ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 19 September 2023

Written Observations by the Kingdom of Norway

represented by Mr. Pål Wennerås and Ms. Ida Thue, advocates at the Office of the Attorney General for Civil Affairs and, Mr. Terje Aalia, senior adviser at the Ministry of Foreign Affairs, submitted pursuant to Article 20 of the Statute of the EFTA Court, in

Case E-5/23 LDL v. Påtalemyndigheten

• • •

1 INTRODUCTION

(1) This request for an advisory opinion concerns the interpretation of Articles 4, 5, 6, 7, 27, 29, 30 and 31 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 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, as well as Articles 28 and 36 EEA.

(2) The request was made in criminal proceedings between LDL and påtalemyndigheten (the prosecuting authority) concerning a failure to comply with an obligation to stay in a quarantine hotel following travel abroad.

(3) The national court notes that the particular features of the Covid-19 pandemic have given rise to "certain questions regarding the understanding of the established assessment to be applied…" when considering whether restrictions on freedom of movement can be justified

Universitetsgata 8, 0164 Oslo
P.O. Box 8012 Dep. NO-0030 Oslo
postmottak@regjeringsadvokaten.no
pw@regjeringsadvokaten.no
+47 22 99 02 00
+47 22 99 02 31

under EEA law.[1] The Supreme Court also observes that there is currently no EU/EEA case law concerning the compatibility of national measures for control of communicable diseases during the Covid-19 pandemic, albeit that some clarification may be gained from the *Nordic Info* case pending before the Court of Justice.[2]

(4) While welcoming the request for an advisory opinion, the Government considers that the case law of the EFTA Court and the Court of Justice, in particular in the domain of public health protection, provides guidance with regard to the questions referred. The particular features of the Covid-19 pandemic, given its breadth, complexity and seriousness, only serve to further underscore the margin of discretion that must be granted to national health authorities, something which the existing case law already recognises.

(5) The *Nordic Info* case concerns Belgian rules which inter alia imposed bans on travelling to countries with increased infection rates (red zones) as well as entering Belgium from those states (except for residents). The Advocate General's opinion provides a lengthy reasoning explaining in detail why the Belgian rules were justified.[3] This conclusion applies a fortiori to the contested hotel quarantine rules at issue in the main proceedings, which constitute a deliberate choice by the Norwegian authorities to employ a less restrictive measure than the system employed by countries such as Belgium, while still ensuring a high level of protection.[4]

2 THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

(6) Section 3 of the Order for reference provides a description of the factual background of the case, for purposes of which it is sufficient to provide a brief summary here.

(7) LDL is a Swedish citizen. He has resided and worked in Norway since 2016. He went to visit his father in Karlstad, a small town in Sweden, at the end of April 2021. The purpose of LDL's visit was to comfort his father, who previously had lost his brother, in addition to spending time with LDL's brothers and his father's cohabiting partner.

(8) LDL was obliged, in accordance with the applicable health regulation, to stay at quarantine hotel upon his return to Norway. A room was organised at Kjølen hotel, but LDL did not show up. He apparently considered it sufficient to quarantine at home instead.

(9) LDL's omission to comply with the required hotel quarantine resulted in an optional penalty writ (forelegg) for violation of Section 7-12 of the control of communicable diseases act. He did not accept the optional penalty writ, however. This resulted in criminal proceedings and the present request for an advisory opinion by the EFTA Court.

---

[1] Order for reference, para 5.
[2] Order for reference, paras 4 and 6, referring to Case C-128/22.
[3] Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645.
[4] Order for reference, para 48.

3 THE NATIONAL HEALTH REGULATION

3.1 Summary of the order for reference

(10) Section 4, and in particular 4.1.3, of the order for reference provides a thorough overview of the relevant legal framework. It is therefore sufficient to give a brief summary of the salient features and facts.

(11) The entry quarantine scheme was regulated by Section 4(1)(a) of the Covid-19 regulation, according to which "persons entering Norway from an area with an obligation to quarantine as set out in Appendix A shall go into quarantine for a period of 10 days".[5] Appendix A 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.[6]

(12) Section 6(a)–(j) of the Regulation provides that certain types of travel, persons performing public functions, etc., were exempted from the entry quarantine requirement. Those exemptions must, as the order for reference explains, be viewed in connection with the recommendations laid down in Council Recommendation (EU) 2020/1475 para 19.[7]

(13) The quarantine hotel scheme was first established in November 2020 and was amended several times following discussion in the Government's Covid-19 Committee (GCC).[8] Persons subject to the rules on quarantine hotels were required to quarantine at an assigned room in certain hotels specifically designated to accommodate travellers entering Norway, in accordance with Section 5(1) of the Covid-19 Regulation.[9]

(14) The requirements for the entry quarantine were tightened up in March 2021. The obligation to undergo quarantine hotel had until then been linked to whether or not the traveller had a suitable location to quarantine. The amendment entailed that, as from 19 March, the purpose of the travel could trigger the obligation to quarantine at a quarantine hotel, irrespective of whether the traveller had a suitable quarantine location.[10]

(15) This followed, inter alia, from Section 5(2)(a) and (c) and 5(5), which read as follows at the time of the offence:[11]

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

---

[5] Ibid, para 28.
[6] Order for reference, para 29. The Värmland region of Sweden was listed in the overview in Appendix A at the time of LDL's visit there and return to Norway, see para 29 in fine.
[7] Order for reference, para 30.
[8] Order for reference, para 31.
[9] Order for reference, para 32.
[10] Order for reference, para 33.
[11] Ibid.

> *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 a 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 six months. […]*
>
> *Work-related travel will be deemed necessary under letters (a) and (c) of the second paragraph when confirmation from an employer or client is provided. For persons who are resident in Norway, see letter (a) of the 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 on 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 funerals of close relatives."*

(16) The justification for the tightening-up of the Covid-19 Regulation in March 2021 follows from a Government document entitled "Justification for amendments of 16 March 2021 to Section 5 of the Covid-19 Regulation on place of stay for entry quarantines."[12]

(17) The Government document underscores the experience gained from rapidly increasing infections following the previous year's winter holiday, and how the combination of the imminent Easter holiday and new, more infectious variants of the virus means that increased rates of imported infection can now have far greater implications.[13] By extension thereof, the following is stated:

> *"In the difficult situation in which we now find ourselves, in the Government's assessment it is necessary to introduce measures which are both conducive to having as few people as possible opting to travel abroad and to limit the risk that people who nevertheless do opt to travel bring the virus with them upon their return and spread it in Norway."*[14]

(18) The justification, suitability and necessity of tightening the rules on quarantine hotels is discussed in greater detail in part 3 of the document:

---

[12] Order for reference, para 42.
[13] Order for reference, para 43.
[14] Order for reference, para 43.

> *"The Government has concluded that it is necessary to tighten up on the exemption from stays at a quarantine hotel for persons who are resident or have a permanent residence in Norway. In light of the recommendations from the Directorate of Health (Helsedirektoratet) and the Institute of Public Health (Folkehelseinstituttet – FHI) to delay the introduction and spread of the mutated virus variants as much as possible, the Government takes the view that it is absolutely necessary to restrict unnecessary travel out of the country. An increase in the number of journeys will likely lead to increased import infection and subsequent spread of infection in Norway. The Government further refers to the public directorates' assessment that the mutated viruses are more infectious, and accordingly takes the view that a person's home can no longer, to the same extent, be considered a suitable place to undergo quarantine. For persons who shall undergo quarantine in their own home, there are, inter alia, on grounds of the right to respect to private life and family life, no requirements for a separate bedroom, bathroom and kitchen, as is done for most of the exemptions from a quarantine hotel. This entails a heightened risk that persons in quarantine will infect members of their own household, who in turn can further spread the infection in society. Lastly, reference is made to the States' assessment that there is a need to strengthen monitoring of compliance with the rules applicable to persons in entry quarantine. Such monitoring is possible only to a limited degree in respect of persons who quarantine in their own homes. Quarantine hotels are generally considered the most suitable place for completing quarantine and offer the best possibilities for carrying out monitoring of compliance with the rules."*[15]

(19) In the document the Government considers whether other, less restrictive measures might be sufficient, but concluded that this was not the case.[16] Alternative measures, such as requirements of a separate bedroom, separate bathroom and separate kitchen in a person's own home, would give rise to other challenges, including documentation and control. Such alternatives would still be liable to interfere with the right to respect for private life and family life, without any gain in the prospects for monitoring of compliance with the quarantine rules. The lack of monitoring opportunities also highlights that such a measure would not be sufficient if allowing people to stay in their own homes on such terms were to become a general alternative to a quarantine hotel, irrespective of whether the stay abroad had been necessary.

(20) The Government also explicitly points out that a tightening-up of the exemption allowed for quarantine hotels is a less invasive measure than a ban on unnecessary travels ("non-essential travels") abroad, as certain other countries had introduced at that time.[17]

---

[15] Order for reference, para 46.
[16] Order for reference, para 47.
[17] Order for reference, para 48.

(21) The Government's proportionality assessment is reproduced in its entirety in the order for reference:

> *"The Government further takes the view that the measure will be proportionate. It is only in those cases where the travel out of the country is found to be unnecessary that persons who are resident in Norway must undergo quarantine at a quarantine hotel. The tightening-up of the rules will primarily affect purely leisure travel and visits to family abroad in those cases where there are no compelling welfare considerations suggesting that the visit cannot wait. Those considerations also justify why it is necessary and proportionate to impose more stringent requirements on persons who are returning from unnecessary travel, even though the purpose of the travel on its own has no implications for the risk of infection the person represents. Reference is also made to the fact that the measure is temporary, in a situation where there is an acute need to limit the spread of the mutated viruses until a larger proportion of the population is vaccinated.*
>
> *In line with the foregoing, the Government takes the view that the quarantine hotel requirement can be limited to those who have been on an unnecessary travel abroad, as that term is defined in the Covid-19 Regulation. The handling of the pandemic is based on reducing infection pressure as much as possible, without the measures being more restrictive than necessary. In such a situation, it will be legally possible, also within the framework of the Constitution and human rights, to emphasise other legitimate societal considerations in the assessment of who must undergo the entry quarantine at a quarantine hotel. In addition, in the handling of the pandemic it must be possible to have general rules that can be enforced without it being necessary to consider whether the individual traveller satisfactory would have undergone quarantine in its own home. In this balancing of different considerations, the Government considers that it is proper that people engaged in leisure travel who are unable to document compelling welfare considerations must undergo quarantine at a quarantine hotel, whilst an arrival back after documented work-related travel will be considered differently. This is also consistent with the Government's strategy to prioritise working life and the economy over holiday and recreation.*[18]

3.2 Supplementary facts

(22) The order for reference, as summarised above, noted inter alia that the tightening-up of the Covid-19 Regulation in March 2021 related to new, more infectious variants of the virus, which in turn meant that increased rates of imported infection were liable to having greater implications.[19]

---

[18] Order for reference, para 49.
[19] Order for reference, para 43 – see also para 49.

(23) The Government may for the sake of completeness provide some supplementary observations in this regard.

(24) The background for the measures in March 2021 was that Norway experienced a significant increase in infections over the winter of 2021, often referred to as the third wave of infections.[20] The number of weekly reported cases rapidly increased from week 7 to week 11. In week 11 (March 15-21), the highest weekly number of cases thus far in the pandemic (6,574) was reported, along with the second-highest number of new hospital admissions since the start of the pandemic (202).[21] In December 2020, the United Kingdom reported a new, more contagious variant of the coronavirus. By March 2021, this variant had become dominant in Norway. In addition to being more contagious, the new variant also appeared to pose a higher risk of hospitalization compared to previous variants.[22]

(25) The assessments by the Norwegian Institute of Public Health (FHI) and the Norwegian Directorate of Health during this period indicated, among other things, that failure to comply with quarantine requirements was considered to weaken the effectiveness of measures to delay the spread of imported infections and contributed to outbreaks.[23] It was also stated that unnecessary travel should be avoided, [24] and the duration of the quarantine hotel obligation was recommended to be extended over time. [25]

4 QUESTIONS 1-3: APPLICABLE EEA RULES

(26) By its first three questions, which should be examined together, the referring court asks, in essence, for guidance as to which provisions of EEA law apply to a national measure such as that at issue in the main proceedings.

(27) It will be recalled at the outset, as the Court of Justice has pointed out on several occasions in the context of EU law, that Directive 2004/38/EC aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and that it aims in particular to strengthen that right.[26] This covers also the territory of the EEA EFTA States following the incorporation of Directive 2004/38/EC into the EEA Agreement.

(28) On the other hand, whilst it is true that Directive 2004/38/EC aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains

---

[20] *NOU 2022: 5 Myndighetenes håndtering av koronapandemien – del 2* point 2.3.
[21] FHI situation report week11 (15.-21. mars 2021), dated 24. 03.2021.
[22] UK virus variant associated with higher risk of hospital admission - NIPH (fhi.no)
[23] FHI/ Helsedirektoratet: reply to task 343, dated 05.02.2021 og FHI/Helsedirektoratets reply to task 348, dated 11.02.2021.
[24] FHI/ Helsedirektoratet: reply to på task 379; dated 10.03.2021.
[25] The government's rationale for changes in the covid-19-regulation Section 5, dated 26.03.2021 and FHI/ Helsedirektoratets reply to task 409, dated 23. 03.2021
[26] E.g. judgment of 12 March 2014, *O and B*, C-456/12, EU:C:2014:135, para 35.

that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.[27] In this regard, the Court of Justice has noted that Directive 2004/38/EC is intended only to govern the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he is a national.[28]

(29) It is, therefore, necessary to first ascertain whether the claimant can benefit from provisions of Directive 2004/38/EC and, if that is not the case, to consider next whether the claims can be based directly on the provisions of the main part of the EEA Agreement.[29]

(30) Article 4 of Directive 2004/38/EC provides that EEA nationals shall have the right to leave the territory of an EEA State to travel to another state, while Article 5 provides that the EEA states shall grant EEA nationals leave to enter their territory.

(31) The contested measure in this case involved subjecting persons travelling from states experiencing increased rates of infection, which at the relevant time included Värmland in Sweden, to quarantine at a hotel near the border. LDL is a Swedish citizen. It appears therefore that the quarantine requirement constituted a restriction of his right of entry under Article 5 of Directive 2004/38/EC.

(32) The contested measure did not, however, prevent LDL from exiting from Norway and travelling to Sweden. It could perhaps be argued that it had a deterrent effect. Yet neither a literal nor a contextual interpretation suggests that restrictions on right of entry under Article 5 also constitute (indirect) restrictions of the right of exit within the meaning of Article 4 of the directive.

(33) Since the contested measure constitute a restriction of the right of entry under Article 5 of Directive 2004/38/EC, it is not necessary to consider whether Articles 28 or 36 EEA apply as well.

(34) In the event that the EFTA Court nevertheless should consider otherwise, the Government may for the sake of completeness provide brief observations concerning the applicability of these provisions.

(35) In the first place, as concerns Article 28 EEA, it will be recalled that any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'.[30] Nationals of EEA states have in particular the right, which they derive directly from the main part of the EEA Agree, to leave their country of origin to enter the territory of another Member State and

---

[27] Ibid, para 41.
[28] Ibid, para 42.
[29] See, to this effect, judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paras 34-35, of 12 March 2014, *O and B*, C-456/12, EU:C:2014:135, paras 37 and 44, and of 12 March, *S and G*, C-457/12, EU:C:2014:136, paras 31 et seq.
[30] E.g. judgment of 4 February 2010, *Hava Genc*, C-14/09, EU:C:2010:57, para 19.

reside there in order to pursue an economic activity.[31] It is thus settled case law that nationals of an EEA State seeking employment in another EEA State fall within the scope of Article 28 EEA.[32] While provisions which, even if they are applicable without distinction, preclude or deter an EEA national from leaving his country of origin in order to exercise his right to freedom of movement can constitute an obstacle, they are nevertheless only capable of constituting such an obstacle in so far as they affect access of workers to the labour market.[33]

(36) The order for reference contains nothing that suggests that the freedom of movement for workers is relevant in this case. LNL has worked and resided in Norway since 2016. The quarantine requirement was thus not capable of affecting the applicant's access to the labour market in Norway, which he had gained access to several years before. Nor did LNL seek (new) employment during his visit to Sweden.[34] That trip concerned, as the order for reference explains, a social visit to his father, who was distressed after the loss of a family member.[35]

(37) Second, as concerns Article 36 EEA, it is settled case law that the freedom to provide services also includes the "passive" freedom to provide services, namely the freedom for recipients of services to go to another EEA State in order to receive a service there, without being hindered by restrictions.[36] Case law has thus recognised that persons established in an EEA State who travel to another EEA State as tourists or for the purposes of education must be regarded as recipients of services.[37] This is logical since both kinds of travel are directly linked to receiving certain services, i.e. services relating to transport and accommodation in the case of tourists, and services relation to education and accommodation in the case of students.

(38) It follows, conversely, that not any stay in another Member State is sufficient to fall within the scope of application of Article 36 EEA. This would otherwise render the tourism and education categories meaningless. Furthermore, such an interpretation would also mean that the passive right to receive services under Article 36 EEA, in practice, covered all free movement not involving economic activity. This would entail that Article 36 EEA (and Article 45 TFEU) in practice was given the same scope as the right to free movement on the basis of Union citizenship, which would be contrary to a systematic interpretation of the EEA Agreement and the TFEU and as well as conflicting with the EU case law concerning Article 21 TFEU.[38]

(39) The order for reference likewise contains nothing suggesting that the rules on services are relevant in this case. LNL did not travel to the small Swedish town of Karlstad as a tourist, but to visit and comfort his grieving father and spend time with his brothers as well as his father's

---

[31] E.g. judgment of 27 January 2000, *Graf*, C-190/98, EU:C:2000:49, para 22.
[32] E.g. judgment of 16 July 2009, *Chamier-Glisczinski*, C-208/07, EU:C:2009:455, para 70.
[33] E.g. judgment of 27 January 2000, *Graf*, C-190/98, EU:C:2000:49, para 23.
[34] See, to this effect, ibid, para 72.
[35] Order for reference, para 9.
[36] Case E-8/20 *Criminal proceedings against N*, para 75 and case law cited.
[37] Ibid.
[38] To that effect, see opinion of 16 May 2017, *Staatsanwaltschaft Offenburg*, C-195/16, EU:C:2017:374, paras 71-73, see also opinion of 11 April 2013, *Demirkan*, Case C-221/11, EU:C:2013:237, para 50.

cohabiting partner.[39] Article 36 EEA accordingly does not appear applicable, in the absence of any information that LNL in fact travelled to Sweden for purposes of tourism. Furthermore, any restrictive effects of the contested measures would, in the context of a family visit such as that described in the order for reference, in any event appear too uncertain and indirect for the purposes of Article 36 EEA.[40]

(40) In conclusion, and in response to questions 1-3 posed by the referring court, the Government considers that a hotel quarantine measure, such as that at issue in the main proceedings, constitutes a restriction on the right of entry provided by Article 5 of Directive 2004/38/EC.

5 QUESTION 4: JUSTIFICATION

(41) By its fourth question, the referring court asks, in essence, whether Directive 2004/38/EC precludes national health authorities from protecting public health through a measure of general application rather than individual decisions.

(42) In this regard, it may be recalled at the outset that protection of public health constitutes one of the overriding requirements relating to the public interests recognised by EEA law and it is settled case law that such a requirement may justify national measures restricting freedom of movement.[41]

(43) This is codified by Articles 27(1) and 29(1) of Directive 2004/38/EC. Article 29(1) provides more specifically that inter alia "diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation" justify measures restricting freedom of movement.

(44) This requirement was fulfilled in this case. The World Health Organisation (WHO) declared on 30 January 2020 that the global outbreak of COVID-19 constituted a public health emergency of international concern, which it later classified as a pandemic on 11 March 2020.[42]

(45) Council Recommendation (EU) 2020/1475 similarly acknowledged that the COVID-19 pandemic had caused an "unprecedented health emergency" and an "exceptional situation", according to which protection of health had become an "overriding priority" for both the Union and its Member States.[43]

(46) The European Court of Human Rights echoed the same sentiment. It held that the COVID-19 pandemic was liable to have "very serious consequences" for health and life in general, and that the situation should be described as an "exceptional and unforeseeable context".[44]

---

[39] Order for reference, paras 9-10.
[40] Judgment of 15 June 2010, *Commission v Spain*, C-211/08, EU:C:2010:340, para 72.
[41] E.g. judgment of 1 March 2018, *CMVRO*, C-297/16, EU:C:2018:141, para 57.
[42] Cited in Council Recommendation (EU) 2020/1475, para 4.
[43] Council Recommendation (EU) 2020/1475, paras 9-10.
[44] ECtHR, 1 March 2022, *Fenech v. Malta*, No 19090/20, para 96.

(47) It follows, as a preliminary conclusion, that a measure seeking to limit the spread of Covid-19 by imposing a requirement of hotel quarantine, such as that at issue in the main proceedings, could be justified for reasons of protecting public health.

(48) The Government observes, next, that Article 27(2) of Directive 2004/38/EC provides that measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. It appears that the question referred concerns whether the same applies to protection of public health, as LDL claims.[45]

(49) It may be recalled in this regard that, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs, and the objectives pursued by the rules of which it is part.[46]

(50) As for the literal interpretation of Article 27(2) of Directive 2004/38/EC, it is noteworthy that that provision only requires that measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. It does not impose a similar requirement as concerns *public health* measures, however.

(51) This is corroborated by a contextual interpretation. Protection of public health is regulated in more detail in Article 29, which likewise does not contain any requirement that public health measures shall be based exclusively on the personal conduct of the individual concerned.

(52) The distinction drawn in the directive between public policy and public security, on the one hand, and public health on the other, also gains support from a teleological interpretation. Measures taken on grounds of public policy or public security, which may involve expulsion regulated in Article 28, are typically concerned with individual actions and conduct. It is logical, therefore, that Articles 27(2) and 28 of Directive requires that such measures are justified for reasons relating to the personal conduct of the individual concerned. By contrast, the public health risks listed in Article 29(1) of Directive, such as "diseases with epidemic potential", are normally neither related to the personal conduct of one individual nor, therefore, would it make sense to require that measures taken to combat such public health risk should be exclusively based on such conduct.

(53) Finally, it may be added for the sake of completeness that the Court of Justice, for similar reasons as those discussed above, has even held that measures taken on the grounds of *public policy* under Article 6 of Directive 2003/86/EC on the right to family reunification does not, unlike Article 27(2) of Directive 2004/38/EC, require the personal conduct of the individual concerned to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[47] The same kind of reasoning entails *a fortiori* that the

---

[45] Order for reference, paras 69-71.

[46] E.g. judgment of 3 September 2015, *FranceAgriMer*, C-383/14, EU:C:2015:541, para 20 and the case law cited.

[47] See judgment of 12 December 2019, *G.S. and V.G*, C-381/18 and C-382/18, EU:C:2019:1072, paras 53-63.

limitation imposed by Article 27(2) as concerns public policy (and public security) cannot be imposed as concerns public health measures based on Article 29(1) of Directive 2004/38/EC.[48]

(54) Consequently, neither Article 27(2) nor Article 29(1) of Directive 2004/38/EC requires that measures restricting freedom of movement in order to prevent transmission of a disease with epidemic potential must be based on an individual assessment of the person concerned rather than generally applicable regulation.[49]

6 QUESTIONS 5 AND 6: SUITABILITY

(55) By its fifth and sixth questions, which it is appropriate to examine together, the national court essentially asks for guidance, in the context of the requirement that national measures must be appropriate to attain their aims, of the relevance of the fact that only "certain groups" were subject to quarantine hotel, while others were exempted based on considerations for society as a whole.

(56) In this regard, it may be recalled at the outset that measures restricting freedom of movement on grounds of public health in accordance with Article 29(1) of Directive 2004/38/EC must, similar to what Article 27(2) of the Directive explicitly requires as regards public policy and public security, comply with the principle of proportionality.

(57) The two limbs of the proportionality principle entail that the national measure must be appropriate for securing the attainment of the objective pursued and must not go beyond what it is necessary in order to attain it.[50]

(58) It is readily apparent that a quarantine requirement, such as the quarantine hotel requirement at issue in the main proceedings, is a suitable instrument for preventing the spread of covid-19 and thus protecting public health.

(59) What remains to be ascertained is whether this preliminary conclusion is called into doubt by the fact that the hotel quarantine requirement did not apply to residents in Norway that were returning from "necessary" travel and fulfilled the other conditions for exemption.[51]

(60) It may be recalled in this context that, according to the Court's settled case-law, national legislation is appropriate for ensuring the attainment of the objective pursued "only if it genuinely reflects a concern to attain it in a consistent and systematic manner".[52]

(61) In this regard, it should be observed that, while it is true that a member state seeking to justify a restriction on a fundamental freedom must establish both its appropriateness and its

---

[48] See, to this effect, ibid, para 63 read in conjunction with para 56.
[49] See also Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, paras 62-73.
[50] See e.g. judgment of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, para 59.
[51] See order for reference, para 33.
[52] E.g. judgments of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, para 36 and case law cited, and of 8 December 2022, *GV*, C-731/21, EU:C:2022:969, para 37 and case law cited.

proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the *most* appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is *not inappropriate* for that purpose.[53]

(62) The same rationale underlies the accompanying consistency requirement. The words "genuinely reflects a concern…" reveals a negative test, the purpose of which is to control for inconsistences of such importance that they are liable to call into question whether the restrictive national measure is genuinely concerned with the stated objective. This interpretation is confirmed by the facts of the Italian gambling case (Gambelli) in which the consistency requirement was first underscored.[54] Legal theory[55] as well as Advocates General[56] have thus referred to the requirement of consistency as a hypocrisy test.

(63) The foregoing observations apply, if anything, with added force in the field of public health.

(64) The EFTA Court has already had occasion to note in *Philip Morris* that, where an EEA State legitimately aims for a very high level of protection, it must be sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was "reasonable to assume that the measure would be able to contribute to the protection of human health".[57] This includes a measure "which by its nature seems likely to limit, at least in the long run…" a health risk.[58] Accordingly, in the absence of convincing proof to the contrary, a measure of this kind may be considered suitable for the protection of public health.[59]

(65) It may be added that the EFTA Court's reasoning, as set out above, dismissed Philipp Morris' claim of inconsistency based on the fact that, despite being blocked from view, the tobacco products remained available at points of sale.[60] This claim was analogous to what is argued by LDL in this case, namely that it is, in essence, not appropriate – and inconsistent with – protection of public health not to opt for the highest level of protection possible. Instead of enacting a requirement of hotel quarantine applicable to most circumstances, the national authorities could and should have required a hotel quarantine in all cases (or imposed travel bans) or in no cases. It is apparent that such maximalist reasoning turns the suitability and consistency requirement on its head, in conflict with inter alia the reasoning in *Philip Morris*.

---

[53] Opinion of 7 October 2010, *Commission v. Spain*, C-400/08, EU:C:2010:588, para 89 (emphasis added).
[54] Judgment of 6 November 2003, *Gambelli and Others*, C-243/01, EU:C:2003:597, paras 67-69.
[55] See e.g. Spapens, T., Littler, A. and Fijnaut, C., Crime, Addiction and the Regulation of Gambling, Martinus Nijhoff Publishers, 2008, p. 86, and Straetmans, G., Common Market Law Review, No 41 (2004), issue 5, p. 1424.
[56] Opinion of 3 March 2010, *Stoss and Others*, C-316/07, C-358-360/07 and C-409-410/07, EU:C:2010:109, para 50.
[57] Case E-16/10 *Philip Morris Norway*, para 83.
[58] See, to this effect, ibid, 84.
[59] Ibid.
[60] See, to this effect, para 56.

(66) Drawing the lines together, the Government respectfully submits that it is readily apparent that the hotel quarantine regulation was an appropriate means of protecting public health and that it genuinely reflected a concern to attain protection of public health in a consistent and systematic manner.[61]

(67) In this regard, it should be underscored at the outset that hotel quarantine was the main rule for people travelling to Norway from an area set out in Appendix A due to an increased risk of infection.[62] Exceptions were only allowed for residents returning from necessary travel, i.e. travel required by work or travel justified by compelling welfare-related grounds.[63]

(68) Second, those groups were not exempt from quarantine as such, but could – subject to various criteria concerning suitability – quarantine at their home residence or other suitable location.[64]

(69) Third, the foregoing differentiation reflects an attempt to strike a fair balance between ensuring a high level of public health protection and keeping the societal wheels in motion as well as acknowledging particularly weighty welfare grounds.[65] As mentioned above, the Government's goal was to monitor and control the spread of the virus by supressing resurgences of infections early to ensure manageable levels and avoid overwhelming the capacity of the healthcare system. This goal was considered attainable, although the said groups was allowed to quarantine at their home residence or in another suitable location. The decrease in infection rates from Mars to June 2021, indicates that this assessment was adequate. The consistency requirement cannot be interpretated in such a way that it obliged the government, under such circumstances as in the main proceedings, to opt for more restrictive measures than the one that was chosen (i .e. travel bans or a general obligation to undergo quarantine in quarantine hotel).

(70) Finally, it is apparent that the system put in place reflects, in principle, the same differentiation between essential and non-essential travels as in Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.[66]

(71) Based on the foregoing, the Government considers, in response to the question referred, that the requirement that a measure must be appropriate for securing the attainment of the objective pursued, including that it genuinely reflects a concern to attain that objective in a consistent and systematic manner, which constitutes the first limb of the proportionality principle enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, does not preclude national measures, such as those at issue in the main proceedings, according to which persons

---

[61] See also opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 105.
[62] Order for reference, paras 28-29.
[63] Order for reference, para 33.
[64] Ibid.
[65] Order for reference, para 49. See also See also opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 132.
[66] See, in particular, Council Recommendation (EU) 2020/1475, paras 17 and 19.

seeking to enter the State from a State experiencing increased rates of infection were as a main rule subject to hotel quarantine, while allowing exceptions for persons returning from necessary travel to those States, either for professional reasons or weighty private reasons.[67]

7 QUESTIONS 7 AND 8: NECESSITY

(72) By its sixth and seventh questions, which it is appropriate to examine together, the referring court essentially asks for guidance, in the context of the requirement that national measures must not go beyond what is necessary and observations in relation to this requirement in Case C-110/05 Commission v Italy (para 67), of the relevance in a pandemic of having general and simple rules which will be easily managed and supervised by the competent authorities as well as the fact that such rules could potentially have a deterrent effect for persons contemplating travel abroad.

(73) The Government recalls at the outset, as noted above, that the two limbs of the proportionality principle entail that the national measure must be appropriate for securing the attainment of the objective pursued and must not go beyond what it is necessary in order to attain it.[68]

(74) The requirement that the national measures must not go beyond what is necessary, as both the EFTA Court[69] and the Court of Justice have explained, [70] depends on whether the objectives may be achieved in an equally effective manner by measures that are less restrictive of freedom of movement.

(75) Such a functional review of necessity, as opposed to a balancing of opposing interests, is the logical corollary of the fact, that in order to assess whether a Member State has observed the principle of proportionality, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by TFEU and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved.[71]

(76) Since that level may vary from one Member State to another, Member States have been granted a measure of discretion, and the fact that a Member State imposes less strict rules

---

[67] See also opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, paras 102 and 105.
[68] See e.g. judgment of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, para 59.
[69] See Case E-4/04 *Pedicel*, para 56, Case E-14/15 *Holship*, para 130, Case E-16/10 *Philip Morris Norway*, paras 85-86.
[70] E.g. judgments 5 July 1991, *Stichting Collectieve Antennevoorziening Gouda*, EU:C:1991:323, para 15 and case law cited, of 5 June 2007, *Rosengren and Others*, C-170/04, EU:C:2007:313, para 43, of 23 December 2015, *Scotch Whisky Association*, C-333/14, EU:C:2015:845, paras 40-41, and of 12 November 2015, *Visnapuu*, C-198/14, EU:C:2015:751, para 119.
[71] E.g. Case E-4/04 *Pedicel*, para 55, Case E-16/10 *Philip Morris Norway*, paras 77 and 80, and judgment of 10 March 2021, *Ordine Nazionale dei Biologi and Others*, C-96/20, EU:C:2021:191, para 36.

than another Member State therefore does not mean that the latter's rules are disproportionate.[72]

(77) Such discretion is especially important where, if there is uncertainty as to the existence or extent of risks to human health, a Member State must be able to take protective measures without having to wait until the reality of those risks becomes fully apparent.[73] Member States must in particular be able to take any measure capable of reducing, as far as possible, a health risk.[74] Such leeway for the Member State, is also all the more pertinent given the precarious and time-critical nature of the pandemic.

(78) It follows that, where a Member State or EEA EFTA State aims for a high level of protection, it is sufficient for the authorities to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the disputed measure, it was reasonable to assume that the measure would be able to contribute to the protection of human health.[75] As indicated above, the measure in question was implemented in accordance with the advice and assessments by the health authorities, and based on the knowledge available at the time.[76]

(79) Suggestions to the effect that the necessity requirement entails two distinct conditions, one of which concerns "strict necessity", is thus based on a misreading of the case law.[77] The same applies to suggestions that, in addition to "strict necessity" (?), national courts must carry out an assessment of strict proportionality.[78] Leaving aside particular questions that may arise in the context of fundamental rights, which we comment upon below, even the proponents of such a test, acknowledge that it is generally absent from the 'traditional' case law of the Court on free movement.[79]

---

[72] E.g. Case E-16/10 *Philip Morris Norway*, para 80, and judgments of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, para 82 and of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, para 71 and the case-law cited.
[73] E.g. judgment of 1 March 2018, *CMVRO*, C-297/16, EU:C:2018:141, para 65.
[74] Ibid.
[75] Case E-16/10 *Philip Morris Norway*, para 83.
[76] Section 3.
[77] See Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 106 and footnote 146. The sole justification for this proposition is a reference to judgment of 26 April 2012, *Anett*, C-456/10, EU:C:2012:241, para 45. Far from referring to a test of "strict necessity", as the Advocate General claims, that paragraph does nothing more than recalling the basic requirement that a national measure must not go beyond what it is necessary. This depends, as the case law in footnotes 67 and 68 above explain, depends on whether the objectives may be achieved in an equally effective manner by measures that are less restrictive of freedom of movement. This is, in fact, also implicit by the reference in *Anett*, ibid, para 45, to the judgment of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, para 59. It is clear from the assessment of whether the national measure went beyond what was necessary, that the Court in that case considered whether the objectives could be achieved in an equally effective manner by measures that were less restrictive of freedom of movement, which it ultimately answered negatively – see paras 65-68 of the judgment.
[78] Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 120.
[79] Ibid.

(80) The fact of the matter is rather, as the Court has expressly acknowledged, that the principle of proportionality is applied "in a particular manner in the sensitive area of public health".[80]

(81) Hence, while recognising that it is for the Member State which invokes an imperative requirement as justification for the hindrance to freedom of movement to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, the Court of Justice has underscored that that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.[81]

(82) Instead the Court has considered whether for instance it is "evident" that alternative measures are liable to give the same result and whether the national authorities were "entitled to take the view" that this was not the case.[82] Case law has similarly held that it is sufficient for the national court to review whether it may "reasonably be concluded"[83] or "reasonable to assume"[84] that the means chosen by a Member State for protecting public health are suitable and necessary.

(83) Finally, even if alternative measures could guarantee a certain level of health protection, the Court clarified in *Italian Trailers*, to which the national court refers in its question, that Member States cannot be denied the possibility of attaining an objective such as public health safety by the introduction of general and simple rules which will be easily understood and applied by the persons concerned and easily managed and supervised by the competent authorities.[85] This has been repeated in several judgments and is today settled case law.[86]

(84) There is accordingly, first of all, no conflict between this jurisprudence and the case law dictating that considerations of an administrative nature cannot justify a derogation of the rules of EU/EEA law, as the Court has explicitly noted.[87] Moreover, the Court has remarked that rules of this kind are necessarily approximate in nature and therefore cannot amount to indirect discrimination.[88] Secondly, the reason why the Member States could not be denied general rules which are easily managed and supervised was that such benefits bolstered the

---

[80] E.g. judgment of 25 October 2018, *Roche Lietuva*, C-413/17, EU:C:2018:865, para 42.
[81] E.g., to this, effect, judgment of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, para 66.
[82] E.g. judgment of 1 March 2018, *CMVRO*, C-297/16, EU:C:2018:141, paras 70-71.
[83] Judgment of 23 December 2015, *Scotch Whisky Association*, C-333/14, EU:C:2015:845, para 56 cf. para 55 – see also para 36.
[84] See, to this effect, Case E-16/10 *Philip Morris Norway*, para 83.
[85] See, to this effect, e.g. judgment of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, para 67-68.
[86] Judgment of 4 June 2009, *Mickelsson and Roos,* C-142/05, EU:C:2009:336, para 36; of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:744, paras 81–82; and of 22 January 2015, *Stanley International Betting and Others*, C-463/13, EU: C:2015:25, paras 50–53.
[87] Judgment of 24 Feburary 2015, *Sopora*, C-512/13, EU:C:2015:108, para 33.
[88] Ibid, para 34.

effectiveness of the ultimate objectives pursued, be they environmental protection, road safety, combatting public nuisance, or consumer protection.[89]

(85) The first case, *Italian Trailers*, clearly illustrates this. Italy had for reasons of road safety enacted a general prohibition on motorcycles towing trailers. The Advocate General opined that a less restrictive measure would be to define the most risky roads (mountain crossings, motorways or even particularly heavily used public highways) for the purpose of laying down sectoral prohibitions or limitations.[90] It was in response to such an alternative measure, while recognizing that it could guarantee "a *certain* level of road safety", that the Court underscored that Member States were entitled to introduce general and simple rules which can be easily managed and supervised, while adding that nothing allowed for a presumption that road safety could be ensured at the *same level* by a road traffic authorization subject to compliance with certain conditions.[91]

(86) The Court essentially made the same point in *Josemans*. Here too, the Court juxtaposed regulation which entailed challenges in relation to monitoring and control with the benefits of more general rules that were easily managed and supervised, and again noting that nothing allowed for an assumption that the objective pursued could be achieved "to the extent envisaged" by rules that were not as easily managed and supervised.[92]

(87) This line of reasoning is particularly pertinent to public health measures such as those at issue in the main proceedings. While quarantine in the home could ensure a certain level of safety in terms of limiting the spread of Covid-19, it evidently could not, inter alia due to challenges relating to monitoring and control, ensure the same level of protection as a hotel quarantine.[93] This and other differences are explained in detail in the preparatory works.[94] The same applies a fortiori to an individualised system of testing and quarantine based on symptoms.[95]

(88) In addition to ensuring a higher level of disease control with regard to persons returning from unnecessary travels, the system of hotel quarantine could also – as the referring court notes in its question – have a deterrent effect on unnecessary travel to areas experiencing increased rates of infection and which thus were included in Appendix A.[96] This would promote the protection of public health and ensure a higher level of protection than measures which, while less restrictive, for the very same reason would have less of a deterrent effect.[97] In the same vein as the highest level of road safety is ensured by having no motorcycles towing trailers, the most effective means of avoiding the spread of Covid-19 was to prevent people from

---

[89] See supra note 62 and 63.
[90] (Second) Opinion 8 July 2008, *Commission v Italy*, C-110/05, EU:C:2008:386, para 170.
[91] Judgment of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, para 67-68.
[92] Judgment of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:744, paras 81–82
[93] See also, to this effect, opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 110 in fine.
[94] Order for reference, paras 46-47, see also para 49.
[95] See also, to this effect, opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 109.
[96] See, to this effect, order for reference, paras 43, 46 and 49.
[97] Ibid.

becoming contaminated in the first place. Hotel quarantine was an effective means in this regard, while less restrictive than banning non-essential travels altogether.[98]

(89) Drawing the lines together in response to the question referred, the Government notes that, in relation to the requirement that a measure must be necessary to attain the objective pursued, which constitutes the second limb of the proportionality principle enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, it is possible to envisage that measures other than a hotel quarantine, such as that at issue in the main proceedings, could guarantee a certain level of protection of public health, but the fact remains that Member States cannot be denied the possibility of attaining an objective such as protection of public health by the introduction of general and simple rules which will be easily understood and applied by the public and easily managed and supervised by the competent authorities. This covers also the deterrent effect of such rules which, in a similar vein to a prohibition, bolster the effectiveness of the rules and alleviate control concerns.

8 QUESTIONS 10 AND 11: STRICT PROPORTIONALITY?

(90) By its tenth and eleventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 27 and 29 of Directive 2004/38/EC, and if applicable the main part of the EEA Agreement, requires national courts to review proportionality stricto sensu.

(91) Proportionality stricto sensu, which is a term of art primarily employed in legal theory, connotes a weighing between competing values to assess which value should prevail.[99]

(92) It is apparent from the case law set out above, concerning the proportionality of national measures restricting freedom of movement, that there is no such weighing of competing interests.[100] Not only is such a test absent from the free movement case law,[101] but it would also have conflicted with the fact that the EEA States, according to settled case law, remain free to determine their level of protection concerning inter alia public health.

(93) This is without prejudice, however, within the EU, to the application of the proportionality principle pursuant to Article 52(1) of the Charter of Fundamental Rights of the European Union. According to Article 52(1) of the Charter, limitations may be imposed on the exercise of rights enshrined by the Charter as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, in accordance with the principle of

---

[98] Order for reference, para 48. See also, to this effect, Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 110.

[99] See, e.g., Pirker, B., Proportionality Analysis and Models of Judicial Review, Europa Law Publishing, Groningen, 2013, p. 30: 'In its simple form, one could state that proportionality stricto sensu leads to a weighing between competing values to assess which value should prevail.'

[100] Section 7 above.

[101] Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 120. See also the tour d'horizon by the UK Supreme Court in R (on the application of Lumsdon and Others) v legal Services Board [2015] UKSC 41, para 33 cf. paras 52-53 and 55.

proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. In this regard, the Court of Justice has held that the principle of proportionality requires that the limitations on fundamental rights do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by that legislation; where 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.[102]

(94) Referring to the case law cited in the paragraph above, the Advocate General's opinion in *Nordic Info* suggests that national courts must assess the strict proportionality of travel restrictions enacted by the EEA States during the Covid-19 pandemic.[103] This is necessary since, in his opinion, restrictions of free movement of persons generally involve limitation of fundamental rights as well, not only because freedom of movement of Union citizens is a fundamental right protected by the Charter, but also because it usually will limit fundamental rights protected by Articles 7, 14, 15, and 16 of the Charter.[104]

(95) While the Advocate General's argument is intuitively logical, it is not necessarily firmly rooted in present case law. In this regard, it should be observed that the case law cited above, to which the Advocate General refers, concerned a different legal context than ours. These cases either concerned the legality of acts of the EU institutions or national acts implementing secondary law.[105]

(96) Our case falls within a different category of cases, however, namely national measures derogating from freedom of movement. This is not to say that the EEA States need not respect fundamental rights in this context. It is settled case law since *ERT* that, when a Member State relies on overriding requirements in the public interest in order to justify rules liable to obstruct the exercise of the freedom of movement, such justification must also be interpreted in the light of the general principles of EU law, in particular the fundamental rights, and the national legislation can therefore fall under one of the justifications provided for only if it is compatible with those principles and those rights.[106] This applies, save for the application of the Charter, similarly in the EEA as fundamental rights derived from the ECHR and accompanying case law form part of the unwritten principles of EEA law.[107]

(97) However, in the context of cases falling within the *ERT* doctrine, the Court of Justice has held in a series of cases that the assessment of whether a restriction of the freedom of movement

---

[102] Judgments of 22 january 2013, *Sky Österreic*h, C-283/11, EU:C:2013:28, para 50, and of 7 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 65.
[103] Opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 120 and footnote 170.
[104] Ibid, paras 121 and 122.
[105] Cases cited in opinion of 7 September 2023, *Nordic Info*, C-128/22, EU:C:2023:645, para 120 footnote 170.
Ibid, paras 121 and 122.
[106] Judgment of 20 December 2017, *Global Starnet* (C-322/16, EU:C:2017:985, paragraph 44 and case law cited.
[107] E.g. Case E-14/15 *Holship Norge AS*, para 123.

is justified and proportionate also covers possible limitations of the fundamental rights in Articles 15-17 of the Charter, so that a separate examination is not necessary.[108] It is noteworthy that Article 17 of the Charter is based on Article 1 of the Protocol to the ECHR, which accordingly presupposes that the Court of Justice considers that the proportionality principle applicable to restrictions of freedom of movement coincides sufficiently with the proportionality principle applied by the ECtHR.

(98) By contrast, in one case falling within the *ERT* doctrine, the CJEU preliminary concluded that aims of that legislation must be weighed against other legitimate interests.[109] The implication of that judgment was obscured, however, by the fact that the Court held in the following paragraph that whether national legislation was proportionate ultimately depended on whether there were less restrictive means of achieving the same level of protection.[110]

(99) In one case, *AGET Iraklis,* the Court (in grand chamber) could perhaps be seen as nuancing its test somewhat. The Court maintained its usual formulation of the proportionality principle, namely that the restriction should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective.[111] It then noted that the case also involved an interference of a fundamental rights, which nevertheless was acceptable subject to the conditions in Article 52(1) of the Charter.[112] Drawing the lines together with regard to the application of the proportionality principle, the Court repeated the ordinary suitability and necessity requirements in its freedom of movement case law, coupled with a margin of discretion depending on the subject matter, and finally added that limitations imposed on fundamental rights must respect the essence of those rights.[113]

(100) The Government finally observes that in the context of the *Schmidberger* doctrine, which concerns national measures derogations from freedom of movement for reasons of protecting fundamental rights, the Court of Justice has required the competing interests to be reconciled and that a fair balance is struck.[114] Furthermore, the national authorities enjoy a wide margin of discretion in this regard.[115] The same applies where there are conflicting fundamental rights.[116]

---

[108] See judgments of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paras 57 to 60; of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paras 90 and 91; and of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, para 50. See also judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paras 102 and 103.
[109] Judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154, para 109.
[110] Ibid, para 110.
[111] Judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, para 61.
[112] Ibid, para 70.
[113] Ibid, paras 80-82.
[114] Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paras 77-81.
[115] Ibid, para 82.
[116] See, to this effect, judgment of 7 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, para 65.

(101) Before commenting on the case at hand in light of the foregoing principles of EU and EEA law, it is appropriate, bearing in mind the requirements of the *ERT* doctrine, to recall some basic tenets of the ECtHR case law concerning interferences with fundamental rights for reasons of protecting public health.

(102) In this regard, the ECtHR has held at the outset that matters of health-care policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs. [117] That margin of appreciation is usually wide if it is required to strike a balance between competing private and public interests or Convention rights.[118] Furthermore, the ECtHR has reiterated that the Contracting States are under a positive obligation under Articles 2 and 8 of the Convention to take appropriate measures to protect the life and health of those within its jurisdiction.[119] Finally, the case law of the ECtHR has underscored that it is irrelevant whether other States have adopted less restrictive measure, and that the salient issue is "rather, whether in striking the particular balance… the authorities remained within their margin of appreciation."[120]

(103) As concerns Covid-19 in particular, the ECtHR has acknowledged that limitations occurred within a very specific context, namely during a public health emergency and were put in place in view of significant health considerations, affecting not only individual applicants but society at large.[121] The Court has also noted Court that the Covid-19 pandemic was liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an "exceptional and unforeseeable context".[122]

(104) In conclusion, the Government considers that the question referred should be answered as follows. The principle of proportionality, as enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, requires that restrictions on the right of entry must be appropriate and necessary to attain the legitimate objective being pursued. It follows that the proportionality principle does not require, in so far as these two requirements are fulfilled, and also taking into account that the Member States remain free to determine their own level of protection as concerns inter alia protection of public health, an examination of whether the benefits to protection of public health outweigh the interest of freedom of movement.

(105) There is a possible caveat for cases involving limitations of fundamental rights. Yet a separate examination appears unnecessary, taking into account the case law of the Court of Justice as well as the fact that the order for reference makes no reference to a possible breach of

---

[117] ECtHR, judgment of 8 April 2021, *Vavřička and Others v Czech Republic,* nos. 47621/13 (and 5 others), para 274.
[118] Ibid, para 275.
[119] Ibid, para 282.
[120] Ibid, para 310.
[121] ECtHR, 1 March 2022, *Fenech v. Malta*, No 19090/20, para 96.
[122] Ibid.

fundamental rights, but is solely focussed on a possible breach of the EEA rules on freedom of movement.[123] The question is accordingly hypothetical.

(106) In the alternative, the Government considers that the answer to the question referred could be elaborated as follows. In so far as the national measure also represent an interference with fundamental rights, which constitute general principles of EEA law, it can be justified under Articles 27(2) and 29 of Directive 2004/38/EC only if it is compatible with those principles and those rights. This requires a national court, in addition to assessing the suitability and necessity of the national measure, to ascertaining whether it respects the essence of the fundamental right in question. Furthermore, in so far as the national measure also seek to protect fundamental rights and uphold the positive obligations of that State, the national court must ascertain whether the competent national authorities, in attempting to reconcile those interests and strike a fair balance, have remained within their margin of appreciation in matters concerning protection of human life and health.

(107) In this regard, and without prejudice to the assessments – if any – to be carried out by the national court with regard to a potential interference with fundamental rights, it is apparent that employing a system of quarantine in the case of a health emergency caused by a pandemic does not affect the essence of the right to private and family life in Article 8 ECHR. Nor can there be any doubt that the Norwegian health authorities, when attempting to reconcile the opposing interests at stake and strike a fair balance, having regard, in particular, to their obligations to protect the life and health of persons under their jurisdiction, remained within their margin of appreciation.

9 QUESTION 9: JUDICIAL PROTECTION

(108) By its ninth question, the referring court essentially asks whether any potential shortcomings as regards Articles 30 and 31 of Directive 2004/38/EC would be liable to impact the lawfulness of the quarantine hotel rules.

(109) Article 30 of Directive 2004/38/EC provides that the persons concerned must be notified of any decision taken under Article 27(1) as well as the grounds for that decision. Furthermore, Article 31 of Directive 2004/38/EC requires that the persons concerned shall have access to judicial – and, where appropriate, administrative – review of such decisions.

(110) It is apparent that those provisions are specific expressions of the principle of effective judicial protection, which is a general principle of EU and EEA law. As such, Articles 30 and 31 codify the most basic requirements applicable to decisions of individual and direct concern, which is by definition is required as concerns measures taken on grounds of public policy or public security.

---

[123] See, by analogy, opinion 8 June 2017, *Global Starnet,* C-322/16, EU:C:2017:442, paras 59-60.

(111) Conversely, since those provisions limit themselves to imposing certain obligations as regards "decisions" taken under Article 27(1), they apply without prejudice to the Member States' adoption of measures of general application as well as the requirements imposed by the principle of effective judicial protection as regards such acts.

(112) With regard to the matter of publicity and notification, it may be recalled that the obligation to stay in hotel quarantine, subject to the relevant conditions, were imposed by regulation in accordance with law, both which were official and public documents.[124] Furthermore, Point 1 of the Revised Circular on quarantine hotels (G-2021-12) of 27 March 2021 provided that the police in their border control, should verify the conditions for entering Norway and provide guidance on the regulations, including the obligation to stay at a quarantine hotel as required under Section 5 of the Covid-19 Regulation.[125]

(113) As concerns judicial review, it may be recalled that *Unibet* affirmed that the principle of effective judicial protection does not require it to be possible to bring a free-standing (direct) action concerning the compatibility of national provisions with EU or EEA law, provided that the principles of equivalence and effectiveness are observed.[126] Furthermore, the principle of effectiveness is fulfilled as long as the compatibility of the national regulation with EU and EEA law can be reviewed indirectly, i.e. preliminary assessed in the context of an action for damages, or judicial review of an individual decision adopted under the national regulation, or in the context of administrative action or criminal proceedings brought against him or her.[127]

(114) Those conditions are fulfilled, as evidenced by claims made in these criminal proceedings, in which LDL disputes the compatibility of the national regulation with EEA law.

(115) Finally, it may be added for the sake of completeness that, even if there would exist shortcomings in the rules concerning notification and judicial redress, such fact would in any event not be capable of affecting the substantive lawfulness of the contested measures.

(116) Drawing the lines together, the Government maintains in response to the question referred that Articles 30 and 31 of Directive 2004/38/EC do not preclude national authorities from protecting public health through measures of general application. However, the principle of effective judicial protection, which those provisions are a specific expression of, requires that the public is informed of such measures and that it is possible to obtain judicial review of their compatibility with Directive 2004/38/EC and, in particular, the requirements of Articles 27 and 29.

---

[124] Order for reference, Section 4.3.1
[125] Order for reference, para 51.
[126] Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para 47.
[127] Ibid, paras 55-65.

10 ANSWER TO THE QUESTIONS

(117) Based on the foregoing considerations, the Government respectfully submits that the questions referred should be answered as follows:

- A national measure such as that at issue in the main proceedings constitutes a restriction on the right of entry provided by Article 5 of Directive 2004/38/EC.

- Articles 27(2) and 29 of Directive 2004/38/EC does not preclude national authorities from protecting public health through measures of general application.

- The requirement that a measure must be appropriate for securing the attainment of the objective pursued, including that it genuinely reflects a concern to attain that objective in a consistent and systematic manner, which constitutes the first limb of the proportionality principle enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, does not preclude national measures, such as those at issue in the main proceedings, according to which persons seeking to enter the State from a State experiencing increased rates of infection were as a main rule subject to hotel quarantine, while allowing exceptions for persons returning from necessary travel to those States, either for professional reasons or weighty private reasons.

- As concerns the requirement that a measure must be necessary to attain the objective pursued, which constitutes the second limb of the proportionality principle enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, it is possible to envisage that measures other than a hotel quarantine, such as that at issue in the main proceedings, could guarantee a certain level of protection of public health, but the fact remains that Member States cannot be denied the possibility of attaining an objective such as protection of public health by the introduction of general and simple rules which will be easily understood and applied by the public and easily managed and supervised by the competent authorities. This covers also the deterrent effect of such rules which, in a similar vein to a prohibition, bolster the effectiveness of the rules and alleviate control concerns.

- The principle of proportionality, as enshrined in Articles 27(2) and 29 of Directive 2004/38/EC, requires that restrictions on the right of entry must be appropriate and necessary to attain the legitimate objective being pursued. It follows that the proportionality principle does not require, in so far as these two requirements are fulfilled, and also taking into account that the Member States remain free to determine their own level of protection as concerns inter alia protection of public health, an examination of whether the benefits to protection of public health outweigh the interest of freedom of movement.

- (The preceding proposed answer could, in the alternative, be elaborated upon as follows: However, in so far as the national measure also represent an interference with fundamental rights, which constitute general principles of EEA law, it can be justified under Articles 27(2) and 29 of Directive 2004/38/EC only if it is compatible with those principles and those rights.)

– Articles 30 and 31 of Directive 2004/38/EC do not preclude national authorities from protecting public health through measures of general application. However, the principle of effective judicial protection, which those provisions are a specific expression of, requires that the public is informed of such measures and that it is possible to obtain judicial review of their compatibility with Directive 2004/38/EC and, in particular, the requirements of Articles 27 and 29.

• • •

Oslo, 19 September 2023

OFFICE OF THE ATTORNEY GENERAL
FOR CIVIL AFFAIRS

Pål Wennerås
Agent

Ida Thue
Agent

MINISTRY OF FOREIGN AFFAIRS

Terje Aalia, Agent