DIRECTOR OF PUBLIC PROSECUTIONS

EFTA Court
1 Rue du Fort Thüngen
L-1499, Luxembourg

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WRITTEN OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court, on behalf of the Prosecuting Authority of Norway (Påtalemyndigheten, hereinafter referred to as "the PA"), in

CASE E-5/23 *LDL V. PÅTALEMYNDIGHETEN*,

concerning the Supreme Court of Norway's request (hereinafter referred to as "the Request") 7 June 2023 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.

PA is represented in this matter by Public Prosecutor Alf Butenschøn Skre, who is also in charge of the criminal case against LDL in the proceedings before the Supreme Court of Norway.

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Table of Contents

I. Introduction

The Request concerns eleven distinct questions regarding the interpretation of EEA law in the context of infection control measures enacted in Norway during the Covid 19 pandemic. The main proceedings in Norway is a criminal case brought by the PA against LDL on the basis that he did not stay in a quarantine hotel after entering into Norway from Sweden on 2 May 2021.

II. Relevant facts and applicable national law

PA refers to the statement of facts in the Request pertaining the relevant actions undertaken by LDL that provide the factual basis for criminal liability, the criminal proceedings before national courts, and the applicable legal framework under Norwegian law. The following remarks will be limited to what the PA considers as a necessary supplement to the Supreme Court's presentation.

(a) Background for the Covid 19 Regulation and its legal basis under national law

As is pointed out in paragraph 31 of the Request, the rules on quarantine hotels were introduced in November 2020, and underwent several amendments. The PA wishes to highlight that questions of whether to continue travel restrictions, and in what form and to what extent, were subject to careful considerations, informed by analysis and advice from the Directorate of Health (Helsedirektoratet, Hdir) and the Norwegian Institute of Public Health (Folkehelseinstituttet, FHI).

As regards the context on the material time in the criminal proceedings, that is 2 May 2021, it should be noted that the Hdir on 12 April 2021, building upon expert advice from FHI, in a formal letter to the Ministry of Health advised that strict travel restrictions are maintained until further notice, initially for three new weeks until 12 May or possibly earlier. [Norwegian original: Helsedirektoratet anbefaler på smittevernfaglig grunnlag at strenge innreiserestriksjoner opprettholdes inntil videre, i første omgang for tre nye uker til ca 12. mai, eller evt. før."][1]

[1] Hdir, Letter responding to Covid 19 task 420 – Assessment of whether travel restrictions should be maintained, 12 April 2021.

Following the Supreme Court's description of Section 4-3 of the communicable diseases act in paragraph 24 of the Request, the PA wishes to expand on the statutory basis in Norwegian law for adopting the requirement in Section 5 of the Covid 19 Regulation that quarantine was to be undertaken in a hotel. When the requirement was first introduced in November 2020, the provision in the Regulation was issued under authority given by Section 7-12 of the communicable diseases act. This statutory provision gives the King, i.e. the Government, authority to enact provisions necessary to address an emergency relating to a communicable disease. Regulations issued under the authority of this statutory provision are by nature provisional and issued *pro tempore* in light of the emergency that justifies them. A process to provide statutory authority in ordinary legislation was also initiated. On 11 December 2020 the government proposed a bill to parliament, in Prop. 62 L (2020–2021),[2] which suggested amending Section 4-3 of the communicable diseases act, adding Paragraphs 2 and 3 which are quoted in paragraph 24 of the Request. In Prop. 62 L, the government presented a thorough examination of compliance with Norway's Constitution, relevant human rights documents and EEA Law. The proposal built upon, *inter alia*, a public consultation hearing (see Chapter 2.2 of the proposal) and analyses provided by the Hdir and FHI (see Chapter 3.4 of the proposal).

Legislative act no. 66 (2020–2021)[3] on 4 February 2021, was enacted on the basis of Prop. 62 L (2020–2021). As per Roman numeral II, no. 2, of the legislative act, i.e., the two added paragraphs in Section 4-3, were subject to a "sunset clause", with 1 July 2021 as its end date. Because Section 5 of the Covid 19 Regulation is invalid without a statutory authority, the obligation to undertake quarantine in a hotel would by consequence also be repealed at the latest on that date. Moreover, Chapter 5.4.3 of the proposal emphasised that the

> "duration of the statutory authority for issuing a regulation is a separate question to the question of the duration of the quarantine hotel scheme. The Ministry [of Justice and Public Security] notes that regulations issued under the authority of this provision cannot have a longer duration than what is necessary, cf. Section 1-5 of the communicable diseases act."

[2] https://www.regjeringen.no/no/dokumenter/prop.-62-l-20202021/id2791046/
[3] https://www.stortinget.no/globalassets/pdf/lovvedtak/2020-2021/vedtak-202021-066.pdf

> [Original Norwegian version: "Departementet understreker videre at forskriftshjemmelens varighet er et annet spørsmål enn hvor lenge karantenehotellordningen skal vare. Departementet viser til at forskrifter gitt i medhold av denne bestemmelsen ikke kan vare lenger enn nødvendig, jf. smittevernloven § 1-5."]

The PA recalls that Section 1-5, which is referred to in the proposal, is quoted in paragraph 22 of the Request, and contains key criteria for enacting infection control measures (see also case-law cited in paragraph 23 of the Request). In other words, as per the legislative enactment in February 2021, the requirement could not, as a matter of national law be in place longer than what could be deemed necessary, and it would in any case repealed on 1 July 2021.

By legislative act no. 125 (2020–2021)[4] on 27 May 2021, Parliament extended the statutory "sunset" described above, from 1 July 2021 to 1 December 2021. The legislative act was adopted on the basis of a proposal submitted by the Government on 9 April 2021, Prop.162 L (2020–2021).[5] The proposal contained an up-to-date analysis of the situation, and advice from the Hdir and FHI that was formally submitted on 11 March 2021. Hdir and FHI agreed that uncertainty regarding the development of infections created a need to extend the duration of the provisions. Moreover, there was consensus that travel restrictions are an effective measure to limit infections when the rate of infections ("smittetrykket") is higher abroad than in Norway. As described in Chapter 2 of the proposal, a public consultation hearing was conducted in March before the proposal was submitted to Parliament in April 2021.

The process described above of enacting, through the ordinary legislative procedure in Norway, a statutory authority to issue regulations requiring hotel quarantine, and extension of the duration of that statutory authority, shows that the Norwegian Government, experts in Hdir and FHI, a number of other parties who chose to take part in the public consultation hearings, and the Parliament of Norway, were involved in repeated appraisal and scrutiny of the necessity of the measure. In the view of the PA, the repeated legislative processes leave no doubt as to the thoroughness of

[4] https://www.stortinget.no/globalassets/pdf/lovvedtak/2020-2021/vedtak-202021-125.pdf
[5] https://www.regjeringen.no/no/dokumenter/prop.-162-l-20202021/id2843094/

considerations undertaken by Norwegian authorities in enacting the statutory authority for the Section 5 of the Covid 19 Regulation, and the democratic legitimacy of the measure at the material time in the present case.

(b) Section 5 of the Covid 19 Regulation

– *Criteria for inclusion of a country or area in Appendix A to the Regulation*

With reference to the Supreme Court's description in paragraph 28 of the Request of Appendix A to the Covid 19 Regulation, the PA wishes to expand on how Appendix A was compiled and revised.

As regards countries in the EEA and Schengen area, the contents of the list was based on weekly reports from FHI. Criteria for excluding a country or area from the list in Appendix A is stated in the weekly report submitted by FHI on 22 April 2021:[6]
(1) < 25 confirmed cases per 100 000 inhabitants in the past two weeks (14 days incidence), and (2) < 4 % positive test results on average per week in the past two weeks. In addition, there was room for an overall assessment ("helhetsvurdering") in light of trends and other relevant information. For Denmark, Finland and Sweden, the list differentiated between regions within those states. Other EEA and Schengen States, were considered state-by-state. In compiling the list, the FHI relied primarily on data from the European Centre for Disease Prevention and Control. Data from the websites of national health authories was also used.

FHI reported weekly on infection rates in Norway and other countries. According to the weekly report submitted on 25 April 2021, Sweden had 754,2 cases per 100 000 inhabitants in the past 14 days, and the corresponding number for Norway was 128,5 per 100 000. In the report it is stated that the percentage of reported positive test results in Sweden was 12,6 % in week no. 15 of 2021. The corresponding percentage for Norway in the report, which based on week no. 16 of 2021, was 2,7 %.[7]

– *Legal basis in the Regulation to consider strong welfare-related grounds*

[6] FHI, Task 116 part 3 – Week 14 and 15, 22 April 2021, page 1.
[7] FHI, Weekly report – Week 16, 28 April 2021, page 67 (see the two column at the far right in *Tabell 32*).

Supplementing paragraphs 27 to 35 in the Request, the PA wishes to highlight the possibility under Section 5 of the Covid 19 Regulation to take into account strong welfare grounds concerning the individual traveler when applying the rules regarding quarantine. The existence of compelling welfare grounds was relevant when applying the provision, both in relation to the individual traveler's reason for undertaking travel outside of Norway, and in relation to circumstances that could militate against having to undertake quarantine in a hotel.

As regards welfare grounds related to the reason for travel outside of Norway, reference is made to Section 5 paragraph 2 litra a and c. English translation of these provisions is provided in paragraph 33 of the Request. The criterion "necessary" (Norw. "nødvendig") under Section 5 paragraph 2 litra a and c is not exhaustively defined in the Covid 19 Regulation. Section 5 paragraph 5, which is also cited in the Request, states that a travel can be deemed necessary on account of *compelling welfare-related grounds* (Norw. "sterke velferdshensyn"). The provision did not give an exhaustive definition of the term compelling welfare-related grounds, but provides several examples ("*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", emphasis added).

Chapter 2 of the Covid 19 Regulation, where Section 5 is located, contains several other exemptions *both* from the obligation to *quarantine* and exemptions from the obligation to stay at a quarantine *hotel* (in cases where the obligation to quarantine applies), which are not described in detail in the Request. The unmentioned exemptions are clearly not of relevance to the criminal case against LDL in light of the concrete factual basis of the case.

Amongst the exceptions not described in the Request, the PA finds it necessary to describe Section 5 paragraph 2 litra e, compelling welfare-related grounds could exempt travelers from having to stay in a quarantine hotel. This provision also applied to cases where the travel was not deemed *necessary*. Since this provision is not quoted in the Request, the wording in 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"

Accordingly, litra e provided a legal basis to take into consideration whether there were compelling welfare-related grounds that militated against an obligation to stay in a quarantine hotel upon entry into Norway, regardless of whether the travel was (un)necessary. The provision did not provide an exhaustive definition or delineation the grounds that would make the exemption applicable. Litra e is described in Circular G-12/2021 (27 March 2021, see paragraph 50 of the Request)[8] as a narrow exemption meant for extraordinary cases ("en snever unntaksregel og gjelder kun for helt spesielle situasjoner"). The circular provides several examples of situations where the criterion is met, but does not limit the exemption to such situations.

The provisions in litra a, c and e show that the hotel quarantine scheme was nuanced and allowed for flexibility in its enforcement. In general, a person who travelled to Norway at the material time, would have the opportunity to invoke the exceptions in

[8] Available at https://lovdata.no/static/RDEP/g-2021-0012.pdf. See page 7.

Section 5 paragraph 2 litra a, c or e, at the following points in time: *Firstly*, during his or her dialogue with Norwegian police after crossing the border (that is, at the time when LDL was informed by police of arrangements to stay at a named quarantine hotel – arrangements that, evidently, would have been uncalled for if LDL's travel was "necessary" under Section 5 paragraph 2 litra a or c, or if there were compelling welfare-related grounds for him not to stay in a hotel, cf. litra e). *Secondly*, when he or she receives an optional penalty writ ("forelegg") from the Police and is requested to provide the Police with an answer as to whether or not the penalty is accepted. *Thirdly*, if he or she does not accept the penalty, in the course of the ensuing criminal court proceedings.

Moreover, as regards such criminal court proceedings, according to case-law of the Supreme Court of Norway, violating a Regulation ("forskrift") only incurs criminal liability if the violated Regulation was valid ("gyldig"), see the Supreme Court's judgement 10 November 2022 in Case 22-054335STR-HRET (HR-2022-2171-A),[9] in particular paragraph 17. The cited Supreme Court judgement concerned criminal liability for violation of a local regulation adopted in the city of Oslo during the Covid 19 pandemic. The local regulation set a maximum limit to how many persons were allowed to gather in private homes.

In such cases, as in the criminal case against LDL, the legality of the Regulation is considered a *prerequisite* for criminal liability. Thus, in the course of criminal proceedings where criminal liability is based on contravention of the Covid 19 Regulation, questions related to the legality of the Regulation, raised either by the parties or the court *ex officio*, must be reviewed by the court as a preliminary matter. Accordingly, there is an avenue for the defendant to raise objections to the legality of relevant provisions of the Regulation, including, but not limited to, whether the provisions were within the boundaries of the statutory authority for issuing the regulation (see the communicable diseases act Sections 1-5 and 4-3), whether they were compatible with the Constitution of Norway, as well as Norway's obligations under EEA law and relevant national legislation, and the European Convention on Human Rights (ECHR).

[9] A summary in English is available on the website of the Supreme Court: https://www.domstol.no/en/supremecourt/rulings/rulings-2022/supreme-court-criminal-cases/HR-2022-2171-A/

(c) The criminal proceedings against LDL

Reference is made to section 3 of the Request. In addition to those facts, the PA notes that, as stated on page 4 in the judgement from Eidsivating Court of Appeals (judgement issued on 6 July 2022 in case no. 22-056411AST-ELAG), it is *common ground* in the criminal proceedings, i.e., uncontested amongst the parties, that LDL's travel to Sweden was *not* necessary ("nødvendig") within the meaning of that term under Section 5 paragraph 2 litra a or c. Moreover, there is no record of LDL claiming that there were circumstances in his case that rise to the threshold of litra e – neither before the Police or during court proceedings. In other words, when returning to Norway, LDL did not plead that personal reasons for travelling to Sweden to visit close family members (i.e., LDL's father being distraught after the passing of LDL's uncle), or welfare-related circumstances after his return to Norway, were sufficiently compelling to exempt him from the general rule under Section 5 of the Covid 19 Regulation that mandated staying in a hotel. Thus, LDL did not avail himself of the opportunity to under Section 5 to make the case that *compelling welfare-related grounds* exempted him from the quarantine hotel requirement.

With regard to the level of the fine imposed on LDL, The PA notes that LDL did not appeal the level of punishment, i.e. the amount payable as a fine, that was set by the District Court. The Director of Public Prosecutions issued guidelines 14 January 2021 for handling of criminal cases in the context of the Covid 19 pandemic. The guidelines included a list of guiding levels for fines for the most common violations of infection control measures. For violations of rules regarding quarantine hotel, the guidelines suggested a fine of Norwegian kroner 20 000. As per Section 55 of the Criminal Code, when a fine is imposed, it is generally required to specify the number of days of imprisonment that will occur in the case of non-payment. The guidelines suggested 15 days for this category of violations. The penalty in LDLs case was set somewhat higher because the guidance levels are suitable for cases where the violator accepts the optional writ penalty ("forelegg"). In general, in criminal cases in Norway, the level of the fine (and, correspondingly, the number of days imprisonment in case of non-payment) is raised from the level stated in guidance documents if the defendant does not accept the writ and the case is instead adjudicated by way of court proceedings.

III. Analysis

(a) Questions 1 to 3

By its first, second and third questions the Supreme Court of Norway in essence requests advice from the EFTA Court as to which provision under the EEA agreement, and/or EEA relevant EU legislation, should serve as the vantage point for a legal analysis of whether LDL's rights under EEA law have been violated. As explained below, the PA submits that the quarantine hotel requirement should be considered in light of LDL's right of entry under Article 5 of Directive 2004/38/EC.

(i) Freedom of movement – relationship between Article 28 EEA Agreement and Directive 2004/38/EC

LDL's travel from his residence in Norway in order to visit family members in Sweden and his return to Norway, by necessity entails (1) exiting Norway and entering Sweden, and (2) exiting Sweden and entering Norway. The situation of an EEA national residing in an EEA State, seeking to undertake a travel to another EEA State, is covered by the right to move and reside freely in the EEA. Although LDL was not banned from leaving Norway or reentering Norway after his visit to Sweden, the requirement of staying in a quarantine hotel had an undeniable negative effect on the practical realities of reentering Norway, thus interfering with LDL's right under Article 5 of Directive 2004/38/EC to enter into Norway from Sweden. The requirement of staying in a quarantine hotel upon returning to Norway could also have the effect of deterring persons from *exiting* Norway (in apprehension of the requirement of quarantine upon reentry), which could in theory interfere with their rights under Article 4 Directive 2004/38/EC. However, as the measure interfered with rights under Article 5, the PA does not consider it necessary to conclude as to whether the measure also interfered with rights under Article 4.

The PA submits that – in accordance with the Court's approach in Case E-15/12 *Wahl*, although there are significant differences between the present case and *Wahl* – it is sufficient to consider the legitimacy of the interference with LDL's right to movement

within the EEA on the basis of his rights under Directive 2004/38/EC, and that Article 28 EEA Agreement does not raise questions in this matter separate to those raised when applying the Directive.

The PA is unable to see that the exclusion under Joint Committee Decision No. 158/2007 of the concept of 'Union Citizenship' and immigration policy should have any material impact on the present case.

(ii) Freedom of movement – article 4/5 and 6/7 Directive 2004/38/EC

While it is without bearing for the question of whether LDL has violated Section 5 of the Covid 19 Regulation, the PA, within the boundaries of the criminal proceedings, accepts as a given that LDL has exercised his right, as a national of an EEA State, to reside and work in Norway since the autumn of 2016.

Section 5 of the Covid 19 Regulation did not differentiate, directly or indirectly, between Norwegian nationals and nationals of other EEA States who have made use of their right of residence in Norway, and neither the criminal case against LDL, or the quarantine hotel scheme concerns expulsion from Norway. Overall, the Regulation did not hinder LDL's access to the Norwegian labour market.

The PA therefore submits that, should there be any negative effects of the contested quarantine requirement on LDL's exercise of his right to reside in Norway pursuant to Article 6 or 7 of Directive 2004/38/EC, such effects would in any case be the unavoidable consequence of the quarantine hotel requirement's impact on his right of entry to Norway under Article 5 of the Directive. Therefore, the impact of the quarantine hotel requirement on the possibility, or desirability, to undertake a return travel between Norway and another EEA state does not, in the PA's view, justify a separate examination in light of Article 6 or 7 of Directive 2004/38/EC, in addition to the examination in light of Article 5 as described above.

(iii) Freedom to receive services – Article 36 EEA Agreement

In the PA's view, the parties in the criminal proceedings that the purpose of LDL's travel to Sweden was to visit family members, i.e., leisure travel. Nevertheless, it is fair to assume that LDL did receive services, at the very least such services that would be of an essential nature during virtually any travel (domestic or abroad) lasting approximately one week and that could be received passively, such as electronic communications (i.e. a mobile phone automatically connecting to a network in Sweden). For reasons explained in the following paragraph, the PA does not find it necessary to take a position as to whether receiving services of this nature in itself is sufficient to bring LDL's travel within the scope of Article 36 of the EEA Agreement.

In light of the factual basis of the present matter, the PA submits that the effect, if any, of the quarantine hotel requirement on LDL's freedom to receive services in another EEA State, would be limited to what is the unavoidable consequence of the quarantine hotel requirement's impact on the *freedom of movement of persons between EEA States*. As such, the impact of the quarantine hotel requirement on the desirability to undertake a return travel between Norway and another EEA state does not justify a separate examination of whether that requirement was in breach of Article 36 of the EEA Agreement. See, *mutatis mutandis*, the approach taken in Case C-544/11 *Petersen*, paragraph 33.

Finally, the PA notes that the wording in Article 37 of the EEA Agreement would seem to indicate that Article 36 and a directive that implements the right to freedom of movement, are – as a rule – not intended to apply simultaneously. See, as regards the relationship between Article 40 EEA and Article 36 EEA, Case E-1/00 *State Debt Management Agency and Íslandsbanki-FBA hf.*, paragraph 33:

> "Furthermore, Article 37 EEA states that activities are to be considered as "services" within the meaning of the EEA Agreement only "in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons". One may conclude from that provision that Article 40 EEA and Article 36 EEA are, as a rule, not intended to apply simultaneously."

(b) Question 4

The requirement of staying in a quarantine hotel pursuant to Section 5, paragraph 1, of the Covid 19 Regulation, was a rule of general application. The provision did not require a case-by-case assessment of whether the traveler in fact posed a threat to public health. Rather, the requirement – and exceptions – applied to abstract categories of persons.

In this regard, there is an obvious connection between the present case and the first preliminary question before the Court of Justice of the European Union (ECJ) in Case C-128/22 *Nordic Info*, see, in particular paragraph 62 to 73 of the opinion delivered by Advocate General Emiliou on 7 September 2023. The PA agrees with Advocate General Emiliou that Articles 27(1) and 29 Directive 2004/38/EC do not preclude travel restrictions in the form of rules of general application relating to *categories* of persons, and refers to the reasoning in those paragraphs of the opinion.

(c) Question 5 and 6

By its fifth and sixth questions, the Supreme Court of Norway seeks to establish whether the fact that measures taken by the Norwegian government in order to protect against covid 19 differentiated between different categories of travelers has implications for the assessment of whether the measure pursuant to Section 5 of the Covid 19 Regulation was *suitable* (which includes an assessment of whether the measure was consistent). The question is understood to refer to the requirement under the general principle of proportionality under EU and EEA law, that a measure that infringes the right to freedom of movement and residence must be appropriate/suitable to contribute to the attainment of the objective pursued.

The principle of proportionality is expressly referred to in Article 27(2) Directive 2004/38/EC, as a requirement for measures taken on grounds of public policy or public security, but not in the general provision in paragraph 1 of that Article, or in Article 29 regarding measures on the grounds of public health. Nevertheless, the PA takes as a

given that also measures taken on grounds of public health must comply with the principle of proportionality.

The PA notes that the Supreme Court of Norway has not sought comprehensive guidance to all questions of EEA law that arise when considering the principle of proportionality in the present case, such as the requirement that the aim pursued was *legitimate aim*, and the *necessity* of the measure. Therefore, at this time the PA will limit – to a reasonable extent – its remarks in this regard to the particular questions raised in the Request.

(i) Margin of discretion when relying on the objective of public health to justify a restriction

It follows from settled case-law that the protection of public health is one of the overriding reasons in the public interest recognised by EEA and EU law, and that Member States have a wide margin of discretion in this area, see Case C–342/17 Memoria Srl paragraph 54, and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes*, paragraph 19. As it is stated in Case E-16/10 *Phillip Morris*, paragraph 80:

> "In accordance with the case-law set out in paragraph 77 of this judgment, an assessment of whether the principle of proportionality has been observed in the field of public health must take account of the fact that an EEA State has the power to determine the degree of protection that it wishes to afford to public health and the way in which that protection is to be achieved. As EEA States are allowed a certain margin of discretion in this regard, protection may vary from one EEA State to another. […]"

In that decision, after a general description the principle of proportionality in paragraph 81, the Court held in paragraphs 82-83:

> "However, where there is uncertainty as to the existence or extent of risks to human health, an EEA State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent.

> Furthermore, an EEA State may take the measures that reduce, as far as possible, a public health risk (see, for comparison, Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes and Others [2009] ECR I-4171, paragraph 30).
>
> It follows that, where the EEA State concerned 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."

The PA takes the view that the Covid 19 virus constituted a serious risk to public health at the time of enactment of the impugned measure, and considers that there was uncertainty regarding both the extent of risks presented by what was at the time new variants of the Covid 19 virus, and how to protect the population against this significant risk.

The lawfulness of the measures must be assessed in the light of the context at the material time, that is, in the months of March through May 2021. The PA notes that at that time, although the Covid 19 pandemic was entering its second year, there was still uncertainty with respect to how states could protect their populations against this threat to public health. Novel threats in the form of new variants of the virus, including strains that caused alarm from an epidemiological point of view, caused uncertainty and concern at that time. This is referenced in the Governments publicly available reasoning behind the amendment to the Covid 19 Regulation on 16 March 2021:[10]

> "The situation is critical, in particular in light of the fact that *it is significantly more demanding to supress outbreaks of the new and more infectious variants of the virus*. Disease caused by the new variants also *seems to have* a more serious course. The Norwegian Directorate of Health and FHI recommend delaying the introduction and spread of the more infectious virus variants as

[10] Government of Norway, Justification for amendments of 16 March to Section 5 of the Covid-19 Regulation on place of stay for entry quarantines, 17 March 2021.

much as possible. The goal of delaying the establishment of more infectious virus variants is that as many people as possible are vaccinated before infections from the new variants dominates." (unofficial translation to English by the PA, emphasis added)

[Norwegian original version:
"Situasjonen er kritisk særlig med tanke på at det er betydelig mer krevende å slå ned utbrudd med de nye og mer smittsomme virusvariantene. Sykdom forårsaket av de nye variantene synes også å gi et mer alvorlig forløp. Helsedirektoratet og FHI anbefaler å forsinkeintroduksjon og spredning av de mer smittsomme virusvariantene så mye sommulig. Målet med å forsinke etableringen av mer smittsomme virusvarianter er at flest mulig blir vaksinerte før smitte med de nye variantene dominerer."]

As a reminder of the situation at the time, the PA refers to an expert recommendation given by the FHI on 10 March 2021, in a section describing the epidemiological situation:[11]

"Following a national decline in reported cases in weeks 1–7, there has been an increase from, and including, week 7. The increase is mainly caused by more infections in Oslo and Viken [two administrative regions], but there is also increased prevalence in most counties. Variants of the virus that have been the most common in the past months declined in February, while outbreaks of the English, and subsequently the South African, variants of the virus increased accordingly. The English variant now dominates in Oslo and Viken. Outbreaks of new variants are seen throughout the country. (unofficial translation to English by the PA)

In Europe, there is still a high prevalence of infections in most countries, and many countries are also seeing an increase in 14-days incidence. More infectious variants of the virus spread quickly, and make great demands on the

[11] FHI, Response to Covid-19 task 379 – Regarding assessment of continued need for strict travel restrictions, 10 March 2021, page 5-6.

capacity for (enhanced) testing, isolation, infection tracking and quarantine, with significant additional work and demanding tracking of infection."

[Norwegian original version: "Etter en nasjonal nedgang i antall meldte tilfeller i uke 1- 7, har det vært en økning fra og med uke 7. Økningen skyldes i hovedsak mer smitte i Oslo og Viken, men det er også økende forekomst i de fleste fylker. Virusvariantene som har vært vanligst de siste månedene har avtatt i februar, mens utbrudd med den engelske, og etter hvert den sør-afrikanske, virusvarianten har økt tilsvarende. Den engelske varianten dominerer nå i Oslo og Viken. Utbrudd med nye varianter er sett i hele landet.

I Europa er det fortsatt høy smitteforekomst i de fleste land, flere land ser også en økning i 14-dagers insidens. Mer smittsomme varianter sprer seg raskt, og stiller store krav til TISK-kapasiteten (forsterket TISK), med betydelig merarbeid og krevende smittesporingsarbeid"]

Hdir stated in its advice to the Ministry of Health on 10 March 2021 that:[12]

"As shown above, the Communicable Diseases Act requires a continuous assessment and adjustment of the measures as the situation develops, in order to secure that the basic requirements are met. Measures enacted in order to handle outbreaks must be adjusted as the infection situation develops and shall not last longer than necessary. As we obtain more knowledge, it will be possible to adjust the measures in line with the development in the infection situation." (unofficial translation to English by the PA)

[Norwegian original version: "Som vist til over så forutsetter smittevernloven at det foretas en løpende vurdering og justering av tiltakene etter hvert som situasjonen utvikler seg for å sikre at de grunnleggende kravene er oppfylt. Tiltak som iverksettes for å håndtere utbrudd må tilpasses i takt med smittesituasjonen og skal ikke vare lenger enn nødvendig. Etter hvert som man

[12] Hdir, Response to Covid-19 task 379, 10 March 2021, page 6

får bedre kunnskap, vil det være mulig å tilpasse tiltakene i takt med utvikling av smittesituasjonen.]

On the basis of the above, the PA submits that the scope of judicial review when assessing the proportionality of the measures is whether it was, at the time, reasonable for the Norwegian government to assume that the measure would be able to contribute to the protection of human health, cf. *Phillip Morris* paragraph 83. This would appear to be essentially consistent with the approach proposed by General Advocate Emiliou in his opinion in *Nordic Info*, paragraph 99 ("I agree that the Belgian authorities *could reasonably assume* that travel restrictions were liable to contribute to the achievement of the 'public health' objective pursued." emphasis added).

(ii) It was reasonable to assume that the measure was suitable to contribute to mitigating the public health risk of Covid 19 infection

The PA submits that the travel restrictions provided for by the Covid 19 Regulation were suitable to attain the objective pursued, which was – in essence – to provide protection against health risks associated with the Covid 19 pandemic. At the time of enacting the measures, the Government was informed by expert advice that strict travel restrictions should be maintained in order to slow the pace of Covid 19 infection, *inter alia* new variants of the Covid 19 virus, being brought into Norway. The PA notes that the obligation to quarantine applied to persons coming to Norway from areas with a high rate of infection, see paragraph 28 and 29 of the Request and section II(b) of this pleading.

It is also submitted that the specific requirement to undertake quarantine in a *hotel* was suitable, in the sense that it was reasonable to assume that it would contribute to attaining the objective pursued. The explanation of the benefits of this measure that was given in the Government's justification for the amendment 16 March 2021, is sufficiently compelling, see the quotation in paragraph 46 of the Request. The PA highlights in particular that "[q]uarantine 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". The government held this view on the basis of advice from Hdir and FHI.

The PA also refers to the general points in the General Advocates discussion of the suitability of travel restrictions in *Nordic Info*, see paragraph 102.

To the PA it was clearly, at the material time, reasonable to take the view that imposing a requirement on travellers who arrive in Norway from countries/regions with high rates of infection to undertake quarantine in a hotel would be able to contribute to addressing the risk to public health of importing Covid 19 infections from abroad.

(iii) Attaining the objective in a consistent and systematic manner

Under relevant case law, a measure can be regarded as appropriate/suitable for securing attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner, se e.g. C-377/17 *Commission v Germany* paragraph 89 and Case C-161/09 *Kakavetsos-Fragkopoulos* paragraph 42.

The latter case, which concerned different marketing restrictions for grapes according to different areas of production in Greece, is an example of a case where the ECJ found that the impugned measure was not objectively justified since it did not pursue the stated objective in a consistent manner. The Court stated that it was "not clear why a much more restrictive measure is imposed on producers" of dried grapes in a particular sub-area in area A. Moreover, the Court and noted that produce from another area in which "dried grapes are unquestionably of inferior quality, were granted [protected designation of origin] status, whereas dried grapes from the second sub-area of Area A, which are of a relatively superior quality, are still not protected". In other words, the ECJ's analysis of the impugned measures apparently did not reveal a cogent rationale for how the measures would contribute to the objective pursued.

In contrast, in Case C-333/14 *Scotch Whisky Association and Others*, the impugned measure was "part of a more general political strategy designed to combat the devastating effects of alcohol" and constituted "one of 40 measures whose objective is to reduce, in a consistent and systematic manner, the consumption of alcohol by the Scottish population as a whole, irrespective of where that consumption takes place or the nature of that consumption".

In the view of the PA, the infection control measures put in place by Norwegian authorities during the Covid 19 pandemic did clearly reflect a genuine concern to attain the stated objective.

The fact that some general categories of travellers were exempt from the requirement of quarantine under Section 4 of the Covid 19 Regulation, and from the requirement of undertaking mandated quarantine in a hotel under Section 5 of the same Regulation, does not give rise to doubts as to whether the enacted Regulation genuinely reflects a concern to protect public health. Admittedly, because the requirements of quarantine and staying in a hotel during the quarantine period were effective in addressing the risk of importing infection from abroad, protection from infection from persons within the scope of such exemptions was reduced compared to protection from infection from persons outside the scope of the exemptions (who accordingly were required to undertake quarantine and stay in a hotel). The nature of the exemptions were such that they provided flexibility, and a balancing of interest that was necessary in order to put in place a systematic scheme for quarantine upon entering Norway from areas with high infection rates in the way deemed fit by Norwegian authorities.

Arguably, it is a keystone in the the Court's reasoning in the *Phillip Morris* Case, cited above, that EEA States have the power to determine both the *degree of protection* that it wishes to afford to public health and *the way in which that protection is to be achieved*. If Defence Council's interpretation of the requirement of suitability – as it is rendered in paragraph 73 of the Request, that "regard must be had solely to health-related grounds" when determining whether restrictions to protect public health are suitable – were to be adopted by the Court, national authorities in EEA States would, as matter of EEA law, be barred from enacting rules on travel restrictions that are tailored in a holistic manner to the current situation and needs on the basis of the particular context of that State. Under the narrow construction of the suitability requirement put forward by Defence council, the power of EEA States to choose *the way in which* the desired degree protection is attained, would in effect become theoretical, because the state could not take into account public interest considerations that are inherent in the national authorities' competence to choose between alternatives when shaping its domestic

public health policies. In practice, this would negate the margin of appreciation described by The Court in the *Phillip Morris* case (see above).

See also, in this regard, the reasoning of the ECJ in Case C-377/17 *Commission v Germany*, where it is held that applying an overly strict burden of proof on the national authorities when considering the requirement of necessity of the impugned measure, would "amount, in practice, to depriving the Member State concerned of its regulatory competence in the field concerned".

Finally, the PA notes that the Advocate General did not hold that exemptions for essential travels lead to a conclusion that the contested travel restrictions scheme in Belgium sought to attain the objective of protecting public health in a way that was not consistent or systematic.

In the view of the PA, exemptions from the obligation to quarantine, or the obligation to quarantine *in a hotel*, do not necessarily run counter to the objective of the policy of travel restrictions. Rather, it is difficult to envisage how a policy of travel restrictions, involving a mandate to stay in a hotel, that provides a high level of protection of public health during a pandemic, could be considered proportional if the regulations do not provide for differentiation between different categories of travellers. The reasoning in paragraphs 105 and 132 of General Advocate Emiliou's opinioin in Nordic Info is illustrative in this regard.

(d) Question 7

The PA submits that it is a legitimate concern for State authorities that the rules it imposes on subjects within its jurisdiction are clear, easily understood and enforceable. This is particularly true when the rules in question are not directed towards a specialized professional niche of society, but instead, in principle, directed towards the population in general, as well as aliens who enter into the state's territory.

Moreover, the principle of legal certainty forms part of the Community legal order in the EU, see Case C-347/06 paragraph 65. It is held in paragraph 69 of the same judgement that the principle requires that rules of law be clear, precise and predictable

in their effects, in particular where they may have negative consequences on individuals and undertakings.

Case-law of the ECJ provides precedent for taking into account considerations of practical possibilities of application and enforcement in particular in the context of assessing whether an impugned measure was necessary, i.e., whether the same contribution to the objective pursued could be attained through alternative less restrictive measures.

In Case C-512/13 *Sopora*, paragraph 33, the ECJ held:

> "While it is true that considerations of an administrative nature cannot justify a derogation by a Member State from the rules of EU law (judgment in Terhoeve, C-18/95, EU:C:1999:22, paragraph 45), it is also clear from the Court's case-law that Member States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities (see judgments in Commission v Italy, C-110/05, EU:C:2009:66, paragraph 67; in Josemans, C-137/09, EU:C:2010:774, paragraph 82; and in Commission v Spain, C-400/08, EU:C:2011:172, paragraph 124)."

Building upon Case C-110/05 *Commission v Italy*, the ECJ in Case C-142/05 Mickelsson and Roos, which concerned restrictions on using personal watercraft in Swedish waters in order to protect the environment, held that although other measures could be envisaged that would guarantee a certain level of protection of the environment, "the fact remains that Member States cannot be denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities" (paragraph 36).

Case C-137/09 *Josemans* concerned a measure banning non-residents form entering so-called coffee shops in Maastricht, in an effort to address so-called drug tourism from other member states. One alternative measure could be to ban coffee shops from selling

the products in question to tourists. In paragraph 81 of its judgement, ECJ, remarked that "it must be pointed out that it is not easy to control and monitor with accuracy that that product is not served to or consumed by non-residents". In paragraph 82 of the same judgement it is held that member states could not be denied "general rules which are easily managed and supervised by the national authorities"

It is evident from the case-law that the ECJ has recognised that the practical realities of monitoring compliance with the measure is a legitimate concern when drafting rules, and that such considerations may form part of the justification for choosing a measure instead of conceivable alternative measures.

(e) Question 8

By its eighth question, the Supreme Court of Norway seeks guidance as to whether the potential deterrent effect of the quarantine hotel scheme on persons contemplating to travel abroad, is within the "legitimate aims in the assessment of whether the measure is justified".

In the view of the PA, the potentially deterrent effect of travel restrictions should be taken into account when considering whether it was reasonable, at the material time, to assume that the measure could contribute to the objective pursued. It is a matter of fact that the Hdir and FHI advised maintaining travel restrictions. As described in paragraph 42 et seq. in the Request, the Government of Norway found it necessary to impose measures which were "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" (see paragraph 43). The Government considered the general requirement of staying in a quarantine hotel as a less restrictive alternative to a general ban on unnecessary travels.

(f) Question 9

By its ninth question, the Supreme Court of Norway seeks guidance for the hypothetical situation that procedural requirements in Articles 30 and 31 Directive 2004/38/EC are deemed not to have been fulfilled in the present case.

The Articles implement the general principle under EU law of the right to an effective remedy, which follows from case law and is also enshrined in Article 47 of the EU Charter.

(i) Requirement of notification under Article 30 Directive 2004/38/EC

The PA agrees with Advocate General Emiliou's position in his opinion in *Nordic Info* (paragraph 116), that a notification in writing could obviously not be given to every traveler that fell within the scope of travel restrictions. The wording in Article 30, which requires notice in writing does not lend itself to a clear application in the case of general measures taken for the purpose of protecting public health. The PA finds the reasoning of the General Advocate that frequent sharing of information about the measures with the general public through large-audience media, which should be taken to include resources made available via the Internet by the government, compelling.

The argument could be made that the requirement of written notification to the individual in fact does not apply in the case of rules of general application, since there is no "decision" taken against the individual traveler as such. For the measure to pass the necessity test under the general principle of proportionality (i.e. regardless of whether the requirement under Article 30 of notification in writing of a "decision"), the measure itself, and the way in which it is announced to the public, should provide a sufficient opportunity to those affected to understand and adapt to the rules. See, to that effect, Case C-309/02 Radlberger Getränkegesellschaft mbH & Co, paragraph 80, and Case C-463/01 Commission v Germany paragraph 80. Failure to do so could arguably lead to the *measure* being in violation of the principle of proportionality and thus unlawful – alternatively it could be unlawful for state authorities, such as the PA, to *sanction violations of the measure* in an initial period where the regulations have not (yet) been communicated in a way that allows a possibility to adapt to the measure that is adequate seen in light of the nature of the regulation.

In the view of the PA, the evident need to undertake regular and frequent reviews of the travel restrictions, inter alia the list of countries to which travel quarantine applied (i.e. Appendix A to the Covid 19 Regulation), which was necessary to avoid that the

measures were calibrated to the latest available data on the development of infections, entails that the state could justifiably announce infection control rules, and changes to those rules, on short notice. It may reasonably be assumed that persons undertaking in cross-border travel at the material time during the Covid 19 pandemic were in general conscious of the possibility that travel restriction policies could be subject to change on short notice. In general, state authorities cautioned against unnecessary travel. This context is significantly different to that in Case C-463/01, cited above, where a period of six months from the date of the announcement of a change in policy until the date of entry into force was not deemed sufficient to allow the relevant subjects to adapt to the new policy, which required changes in the production of natural mineral water and the management of non-reusable packing waste in connection with such production.

(ii) Requirement of procedural safeguards under Article 31 Directive 2004/38/EC

As argued by the Advocate General in *Nordic Info*, see paragraph 117–119, the right to judicial redress may be ensured in the process of enforcing the measure, e.g. in criminal proceedings. A decision to impose a penalty (e.g., a fine) on an individual traveler for violating measures of general application, thus infringing his or her right of entry into Norway under Article 5 of Directive 2004/38/EC, could arguably be considered a "decision" within the meaning of Article 31 of the same Directive.

In the view of the PA, shortcomings in e.g. criminal proceedings in upholding procedural safeguards, should, however, not lead to the conclusion that the enacted travel restriction in question in itself was illegitimate, and that violation of the measure could not constitute the basis of criminal liability. Rather, such shortcomings of the criminal proceedings should be addressed through the possibility under the Part VI (*Judicial remedies*) of the Criminal Procedure Act to appeal decisions on account of procedural error or error in application of the law.

(g) Question 10 and 11

By its tenth and eleventh questions, the Supreme Court breaches the topic of strict proportionality (proportionality *stricto sensu*).

It has been pointed out by the General Advocate in his opinion in Nordic Info, paragraph 120, that a requirement of proportionality *stricto sensu* is "generally absent" from the ECJ's "traditional" case-law on freedom of movement, while it features "consistently" in the ECJ's decisions "relating to legality of national measures that limit the exercise of the fundamental rights guaranteed by the Charter, under Article 52(1) thereof".

The PA takes as a given that reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of fundamental freedoms, only if the measure in question takes account of such rights, see Case C-441/02 *Commission v Germany* paragraph 108-109. The EU Charter does not apply to the EEA Agreement. However, it is established case-law, recalling that all EEA States are parties to the European Convention of Human Rights (ECHR), that provisions of the EEA Agreement are to be interpreted in the light of fundamental rights, Case E-28/15 paragraph 81 and Case E-4/11 Clauder, paragraph 49.

The test of proportionality under EEA law should therefore provide a protection of fundamental rights that is equivalent to that required under the European Convention on Human Rights (ECHR). Thus, if a requirement under national law to undertake quarantine, or more specifically quarantine in a hotel, is seen as an infringement of the right of the individual to respect for his private and family life under Article 8 of the ECHR, whether the measure is justified must be considered in light of the derogation clause in paragraph 2 of that Article, which requires that the measure was "necessary in a democratic society [...] for the protection of health".

This test will, *inter alia*, entail an assessment of whether the measure placed an excessive burden on members of society, that is, that a fair balance has been found between fundamental rights negatively affected by the measure, and on the other hand the positive obligations of the state to protect human life and health, cf. Article 2 ECHR.

It follows from the above that the question of whether there is a requirement of proportionality in a narrow sense of the term (*stricto sensu*), and, if so, the question of

the legal content of such a requirement, is closely linked to an analysis of the State's obligations under the ECHR and potentially other applicable human rights instruments.

In undertaking an assessment of the proportionality, there is a distinction to be made between assessments *in abstracto* and *in concreto*. In the present matter, the context of the assessment is a criminal case against an individual defendant. The assessment of proportionality *stricto sensu* should arguably be applied *in concreto* in light of the individual circumstances of the case. It would appear that the same position, although under a different reasoning, is taken in paragraph 129 in the Advocate General's opinion in *Nordic Info*.

An *in concreto* assessment is compatible with ECtHR practice on Article 8 as a limitation for criminalisation or criminal penalties: Unless the criminalisation in question interferes with intimately personal aspects of private life, such as sexuality, in a broad and absolute way (as was the case in Dudgeon v. UK, application no. 7525/76, see in particular pargraphs 60-61), the assessment of whether imposing a criminal sanction would violate Article 8 should, arguably, be carried out *in concreto* in light of available facts regarding how the criminal sanction impacts the individual defendant in that particular case. See, Lacatus v. Switzerland, application no. 14065/15, paragraph 115, where the Court's conclusion regarding the requirement of proportionality (which was not met in that case) addresses the criminal penalty that was imposed on the applicant within the context of her particular situation, and not the provisions in national law that provided the legal basis for the penalty in general.

If an *in concreto* assessment leads to a conclusion of violation of rights, the conclusion would only have effect for the charges in the individual case – it would not necessarily have the effect that the measure in question should be considered as invalid in the context of cases against other defendants. In other words, should an assessment *in concreto* lead to the conclusion that it was not proportional *strictu sensu* to require LDL to undertake quarantine in a hotel, the criminal charges against him must be dropped, but the conclusion does not directly impact the general obligation that was imposed on the population at large by Section 5 in the Covid 19 Regulation.

IV. Proposed response to the preliminary questions submitted by the Supreme Court of Norway

In light of the foregoing considerations, the PA respectfully submits that the questions in the Request be answered as follows:

Questions 1 to 3: National measures such as that imposed by Section 5 of the Covid 19 Regulation on 2 May 2021 constitutes a restriction on the right of entry under Article 5 of Directive 2004/38/EC.

Question 4: Chapter IV of Directive 2004/38/EC does not preclude measures of general application enacted for the purpose of protecting public health.

Question 5 and 6: In the area of public health, the State enjoys a wide margin of discretion in determining the degree of protection and the way in which that protection is to be achieved. Differentiating between abstract groups in society on the basis of different circumstances, and taking into account general public interests ordinarily involved in policy decision-making, does not in itself result in that the measures fail the requirement of attaining the objective pursued in a consistent and systematic manner.

Question 7: When drafting rules with the purpose of infection control during a pandemic such as that at issue in the present case, it is legitimate for the State to take into consideration whether the rules are easily understood and applied by concerned parties and easily managed, supervised and enforced by the authorities.

Question 8: The potentially deterrent effect, if any, that a requirement of staying in a quarantine hotel upon entry may have on members of the public contemplating to travel to countries with high rates of infection may be taken into account in the assessment of whether the was justified.

Question 9: Articles 30 and 31 of Directive 2004/38/EC, which are an expression of the general principle of the right to an effective remedy. In the case of measures of general application, it is a prerequisite for sanctioning violations of the measure that the general public was, at the material time, provided with adequate information in due time.

regarding the measures, taking into account to the nature of the measures, and that it is possible to challenge the legality of the measure and obtain judicial review.

Question 10 and 11: The test of proportionality under EEA law should therefore provide a protection of fundamental rights that is equivalent to that required under the European Convention on Human Rights (ECHR). Thus, if a requirement under national law to undertake quarantine, or more specifically quarantine in a hotel, is seen as an infringement of the right of the individual to respect for his private and family life under Article 8 of the ECHR, whether the measure is justified must be considered in light of the derogation clause in paragraph 2 of that Article, which requires that the measure was "necessary in a democratic society […] for the protection of health", while taking into account the positive obligation of States to protect human life and health.

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An electronic copy of this pleading is lodged electronically (scanned PDF of the signed document and MS Word format) via e-mail to registry@eftacourt.int. The signed original document will be delivered to the Registry no later than 10 days from today, cf. Article 54(7) of the Rules of Proceedure.

Oslo, 19 September 2023

RIKSADVOKATEN

Alf Butenschøn Skre

Public Prosecutor (statsadvokat)

RIKSADVOKATEN

Godkjenning/Underskrift mangler ABS021

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DATE: 21/9/23