JUDGMENT OF THE COURT

21 March 2024[1]

(*Directive 2004/38/EC – Acts of general application to protect public health – Conditions and safeguards for measures adopted on public health grounds – Free movement – Fundamental rights and freedom of movement – Legitimate aim – Implementation in a consistent and systematic manner – Proportionality in the strict sense*)

In Case E-5/23,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*) in criminal proceedings against

LDL,

concerning the interpretation of the Agreement on the European Economic Area, in particular Articles 28 and 36 thereof, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC,

THE COURT,

composed of: Bernd Hammermann, Acting President (Judge-Rapporteur), Michael Reiertsen, and Gunnar Þór Pétursson (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

[1] Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

having considered the written observations submitted on behalf of:

- LDL, represented by John Christian Elden and Olaf Halvorsen Rønning, advocates;

- the Norwegian Prosecution Authority (*Påtalemyndigheten*), represented by Alf Butenschøn Skre, acting as Agent;

- the Norwegian Government, represented by Terje Aalia, Ida Thue and Pål Wennerås, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Erlend Møinichen Leonhardsen, Kyrre Isaksen, Hildur Hjörvar and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Elisabetta Montaguti and Jonathan Tomkin, acting as Agents;

having regard to the Report for the Hearing,

having heard oral arguments of LDL, represented by Olaf Halvorsen Rønning; the Norwegian Prosecution Authority, represented by Alf Butenschøn Skre; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Erlend Møinichen Leonhardsen and Kyrre Isaksen; and the Commission, represented by Jonathan Tomkin, at the hearing on 15 November 2023,

gives the following

Judgment

I Legal background

EEA law

1 Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

2 Article 36(1) of the EEA Agreement reads:

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

3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) ("the Directive" or "Directive 2004/38") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 ("JCD 158/2007") (OJ 2008 L 124, p. 20; and Norwegian EEA Supplement 2008 No 26, p. 17), and is referred to at points 1 and 2 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements indicated by Iceland, Liechtenstein and Norway were fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

4 Article 1 of JCD 158/2007 reads:

Annex VIII to the Agreement shall be amended as follows:

1) …

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".

...

5 Article 1 of the Directive reads:

This Directive lays down:

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

(b) the right of permanent residence in the territory of the Member States for nationals of EC Member States and EFTA States and their family members;

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

6 Article 4(1) of the Directive reads:

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

7 Article 5(1) of the Directive reads:

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

No entry visa or equivalent formality may be imposed on nationals of EC Member States and EFTA States.

8 Article 7(1) of the Directive reads, in extract:

All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

…

(d) are family members accompanying or joining a national of EC Member States and EFTA States who satisfies the conditions referred to in points (a), (b) or (c).

9 Chapter VI of the Directive entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health" contains Articles 27 to 33. Article 27 of the Directive reads:

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

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

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

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

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

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

10 Article 29(1) of the Directive reads:

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

11 Article 30 of the Directive reads:

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

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

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

12 Article 31 of the Directive reads:

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

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may

not take place until such time as the decision on the interim order has been taken, except:

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

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

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

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

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

National law and practice

13 The national law and practice on 2 May 2021, the date of the indicted offence ("the material time"), is set out in the following paragraphs.

14 The Norwegian framework for the control of communicable diseases was set out in the Act of 5 August 1994 No 55 relating to the control of communicable diseases (*lov 5. august 1994 nr. 55 om vern mot smittsomme sykdommer (smittevernloven)*) ("the CCDA").

15 Section 1-5 of the CCDA read:

Measures for control of communicable diseases pursuant to this Act shall be based on a clear medical justification, be necessary for the purpose of controlling infection and appear appropriate after an overall assessment. Upon the implementation of measures for control of communicable diseases, emphasis shall be given to voluntary participation by the person or persons concerned by the measure.

16 Section 4-3 of the CCDA read:

The King may issue regulations to prevent communicable diseases from being brought into the country or spread to other countries (quarantine measures), including provisions regarding measures in respect of persons, animals, means of transport, goods and objects which may conceivably transmit

> *communicable diseases. In the regulations the King may also establish further requirements for examinations, removal of sources of contagion and documentation in connection with entry into and departure from Norway and in connection with the import and export of goods.*
>
> *In order to prevent or hinder the spread of COVID-19, the King may issue regulations governing where and how persons entering Norway shall undergo quarantine. The King may also issue regulations governing deductibles for persons in quarantine or their employers or clients to cover costs of the quarantine stay.*
>
> *The King may issue regulations governing procedural rules for decisions taken pursuant to regulations under the second paragraph. In that connection, exceptions may be made from Chapters IV, V and VI of the Public Administration Act (forvaltningsloven).*

17 Section 4-3a of the CCDA conferred authority to enact rules on isolation of infected persons and rules governing "infection-related quarantine" (*smittekarantene*) or "waiting quarantine" (*ventekarantene*). Infection-related quarantine was directed at persons having had close contact with an infected or presumably infected person, whilst waiting quarantine concerned persons living in the same household as a person placed in infection-related quarantine.

18 Section 8-1 of the CCDA provided that intentional or negligent violation of the act or measures enacted on the basis of the act constituted a punishable offence.

19 In light of the COVID-19 pandemic, Norway adopted the Regulation on measures for the control of communicable diseases during the COVID-19 outbreak ("the COVID-19 Regulation") (*forskrift om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften)*).

20 Letter (a) of the first paragraph of Section 4 of the COVID-19 Regulation read, in extract:

> *... 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. ...*

21 Section 4d of the COVID-19 Regulation contained requirements for testing for SARS-CoV-2 at border crossings.

22 The first paragraph of Section 5 of the COVID-19 Regulation read:

> *Persons in entry quarantine shall stay at a quarantine hotel at the first point of entry in the Kingdom during the period of quarantine.*

23 Letters (a) and (c) of the second paragraph of Section 5 of the COVID-19 Regulation read:

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

a. upon entry, are able to document that they are resident in Norway and that the travel was necessary, and who stay 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. …

24 The fifth paragraph of Section 5 of the COVID-19 Regulation read:

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, study 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.

25 The seventh paragraph of Section 5 of the COVID-19 Regulation read:

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

26 The first paragraph of Section 22 of the COVID-19 Regulation read:

Individuals staying at a quarantine hotel during the quarantine period under Section 5 shall pay a deductible of NOK 500 per day. If a person has an employer or client in Norway, that party shall pay the deductible of NOK 500 per day.

27 Further rules on the quarantine hotels system were set out in the Revised Circular on quarantine hotels (G-2021-12) of 27 March 2021. Point 4 of the Circular contained some guidance on compliance checks at quarantine hotels. Point 4(h) of the Circular stated that the municipality, in cooperation with the hotel, had to establish a control

system to ensure that those in quarantine complied with the guidelines and stayed at the hotel. If a breach of the quarantine obligation was revealed, the police were to be contacted to consider potential criminal sanctions. It was also stated therein that the use of coercion in the implementation of the quarantine hotel scheme was not permitted.

28 Point 19 of Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ 2020 L 337, p. 3) read as follows:

> *Travellers with an essential function or need should not be required to undergo quarantine while exercising this essential function, in particular:*
>
> *(a) Workers or self-employed persons exercising critical occupations including health care workers, frontier and posted workers as well as seasonal workers as referred to in the Guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak;*
>
> *(b) transport workers or transport service providers, including drivers of freight vehicles carrying goods for use in the territory as well as those merely transiting;*
>
> *(c) patients travelling for imperative medical reasons;*
>
> *(d) pupils, students and trainees who travel abroad on a daily basis;*
>
> *(e) persons travelling for imperative family or business reasons;*
>
> *(f) diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and police officers, and humanitarian aid workers and civil protection personnel in the exercise of their functions;*
>
> *(g) passengers in transit;*
>
> *(h) seafarers;*
>
> *(i) journalists, when performing their duties.*

II Facts and procedure

29 The facts and background of the criminal proceedings against LDL are summarised in the following manner in the Court of Appeal's judgment, with references to further descriptions in Østre Innlandet District Court's judgment:

> *The indicted is a Swedish national, but is resident together with his wife at Bruvoll in Nord-Odal (in Norway). His parents and siblings reside in Sweden.*

For about a week from the end of April until the beginning of May 2021, he went to Sweden to visit his father in Karlstad in Värmland. The reason for the travel, as well as the further course of events, are described as follows in the District Court's judgment:

> *'His father was very distraught after his brother (the indicted' s uncle) had recently passed away. In Karlstad, the indicted was also together with his brothers and his father's cohabiting partner. The indicted was to return to Norway because he has permanent residence here, where he resides with his wife.*
>
> *On the way home, the indicted was stopped at the border at Magnormoen. He was ordered to the quarantine hotel, but instead, he opted to return home to undergo the quarantine at home. His wife was in Oslo at that time, so the indicted considered it acceptable to undergo quarantine at home. Trysil municipality attempted to contact him by telephone on 2 and 3 May but were unable to reach him.'*

30 LDL has resided and worked in Norway since the autumn of 2016.

31 According to the request, Section 4 of the COVID-19 Regulation provided for a general obligation to quarantine for persons entering Norway from an area with an obligation to quarantine as set out in Appendix A, but with a certain number of exceptions, which according to the request, were to be viewed in connection with the recommendations laid down in point 19 of Council Recommendation (EU) 2020/1475. The obligation to quarantine was not contingent on an individual decision having been adopted against the person concerned. Principally, depending on whether or not the travel was to be deemed necessary under Section 5 of the COVID-19 Regulation, the traveller had to undergo the period of quarantine at a quarantine hotel. This obligation was also not contingent on an individual decision having been adopted against the traveller.

32 According to the request, the requirements for the entry quarantine were tightened in March 2021, by expanding the categories of persons to which the obligation to undergo entry quarantine at a quarantine hotel applied. Until 18 March 2021, the question of an obligation to undergo quarantine at a quarantine hotel had been linked to whether the traveller had a suitable location to undergo quarantine. The amendment entailed that, from 19 March 2021, 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.

33 Further, the quarantine period could be shortened if the traveller could document a negative COVID-19 test result. At the material time, such a test could at the earliest be taken seven days after entry into Norway. Such a test was to be offered to persons staying at a quarantine hotel. Thus, persons under an obligation to quarantine at a quarantine hotel under Section 5 of the COVID-19 Regulation had to pay a minimum deductible for seven days – a total of NOK 3500 – for the stay.

34 As stated in the request, violation of the provisions of the COVID-19 Regulation was largely subject to criminal sanctions. The threat of criminal sanctions followed from Section 8-1 of the CCDA, but also from Section 24 of the COVID-19 Regulation. Section 24 of the COVID-19 Regulation provided that intentional or grossly negligent violation of Section 5 of the COVID-19 Regulation – the obligation to undergo the stay at a quarantine hotel – was punishable by fine or imprisonment up to six months.

35 On 25 June 2021, the Chief of Police of Innlandet County (*Politimesteren i Innlandet*) issued LDL with an optional penalty writ (*forelegg*) for violation of Section 7-12 of the CCDA, read in conjunction with Section 24 of the COVID-19 Regulation and Section 4-3 of the CCDA, read in conjunction with a combined reading of Sections 4 and 5 of the COVID-19 Regulation. The grounds for the penalty writ were described as follows:

> *Sunday 2 May 2021, at around 20:00, he entered Norway via Magnormoen. Under the applicable provisions on control of communicable diseases, he was to stay at a quarantine hotel, and a room was organised at Kjølen hotel, but despite of this he never presented himself at Kjølen hotel.*

36 LDL did not accept the optional penalty writ and the case was referred to Østre Innlandet District Court for judgment.

37 On 28 February 2022, Østre Innlandet District Court delivered judgment in which LDL was convicted as charged in the optional penalty writ and ordered to pay a fine of NOK 24 000 and costs in favour of the State of NOK 4 000.

38 The District Court held that the rules on quarantine hotels were not contrary to the CCDA, the Constitution (*Grunnloven*) or the European Convention on Human Rights ("ECHR"). Accordingly, in the District Court's view, the order for a quarantine hotel was valid, with the result that LDL could be sanctioned for failing to undergo the quarantine period at a quarantine hotel. The District Court did not, however, consider whether the rules on quarantine hotels were compliant with Directive 2004/38 or the EEA Agreement.

39 LDL appealed to Eidsivating Court of Appeal on the point of the application of the law concerning the question of guilt. By decision of Eidsivating Court of Appeal of 29 April 2022, the appeal was referred to appeal proceedings.

40 Subsequently, on 6 July 2022, Eidsivating Court of Appeal delivered judgment in the case. In the judgment, the Court of Appeal considered whether the rules on quarantine hotels were contrary to EEA law but concluded that they were not. The Court of Appeal further held, as the District Court had held previously, that the rules were not contrary to the CCDA, the Constitution or the ECHR, and accordingly concluded that the rules were valid. Thus, LDL's appeal was dismissed.

41 LDL appealed to the Supreme Court on the points of the application of the law concerning the question of guilt and the procedure before the Court of Appeal. By decision of 25 November 2022 of the Appeals Selection Committee of the Supreme

Court (*Høyesteretts ankeutvalg*), LDL was granted leave to appeal "on the point of the application of the law in so far as it concerns the question whether the applicable rules in the Regulation are contrary to the rules of the [CCDA], the Constitution, the European Convention on Human Rights or EEA law". Leave to appeal was refused as to the remainder.

42 Against this background, the Supreme Court of Norway decided to refer the following questions to the Court:

> *1. Based on the information provided about the factual background to the case [as set out in the request], in the light of which provision(s) of Directive 2004/38/EC should the restriction-related questions in the present case be examined?*
>
> *2. Provided that LDL, upon returning to Norway, could rely on his rights under Articles 4, 5, 6 and/or 7 of Directive 2004/38/EC, does a more extensive right to cross the border and reside in Norway without restrictions derive from his right of free movement as a worker under Article 28 of the Main Part of the EEA Agreement or from his right to travel to Sweden to receive services under Article 36 of the Main Part of the EEA Agreement?*
>
> *3. If a more extensive right of entry derives from the provisions on freedom of movement under the Main Part of the EEA Agreement, ref. Question 2, and if LDL's travel to Sweden on its own also came within the scope of his right to travel there to receive services, is the question of whether the restriction on the freedom to provide services absorbed by the question of whether the restriction on his free movement as a worker can be justified?*
>
> *4. Does Chapter VI of Directive 2004/38/EC allow for the introduction of restrictions on rights under that directive, with the objective of safeguarding public health, in the form of general regulations, or is that option limited to individual measures based on considerations of risk of infection relating to the individual traveller?*
>
> *5. In light of the fact that the authorities are free to determine the degree of protection, and assuming that EEA law would not have precluded the adoption of even more invasive measures such as total or partial closure of borders, or a decision to require all travellers to undergo the period of quarantine at a quarantine hotel, what implications does it have for the EEA law assessment of the suitability of the scheme chosen that only certain groups had to go to a quarantine hotel?*
>
> *6. What significance does it have for the assessment of whether the measure is consistently implemented and therefore suitable, that the quarantine hotel scheme (was part of an overall strategy for control of communicable diseases that also) was based on prioritisations as to which groups who, out of consideration for society as a whole, should be given priority within the*

parameters of the overall infection burden which the authorities considered acceptable at that time?

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

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

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

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

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

43 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Questions 1, 2 and 3

44 By its first question, the referring court asks, in essence, under which provisions of the Directive the restriction related questions in this case should be examined. By its second question, the referring court asks, in essence, whether Articles 28 or 36 EEA provide more extensive rights than the Directive for an individual such as LDL to enter and reside in Norway. Furthermore, by its third question, the referring court asks, in essence, if the answer to the second question is in the affirmative, whether an examination of Article 36 EEA is material in circumstances such as in the main proceedings if a restriction of Article 28 EEA may be justified. The Court finds it appropriate to answer these questions together.

45 In order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the EEA Agreement, it is clear from established case law that the purpose of the legislation concerned must be taken into consideration. Moreover, in principle, a measure in dispute will be examined only in relation to one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it. Furthermore, the Court takes account of the facts of the individual case in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or another of those provisions (see Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraphs 111, 112 and 117 and case law cited).

46 It follows from the request that the purpose of the measure in the main proceedings, which concerned an obligation to undergo a period of quarantine at a quarantine hotel for persons entering Norway from specified areas abroad, including from within the EEA, was to protect public health, and the measure was one of numerous measures which sought to control COVID-19.

47 The Court recalls that any EEA national who exercises the right of freedom of movement to seek employment, or has been employed in an EEA State other than that of residence, falls within the scope of Article 28 EEA (see Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 50 and case law cited). The same applies to those EEA nationals who have taken up employment and residence in an EEA State other than that of their origin.

48 Accordingly, a factual situation such as the one giving rise to the dispute in the main proceedings comes, in principle, within the scope of Article 28 EEA, which secures freedom of movement for workers, and Article 7(1)(a) of the Directive, given that LDL, who is a Swedish national, resides in Norway and pursues an activity there as an employed person.

49 The Court observes that the purpose of the Directive, as may be seen from recitals 1 to 4 thereof, is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the EEA States (compare the judgment in *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 18 and case law cited). However, this right is not unconditional and may be subject to the limitations and conditions imposed by the EEA Agreement and by the measures adopted to give it effect (compare the judgment in *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 47).

50 As regards the limitations and conditions laid down by the EEA Agreement and the measures adopted to give it effect, it is important in this case to note particularly the provisions of the Directive. In circumstances such as those of the main proceedings, neither Article 28 EEA nor Article 36 EEA provides for a more extensive right for an individual such as LDL to enter and reside in Norway than the Directive.

51 As set out in its Article 1, the Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA States by EEA nationals and their family members, their right of permanent residence in the territory of an EEA State and the limits placed on these rights on grounds of public policy, public security or public health. The objective of the Directive is to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States. Since the freedom of movement for persons is one of the foundations of the Directive, any limitations to that freedom must be interpreted strictly. In the light of the context and the aims pursued by the Directive, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their practical effect (see *Campbell*, cited above, paragraph 57 and case law cited).

52 In that regard, it should be recalled that, under Article 27(1) of the Directive, which falls within Chapter VI of that directive, entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security and public health", and gives concrete expression to Article 1(c) thereof, EEA States may, subject to the provisions of that chapter, restrict the freedom of movement and residence of EEA nationals and their family members, irrespective of nationality, on grounds of public policy, public security or public health, provided that those grounds are not invoked to serve economic ends (compare the judgment in *Nordic Info*, C-128/22, EU:C:2023:951, paragraph 50).

53 It must further be recalled that any interpretation of the Directive must be exercised in the light of and in line with fundamental rights and freedoms. It should be added that recital 5 of the Directive links the derived family rights to the EEA national's freedom and dignity while recital 6 confirms that "maintaining the unity of the family in a broader sense" is one of the objectives of the Directive (see Case E-1/20 *Kerim*, judgment of 9 February 2021, paragraph 42 and case law cited).

54 It is settled case law that fundamental rights form part of the general principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the European Court of Human Rights ("ECtHR") are important sources for determining the scope of these fundamental rights. In that regard, it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (see *Kerim*, cited above, paragraph 43 and case law cited).

55 The right to leave the territory of an EEA State to travel to another EEA State ("right of exit") and the right to be admitted to the territory of an EEA State ("right of entry") form part of the freedom of movement, which is apparent from a reading of Article 1(a) of the Directive in conjunction with Articles 4 and 5 (compare the judgment in *Nordic Info*, cited above, paragraph 55). In general, since the hotel quarantine obligation, at issue in the main proceedings, concerned persons entering Norway, it affected the right of entry provided by Article 5 of the Directive and for those who aimed to return to

Norway after leaving, it also affected the right of exit provided by Article 4 of the Directive.

56 According to the request, LDL is a Swedish national, who had been residing and working in Norway for a period of more than three months. For a person such as LDL an obligation to quarantine in a quarantine hotel affected the conditions under which he could travel to another EEA State and return to his place of residence. Therefore, in the circumstances of the main proceedings, the measure in dispute affected how LDL could exercise his right of residence pursuant to Article 7(1)(a) of the Directive. In circumstances such as those of the main proceedings, it is not necessary to examine Articles 4 and 5 of the Directive. In this respect, the Court notes that, regardless of which provision of the Directive may be applicable in a concrete case, any restriction of the freedom of movement and residence under the Directive must comply with the requirements laid down in Chapter VI of the Directive. Furthermore, the interpretation of the Directive must be exercised in the light of and in line with fundamental rights and freedoms that form part of the general principles of EEA law.

57 Due to the applicability of Article 7 of the Directive and, in particular, the circumstances set out in the request, there is no need to examine Article 28 EEA separately (see, to that effect, Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraph 93).

58 In light of the above, the answer to the first question must be that a restrictive measure, under circumstances such as those in the main proceedings, is to be examined with regard to the right of residence in Article 7(1)(a) of the Directive. Any interpretation of that Directive must be exercised in the light of and in line with fundamental rights and freedoms that form part of the general principles of EEA law. The answer to the second question must be that, in circumstances such as those of the main proceedings, neither Article 28 EEA nor Article 36 EEA provides for a more extensive right for an individual such as LDL to enter and reside in an EEA State such as Norway than the Directive. Due to the applicability of Article 7(1)(a) of the Directive and the particular circumstances set out in the request there is no need to examine Article 28 EEA separately. The answer to the third question must be that, in principle, a measure in dispute is examined only in relation to one of two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it. In the circumstances set out in the request, the right to receive services as a traveller in another EEA State under Article 36 EEA is entirely secondary to the right of free movement of workers.

Questions 4 and 9

59 By its fourth question, the referring court asks, in essence, whether Chapter VI of the Directive allows for the introduction of restrictions on rights under that directive in the form of regulations of general application with the objective of safeguarding public health. Furthermore, by its ninth question, the referring court asks, in essence, what are the implications for the assessment of the restrictions if Articles 30 and 31 of the Directive, which, inter alia, concern safeguards for individual legal certainty, are applicable, but were potentially not fulfilled. Considering that Articles 30 and 31 of the

Directive are part of Chapter VI, the Court finds it appropriate to examine these questions together.

60 With regard to measures restricting the rights under the Directive with the objective of safeguarding public health, first, the conditions set out in Articles 27 and 29 of the Directive must be observed. The Court recalls that, pursuant to Article 27(1) of the Directive, EEA States may, subject to the provisions of Chapter VI, restrict the freedom of movement and residence of EEA nationals and their family members, irrespective of nationality, on grounds of public policy, public security or public health, provided that those grounds are not invoked to serve economic ends.

61 Article 29(1) of the Directive, which is devoted more specifically to measures restricting freedom of movement on public health grounds, provides that only certain diseases, namely diseases with epidemic potential as defined by the relevant instruments of the WHO and other infectious diseases or contagious parasitic diseases, may justify such measures, provided that they are the subject of protection provisions applying to nationals of the host EEA State, that is to say, in accordance with point 3 of Article 2 of the Directive, the EEA State to which an EEA national moves in order to exercise his or her right of free movement and residence (compare the judgment in *Nordic Info*, cited above, paragraph 51).

62 It is apparent from the wording of Articles 27(1) and 29(1) of the Directive that an EEA State may, for non-economic ends and in compliance with the conditions laid down in Chapter VI of the Directive, adopt such measures solely on account of certain diseases which are the subject of protection provisions applying to its own nationals, namely diseases with epidemic potential as defined by the relevant instruments of the WHO or other infectious diseases or contagious parasitic diseases. Therefore, *a fortiori*, EEA States in that context may adopt on the basis of those provisions measures restricting freedom of movement in order to respond to a threat linked to a contagious infectious disease which is of a pandemic nature recognised by the WHO (compare the judgment in *Nordic Info*, cited above, paragraphs 52 and 53).

63 According to the request and subject to verification by the referring court, the measures in the main proceedings were adopted not to serve economic ends, but in order to protect the population and to prevent the spread of the infectious and contagious COVID-19 disease in Norway, which had been classified as a pandemic by the WHO on 11 March 2020 and was still classified as such during the period at issue in the main proceedings. Subject to that reservation, the conditions set out in Article 29(1) of the Directive appear to be fulfilled.

64 The scope of Article 27(1) and Article 29(1) of the Directive is not restricted to the right of entry, but covers all components of the freedom of movement (compare the judgment in *Nordic Info*, cited above, paragraphs 56 and 57).

65 It follows from established case law that all measures which prohibit, impede or render less attractive the exercise of the freedom of movement of EEA nationals and their

family members must be regarded as "restrictions" on that freedom (compare the judgment in *Nordic Info*, cited above, paragraph 58 and case law cited).

66 Measures restricting freedom of movement which an EEA State may adopt on public health grounds under Article 27(1) and Article 29(1) of the Directive may also include measures which have the effect of impeding or rendering less attractive the right of the persons concerned to enter or leave that territory, such as an obligation for travellers entering that territory to undergo screening tests and to observe quarantine (compare the judgment in *Nordic Info*, cited above, paragraph 59).

67 Unlike Article 27(2) of the Directive in relation to measures taken on grounds of public policy or public security, neither Article 27(1) nor Article 29(1) of the Directive precludes measures adopted on public health grounds from being laid down in the form of an act of general application. While the terms and expressions used in Articles 30 to 32 of the Directive call to mind restrictive measures laid down in the form of an individual decision, they do not prevent restrictive measures adopted in accordance with Articles 27(1) and 29(1) on public health grounds being laid down in the form of an act of general application. Hence, restrictions based on grounds of public health may, depending on the circumstances and in particular the health situation, be adopted in the form of an act of general application which applies without distinction to any person in a situation covered by that act (compare the judgment in *Nordic Info*, cited above, paragraphs 63, 66 and 70).

68 However, the conditions and safeguards set out in Chapter VI, in particular in Articles 30 to 32, must also be applied in the case of restrictive measures adopted in the form of an act of general application. All of the conditions and safeguards laid down in Articles 30 to 32 of the Directive give effect to the principle of legal certainty, the principle of good administration and the right to an effective judicial remedy; those principles and that right apply to restrictive measures adopted both in the form of individual decisions and in the form of acts of general application (compare the judgment in *Nordic Info*, cited above, paragraphs 65, 67 and 70). Having regard to Article 30(1) and (2) of the Directive, any act of general application laying down measures restricting freedom of movement on public health grounds must be brought to the attention of the public by an official publication of the EEA State which adopts it and by means of sufficient official media coverage so that the content and effects of that act can be understood, as well as the specific and full public health grounds relied on in support of that act, and that the remedies and time limits for challenging it are specified (compare the judgment in *Nordic Info*, cited above, paragraph 71). It is for the referring court to assess having regard to all the information that was available to the persons concerned at the material time whether the act in question fulfilled this requirement.

69 Furthermore, in order to comply with the procedural safeguards referred to in Article 31 of the Directive, the act of general application must be open to challenge in judicial and, where appropriate, administrative redress procedures. In that regard, where national law does not allow persons covered by a situation defined in general terms by that act to challenge the validity of such an act directly in an independent action, it must at least provide for the possibility of challenging that validity incidentally in an action

the outcome of which depends on whether that act is valid (compare the judgment in *Nordic Info*, cited above, paragraph 72).

70 In addition, an individual cannot be forced to be subject to criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with EEA law. Such a sole avenue would not be sufficient to secure the effective judicial protection required by EEA law (compare the judgment in *Unibet*, C-432/05, EU:C:2007:163, paragraph 64). It is for the referring court to determine whether national law provided sufficient safeguards in this regard.

71 Moreover, it follows from Article 30(3) of the Directive that the public must be informed, either in the act itself or by means of official publications or websites which are free of charge and easily accessible, of the court or administrative authority before which the act of general application may, where applicable, be challenged and of the time limits for the respective challenges (compare the judgment in *Nordic Info*, cited above, paragraph 73).

72 With regard to the question concerning implications for the restrictions in the event that Articles 30 and 31 of the Directive have been infringed, it must be observed that the safeguards contained in those Articles have different objectives. The aim of the notification requirements in Article 30 is to put the individual in a position where he or she may effectively consider whether any restrictions actually apply, so that he or she may *avoid* breaching any decision taken against him or her. Accordingly, this requirement is inherently linked with the decision restricting the rights under the Directive, irrespective of whether it takes the form of an individual decision or an act of general application. Moreover, a decision to penalise a person for breaching a decision which does not fulfil the requirements of Article 30 of the Directive would be liable to infringe the fundamental requirements of accessibility and foreseeability protected by the general EEA principles of legal certainty and proportionality and Article 7 of the ECHR. Conversely, the procedural safeguards in Article 31 of the Directive aim to secure effective redress procedures *after* a decision has been taken against a person or when it is claimed that a person has breached any decisions taken against him or her. Such subsequent judicial and/or administrative redress procedures are fundamental for ensuring the effective protection of substantive EEA rights. In this context, it must be borne in mind that national courts are bound under the principle of sincere cooperation in Article 3 EEA, for the matters within their jurisdiction, to ensure the full effectiveness of EEA law when they determine the disputes before them (see Case E-2/21 *Norep AS*, judgment of 14 December 2021, paragraph 43).

73 In light of the above, the answer to the fourth question must be that restrictions based on grounds of public health may, depending on the circumstances and in particular the health situation, be adopted in the form of an act of general application which applies to any person in a situation covered by that act, while the conditions and safeguards laid down in Articles 30 and 31 of the Directive must be applied in the case of restrictive measures adopted in this form. The answer to the ninth question must be that when

considering whether the restrictions are justified, it must be verified whether the procedural guarantees in Articles 30 and 31 of the Directive have been fulfilled.

Questions 5, 6, 7, 8, 10 and 11

74 By its fifth question, the referring court asks, in essence, whether it is of relevance for the suitability of the measures that only certain groups had to go to a quarantine hotel, if the authorities are free to determine the degree of protection and the adoption of even more invasive measures, such as the total or partial closure of the borders, or a requirement that all travellers undergo the period of quarantine in a quarantine hotel, are not precluded by EEA law.

75 By its sixth question, the referring court enquires, in essence, whether it is of relevance for the suitability of the measures, as regards their consistency, that the quarantine hotel scheme was part of an overall strategy for control of communicable diseases that also was based on prioritisations as to which groups, out of consideration for society as a whole, should be given priority within the parameters of the overall infection burden which the authorities considered acceptable at that time.

76 Furthermore, by its seventh question, the referring court seeks guidance, in essence, as to the relevance of the need to introduce general and simple rules which can be easily understood and applied by parties concerned and easily managed and supervised for compliance by the authorities in a pandemic situation.

77 By its eighth question, the referring court asks, in essence, whether it is compatible with the requirement to pursue legitimate aims that the quarantine hotel scheme could potentially have a deterrent effect for persons contemplating travel abroad, with the consequence that the total infection pressure was reduced.

78 Finally, by its tenth and eleventh questions, the referring court seeks guidance as to whether the requirement of proportionality in the narrow sense of the term (*stricto sensu*) applies in the case at hand and, if so, the legal content and the legal subject-matter to be examined in the present case.

79 The Court finds it appropriate to answer these questions together since they all concern aspects of the justification of the measure in question in the main proceedings with regard to the principle of proportionality.

80 Article 31(1) and (3) of the Directive provides that the persons concerned must have access to judicial and, where appropriate, administrative redress procedures in the host EEA State to challenge, inter alia, the proportionality of a decision taken against them on grounds of public health (compare the judgment in *Nordic Info*, cited above, paragraph 75).

81 It follows, inter alia, from these provisions that any measure restricting freedom of movement adopted on public health grounds on the basis of Article 27(1) and Article 29(1) of the Directive must be proportionate. The principle of proportionality, having

its foundations in the protection of fundamental rights and freedoms, constitutes a general principle of EEA law and is binding on EEA States when they are implementing an act such as the Directive (see, to that effect, Case E-2/20 *Norway* v *L*, judgment of 21 April 2021, paragraphs 50 and 54 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 76).

82 The requirement of proportionality specifically requires verification that measures such as those at issue in the main proceedings, first, are appropriate for attaining the objective pursued, in this case the protection of public health, second, are limited to what is strictly necessary, in the sense that that objective could not reasonably be achieved in an equally effective manner by other means less prejudicial to the rights and freedoms guaranteed to the persons concerned, and, third, are not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference with those rights and freedoms (see, to that effect, Case E-8/20 *Criminal proceedings against N*, judgment of 5 May 2021, paragraphs 91, 93, 94 and 95 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 77).

83 In order to assess whether an EEA State has observed the principle of proportionality in the area of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by EEA law and that it is for the EEA States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since that level may vary from one EEA State to another, EEA States should be allowed some measure of discretion. Consequently, the fact that one EEA State imposes less strict rules than another EEA State does not mean that the latter's rules are disproportionate (see Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 80 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 78 and case law cited).

84 If there is uncertainty as to the existence or extent of risks to human health, an EEA State must be able, under the precautionary principle, to take protective measures without having to wait until the reality of those risks becomes fully apparent. In particular, EEA States must be able to take any measure capable of reducing, as far as possible, a health risk (see Case E-9/16 *ESA* v *Norway* [2017] EFTA Ct. Rep. 299, paragraph 77 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 79 and case law cited).

85 Furthermore, when imposing restrictive measures on public health grounds, EEA States must be able to adduce appropriate evidence to show that they have indeed carried out an analysis of the appropriateness, necessity and proportionality of the measures at issue and to present any other evidence substantiating their arguments. Such a burden of proof cannot, however, extend to creating the requirement that the competent national authorities must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions (compare the judgment in *Nordic Info*, cited above, paragraph 80 and case law cited).

86 It is for the referring court, which has sole jurisdiction to assess the facts of the main proceedings and interpret the national legislation, to verify, in accordance with the rules of evidence of national law, provided the effectiveness of EEA law is not undermined, whether the restrictive measures in question satisfied the requirement of proportionality. However, the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see *Kerim*, cited above, paragraph 52 and case law cited).

87 Concerning the appropriateness of such measures for attaining the objective of protecting public health in the context of a disease classified as a pandemic by the WHO, the referring court will have to ascertain whether, in the light of the scientific data commonly accepted at the material time concerning COVID-19, of the trend in cases of infection and mortality due to that virus and in view of the degree of uncertainty that might prevail in that regard, the adoption of those measures and the criteria for their implementation were appropriate, having regard to the national healthcare system being overwhelmed or the risk thereof (compare the judgment in *Nordic Info*, cited above, paragraph 82 and case law cited). Hence, for attaining the objective of protecting public health in this context the measure of general application must have due regard to the considerations of the risk to human health due to infection.

88 The referring court will also have to take into account the fact that the restrictive measures at issue in the main proceedings were adopted in the context of similar measures adopted by the other EEA States (compare the judgment in *Nordic Info*, cited above, paragraph 83 and case law cited).

89 The Court also recalls that restrictive measures such as those at issue in the main proceedings can be regarded as capable of ensuring the public health objective pursued only if they genuinely reflect a concern to attain it and are implemented in a consistent and systematic manner (see *Criminal proceedings against N*, cited above, paragraph 93 and case law cited and compare, to that effect, the judgment in *Nordic Info*, cited above, paragraph 84 and case law cited).

90 In this regard the Court underlines that deterring people from travelling abroad cannot be a legitimate aim in itself but may be a justifiable means to achieve the public health objective to reduce the total infection pressure in a situation such as that at issue in the main proceedings.

91 Furthermore, the referring court will have to ascertain whether the abovementioned restrictive measures were limited to what was strictly necessary and whether there were means less prejudicial to the free movement of persons but equally effective for achieving the public health objective (see *Criminal proceedings against N*, cited above, paragraph 94 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 87).

92 With regard to the assessment whether measures that were less restrictive but equally effective existed, it is necessary to take into account the measure of discretion enjoyed by the EEA States in the field of the protection of public health, on account of the

precautionary principle, as already mentioned (compare the judgment in *Nordic Info*, cited above, paragraph 90). Given this, there is the possibility to take protective measures when scientific investigation has identified a plausible risk and corresponding strategies capable of reducing the health risk.

93 Moreover, according to settled case law, EEA States cannot be denied the possibility of attaining an objective such as the protection of public health by the introduction of general and simple rules which will be easily understood and applied by individuals and easily managed and supervised by the competent authorities (compare, to that effect, the judgments in *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 67; and *Commission* v *Portugal*, C-126/15, EU:C:2017:504, paragraph 84). Particularly in the context of a pandemic and with regard to the legal safeguards required by Article 30 of the Directive, such considerations may become increasingly important for achieving the public health objective. That said, such general and simple rules must comply with the general principles of EEA law including the principles of proportionality and legal certainty. The Court observes that, in general, an increased financial burden and administrative difficulties do not constitute grounds that can justify a restriction on a fundamental freedom guaranteed by EEA law (compare the judgments in *Airbnb Ireland and Airbnb Payments UK*, C-83/21, EU:C:2022:1018, paragraph 74 and case law cited, and *Gottardo*, C-55/00, EU:C:2002:16, paragraph 38).

94 As regards the question of proportionality in the strict sense, the referring court will have to ascertain whether the measures at issue were disproportionate in relation to the public health objective pursued, having regard to the impact that those measures may have had on the free movement of EEA nationals and their family members and on fundamental rights which form part of the general principles of EEA law. The Court has held that the provisions of the ECHR, such as Article 8(1), the right to respect for private and family life, and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights. In this respect, the Court notes that in their written observations, the Norwegian Prosecution Authority and the Norwegian Government have referred to the positive obligation under Article 2 ECHR, which safeguards the right to life, to protect human life and health, as also noted by the Commission at the hearing. Furthermore, it follows from the request that the preparatory works to the COVID-19 Regulation explicitly refer to the State's duty to implement measures to safeguard the right to life and health protected by, inter alia, Article 2(1) ECHR. In addition, ESA referred, in its written observations, to Article 5 ECHR, which enshrines the right to liberty and security. In that regard, it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (see *Kerim*, cited above, paragraph 43 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 92).

95 Hence, the objective of protecting public health referred to in Articles 27(1) and 29(1) of the Directive may not be pursued by a national measure without having regard to the fact that the national measure must be reconciled with the fundamental rights and

principles affected by that measure, by properly balancing that objective of general interest against the rights and principles at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued. Moreover, the question of whether a limitation on free movement may be justified must be assessed by measuring the seriousness of the interference which such a limitation entails, and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness (see, to that effect, *Norway* v *L*, cited above, paragraphs 50 to 54 and case law cited, and compare the judgment in *Nordic Info*, cited above, paragraph 93 and case law cited).

96 In light of the above, the answer to the fifth and sixth questions must be that if there is uncertainty as to the existence or extent of risks to human health, an EEA State must be able to take protective measures, in accordance with the precautionary principle, without having to wait until the reality of those risks becomes fully apparent and, in particular, EEA States must be able to take any measure capable of reducing, as far as possible, a health risk for attaining the objective of protecting public health. Restrictive measures such as those at issue in the main proceedings may be regarded as capable of ensuring the public health objective pursued only if they genuinely reflect a concern to attain it and are implemented in a consistent and systematic manner. The referring court will have to ascertain whether the abovementioned restrictive measures were limited to what was strictly necessary and whether there were means less prejudicial to the free movement of persons but equally effective for achieving the public health objective.

97 The answer to the seventh question must be that EEA States cannot be denied the possibility of attaining the objective of protecting public health by the introduction of general and simple rules which will be easily understood and applied by individuals and easily managed and supervised by the competent authorities. Such general and simple rules must comply with the general principles of EEA law including the principles of proportionality and legal certainty. In general, an increased financial burden and administrative difficulties do not constitute grounds that can justify a restriction on a fundamental freedom guaranteed by EEA law.

98 The answer to the eighth question must be that in light of the freedom of movement deterring people from travelling abroad cannot be a legitimate aim in itself, but may be a justifiable means to achieve the public health objective to reduce the total infection pressure in a situation such as that at issue in the main proceedings.

99 The answer to the tenth and eleventh questions must be that, as regards the question of proportionality in the strict sense, the referring court must ascertain whether the measures were disproportionate in relation to the public health objective pursued, having regard to the impact that those measures may have had on free movement and fundamental rights being part of the general principles of EEA law. Hence, the objective of protecting public health referred to in Articles 27(1) and 29(1) of the Directive may not be pursued by a national measure without having regard to the fact that the national measure must be reconciled with the fundamental rights and principles affected by that measure. In addition, the objective of general interest must be properly balanced against the rights and principles at issue, in order to ensure that the disadvantages caused by

that measure are not disproportionate to the aims pursued. Moreover, the question of whether a limitation on free movement and fundamental rights may be justified must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness.

IV Costs

100 Since these proceedings are a step in the proceedings pending before the Norwegian Supreme Court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Norwegian Supreme Court hereby gives the following Advisory Opinion:

1. **A restrictive measure, under circumstances such as those of the main proceedings, is to be examined with regard to the right of residence in Article 7(1)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Any interpretation of that Directive must be exercised in the light of and in line with fundamental rights and freedoms that form part of the general principles of EEA law.**

2. **In circumstances such as those of the main proceedings, neither Article 28 EEA nor Article 36 EEA provides for a more extensive right for an individual such as LDL to enter and reside in an EEA State such as Norway than Directive 2004/38/EC. Due to the applicability of Article 7(1)(a) of Directive 2004/38/EC and the particular circumstances set out in the request there is no need to examine Article 28 EEA separately.**

3. **In principle, a measure in dispute is examined only in relation to one of two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it. In the circumstances set out in the request, the right to receive services as a traveller in another EEA State under Article 36 EEA is entirely secondary to the right of free movement of workers.**

4. **Restrictions based on grounds of public health may, depending on the circumstances and in particular the health situation, be adopted in the form of an act of general application which applies without distinction to any person in a situation covered by that act, while the conditions and safeguards laid down in Articles 30 and 31 of Directive 2004/38/EC must be applied in the case of restrictive measures adopted in this form.**

5. **When considering whether the restrictions at issue are justified it must be verified whether the procedural guarantees in Articles 30 and 31 of Directive 2004/38/EC have been fulfilled.**

6. **If there is uncertainty as to the existence or extent of risks to human health, an EEA State must be able to take protective measures, in**

accordance with the precautionary principle, without having to wait until the reality of those risks becomes fully apparent and, in particular, EEA States must be able to take any measure capable of reducing, as far as possible, a health risk for attaining the objective of protecting public health. Restrictive measures such as those at issue in the main proceedings may be regarded as capable of ensuring the public health objective pursued only if they genuinely reflect a concern to attain it and are implemented in a consistent and systematic manner. The referring court will have to ascertain whether the abovementioned restrictive measures were limited to what was strictly necessary and whether there were means less prejudicial to the free movement of persons but equally effective for achieving the public health objective.

7. **EEA States cannot be denied the possibility of attaining the objective of protecting public health by the introduction of general and simple rules which will be easily understood and applied by individuals and easily managed and supervised by the competent authorities. Such general and simple rules must comply with the general principles of EEA law including the principles of proportionality and legal certainty. In general, an increased financial burden and administrative difficulties do not constitute grounds that can justify a restriction on a fundamental freedom guaranteed by EEA law.**

8. **In light of the freedom of movement deterring people from travelling abroad cannot be a legitimate aim in itself, but may be a justifiable means to achieve the public health objective to reduce the total infection pressure in a situation such as that at issue in the main proceedings.**

9. **As regards the question of proportionality in the strict sense, the referring court must ascertain whether the measures were disproportionate in relation to the public health objective pursued, having regard to the impact that those measures may have had on free movement and fundamental rights being part of the general principles of EEA law. Hence, the objective of protecting public health referred to in Articles 27(1) and 29(1) of Directive 2004/38/EC may not be pursued by a national measure without having regard to the fact that the national measure must be reconciled with the fundamental rights and principles affected by that measure. In addition, the objective of general interest must be properly balanced against the rights and principles at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued. Moreover, the question of whether a limitation on free movement and fundamental rights may be justified must be assessed by measuring the seriousness of the**

interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness.

Bernd Hammermann Michael Reiertsen Gunnar Þór Pétursson

Delivered in open court in Luxembourg on 21 March 2024.

Ólafur Jóhannes Einarsson
Registrar

Bernd Hammermann
Acting President