the body of case law from the EU court, reference can firstly be made to the matter Case C-126/15, where the EU court states in para 64 (citations omitted)

> *It must be recalled that the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant EU legislation. The case-law of the Court states in that regard that, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued).*

106. As shown here, the EU court specifically states that a strictu sensu proportionality assessment must be made.

107. Similarly, the same requirement of proportionality appears in a range of Grand chamber judgments e.g. C-379/08 [GC] ERG para 86, C-189/01 [GC] Jippes para 81, c-62/14 Gauweiler para 91.

108. I ask the court to note that these matters do not purely refer to restrictions on fundamental rights under the EU Charter, but a wide range of restriction on rights conferred to individuals under the four freedoms.

109. Furthermore, one might note that no recent case law of the EU court can be taken a an indication that the EU court fails to adhere to the established requirement of proportionality *strictu sensu.* Although there are a number of cases in which the EU court does not explicitly refers to such an requirement, one cannot infer from such omissions that there is no such requirement.

110. Similarly, under the EEA agreement, the EFTA court has repeatedly held that there is a requirement of proportionality *strictu sensu* when assessing the restrictions of EEA rights.

111. This is e.g. held in the Case E-1/09 Lichtenstein judgment para 38, in which the EFTA court generally states

> *However, in order to be justified, the residence requirements must not only pursue legitimate objectives. They must also be suitable, necessary and proportionate as means to attain those objectives*

112. Similarly, judgments from the EFTA court, i.a. E-8/17 Kristoffersen para 124 appear to be grounded upon an assessment of proportionality *strictu sensu.*

113. In the light of the wording of the EEA agreement art 6, and the corresponding obligation to interpret corresponding provisions under EU and EEA law in a similar manner to the allowable extent, the EFTA court must place decisive weight on the case law of the EU court when assessing the issue of whether there is a requirement of proportionality *strictu sensu.*

3.10.3 Suggestion for reply

114. The defence suggests that the EFTA court replies that when assessing the compliance of restrictive measures with the CD, there is a requirement to asses the proportionality *strictu sensu* of such restrictions.

3.11 Question 11

3.11.1 Introductory remarks

115. In essence, the referring court ask about which assessments must be made when considering the proportionality *strictu sensu* of measures such as the one in question.

3.11.2 Substantive remarks

116. In the view of the defence, the requirement of proportionality *strictu sensu* entails a proportionality assessment both in the abstract and in the concrete, where the proposed advantages of the restrictive measure is weighted against the disadvantages the measure entails for the individual, the functioning of the EEA and EU area, and the broader society.

117. The starting point of any such proportionality assessment is the observation that this require balancing between competing rights and interests. It is not disputed that restrictive measures in order to protect the health of individuals and the greater population is a key individual right with a corresponding positive obligations for the national states. On the other hand, restrictive measures interfere with the most fundamental individual rights under the ECHR, with corresponding similar rights under the Charter, such as the right to respect for private and family life and right to exit a country. Furthermore, restrictive measures such as the one in question interfere with the most fundamental rights under the EEA and EU law, the right to freedom of movement.

118. As such, this is not only a balancing act between competing individual rights, but relates to the general functioning of the EEA and EU area. Restriction on fundamental EEA rights not only constitutes an interference during the period such measures are in effect, but also, and perhaps more importantly, undermines the confidence of individuals, businesses, and member states have that they can rely on the right of freedom of movement between member states for the future. Allowing restrictions might thus serve to erode upon the core of the functioning of the EEA and EU.

119. Accordingly, in the light of restrictions under the chap VI of the CD in general interfering with fundamental rights under either the ECHR, the EEA agreement, national constitutional individual rights, or similar rights as the EU Charter, the proportionality *strictu sensu* assessment under the CD art 27, cf CD art 31, must be corresponding in nature as proportionality assessments of interferences under the ECHR and the EU Charter art 52. EEA law cannot be understood as allowing interferences in fundamental rights beyond what the ECHR or the EU Charter allows.

120. We would stress the point that such an interpretation of the proportionality *strictu sensu*-requirement does not correspond to a transposition in practice of the EU Charter on EEA states. The fundamental rights on i.a. right to respect for personal and private life under the ECHR are comparable in scope, and does not amount to an expansion of the obligations incumbent on member states to the CD not bound by the EU Charter. In the same manner, the fundamental nature of the EEA right to freedom of movement under both the EEA agreement and in the CD is of such a fundamental nature that comparable stringent application of rules on restriction does not amount to expansion of obligations. Lastly, a difference in applying the rules of restrictions between member states bound by the EU Charter and EEA members, allowing the latter a wider scope of restricting the same freedom of movement rights under the CD, would amount to an irreconcilable difference in protection of freedom of movement rights, in contravention with the principle of uniform application of similar provisions, cf C-897/19 PPU para 50, and furthermore threatening the functioning of the EU and EEA area.

121. As regards to the assessment of proportionality *strictu sensu,* in the view of the defense this must firstly amount to an abstract assesment of the advantages of the restrictive measure, balanced against the disadvantages.

122. Regarding the former, the advantages of the measure must not only be assessed in relation to the object or purpose of the restrictions. The assessment must be more stringent. Accordingly, the assessment must be made as to the advantages the national authorities expect will follow from the measure, i.e. the likely contribution the measure will have for the attainment of the sought objective and purpose of the measure. Thus, a measure having an likely greater effect for containing spread of Covid-19 would balance out negative consequences to a greater extent than if the likely effect would have been negligible. In this relation, the assesment must furthermore take into account the extent and weight of evidence both as to the existence of a threat and the effectiveness of the proposed restrictive measures, cf by analogy C-663/18 para 88 and 91 and C-333/14 para 54

123. Regarding the disadvantages of the measure, this must be assessed in the light of the nature and character of the right on which the restrictive measure interferes upon. As such, fundamental rights such as right to respect for personal and private life, ranks among such rights where the threshold for severe restrictions must be high. Similarly, in this assessment, the impact of the restriction of the functioning of the EEA area must be taken into consideration, cf C-333/14 para 53.

124. Secondly, the assessment of proportionality *strictu sensu* must asses the advantages and disadvantages of the measure in the concrete, see for instance

125. Such an assessment must take into account the special features of each individual case, thus allowing for an application of restrictive measures which is not excessively broad or stringent, having the potential to undermine the trust and legitimacy, and thereby possibliy also the effect, of restrictive measures to combat the Covid-19 health crisis.

126. In such individual proportionality assessments, note must be taken as to the likely effect of the restrictive measure in each individual case. In individual cases, a restrictive measure of otherwise well established effect might have no perceptible, or even detrimental, effect for the containment of the Covid-19 virus. Likewise, individual circumstances might make restrictive measures unforeseen stringent. Such assessments must be made under the proportionality assesment *strictu sensu.*

127. Furthermore, it follows from this that the scope of review in redress proceedings must as the procedural safe guards under the chp VI are abided by, i.e. by allowing for a full review of the national authorities assessments of proportionality *strictu sensu,* as set out here.

3.11.3 Suggested reply

128. The defence suggests that the EFTA court replies that the requirement of proportionality *strictu sensu* entails a proportionality assessment both in the abstract and in the concrete, where the proposed advantages of the restrictive measure is weighted against the disadvantages the measure entails for the individual, the functioning of the EEA and EU area, and the broader society.

4 APPENDIX

1. Circular G-2021-12 (Norwegian)
2. Prop.62 L (2020–2021) Midlertidige endringer i smittevernloven (oppholdssted under innreisekarantene mv sect 5.3

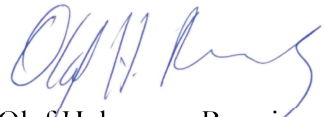
Respectfully,

Oslo, 19. September 2023

ADVOKATFIRMAET ELDEN DA

John Christian Elden

advokat (H)



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