



ROYAL NORWEGIAN  
MINISTRY OF JUSTICE AND PUBLIC SECURITY

EFTA Surveillance Authority  
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Your ref.  
85895

Our ref.  
20/5816 - SBO

Date  
07.07.2021

**RESPONSE TO LETTER OF FORMAL NOTICE CONCERNING NORWEGIAN  
RESTRICTIONS UPON ENTRY ON THE BASIS OF COVID-19**

**1. INTRODUCTION**

Reference is made to the letter of formal notice May 26<sup>th</sup> 2021 from the Authority (Case 85895), and prior correspondance. The Ministry of Justice and Public Security hereby submits its reply to the Authority's letter of formal notice (LFN).

The Ministry notes that while the Authority welcomes the amendments described in our letter of May 21<sup>st</sup> and “underlines the importance of offering its evaluation of the rules as they presently stand” (section 2.1), its analysis “is principally confined to the regime prior to the changes described by the Norwegian Government in its Reply of 21 May 2021” (section 5.1). The Authority repeatedly describes measures that were removed or amended on May 21<sup>st</sup>, as outlined in our letter of the same day, as “current measures” that have been maintained in force. This applies in particular to section 5.3 of the Authority's letter, concerning the “registration requirement” that was removed May 21<sup>st</sup> and also partly sections 5.5 and 5.6. The Ministry thus notes that the analysis of the Authority did not reflect the regulations in force in Norway at the time the LFN was sent. In this reply, the Ministry will mainly address the contested regulations that are currently in force, see sections 3.4 to 3.6 below.

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Before addressing the specific issues raised in the Authority's letter, the Ministry will present an overview of the Norwegian approach to handling the pandemic, focusing primarily on 2021. This is important context in order to fully understand the underlying rationale behind the restrictions imposed on the free movement of persons. The Ministry will also present the amendments to the entry restrictions and quarantine measures that have taken place since May 21<sup>st</sup>, as well as amendments that are planned for the upcoming weeks.

## **2. BACKGROUND AND RECENT DEVELOPMENTS**

### **2.1 THE NORWEGIAN RESPONSE TO THE PANDEMIC**

On May 7<sup>th</sup> 2020, the Norwegian Government launched a long-term strategy<sup>1</sup> on how to handle the challenges of the covid-19 pandemic, with the possibility to adjust the suite of measures throughout the process<sup>2</sup>. The strategy was updated December 14<sup>th</sup> 2020<sup>3</sup>, May 6<sup>th</sup> 2021<sup>4</sup> and July 5<sup>th</sup><sup>5</sup>. The aim of the Norwegian Government has consistently been to minimise death and severe illness and maintain control over the spread of the coronavirus to ensure that the infection rate does not overload the capacity in the health care system. Key success factors of the strategy have been overseeing and ensuring the capacity to test, isolate, contact trace and quarantine («TISK»<sup>6</sup>).

In keeping with Norway's ambition to keep the infection rate low to prevent deaths and serious illness, and a potential collapse of the health services, the authorities have handled the situation based on a comprehensive assessment of the following three medical aspects 1) infection rates and the disease burden, 2) capacity of the health care services, at the municipal level as well as in the specialist health service and 3) vaccination. Rules of entry to the country have been adopted by the Norwegian Government based on public health advice from the Norwegian Directorate of Health (Helsedirektoratet) and The Norwegian Institute of Public Health (Folkehelseinstituttet, FHI). The continuously updated assessments from the health authorities have been based on updated epidemiological data and other relevant information about the pandemic, both in Norway and in other countries<sup>7</sup>.

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<sup>1</sup> [Langsiktig plan og strategi for håndtering av covid-19 pandemien, Regjeringens plan og justering av koronatiltak 7. mai 2020](#)

<sup>2</sup> [Tidslinje: myndighetenes håndtering av koronasituasjonen - regjeringen.no, Microsoft Word - 2020 05 07 Helsedirektoratets vurdering av tiltak mot Covid med vedlegg endelig revidert](#)

<sup>3</sup> [Langsiktig plan og strategi for håndtering av covid-19 pandemien](#)

<sup>4</sup> [Langsiktig plan og strategi for håndtering av covid-19 pandemien](#)

<sup>5</sup> [En normal hverdag med økt beredskap - regjeringen.no](#)

<sup>6</sup> [TISK](#)

<sup>7</sup> [Covid-19: Faglige notater som grunnlag for nasjonale beslutninger - FHI](#). See also [Risikovurderinger - FHI](#).

To prevent imported infection, the healthcare bodies recommended<sup>8</sup> strict measures to be undertaken, such as tests both prior to and after entry to the country, entry quarantine upon arrival and registration at the border. Different measures and considerations must be, and have been, balanced against each other. The overall infection rate is a result of the *aggregated effect* of all the infection control measures and the development of the pandemic, including the properties of new virus variants. Measures and adjustments must be constantly and carefully assessed in light of the overall situation, including Norway's legal obligations and the legal and factual impact on individuals. Accumulated experiences throughout the autumn of 2020 showed examples of poor adherence to the rules of entry by persons arriving the country, and consequently new outbreaks of the coronavirus took place in numerous places, see the response of November 11<sup>th</sup> 2020 to assignment 208<sup>9</sup>. Investigation of local outbreaks revealed that in some cases, the public's understanding of how to behave during quarantine was limited, and that the quarantine facilities were not always adequate.

Surveillance of new strains of the coronavirus in Norway is done by sequencing the viruses. The data from this surveillance indicate that the spread of new variants has been slowed down after the introduction of entry restrictions<sup>10</sup>.

Decisions related to Norwegian entry restrictions, and the changes to these, including lifting restrictions, are based on advice from national health authorities. Norway has, throughout the pandemic, had low infection rates compared to other countries<sup>11</sup>. In order to maintain low infection rates, and thereby protect public health and prevent serious illness and deaths, it has been necessary to introduce and maintain restrictions on entry policies and other strict measures, such as quarantine hotels. At the same time, strict measures have been enforced within national borders, nationally and locally. For example, the capital Oslo was largely "shut down" from november 2020 until a gradual reopening began in late April 2021<sup>12</sup>. Examples of restrictions during this period included forbidding more than two visitors in private homes and the closure of most businesses open to the public except grocery stores, pharmacies and similar necessities. Similar restrictions were introduced nationally and regionally at certain points<sup>13</sup>, in or-

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<sup>8</sup> [Svar på oppdrag om innreisekarantene 14. mai 2020](#), [Svar på oppdrag om innreisekarantene og reiseråd 23. oktober 2020](#), [Oppdaterte smittevern faglige råd om kravet til negativ covid-19 test ved innreise](#)

<sup>9</sup> [Anbefaling til Helse- og omsorgsdepartementet om forsterkede tiltak fra Helsedirektoratet](#). See also risk assessments [2020-10-09-notat-om-risiko-og-respons.pdf \(fhi.no\)](#) and [2020-11-05-notat-om-risiko-og-respons.pdf \(fhi.no\)](#), illustrating the changing circumstances.

<sup>10</sup> [Situasjonsrapport COVID-19 \(fhi.no\)](#)

<sup>11</sup> [COVID-19 situation updates \(europa.eu\)](#)

<sup>12</sup> [Byrådets plan for gradvis gjenåpning av Oslo - Råd og regler i Oslo - Oslo kommune](#)

<sup>13</sup> [Innfører de strengeste innreisereglene til Norge siden mars 2020 - regjeringen.no](#), [Viderefører regionale tiltak i flere Viken-kommuner - regjeringen.no](#)

der to suppress rising infection levels. While the Government's plan for a gradual reopening is progressing, several restrictions remain in place<sup>14</sup>. Following an updated assessment from the health authorities<sup>15</sup>, the Government has decided that "step 4" of the plan for reopening will not be initiated at this time<sup>16</sup>. For most of 2021, the Government has strongly advised against non-essential travel, domestically as well as abroad. As long as Norway does not have a high proportion of vaccinated people and new variants of concern could be introduced, certain entry restrictions are still in place. They are based on a risk based approach including vaccination/immunological status of the individual and the epidemic situation in the country of origin<sup>17</sup>.

Several coronavirus outbreaks in Norway in 2021 have been dominated by new, highly contagious variants, demanding an enforced TISK-strategy. Rapid spread of the coronavirus and increased numbers of people infected has threatened the TISK-capacity in the municipalities, in particular the testing capacity, but also the contact tracing capacity<sup>18</sup>. Nationally, the sequencing/characterisation capacity was under pressure. covid-19 cases related to imported infection have played an important role in the spread of the virus in Norway. Imported coronavirus cases additionally increase the stress on the TISK capacity<sup>19</sup>. The risk of overloading the TISK capacity increases with the numbers of entries to the country, in particular concerning non-residents, since contact tracing and following up on non-residents' quarantine situation requires considerable resources. Both the Norwegian Directorate of Health and The Norwegian Institute of Public Health have, in their recommendations, pointed out that it is of importance to public health safety and the ability to maintain control over the pandemic to keep the imported coronavirus numbers as low as possible.

Refusing categories of travelers entry to Norway, as well as entry quarantine and quarantine hotels, have been important and effective measures. These measures have been justified on grounds of protection of public health and deemed proportionate, see in particular the response of Januar 22<sup>nd</sup> from the Norwegian Directorate of Health and The Norwegian Institute of Public Health to assignment nr. 314<sup>20</sup> on the assessment of further restrictions of entry as a measure against import cases. Their recommendation, in order to protect public health, was to maintain and to fortify entry restrictions. This was

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<sup>14</sup> [Forskrift om forebygging av koronasmitte, Oslo kommune, Oslo - Lovdata, Covid-19-forskriften - Lovdata Pro](#)

<sup>15</sup> [Faglig grunnlag til Helse- og omsorgsdepartementet \(covid-19\) - Helsedirektoratet](#)

<sup>16</sup> [Trinn 4 utsettes - trinn tre i gjenåpningsplanen justeres - regjeringen.no](#)

<sup>17</sup> [COVID-19 situation updates \(europa.eu\)](#)

<sup>18</sup> [Faglig grunnlag til Helse- og omsorgsdepartementet \(covid-19\) - Helsedirektoratet](#), various reports in late December 2020 and January 2021

<sup>19</sup> [Oppdrag 438 - Samleoppdrag om innreiserestriksjoner, reiseråd og karantenehotell.pdf \(helsedirektoratet.no\)](#), [Oppdrag 343 - Vurdering av fortsatt behov for strenge innreiserestriksjoner.pdf \(helsedirektoratet.no\)](#), [Oppdrag 249 - Importsmitte og karantenehotell - med tilleggsspørsmål.pdf \(helsedirektoratet.no\)](#)

<sup>20</sup> [Oppdrag 314 - Vurdering av innstramminger i innreiserestriksjonene som tiltak mot importsmitte.pdf \(helsedirektoratet.no\)](#)

in consideration of the detection of several mutants of the virus in countries such as UK and South-Africa. The Norwegian health authorities' aim was to stop or delay the spread of these variants in Norway<sup>21</sup>.

On January 29<sup>th</sup> 2021, Norway adopted additional measures restricting the entry of foreigners into Norway on the grounds of public health, with some exceptions for specific groups<sup>22</sup>. The restrictions were extended several times.

An assessment of the situation was made by the Norwegian Directorate of Health and The National Institute of Public Health, see response of March 10, 2021 to assignment 379<sup>23</sup>. Their assessment was that it was still necessary and proportionate to uphold the current entry restrictions on the grounds of public health protection. On this basis, it was decided to maintain the entry restrictions, initially until April 21<sup>st</sup>. This also follows from the Norwegian Directorate of Health and the National Institute of Public Health's response to assignment 420<sup>24</sup> April 12<sup>th</sup> 2021. Initially, it was recommended that the restrictions were maintained for three weeks, until the 12<sup>th</sup> of May 2021. It was pointed out that the epidemiological situation internationally was unlikely to change significantly in the next few weeks. The health authorities still considered that there was a large gradient of infection from abroad, and it would still be several months until a large proportion of the population would be vaccinated. Moreover, there was increasing infection rates due to outbreaks of the coronavirus variant originating in the United Kingdom, and the capacity to deal with infection was pressured several places in the country.

The infection rates have been important indicators for the progress of the reopening plan. Based on expert advice from the health authorities, there have been regular assessments of the situation and the need for measures. The health authorities have underscored the importance of evaluating the effect of easing restrictions before implementing new measures or adjustments, see response of June 11<sup>th</sup> on assignment 478<sup>25</sup>.

Statistics provided by The National Institute of Public Health indicate that the number of persons who tested positive during the quarantine period was doubled during the spring of 2021<sup>26</sup>. The assessment from the health authorities was that admittance into Norwegian territory should still be strictly regulated, see response of June 11<sup>th</sup> on assignment 478 as mentioned above. The assessment is based on the serious pandemic situation outside Norway, which indicates that the entry restrictions should be maintained even with a downward infection curve within the country.

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<sup>21</sup> [Vurdering av fortsatt behov for strenge innreiserestriksjoner](#)

<sup>22</sup> [Innfører de strengeste innreisereglene til Norge siden mars 2020 - regjeringen.no](#)

<sup>23</sup> [Oppdrag 379 - Om vurdering av fortsatt behov for strenge innreiserestriksjoner.pdf \(helsedirektoratet.no\)](#)

<sup>24</sup> [Oppdrag 420 – Vurdering av om innreiserestriksjonene skal videreføres.pdf \(helsedirektoratet.no\)](#)

<sup>25</sup> [Svar på covid-19 oppdrag – plan for gjenåpning trinn 3](#)

<sup>26</sup> [Ukesrapporter fra FHI](#)

Since the end of March or early April 2021, there has been a positive development in Norway, with a decreasing number of positive tests, including, since mid-April, a reduced number of positive tests after travelling into Norway. There is also a good progress in the vaccination program. To reflect this situation, the regulations have been eased proportionately, see section 2.2. The government's assessment is still based on the recommendation from health authorities to ensure public health, see response of June 11<sup>th</sup> 2021 to assignments 477, 477 A and B<sup>27</sup>. Both the Norwegian Directorate of Health and The National Institute of Public Health consider that the epidemiological situation primo July still requires a need for a general ban on entry to the country, in order to limit the number of imported cases of covid-19. The consequences of imported coronavirus will be reduced as a higher ratio of the population is protected. Assuming good protection from vaccination and an acceptable development in the number of positive tests and cases of severe disease in the population, the measures implemented to regulate entry to Norway can gradually be revised and reduced.

## 2.2 RECENT DEVELOPMENTS

As described above, Norwegian authorities are in the process of gradually lifting restrictions. After our previous letter of May 21<sup>st</sup>, the following key amendments to entry restrictions and quarantine measures have taken place:

### *Entry restrictions*

- As of May 27<sup>th</sup>, foreign nationals who reside in a “green” EEA/Schengen state (the threshold is harmonised with the EU standard) are exempt from the entry restrictions. See Regulations relating to entry restrictions for foreign nationals out of concern for public health Section 2 (a)<sup>28</sup>. As of July 5<sup>th</sup>, this applies to the majority of EEA states<sup>29</sup>.
- As of June 19<sup>th</sup>, foreign nationals who are residents of an EEA state and in a defined relationship (e.g. adult children, grandparents or romantic relationships) to a person resident in Norway, are exempt from entry restrictions. See Regulations relating to entry restrictions for foreign nationals out of concern for public health Section 2 (i-j)<sup>30</sup>. (Closer family members, such as spouses and minor children, were already exempt<sup>31</sup>).
- As of June 19<sup>th</sup>, all measures for EEA nationals apply equally to all UK nationals (this was already the case for UK nationals covered by the Separation Agreement), cf.

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<sup>27</sup> [Samleoppdrag om innreiserestriksjoner, karantenehotell og reiseråd](#)

<sup>28</sup> [Forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen - Lovdata, Regulations relating to entry restrictions for foreign nationals out of concern for public health - Lovdata](#)

<sup>29</sup> [Store endringer i landvurderingen – flere land blir grønne - regjeringen.no](#)

<sup>30</sup> [Forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen - Lovdata](#)

<sup>31</sup> Ibid, see section 3 (q).

Regulations relating to entry restrictions for foreign nationals out of concern for public health Section 1 second limb<sup>32</sup>.

- As of June 24<sup>th</sup>, persons in possession of an EU Digital COVID Certificate documenting that the bearer is fully vaccinated or has undergone covid-19 in the last six months, are exempt from the entry restrictions. See Regulations relating to entry restrictions for foreign nationals out of concern for public health Section 3 (w)<sup>33</sup>.
- Foreign nationals who will be attending education in Norway, cf. Regulations relating to entry restrictions for foreign nationals out of concern for public health Section 1 (b) and Section 4 (c)<sup>34</sup> will be exempt from the entry restrictions. The exception will enter into force August 1<sup>st</sup>, prior to the start of the school year<sup>35</sup>.

#### *Quarantine measures*

- In accordance with the covid-19-regulations<sup>36</sup> Section 3 and 4, persons in possession of an EU Digital COVID Certificate documenting that the bearer is fully vaccinated or has undergone covid-19 are exempt from quarantine, see the covid-19-regulations Annex D.
- For travelers who are not in possession of an EU Digital COVID Certificate, the obligation to quarantine upon arrival, is dependent on the epidemiological situation in the country or region of which the traveler has spent the last 10 days. As of 5<sup>th</sup> of July Norway has harmonized the colour code system for the classification of countries and regions based on the epidemiological situation, with the system outlined in Council Recommendation (EU) 2020/1475 of 13 October 2020. Hence, travelers from “green countries” are exempt from entry quarantine.
- The general rule is that persons in entry quarantine must stay in quarantine hotels until a negative result on a PCR test taken no earlier than 3 days after entry, cf. the covid-19-regulations Section 5. However, according to Section 5 (2) a, the obligation to carry out the first three days of the quarantine in a quarantine hotel does not apply to persons who on entry can document that they have not stayed in areas listed in the covid-19-regulations Annex B during the last 10 days before entry and have a home or other suitable accommodation where it is possible to avoid close contact with others, with a private room, a private bathroom and its own kitchen or food service. Currently, Annex B refers to “all countries outside the EEA with the exception of Switzerland, UK and countries listed in Annex C” (Australia, Israel, Japan, Lebanon, New Zealand, The Republic of North Macedonia, Serbia, Singapore, South Korea, Taiwan and the United States of America are currently listed in the covid-19-regulation Annex C).

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid, cf. Annex D of the Covid-19 Regulations, [Forskrift om smitteverntiltak mv. ved koronautbruddet \(covid-19-forskriften\) - Lovdata](#)

<sup>34</sup> Ibid.

<sup>35</sup> [Utenlandsstudenter får komme til Norge fra 1. august - regjeringen.no](#).

<sup>36</sup> *Forskrift 27. mars 2020 om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften)*.

### *Amendments that will be introduced in the near future*

The Government has announced its intention to implement further exceptions from the entry restrictions in late July, provided that the epidemiological situation allows for this. The expected adjustments of the restrictions on the free movement of persons seek to ensure that the measures are no more restrictive than necessary and that less restrictive measures are introduced when feasible.<sup>37</sup> This step in the gradual reopening will include the following groups:

- EEA nationals traveling for employment purposes (including self-employed and contractors), except those coming from “dark red” areas. This includes EEA nationals resident in selected third countries from the EU’s list of third countries<sup>38</sup>.
- All EEA nationals with family ties as mentioned in Section 110 of the Immigration Act<sup>39</sup> (e.g. spouses, children, dependants) who are visiting a family member resident in Norway or traveling with a Norwegian family member (many of these persons are already exempt).
- Spouses/partners/co-habitants or children/step-children of a non-resident EEA national traveling for employment purposes, if said family members are traveling with or joining the EEA national.
- Children traveling with adults who are exempt due to a Corona certificate.
- Spouses/partners/co-habitants or children/step-children of non-resident Norwegian nationals, if the family lives together abroad.

## **3. ISSUES RAISED IN THE AUTHORITY’S LETTER**

### **3.1 INTRODUCTION**

In section 5.1 of its LFN, the Authority writes that “the rules in question will, as of 27 May 2021, change substantially”. The Ministry respectfully points out that this is incorrect. The rules regarding *entry restrictions*, i.e. concerning the registration requirement, were amended on May 21<sup>st</sup>, as stated in our letter of the same day. The Ministry refers to circular G-15/2021 (since replaced by G-24/2021<sup>40</sup>, but not amended on this point), which was issued on May 21<sup>st</sup> and immediately entered into effect<sup>41</sup>.

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<sup>37</sup> [Planlegger lettelse i innreiserestriksjoner - regjeringen.no](#), [Gjenåpning: Trinnvis åpning for reiser i trygge rammer - regjeringen.no](#),

<sup>38</sup> [COVID-19: Council updates recommendation on restrictions to travel from third countries - Consilium \(europa.eu\)](#)

<sup>39</sup> [Act relating to the admission of foreign nationals into the realm and their stay here \(Immigration Act\) - Lovdata](#).

<sup>40</sup> [Revidert ikrafttredelsesrundskriv om innreiserestriksjoner - 29.03.21 \(regjeringen.no\)](#)

<sup>41</sup> See [Circular G-15/2021 \(Norwegian\)](#) and [English translation, Press release of May 21st](#) and [Press release in multiple languages of May 24th](#). The text amending the residency requirement is found on page 3-4 of the circular.

The changes regarding *quarantine hotels* were, as also stated in our letter, decided on the 20<sup>th</sup> of May and entered into effect on the 27<sup>th</sup> of May<sup>42</sup>.

The Ministry will reply to the Authority's assessment of the specified topics, starting with section 5.3 of the Authority's letter. Please note that, while generally not specified in the text, regulations concerning EEA nationals apply equally to UK and Swiss nationals<sup>43</sup>.

### 3.2 “THE DISTINCTION BETWEEN EEA NATIONALS WITH NATIONAL IDENTIFICATION NUMBERS AND THOSE WITH D-NUMBERS”

Foreign nationals who are lawfully resident in Norway, are exempt from the entry restrictions. As noted in the introduction and our letter of May 21<sup>st</sup>, it is no longer a requirement that the foreign national is registered as resident in the National Population Registry. Foreign nationals who are not registered as residents, may present evidence of *de facto* residency by other means, in particular by providing documentation of owning or renting a home in Norway. The documentation requirements are outlined on page 3 and 4 in circular G-15/2021 (since replaced by G-24/2021, but not amended on this point).

It is duly noted that the Authority remains critical of the former registration requirement, which entailed that foreign nationals possessing only a D-number were not allowed entry. As this is not a “current” measure that has been maintained in force, but was removed on May 21<sup>st</sup>, the Ministry refers to our previous letters.

### 3.3 NORDIC CITIZENS AND OTHER EEA NATIONALS

The Authority concludes section 5.5 of its letter by noting that if “no distinction between Nordic and other EEA nationals subsists, then in the alternative to the above, the previous reasoning outlined, notably in sections 5.2 and 5.3, should apply to Nordic nationals also”.

The Ministry confirms that, as explained in previous letters, there is no discrimination between Nordic citizens and other EEA citizens under the entry restrictions. The entry restrictions do not apply to Nordic citizens *who are resident in Norway*, and other EEA citizens are *exempt* from the entry restrictions if they are resident in Norway. The residency requirement that applies to Nordic citizens<sup>44</sup> and other EEA nationals<sup>45</sup> is, and has consistently been, the same for both groups. Consequently, in keeping with the statement from the Authority referred to above, the Ministry refers to the remarks in

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<sup>42</sup> See [Endringer i karantenehotellordningen og lettelser i innreiserestriksjonene - regjeringen.no](#) and [Endr. i covid-19-forskriften - Lovdata Pro.](#)

<sup>43</sup> Regulations relating to entry restrictions for foreign nationals out of concern for public health Section 1 second limb.

<sup>44</sup> Interim Act Section 1, second limb.

<sup>45</sup> Interim Act Section 2, first limb, letter a.

section 3.4 below about the entry restrictions for foreign nationals who are not resident in Norway.

### 3.4 ENTRY RESTRICTIONS FOR FOREIGN NATIONALS NOT RESIDENT

#### 3.4.1 Introduction

Pursuant to Section 2 of the Interim Act relating to entry restrictions for foreign nationals out of concern for public health (henceforth “the Interim Act”)<sup>46</sup>, the *main rule* is that foreign nationals are currently not allowed entry to Norway. There are a number of exceptions<sup>47</sup>, including for foreign nationals who are resident in Norway (Section 2 (1) letter a). As demonstrated in section 2.2, there have been several amendments after May 21<sup>st</sup>, to the effect that the scope of the entry restrictions has been significantly reduced. It is no longer entirely accurate to say, as The Ministry did in letter of May 21<sup>st</sup>, that foreign nationals are not allowed to move to Norway, as a large number are in fact allowed to do so. This includes, notably, foreign nationals with a valid EU Digital COVID certificate<sup>48</sup> and residents of “green” EEA states<sup>49</sup>. While this presumably alleviates the Authority’s concerns to some extent, the Ministry will proceed on the assumption that the Authority is critical of the fact that not *all* EEA nationals are allowed entry to Norway.

The Authority notes in its letter that foreign nationals are not permitted to move to Norway, and finds this to be in contravention of Articles 28 and 36 of the EEA Agreement, as well as Article 5 of Directive 2004/38/EC. The Ministry does not share the assessment of the Authority. The Ministry acknowledges that the entry restrictions constitute a restriction on the right to free movement under Articles 28 and 36 of the EEA Agreement as well as Article 5 of Directive 2004/38, but is of the view that the restriction is justified on grounds of public health.

It is the Ministry’s opinion that the Norwegian entry restrictions are suitable, necessary and proportionate, and, thus, compatible with Articles 28 and 36 of the EEA Agreement and Article 5 of Directive 2004/38/EC.

#### 3.4.2 Margin of Appreciation

As a starting point, it is the Ministry’s opinion that EEA States have a significant margin of appreciation in its approach to the pandemic. Defining a desired level of protection and forming a strategy to attain and sustain that level is the responsibility of national

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<sup>46</sup> [Interim Act relating to entry restrictions for foreign nationals out of concern for public health - Lovdata](#)

<sup>47</sup> See the Interim Act Section 2 first and second limb, and the Interim Regulation Sections 1 to 4

<sup>48</sup> See Section 3 (w) of the Regulations relating to entry restrictions for foreign nationals out of concern for public health and [Norway is connecting to the EU Digital COVID certificate \(EUDCC\) gateway - regjeringen.no](#)

<sup>49</sup> See Section 2 (a) of the Regulations relating to entry restrictions for foreign nationals out of concern for public health.

governments and health authorities, which are also in the best position to judge which measures are appropriate in light of the state's particular circumstances. The EFTA Court stated in *Philip Morris* that “the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA. It is for the EEA States, within the limits imposed by the EEA Agreement, to decide what degree of protection they wish to assure”<sup>50</sup>. This reasoning is equally valid when it comes to restrictions on the free movement of persons, cf. Article 28 and 36 EEA. This is supported by Council Recommendation (EU) 2020/1475, see for example paragraphs 9 and 16 of the preamble<sup>51</sup>.

As demonstrated in section 2.1 above, Norway has chosen a very high level of protection and, thus, a strategy that seeks to achieve a very low level of contagion in order to minimise fatalities and cases of severe illness, as well as protecting the health services' capacity to treat covid-19 patients and maintain treatment of other patients, while building sufficient vaccination levels. As a result, the infection rates have been lower in Norway than in most other countries. By necessity, in order to achieve and sustain the results of the national pandemic strategy, it has been paramount to minimise the import of infection from abroad. Before the introduction of more severe entry restrictions on January 29<sup>th</sup> 2021, there were numerous instances of breakouts due to imported infections<sup>52</sup>. The emergence of new virus variants, notably the “British variant”<sup>53</sup> and currently the “Delta variant”<sup>54</sup>, further increased the importance of preventing such import. As regards the State's margin of appreciation, it is also of importance that the unprecedented circumstances of the pandemic represent a great deal of uncertainty. In *Philip Morris*, the Court underscored 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.”<sup>55</sup> The emergence of

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<sup>50</sup> E-16/10 *Philip Morris*, paragraph 77.

<sup>51</sup> [EUR-Lex - 32020H1475 - EN - EUR-Lex \(europa.eu\)](#)

<sup>52</sup> See for example [Covid-19-utbrot ved Havyard skipsverft, Hyllestad kommune, september-oktober 2020 - FHI](#), [Oppdatering om utbruddet i Nordre Follo - FHI](#), [Koronavirus oppdaget om bord på 344 fly i Norge. Nå har 100 kommuner fått smitte fra Polen. \(bt.no\)](#) («Coronavirus on 344 flights. Now 100 municipalities have infection imported from Poland»), [Importsmitte dominerer nesten totalt i Norge – NRK](#) («Imported infection almost totally dominating in Norway»), [Nær doubling av importsmitte fra desember til januar – E24](#) («Near doubling of infection import from December to January»), [Den britiske virusvarianten får skylden for at Oslo ble nedstengt. Men når – og hvordan – kom den til Norge? \(aftenposten.no\)](#) («The british variant is blamed for the lockdown of Oslo. But when – and how – did it come to Norway?»). See also [Faglig grunnlag til Helse- og omsorgsdepartementet \(covid-19\) - Helsedirektoratet](#), assignments 438, 343 and 249

<sup>53</sup> See for example [Situasjonsrapport COVID-19 \(fhi.no\)](#)

<sup>54</sup> See for example [Oppdatert risikovurdering om delta-varianten - FHI](#), [Notat om risikovariant B.1.617.2 \(fhi.no\)](#), [Delta herjer i Sverige -- Fare for importsmitte \(dagbladet.no\)](#) («Delta ravages Sweden – danger of infection import»)

<sup>55</sup> *Ibid*, paragraph 83

new variants of the Corona virus has caused continued uncertainty pertaining to infection rates, severity of illness and effect of vaccination. Furthermore, there is limited knowledge about the effectiveness of various measures, in particular the *isolated* effectiveness of any particular measure. While the overall effect of a suite of measures can be observed, it is less clear which of the measures were more or less effective<sup>56</sup>. In the Ministry's view, the unprecedented and uncertain situation that the global pandemic represents, where new virus of interest (VOI) and virus of concern (VOC) continue to emerge, calls for a precautionary approach, founded on the advice of health authorities<sup>57</sup>.

Finally, as regards the question of margin of appreciation, the court held in *Jan Anfinn Wahl v the Icelandic State* that "if a person is not integrated in the host State, the authorities of that State have a wider margin of appreciation to refuse entry than in the case of expulsion"<sup>58</sup>. In the Ministry's view, this applies in particular when entry is refused based on *temporary* restrictions introduced to protect public health. As demonstrated in section 2.2 above, and also throughout the periode in which the Ministry has corresponded with the Authority, Norway is constantly reviewing and gradually lifting the entry restrictions.

### 3.4.3 *The entry restrictions pursue the legitimate aim of protecting public health*

It is undisputed that public health grounds in general, and the covid-19 pandemic in particular, can and has justified severe restrictions on the right of free movement in numerous countries<sup>59</sup>.

The Ministry would nevertheless note that the objective is not only legitimate, but a *paramount* responsibility for every national government. As stated by the EFTA Court in *Philip Morris*, "the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA"<sup>60</sup>. This is particularly true in the event of an evolving pandemic that may potentially cause large numbers of casualties and cases of severe illness, and lead to a collapse in national health services, further increasing the harm to public health dramatically. There can be no doubt that the Norwegian entry restrictions are imposed not as "an end in itself" or merely "resort to a legitimate aim in the abstract", but "actually pursues the invoked aim"<sup>61</sup>.

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<sup>56</sup> See for example [Oppdrag 249 - Importsmitte og karantenehotell - med tilleggsspørsmål.pdf \(helsedirektoratet.no\)](#) (p. 19)

<sup>57</sup> In the Ministry's view, support for such a precautionary approach may be found in E-16/10 *Philip Morris* paragraph 80–83, C-333/08 *Commission v. France* paragraph 93–96 and C-77/09 *Gowan* paragraph 73–76. This approach also seems acknowledged by the Commission in the *Joint European Roadmap towards lifting COVID-19 containment measures 2020/C 126/01* section 2.

<sup>58</sup> E-15/12 *Jan Anfinn Wahl v the Icelandic State*, paragraph 69

<sup>59</sup> See e.g. paragraph 5 of the preamble to Council Recommendation (eu) 2020/1475

<sup>60</sup> E-16/10 *Philip Morris*, paragraph 77

<sup>61</sup> E-8/17 *Kristoffersen*, paragraph 117

Thus, the question is whether the Norwegian restrictions are appropriate to ensure the achievement of the legitimate objective it pursues and do not go beyond what is necessary to attain it<sup>62</sup>.

#### 3.4.4 *The entry restrictions are suitable and consistent in order to achieve the legitimate aim of protecting public health*

The Authority does not seem to dispute that entry restrictions are suitable in order to protect public health in a pandemic. Rather, the Authority seems to argue that restricting entry for EEA nationals does not comply with the consistency requirement because some EEA nationals are temporarily admitted to Norwegian territory and placed in quarantine hotels pending their return, along with people who have been admitted.

The Ministry notes that while it is correct that *some* foreign nationals are placed in quarantine hotels pending their return, whereas most are “turned around”, this does not represent a lack of consistency. On the contrary, as elaborated on in section 3.5 below, there are very clear practical and medical reasons why temporary placement in a quarantine hotel is necessary in some cases. This is not at odds with the entry restrictions, but based on the same reasoning and grounds of public health, as outlined in detail in section 2.1 above, ensuring return as swiftly as possible while reducing the risk of infection. The Ministry considers it clear that *rescinding* the rejection order of persons who cannot be returned immediately would make the entry restrictions *less* consistent, as well as allowing circumvention of the entry restrictions by entering at a time and place where there are no immediately available means of return.

Rejected foreign nationals are “turned around” at the border to the extent possible, including those who arrive at the land border. However, some travellers are temporarily placed in quarantine hotels for clear, coherent and justifiable reasons, cf. section 3.5. It is the Ministry’s opinion that the entry restrictions are thus applied in a manner that is in fact “genuinely reflecting a concern to attain that aim in a consistent and systematic manner”<sup>63</sup>. This is also demonstrated by the Government’s plan for a gradual reopening<sup>64</sup>, as described in section 2.1, and by the fact that a number of restrictions have been lifted in recent months.

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<sup>62</sup> The Ministry has discussed Norway’s understanding of our obligations under EEA and international law at length in the preparatory works to the Interim Act, see *inter alia*, Prop. 117 L (2020–2021), Prop. 61 L (2020–2021) and Prop. 5 L (2020–2021)

<sup>63</sup> *E-8/17 Kristoffersen*, paragraph 118

<sup>64</sup> [Plan for gradvis gjenåpning - regjeringen.no](#), [Plan for a gradual reopening - regjeringen.no \(the English translation is not updated at the time of writing\)](#)

### 3.4.5 *The entry restrictions are necessary and proportionate, as there are no less restrictive measures available*

In its assessment of the proportionality of the entry restrictions, the Authority argues that the distinction between persons who are resident in Norway and EEA nationals who arrive for the first time is not proportionate.

The Ministry notes that while temporary placement in a quarantine hotel is deemed a necessary solution for the group of rejected foreign nationals discussed above and in section 3.5 below, this does not indicate that *all* foreign nationals who wish to enter Norway could be placed in quarantine hotels, rendering the entry restrictions redundant. In the Ministry's opinion, as elaborated below, quarantine is not a measure that alone could achieve the objective of protecting public health. This is particularly true as the number of arrivals would be dramatically higher in the absence of entry restrictions, whereas the efficacy of quarantine measures is dependent on keeping the number of persons in quarantine at a manageable level to prevent overcrowding, facilitate follow-up and – in the case of infection occurring – conduct contact tracing and medical treatment.

Quarantine is a measure that *reduces*, not eliminates, the risk of importing and spreading infection. Thus, it is not a measure that is as effective as entry restrictions. Even when directed to a designated quarantine hotel, a number of people will not heed their obligation to socially distance etc. There have been numerous instances of people not respecting the obligation to quarantine, including people leaving quarantine hotels, despite the fact that intentional or grossly negligent violations of the covid-19-regulations may be a punishable offence<sup>65</sup>. Furthermore, transmission of covid-19 may take place during quarantine even in the absence of intentional non-compliance; any household or living space holding more than one person – and persons moving to and from that place – in itself involves a risk of spread of infections due to negligence, mishaps and the general risk of close contact between people. This applies in particular to quarantine hotels, where the majority of foreign nationals who do not possess a home in Norway would have to stay. The efficacy and safety of quarantine hotels would be severely diminished if extended to a scale that would increase the logistical and medical challenges of moving and housing a much larger number of people. Indeed, this would not be in line with Article 22 of the The European Commission Guidelines<sup>66</sup>, which states that “Border controls, if introduced at internal borders, should be organised in a way that prevents the emergence of large gatherings (e.g. queues), which risk increasing the spread of the virus”.

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<sup>65</sup> See Forskrift 27. mars 2020 om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften) Section 24. See also for example a recent case in which a chain of at least 75 instances of infection of the Delta variant were attributed to a person who prematurely left a quarantine hotel: [Stakk fra karantenehotell: - Anmeldt: - Enormt omfang \(dagbladet.no\)](#), or this news report from April 2021: [Stikker fra karantene-hotellene – bryr seg ikke om bøter – VG](#) (“[They] Elope from quarantine hotels – don’t care about fines”)

<sup>66</sup> The European Commission Guidelines (C(2020) 1753)

Thus, quarantine for all foreign nationals who would wish to travel to Norway, is not deemed as an alternative which would ensure the level of protection of public health that has been defined by the Norwegian Government. As explained in section 2.1, the Norwegian health authorities, taking into account the totality of the state of the pandemic, have repeatedly stressed the necessity of strict entry restrictions and underscored that the reopening of the borders must take place in a gradual fashion in order to maintain sufficient control mechanisms to minimise the import and further transmission of covid-19<sup>67</sup>. The health authorities have found that entry restrictions strongly contributed to the reduction of infection rate and illness that occurred in the spring of 2021<sup>68</sup>.

The Ministry notes that the reasoning above may lead to the conclusion that *all* entry from abroad should be prohibited, and that any exception in principle undermines the suitability and consistency of the entry restrictions. However, while this would indeed be the most effective solution to protect public health, Norway has respected the principle of proportionality by making exceptions based on the degree of legal and factual impact entry restrictions would have for certain groups. Most notably, this is the reasoning behind the exception for foreign nationals already resident in Norway, and exemptions for family members.

The Norwegian approach regarding which of the exemptions that should be upheld, and the order in which they should be reintroduced, is fully in line with Council Recommendation (EU) 2020/1475 Article 5, which states that foreign nationals *already resident* in a host state should always be admitted. The recommendation confirms that it is the view of the European Council that residents have a greater protection against entry restrictions than non-residents, and, inversely, that it may indeed be legitimate to refuse entry of non-residents. The European Commission Guidelines (C(2020) 1753) confirm the same principle, see Article 21.

The system of protection from expulsion measures established by Directive 2004/38/EC is based on the degree of the integration of the person concerned in the host State, and that the greater degree of integration into the host State, the greater the degree of protection against expulsion becomes (see, in this regard, case C-400/12, M.G., para. 31). This difference with respect to degree of integration also applies for EEA citizens who already reside in Norway, compared to those who reside in another

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<sup>67</sup> See for example the health authorities' assessments of June 11<sup>th</sup> and May 14<sup>th</sup> ([Oppdrag 477 - 477A-477B - Samleoppdrag om innreiserestriksjoner, karantenehotell og reiseråd.pdf \(helsedirektoratet.no\)](#), [Oppdrag 438C – Samleoppdrag om innreiserestriksjoner, reiseråd og karantenehotell.pdf \(helsedirektoratet.no\)](#)), in which it is reiterated that it is imperative to keep the import of infection cases to a minimum, that reopening must take place gradually and that new developments may necessitate delays.

<sup>68</sup> See in particular the Norwegian Directorate of Health and the National Institute of Public Health's response to assignment 438 of May 11<sup>th</sup> 2021, [Oppdrag 438C – Samleoppdrag om innreiserestriksjoner, reiseråd og karantenehotell.pdf \(helsedirektoratet.no\)](#)

EEA state. Thus, these may be considered to be in different situations. The Ministry holds that the Government must be entitled to differentiate between those groups without causing that the measures in question to be considered non-consistent.

As regards *Norwegian nationals*, it would be unconstitutional<sup>69</sup> to ban travelling abroad or refusing entry after such travel. The EFTA Court confirmed in *Jan Anfinn Wahl v the Icelandic State* that “The reservations contained in Article 27 of the Directive permit EEA States to adopt, with respect to the nationals of other EEA States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto”<sup>70</sup>. In the context of the pandemic, this principle is explicitly recognised in Article 5 of Council Recommendation (EU) 2020/1475. As explained in section 2.1, a host of severe infection control measures have been implemented domestically in order to contain the pandemic.

In conclusion, in light of the severity and uncertainty of the pandemic and the established superior effect of entry restrictions over quarantine measures, the Ministry is of the opinion that restricting entry for non-resident foreign nationals is a proportionate measure that could not be replaced by “an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law”<sup>71</sup>.

The Ministry also notes that the EFTA Court has stated that the burden of proof “cannot be so extensive as to require the party to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions”<sup>72</sup>, and 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”<sup>73</sup>.

### 3.4.6 Conclusion

In light of the above, it is the Ministry’s opinion that the Norwegian entry restrictions follow the legitimate aim of protecting public health, are suitable, necessary and proportionate in order to protect public health. Accordingly, the entry restrictions are not in breach of Articles 28 or 36 of the EEA Agreement or Article 5 of Directive 2004/38/EC. As illustrated by the description of recent amendments in section 2.2 above, the restrictions have been revised numerous times, demonstrating that they are under continuous review, in keeping with the principles of EEA law. The Ministry maintains that the

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<sup>69</sup> Section 106 second limb of The Norwegian Constitution

<sup>70</sup> *E-15/12 Jan Anfinn Wahl v the Icelandic State*, paragraph 104

<sup>71</sup> *E-8/17 Kristoffersen*, paragraph 122

<sup>72</sup> *Ibid*, paragraph 123

<sup>73</sup> *E-16/10 Philip Morris*, paragraph 83

Norwegian Government, based on the advice of the health authorities, has a significant margin of appreciation in determining a desired level of protection and forming a comprehensive strategy to achieve and sustain that level. In doing so, the Government strives to strike a fair balance between legitimate interests in an unprecedented situation that still entails a great deal of uncertainty. The Government will continue to assess all measures as the plan of reopening society proceeds, see sections 2.1 and 2.2 above.

### 3.5 PROCEDURAL RIGHTS OF EEA NATIONALS DENIED ENTRY TO NORWAY

#### 3.5.1 Introduction

Before addressing the Authority's concerns, the Ministry would like to correct a misunderstanding. The Authority refers to Section 7 ("Expulsion") of the Interim Act and states that "In practice, it appears that arriving in Norway without fulfilling one of the exceptions to the entry restriction is treated as a gross violation under Section 7, as such persons are subject to expulsion within the meaning of the Directive".

Please note that Section 7 of the Interim Act refers to "expulsion" in the same sense as "expulsion" in the Norwegian Immigration Act, namely a decision that entails an obligation to leave the realm *and a ban on future entry* (permanent or limited). The Norwegian Directorate of Immigration has informed us that to date, no EEA national has been expelled pursuant to section 7 of the Interim Act. Persons arriving Norway without fulfilling one of the exceptions to the entry restrictions are *rejected* ("bortvist") pursuant to section 2 third paragraph, meaning they are denied entry on this occasion, but they are not expelled and banned from future entry. Please note also that the procedural regulations in sections 5 and 6 of the Interim Act apply to decisions of rejection pursuant to section 2 third paragraph and would not be applicable if a foreign national were to be expelled pursuant to section 7. In that event, the normal procedural regulations of the Immigration Act and the Public Administration Act would apply. This difference reflects that expulsion is a significantly more severe measure and is intended for exceedingly rare situations.

#### 3.5.2 Notification in writing – Article 30 section 1 and 2 of Directive 2004/38

Section 6 paragraph 1 of the Interim Act states that a decision of rejection pursuant to the act shall be given in writing, including information on the provisions on which it is based, and provide information about the right to appeal. The decision may be short and standardised. Pursuant to paragraph 2, the decision may, in cases of urgency or if a written decision is otherwise not practically possible, be given orally. The aforementioned information must nevertheless be provided, and the foreign national may demand a subsequent written confirmation of the decision and the grounds on which it was based.

The Authority is of the opinion that these provisions are in violation of Article 30 of Directive 2004/38, on the grounds that section 1 "requires a decision in writing" and that a

short and standardised decision is incompatible with section 2, which states that persons who are subjected to a restriction of movement pursuant to Article 27 “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”.

The Ministry notes, firstly, that persons rejected pursuant to the Interim Act *are* entitled to be notified in writing, see the first and second limb of the Interim Act section 6, as required by Article 30 (1). In particular circumstances of urgency, a written confirmation is issued after the rejection and at the person’s request. It is the Ministry’s opinion that this is a necessary and acceptable adaptation to the unprecedented circumstances of the pandemic, as described in section 2.1 above. The core of Article 30 (1) is that the person shall be able to comprehend the content of the decision and the implications for them. A written confirmation after the fact is, in these circumstances, sufficient to meet these requirements.

Secondly, it is the Ministry’s opinion that short and standardised decisions are compatible with Section 2 of Article 30. Being informed “precisely and in full” does not, even under normal circumstances, necessarily require thorough and detailed information. The requirements will depend on the nature of the particular case or type of cases. The Court of Justice has stated that the notification of the grounds “must be sufficiently detailed and precise to enable the person concerned to defend his interests” and that “it is sufficient in any event if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof”<sup>74</sup>. In the particular circumstances of the pandemic and the general nature of the Norwegian entry restrictions, the Ministry maintains that short and standardised decisions meet this standard.

Restrictions pursuant to Article 27 of the Directive distinguishes between measures based on public policy or public security and measures based on public health. Restrictions based on public policy and public security shall be based exclusively on a personal conduct of the individual concerned that “must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” in accordance with Article 27 second paragraph. In order for the person concerned to comprehend the decision and defend his or her interests, the conduct in question and the reasons why it is deemed to represent a future threat, must necessarily be described in some detail.

Pursuant to Articles 27 and 29 this requirement does however not apply to restrictions based on public health, such as rejections pursuant to the Interim Act. These rejection decisions are not based on individual conduct or an individual risk assessment. On the contrary, all foreign nationals are barred from entry unless one of the exceptions apply. In order for the rejected person to comprehend the content and effect of the decision, it is sufficient to explain the entry restrictions and provide the necessary information

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<sup>74</sup> Joined cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665

about its effect, as well as procedural guarantees. The fact that there is a genuine need to process cases swiftly to protect public health, as elaborated below, further underscores the legitimacy and necessity of issuing short and standardised decisions. In conclusion, it is the Ministry's opinion that Section 6 of the Interim Act is fully compatible with Article 30 of the Directive.

### 3.5.3 *Immediate return - Article 30 section 3 of Directive 2004/38*

Pursuant to Section 2, paragraph 4 of the Interim Act, a foreign national who is rejected must leave the realm without undue delay. To the extent that it is practically possible, this means the rejected person must "turn around" at the border. In some cases, particularly involving persons arriving by airplane, it is however a practical necessity to wait for the next available means of transportation.

The Authority is of the opinion that the above mentioned regulations are incompatible with Section 3 of Article 30 of the Directive, which states that "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." In support of this conclusion, the Authority points to the fact that some rejected persons are placed in quarantine hotels for a few days prior to their return.

In the Ministry's opinion, rejections pursuant to the interim entry restrictions clearly qualify as "cases of urgency".

As an initial observation, the sentence of Article 30 Section 3 referred above is in principle applicable when the person in question is present on the territory. Statements in *Jan Anfinn Wahl* show that the distinction between persons being expelled and persons being denied entry, is significant<sup>75</sup>. There are obvious reasons why an expelled person should be given some time before having to leave a country she or he is present and more or less established in. These considerations have little bearing when a non-resident of Norway is rejected after having just arrived at the border. When the right of entry pursuant to Article 5 can be restricted in accordance with Article 27 it follows, logically, that the person in question will not be allowed to stay in the country for a month. This is reflected in Article 31 (4) of the Directive, which states that a Member State "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 the appeal or judicial review concerns a *denial of entry to the territory*".

In the particular circumstances of the entry restrictions, allowing persons who cannot be returned immediately to enter and stay in the realm for a month before returning would not merely undermine the purpose of entry restrictions, but also pose a signifi-

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<sup>75</sup> *E-15/12 Jan Anfinn Wahl v the Icelandic State*, paragraph 69.

cant risk to public health. Up to 650 foreign nationals (both EEA and third country nationals included) have been denied entry pursuant to the Interim Act every week of 2021 (a total of around 6000 as of early June), and if they were allowed to enter the territory despite being rejected, the number of people arriving would in all likelihood increase dramatically. Allowing free entry to the country would be contrary to the very purpose of the entry restrictions, and render them entirely ineffective. As discussed at length in section 3.4.5 above, keeping a large number of persons in quarantine hotels would also significantly reduce the effectiveness of quarantine measures. Furthermore, such a practise would be counterproductive to the aim of lifting entry restrictions, as the capacity for testing, quarantining and other control measures is crucial to ensure a safe and timely reopening of the border.

The fact that a number of rejected persons are placed in quarantine hotels pending return, does not suggest that this could or should be the general rule. This occurs out of practical necessity and public health considerations. As air traffic in particular has been significantly reduced during the pandemic, it is logistically impossible for many rejected persons to return immediately. These people must therefore wait, and they must do so in a location where the risk of infecting others or being infected is as low as possible. It would not be in line with the aim of protecting public health and reducing the spread of the corona virus for people who have to wait for the next available flight after being denied entry on grounds of public health, to be waiting in the airport lounge for days. .

In short, ensuring that refusals of entry are effectuated as swiftly as possible is imperative to avoid overcrowding in and around points of entry and quarantine hotels. Allowing rejected persons to enter and stay in the country would render the entry restrictions – which are deemed necessary to protect public health, see section 3.4 – ineffective. In the Ministry’s opinion, ensuring swift return is clearly a matter of urgency and thus permissible pursuant to Section 3 of Article 30.

#### *3.5.4 Information about the right to appeal – Article 31 of Directive 2004/38*

The Authority writes that “It has come to the Authority’s attention that, in practice, EEA nationals who are subjected to restrictions of their freedom of movement in this manner, are often not informed of their rights, including their right to appeal against the measures in question (...)”.

As noted earlier, section 6 of the Interim Act states that all persons who are rejected shall be informed of their right to appeal. The Ministry is not aware of any indication that this provision is not respected in practise. If there have been any individual cases, these would be in violation of section 6 of the Interim Act. However, the rules as such are in line with Article 31 of the Directive, and consitute no violation..

## 3.6 THE NORWEGIAN QUARANTINE MEASURES

### 3.6.1 Introduction

As noted above, the Norwegian quarantine rules were significantly amended on 27<sup>th</sup> May and on 18<sup>th</sup> June 2021 according to the plan for reopening the Norwegian society and easing the covid-19-restrictions.<sup>76</sup>

In accordance with the covid-19-regulations Sections 3 and 4, travelers in possession of an EU Digital COVID Certificate documenting that the bearer is fully vaccinated or has undergone covid-19 are exempt from quarantine, see the covid-19-regulation Annex D.

For other travelers, the obligation to quarantine upon arrival, is regulated in the covid-19-regulations<sup>77</sup> Section 4 (1) a and Annex A, and is dependent on the epidemiological situation in the point of departure. On Monday 21<sup>st</sup> June, the Norwegian colour code system for the classification of areas based on the epidemiological situation was harmonized with the with the system outlined in Council Recommendation (EU) 2020/1475 of 13 October 2020. The threshold values for quarantine exemption were amended accordingly on 5<sup>th</sup> July, increasing the number of “green” countries or regions. Travelers from “green” countries or regions are exempt from entry quarantine.

As regards quarantine hotels, the general rule in the amended covid-19-regulations Section 5 (1) is that persons in entry quarantine must stay in quarantine hotels until a negative result on a PCR test taken no earlier than 3 days after entry. The rest of the entry quarantine may be carried out in the person’s home or in another suitable accommodation which makes it possible to avoid close contact with others and has a private room, a private bathroom and a private kitchen or food service.

However, according to the amended Section 5 (2) a, the obligation to carry out the first three days of the quarantine period in a quarantine hotel does not apply to persons who upon entry can document that they have not stayed in areas listed in Annex B during the last 10 days before entry and have a home or other suitable accommodation where it is possible to avoid close contact with others, with a private room, a private bathroom and its own kitchen or food service. Currently, Annex B refers to “all countries outside the EEA, with the exception of Switzerland, UK and countries listed in Annex C” (Australia, Israel, Japan, Libanon, New Zealand, The Republic of North Macedonia, Serbia, Singapore, South Korea, Taiwan and the United States of America are currently listed in Annex C). Hence, travelers coming from any EEA state are therefore currently exempt from the requirement to stay at a quarantine hotel during their entry quarantine. This

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<sup>76</sup> For more information on these amendments, see <https://www.regjeringen.no/no/tema/Koronasituasjonen/id2692388/>.

<sup>77</sup> *Forskrift 27. mars 2020 om smitteverntiltak mv. ved koronautbruddet (covid-19-forskriften)*.

may of course change in accordance with the epidemiological situation in individual states or regions.<sup>78</sup>

### 3.6.2 *The rules regarding suitable accommodations*

As pointed out in the Authority's LFN section 5.6.2, the Norwegian quarantine rules stipulate that travelers from abroad may quarantine in their home or in a suitable accommodation.<sup>79</sup> With regard to the latter option, the rules require that such accommodation makes it possible to avoid close contact with others and has a private room, a private bathroom and a private kitchen or food service.<sup>80</sup> The option of staying at a quarantine hotel, of which the Government will cover most of the costs, is available as an alternative.<sup>81</sup>

The Ministry acknowledges that the requirements regarding suitable accommodation constitute a restriction on the right to free movement under Articles 28 and 36 of the EEA Agreement as well as Article 7 of Directive 2004/38, but is of the view that the restriction is justified on grounds of public health, and also proportionate.

The Ministry recalls that a national rule which restrict a fundamental freedom under the EEA Agreement, or is capable of doing so, can be properly justified only if it is appropriate for securing the attainment of the objective in question and do not go beyond what is necessary in order to attain it.

However, as set out in relevant case law, EEA law allows each EEA state 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. An EEA State can take the measures that reduce, as far as possible, a public health risks and can take protective measures without having to wait until the reality of those risks becomes fully apparent. It is sufficient to demonstrate that, even though there may be some scientific uncertainty as regards the suitability and necessity of the measure, it is reasonable to assume that the measure is able to contribute to the protection of human health.<sup>82</sup> In the Ministry's view, the restrictions in question must also be considered in light of the unprecedented and uncertain situation that the global pandemic represents, where new virus of interest (VOI) and virus of concern (VOC) continue to emerge, calling for a precautionary approach<sup>83</sup> and swift implementation of practicable measures.

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<sup>78</sup> See in this regard the weekly reports provided by the Norwegian Institute of Public Health (NIPH), which provides a report on which countries that may be exempt from entry restrictions and quarantine measures (available at <https://www.fhi.no/publ/2020/covid-19-faglige-notater-som-grunnlag-for-nasjonale-beslutninger/>).

<sup>79</sup> The rules in question were implemented in March 2021 (*FOR-2021-03-26-991*).

<sup>80</sup> Covid-19-regulation Section 5.

<sup>81</sup> Covid-19-regulation Section 22.

<sup>82</sup> E-16/10 *Philip Morris* paragraph 80–83.

<sup>83</sup> In the Ministry's view, support for such a precautionary approach may be found in E-16/10 *Philip Morris* paragraph 80–83, C-333/08 *Commission v. France* paragraph 93–96 and C-77/09 *Gowan* paragraph 73–

Norway has opted for a very high level of protection, with the aim of keeping the infection rates under control.<sup>84</sup> With regard to the suitability and necessity of the measures, it cannot, in the Ministry's view, be questioned that the requirements have contributed to the protection of human health. This clearly fulfills the requirements set out in relevant case law, making it sufficient that it is "reasonable to assume that the measure would be able to contribute to the protection of human health".<sup>85</sup>

In this regard, the Ministry notes that the health authorities have expressed concern on several occasions regarding non-compliance with the quarantine rules and the use of inadequate facilities during entry quarantines.<sup>86</sup> Previous rules, with less strict requirements, have been regarded as inadequate and one factor contributing to the spread of new forms of the virus into the Norwegian society.<sup>87</sup> Furthermore, the specific requirements of the present regulation have been assessed by the Norwegian Institute of Public Health (NIPH) and the Norwegian Directorate of Public Health in assignment 477 dated 11<sup>th</sup> June 2021. In short, the Norwegian Directorate of Public Health (pages 46–47) explicitly considers that the requirements regarding suitable accommodation are necessary to protect the general public from the spread of covid-19.

It must, particularly in light of the health authorities' assessments, be presumed that the relevant legal requirements regarding quarantine facilities reduce the risk that persons in quarantine infect other persons compared with those who are not subject to comparable legal requirements. In particular, the requirements will contribute to less spread of infection to those who are not in quarantine, typically when persons with and without quarantine requirements, respectively, are living together. Hence, the requirements reduce the spread of covid-19 in the general public and contributes to the protection of public health, as well as keeping the infection rates under control. Given the assessment by the Norwegian Directorate of Public Health, it is reasonable to presume that the same level of protection cannot be achieved without the requirements in question.

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76. This approach also seems acknowledged by the Commission in the *Joint European Roadmap towards lifting COVID-19 containment measures 2020/C 126/01* section 2.

<sup>84</sup> See section 2.1 above on the Norwegian long-term strategy on the challenges of the covid-19 pandemic.

<sup>85</sup> E-16/10 *Philip Morris* paragraph 83.

<sup>86</sup> See, inter alia, the Norwegian Directorate of Public Health's considerations in Memorandum to the Ministry dated 05.11.2020, which refers to the Directorate's observations regarding outbreaks in cases where many people are living together without adhering to the rules. In Assignment 343 dated 30.11.2020, the Norwegian Directorate of Public Health notes (page 5) that Arbeidstilsynet has uncovered lack of compliance with the requirements to accommodations offered to employees in 38 % of inspected cases (see also Assignment 438 dated 21.05.2021 pages 14–15 in this regard). Reference is also made to the considerations in assignment 249 dated 30.11.2020 (page 11). Relevant assignments and memorandums are available at <https://www.helsedirektoratet.no/tema/beredskap-og-krisehandtering/korona-virus/faglig-grunnlag-til-helse-og-omsorgsdepartementet-covid-19>.

<sup>87</sup> See in this regard, inter alia, Assignment 343 dated 30.11.2020 page 5.

Nonetheless, the Authority seemingly questions the suitability of the requirements, referring in particular to the principle of consistency and the fact that the same statutory requirements are not applied for quarantines carried out in a person's own home.<sup>88</sup>

The Ministry agrees that it must demonstrate that the measure in question is suitable to achieve the legitimate objective pursued and genuinely reflects a concern to attain that aim in a consistent and systematic manner.<sup>89</sup> The exact scope of this principle of consistency is not always clear, but it cannot, as the Ministry sees it, preclude the contested provision. As set out below, there are additional, legitimate reasons for treating a person's home differently than other possible premises for the performance of the quarantine. Such an adjacent rule – or exception – for a person's home does not render the Norwegian legislation inconsistent within the meaning of EEA law, nor does it call into question the suitability of the general requirement of suitable accommodations. It must indeed be within the discretion of the EEA State to include the protection of other legitimate objectives, beyond public health objectives, when framing the scope and content of a restriction which does not discriminate on grounds of nationality.<sup>90</sup>

The Ministry notes, firstly, that there should be no doubt regarding the Government's genuine concern to prevent the spread of covid-19. As many other states, Norway has put in place extensive and unparalleled public health measures, both domestically as well as with regard to travelers, at a high cost to the Norwegian society.

Secondly, the Ministry notes that the absence of the requirements to quarantines spent in a person's home, is in line with the advice provided by the health authorities. In this respect, reference is made to assignment 477 (pages 46–47) mentioned above. While recalling that the same standard should be aspired to also in these cases, because that provides the best level of protection, the Norwegian Directorate of Public Health considered that such requirements would not be proportionate as regards persons with their home in Norway. In many cases, such requirements would be difficult to comply with for people who are not living alone. The Government considers that a legal requirement of having a private bathroom, kitchen etc. would be significantly more restrictive if applied to a person's home, regardless of that person's citizenship. It would hence be more difficult to substantiate such a measure with regard to the fundamental right to

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<sup>88</sup> See page 24 in the LFN.

<sup>89</sup> See inter alia, E-8/20 *Criminal proceedings against N* paragraph 103, E-8/17 *Kristoffersen* paragraph 118 and E-8/16 *Netfonds Holding and Others* paragraph 117.

<sup>90</sup> Support for this approach may be found in Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes* paragraph 44–50 and Case C-531/06, *Commission v. Italy* 70–71, where the Court held that the protection of the legitimate property rights and interests of the members of deceased pharmacist's family, may justify exceptions from a main rule that excludes the operation of pharmacies by non-pharmacists due to reasons of public health. On a somewhat different note, see the Opinion of A.G. Bot in Joined Cases C-447/08 & C-448/08, *Sjöberg* paragraph 69–71 in the area of gaming, in which the Advocate General seems to dissociate himself from an approach which amounts “to obliging Member States to adopt an all-or-nothing policy.”

privacy and family life, as it would potentially mean denying persons to live in their own home.<sup>91</sup> Instead, it is strongly *recommended* that travelers quarantining in their own home abide by the same requirements as are set for others, even if this is not a legal *obligation*.

Finally, the Ministry notes that the same distinction between a person's home and "other suitable accommodations" is applied to internal situations, see the covid-19-regulation Section 7 on the rules on isolation and to the rules on quarantine after contact with an infected person in the covid-19-regulation Sections 4(1) b and 5a (1).

To the Ministry's understanding, the Authority has also questioned the necessity of the requirements with reference to a lack of consistency.<sup>92</sup> The Ministry recalls in this regard that the necessity of the measure, in line with the case law referred to above of particular relevance to the protection of public health, requires an assessment of whether the measure is needed to meet the objective pursued and may not be achieved equally well with less restrictive measures.<sup>93</sup>

In the Ministry's view, and seemingly in contrast to the Authority's approach, it cannot be inferred from the absence of statutory requirements regarding those who carry out the quarantine in their own home, that the chosen level of protection could have been achieved without the general, statutory requirements to quarantines in suitable accommodations.

Reference is made to the abovementioned need for a precautionary approach, as well as the health authorities' considerations. Furthermore, and as mentioned above, the infection rates have been consistently low in Norway. In order to achieve this, different measures and considerations must be, and have been, balanced against each other. Increasing the risk in one context, e.g. due to the restrictive nature of potential measures, may be balanced by measures in another, as the overall infection rate is a result of the *aggregated effect* of all the infection control measures. In the current pandemic, removing a measure which reasonably must be assumed to reduce the infection rate, would inevitably lead to an increased risk of a lower level of protection. Hence, such steps must be constantly and carefully assessed in light of the overall situation and whether less restrictive measures may be sufficient. This is a challenging and ongoing task, in which the states must be admitted a wide margin of appreciation. The Government will continue to assess all infection control measures as the plan of reopening society proceeds, see section 2.1 above.

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<sup>91</sup> In this regard, see the Government's grounds for amendments in the covid-19 regulations Section 5 on 26th March 2021, available on <https://www.regjeringen.no/no/tema/Koronasituasjonen/begrunnelser-for-endringer-i-covid-19-forskriften/begrunnelse-for-endringer-26-mars-2021-i-covid-19-forskriften-5-om-oppholdssted-for-innreisekarantene/id2844837/>.

<sup>92</sup> See page 24 in the LFN.

<sup>93</sup> See to this effect inter alia E-16/10 *Philip Morris* paragraph 85 and E-3/06 *Ladbroke's* paragraph 58.

In conclusion, it is the Ministry's opinion that the rules regarding suitable accommodations are justified as they are suitable and necessary in achieving human health objectives. They are thus compatible with Articles 28 and 36 of the EEA Agreement and with Article 7 and 27 of Directive 2004/38.

### *3.6.3 Requirement of prior registration of suitable accommodation provided to workers*

After the amendments on 18<sup>th</sup> of June 2021, travelers who in the last 10 days before entry have stayed only within the EEA, are exempt from the requirement of quarantine hotels.<sup>94</sup> Travelers who satisfy this criteria and arrives in Norway to perform work or assignments, may carry out the quarantine in their own home or in a suitable accommodation of their choice fulfilling the requirements in the covid-19-regulation Section 5 (2) a. Currently, this means that EEA nationals who have stayed within the EEA, Switzerland and UK in the last 10 days before entry, can carry out the quarantine in a suitable accommodation (which is not pre-approved) regardless of who the accommodation is made available by.<sup>95</sup>

Alternatively, if this is the preferred option, such persons may choose to carry out the quarantine in a quarantine hotel.<sup>96</sup> For travelers who does not satisfy the criteria in the covid-19-regulation Section 5 (2) a, the rules regarding pre-approval of suitable accommodation may also still be relevant<sup>97</sup>. For instance, this may be the case if the traveler has stayed in a country not referred to in the covid-19-regulations annex B or C during the last 10 days. The listing of countries in Annex B and Annex C, are decided on basis of the epidemiological situation in the individual country.

To the Ministry's understanding, the Authority's comparison with residents of Norway returning from business trips, is not longer relevant following the repeal of the rules on necessary and unnecessary travels on 27<sup>th</sup> May 2021, and the latest amendments in which the obligation of quarantining, and carrying out the quarantine in a quarantine hotel, is made dependent on the epidemiological situation in the state or region of departure. While the alternative in the covid-19-regulation chapter 2A is still, in principle, available to EEA nationals arriving in Norway to perform work or assignments, the other alternatives (residence, suitable accommodation or quarantine hotel) will be available to these persons in the same manner as for other travelers according to the amended covid-19-regulation Section 5 (2) a. The Ministry therefore assumes that it is not necessary to elaborate further on the rules in chapter 2A, but has duly noted the Authority's view.

### *3.6.4 Necessary journeys*

As pointed out in the LFN, the previous distinction between necessary and unnecessary travels has been replaced.

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<sup>94</sup> Covid-19-regulations Section 5 (2) a and Annex B to the regulation.

<sup>95</sup> See covid-19-regulations Annex B.

<sup>96</sup> According to the covid-19-regulations Section 22, the employer must cover the co-payment.

<sup>97</sup> Covid-19-regulation chapter 2A.

The Ministry notes that continuous efforts are made in order to balance the different measures and considerations as required by the covid-19-pandemic, and that this includes ongoing evaluation and amendments of the measures in place. The Ministry has noted the Authority's views on the said distinction.

#### 4. CLOSING REMARKS

Due to the still ongoing outbreak of mutated virus variants, notably the Delta variant, and the uncertain development of the pandemic in Norway and abroad, Norwegian health authorities maintain that entry restrictions are still necessary and proportionate. Nevertheless, the Ministry strives continuously to ensure that restrictions do not constitute a stronger interference on EEA nationals' freedom of movement than what is deemed necessary and proportionate. The Ministry therefore continuously assesses the proportionality of the various measures, taking into account the infection situation and whether the chosen level of protection of public health can be achieved by less restrictive measures.

As demonstrated in section 2.2, The Norwegian Government is gradually, but steadily lifting entry restriction and other measures according to the overall epidemiological situation. The Government's plan for reopening is founded on advice from the Norwegian Directorate of Health and the National Institute for Public Health. You may find more information on the Government's plan for gradual reopening here: [Plan for gradvis gjenåpning - regjeringen.no](https://www.regjeringen.no/en/plan-for-gradvis-gjenapning).<sup>98</sup>

Yours sincerely

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Director General

Sigurd Bordvik  
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*The document is approved electronically, as such no handwritten signatures are required.*

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<sup>98</sup> English version: [The Government's plan for a gradual reopening: Out of the crisis together - regjeringen.no](https://www.regjeringen.no/en/plan-for-gradvis-gjenapning) (may not be fully updated).